

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-
a limited liability company,)	
)	
and)	
)	
The Penn Traffic Company,)	
a corporation.)	

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition of The Penn Traffic Company (“Penn Traffic”) by Tops Markets LLC (“Tops”), a subsidiary of Morgan Stanley Capital Partners V U.S. Holdco LLC (“Holdco”), (collectively, “Respondents”), and Respondents having been furnished with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and that, if issued by the Commission, would charge Respondents with 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

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. 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.
3. 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 29, New York, New York 10036.
4. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

- A. “Tops” means Tops Markets LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Tops Markets LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Penn Traffic” means The Penn Traffic Company, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by The Penn Traffic Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Holdco” means Morgan Stanley Capital Partners V U.S. Holdco LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Morgan Stanley Capital Partners V U.S. Holdco LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Respondents” mean Tops, The Penn Traffic Company, and Holdco, individually and collectively.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer(s)” means an Entity(ies) that receives the prior approval of the Commission to acquire any or all of the Penn Traffic Supermarket Business Assets pursuant to this Order.
- G. “Acquisition” means the acquisition contemplated by the Asset Purchase Agreement by and between Tops Markets, LLC and The Penn Traffic Company dated as of January 7, 2010, (“Asset Purchase Agreement”).
- H. “Agency(ies)” means any government regulatory authority or authorities responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the operations of a Supermarket.
- I. “Closing Date” means the date on which Respondent(s) (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant Penn Traffic Supermarket Business Assets to an Acquirer pursuant to this Order.
- J. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph VI of this Order.
- K. “Effective Date” means the date on which the Respondents close on the Acquisition pursuant to the Asset Purchase Agreement.
- L. “Entity(ies)” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- M. “Governmental Approval(s)” mean any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests thereof, required by applicable Agencies related to the operation of a Supermarket.
- N. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.

- O. “Interim Monitor” means any monitor appointed pursuant to Paragraph V of this Order or Paragraph III of the related Order to Maintain Assets.
- P. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- Q. “Order Date” means the date that this Decision and Order becomes final.
- R. “Penn Traffic Supermarket Business Assets” means all Respondents’ rights, title and interest in and to all assets used in, and or reserved for use in, the Penn Traffic Supermarket Businesses to the extent legally transferable, including, without limitation:
1. all real property;
 2. all leasehold interests;
 3. all equipment and fixtures;
 4. all Governmental Approvals;
 5. at the relevant Acquirer’s option, all Trademarks for transitional purposes of up to one (1) year from the Closing Date;
 6. at the relevant Acquirer’s option, all Trade Dress for transitional purposes of up to one (1) year from the Closing Date;
 7. at the relevant Acquirer’s option, all inventory in existence as of the Closing Date;
 8. all of the Respondents’ books and records, customer files, customer lists and records, vendor files, vendor lists and records, cost files and records, credit information, distribution records, business records and plans, studies, surveys, and files related to the foregoing.

provided however, that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to the Penn Traffic Supermarket Businesses and to other businesses of the Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Penn Traffic Supermarket Businesses; or (2) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the relevant party shall provide such Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Acquirer with the above-described information without requiring

Respondents completely to divest themselves of information that, in content, also relates to businesses that Respondent Tops is not required to divest pursuant to this Order.

- S. “Penn Traffic Supermarket Business(es)” means the business of operating a Supermarket at the locations identified in Schedule A to this Order, including, without limitation, the distribution, marketing, promotion and sale of all products and services offered at such locations.
- T. “Relevant Geographic Market(s)” means each of the geographic markets identified in the Complaint as Relevant Geographic Markets.
- U. “Remedial Agreement(s)” means the following:
 - 1. any agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Penn Traffic Supermarket Business Assets and that has been approved by the Commission to accomplish the requirements of this Order; and/or
 - 2. any agreement between Respondents and a Third Party (or between a Divestiture Trustee and a Third Party) to effect the assignment of the the Penn Traffic Supermarket Business Assets to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.
- V. “Supermarket” means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; frozen and refrigerated 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, which may include salt, sugar, flour, sauces, spices, coffee, and tea; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by Law, wine, beer, and distilled spirits.
- W. “Supermarket Employee(s)” means all employees of Respondents who are currently working at the relevant Penn Traffic Supermarket Business(es), or who have, within the twelve (12) months prior to the Order Date, worked at the relevant Penn Traffic Supermarket Business(es).

