

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:      **Jon Leibowitz, Chairman**  
                                 **William E. Kovacic**  
                                 **J. Thomas Rosch**  
                                 **Edith Ramirez**  
                                 **Julie Brill**

In the Matter of	)	
	)	
Tops Markets LLC,	)	
a limited liability company,	)	
	)	
Morgan Stanley Capital Partners V U.S. Holdco LLC,	)	Docket No. C-4295
a limited liability company,	)	
	)	
and	)	
	)	
The Penn Traffic Company,	)	
a corporation.	)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Tops Markets LLC (“Tops”), a subsidiary of Respondent Morgan Stanley Capital Partners V U.S. Holdco LLC (“Holdco”), and Respondent The Penn Traffic Company (“Penn Traffic”), a corporation, all subject to the jurisdiction of the Commission, entered into an agreement, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, pursuant to which Tops purchased certain assets of Penn Traffic, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. Respondent Tops**

1. Respondent Tops is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at 6363 Main Street, Williamsville, New York 14221.

2. Tops is, and at all times relevant herein has been, engaged in the operation of supermarkets in the State of New York and the Commonwealth of Pennsylvania. Tops operates supermarkets under the Tops banner.

3. Prior to its acquisition of substantially all Penn Traffic assets, Tops owned and operated 71 supermarkets in the United States. In addition, five supermarkets with the Tops banner are owned and operated by franchisees in the United States.

4. Tops is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

## **II. Respondent Holdco**

5. Respondent Holdco is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1585 Broadway, Floor 39, New York, New York 10036.

6. Holdco is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

## **III. Respondent Penn Traffic**

7. Respondent Penn Traffic is a corporation organized, existing, and doing business under and by virtue of the laws of state of Delaware, with its office and principal place of business located at 1200 State Fair Boulevard, Syracuse, New York 13221.

8. Prior to the acquisition, Penn Traffic was engaged in the operation of supermarkets in the Commonwealth of Pennsylvania and the states of New York, Vermont, and New Hampshire. Penn Traffic operated supermarkets under the banners P&C Foods, Quality Markets, and Bi-Lo.

9. Prior to the acquisition by Tops, Penn Traffic owned and operated 79 supermarkets in the United States.

10. Penn Traffic was, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

## **IV. The Acquisition**

11. On or about January 7, 2010, Respondents Tops, Holdco, and Penn Traffic entered into an agreement for Tops to acquire substantially all of Penn Traffic's assets, including all 79 supermarkets and certain assets related to the operation of the supermarkets. The purchase price

was approximately \$85 million. In addition, Tops agreed to the assumption of liabilities and the reduction of approximately \$70 million in claims.

12. On or about January 29, 2010, Respondents Tops, Holdco, and Penn Traffic closed on the acquisition. The acquisition was conducted pursuant to a fast-track bankruptcy proceeding.

## **V. Nature of Trade and Commerce**

13. For purposes of this complaint, the term “supermarket” means a full-line grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, including fresh fruits and vegetables, shelf-stable food and beverage products, including canned and other types of packaged products, staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids.

14. Supermarkets provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products. Supermarkets typically carry more than 10,000 different stock-keeping units, as well as a deep inventory of those items. In order to accommodate the large number of food and non-food products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

15. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at other supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores.

16. Retail stores other than supermarkets that sell food and grocery products, including neighborhood “mom & pop” grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores, and mass merchants, do not, individually or collectively, effectively constrain prices at supermarkets. Those retail stores do not offer a supermarket’s distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to start shopping elsewhere, or significantly increase grocery purchases elsewhere, in response to a small price increase by supermarkets.

## **VI. Relevant Product Market**

17. The relevant line of commerce in which to analyze the acquisition is the retail sale of food and other grocery products in supermarkets.

## **VII. Relevant Geographic Markets**

18. The relevant geographic markets in which to analyze the likely competitive effects of the acquisition are:

- (a) Bath, New York;
- (b) Cortland, New York;
- (c) Ithaca, New York;
- (d) Lockport, New York; and
- (e) Sayre, Pennsylvania.

## **VIII. Market Concentration**

19. The relevant markets are highly concentrated, and the acquisition has substantially increased concentration, whether concentration is measured by the Herfindahl Hirschman Index (“HHI”) or the number of competitively significant firms remaining in the market. Post-acquisition HHIs in the relevant geographic markets range from 5,000 to 10,000, and the acquisition increased HHI levels by between 1,145 and 4,996 points. These market concentration levels give rise to a presumption that the acquisition is unlawful in each of the affected markets.

## **IX. Entry Conditions**

20. Entry would not be timely, likely, or sufficient to deter or prevent anticompetitive effects. The affected markets are insulated from new entry or expansion by significant entry barriers, including the time and costs associated with the need to conduct market research, select an appropriate location for the supermarket, obtain necessary permits and approvals, construct a new supermarket or convert an existing structure to a supermarket, and generate sufficient sales to have a meaningful impact on the market.

## **X. Effects of the Acquisition**

21. The acquisition has substantially lessened competition in the relevant markets in the following ways, among others:

- (a) by eliminating direct competition between Respondents Tops and Penn Traffic;
- (b) by increasing the likelihood that Tops will unilaterally exercise market power; and

- (c) by increasing the likelihood of successful coordinated interaction among the remaining firms.

22. The ultimate effect of the acquisition would be to increase the likelihood that prices of food and other grocery products would rise above competitive levels, or that there would be a decrease in the quality or selection of food, other grocery products, or services.

#### **XI. Violations Charged**

23. The agreement described in Paragraph 11 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the acquisition described in Paragraph 12 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this fourth day of August, 2010, issues its complaint against said Respondents.

By the Commission.

Donald S. Clark  
Secretary

SEAL