UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya
In the Matter of ARKO Corp./Express Stop
Commission File No. 2110087

June 10, 2022

Last year, in an unreportable transaction valued at approximately $94 million, GPM Petroleum, LLC, GPM Southeast, LLC, GPM Investments, LLC, and ARKO Corp. (collectively "GPM") acquired 60 retail gasoline, diesel, and convenience stores from Corrigan Oil Company ("Corrigan"). Today, after a thorough investigation of this deal, the Commission announced an enforcement action alleging that GPM illegally acquired five of those retail fuel stations from Corrigan, and imposed illegitimate, overbroad agreements not to compete in connection with that acquisition. This action marks an important step forward in protecting the public from harm when rivals agree not to compete. Firms proposing mergers should take note that the Commission will scrutinize contract terms in merger agreements that impede fair competition.

Noncompete agreements affect millions of Americans every day, but they come in a variety of forms. Much of the discussion surrounding noncompete clauses in recent years has focused on their inclusion in employment contracts and the resulting harm to workers. Noncompete covenants, however, can also govern businesses that are direct or potential competitors, and sometimes are included in merger agreements. Today's Commission action highlights that noncompete clauses in a merger agreement may unduly and illegitimately restrain competition when both of the parties remain competitors in other markets.

By its very nature, an agreement not to compete between two businesses reduces competition if it restrains the activities of actual and potential rivals during the term of the agreement. Indeed, noncompete agreements between competing businesses are suspect: for instance, an agreement not to compete may constitute a thinly veiled market allocation scheme, a per se violation of the antitrust laws.

In the context of mergers, parties sometimes assert that noncompete clauses are necessary to protect a legitimate business interest in connection with the sale of a business, such as the goodwill acquired in a transaction. When the seller is exiting the business or selling off assets needed to compete with the buyer, a noncompete that limits prospects for reentry may in certain instances reflect that goodwill, if appropriately limited in geographic scope and duration.

In this matter, as alleged in the Commission's complaint, GPM's agreement to purchase Corrigan's retail fuel stations contained noncompete terms that were overbroad and facially unrelated to protecting any goodwill GPM might hope to acquire with the Corrigan stations. According to the complaint, these noncompete provisions are illegal because they were designed to ensure that GPM would not face direct or indirect competition from Corrigan—not only in the competitively overlapping areas, but even in geographic areas far from the acquired stations.

As today’s consent agreement makes clear, firms may not use a merger as an excuse to impose overbroad restrictions on competition or competitors. The Commission will evaluate agreements not to compete in merger agreements with a critical eye.

We look forward to reviewing input and comments from the public about the approach this settlement has taken with respect to the noncompetes at issue here. The Commission is committed to acting in the public interest, and comments from the public are vital to ensuring that we are successful in doing so.

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