- X. "Trade Dress" means the current trade dress of products marketed or sold at the Penn Traffic Supermarket Businesses including, without limitation, product packaging, and the lettering of the product trade name or brand name that are or were owned by Respondent Penn Traffic and that were used in or are used in the Penn Traffic Supermarket Businesses.
- Y. "Trademark(s)" means all proprietary names or designations, trademarks (whether registered or unregistered), service marks (whether registered or unregistered), trade names, product names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Penn Traffic Supermarket Businesses that are or were owned by Respondent Penn Traffic and that were used in, or are used in, the Penn Traffic Supermarket Businesses.
- Z. "Third Party(ies)" means any Entity other than the following: Respondents or the Acquirer for the particular Penn Traffic Supermarket Business Assets.

II.

IT IS FURTHER ORDERED that:

- A. Not later than ninety (90) days after the Order Date, Respondent Tops shall divest the Penn Traffic Supermarket Business Assets, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers in a manner that receives the prior approval of the Commission.
- B. Respondents shall secure all consents and waivers from all Third Parties (including, without limitation, all landlords) that are necessary to permit Respondent Tops to divest the Penn Traffic Supermarket Business Assets to the relevant Acquirer(s), and/or to permit such Acquirer(s) to continue the operations of the Penn Traffic Supermarket Businesses at the respective locations;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.
- C. For a period of one (1) year from the Closing Date, Respondents shall, not interfere with the hiring or employing by the Acquirer of the particular Penn Traffic Supermarket Business of the related Supermarket Employees, and shall remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Supermarket Employee who receives a written offer of employment from such Acquirer;

provided, however, that this Paragraph shall not prohibit Respondents from continuing to employ any Supermarket Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee.

- D. The purpose of the divestiture of the Penn Traffic Supermarket Business Assets and the related obligations imposed on the Respondents by this Order is:
1. to ensure the continued use of the Penn Traffic Supermarket Business Assets in the operation of Supermarkets at the respective locations;
 2. to provide for the future use of the Penn Traffic Supermarket Business Assets in the operation of Supermarkets at the respective locations;
 3. to create a viable and effective competitor, who is independent of the Respondents, in the operation of Supermarkets at each of the respective locations; and
 4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that until the Closing Date for each respective Penn Traffic Supermarket Business, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of such Penn Traffic Supermarket Business(es), to minimize any risk of loss of competitive potential for such Penn Traffic Supermarket Business(es), and to prevent the destruction, removal, wasting, deterioration, or impairment of the Penn Traffic Supermarket Business Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Penn Traffic Supermarket Business Assets (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Penn Traffic Supermarket Businesses. Respondents' responsibilities shall include each of the responsibilities enumerated in Paragraph II.B. of the Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the Order Date, Respondent Tops shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket, within six (6) months prior to the date of such proposed acquisition, in the Relevant Geographic Markets; or
- B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in the Relevant Geographic Markets;

provided, however, that advance written notification shall not apply to the construction of new facilities by Respondent Tops or the acquisition of or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondent Top's offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent Tops and not of any other party to the transaction. Respondent Tops shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Tops shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however,* that the provisions of this Paragraph IV shall not apply to any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C.18a.

V.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent Tops sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Tops, which consent shall not be unreasonably withheld. If Respondent Tops has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim

Monitor within ten (10) days after notice by the staff of the Commission to Respondent Tops of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent Tops shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;
 - 2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and
 - 3. the Interim Monitor shall serve until the date of completion by Respondent Tops of the divestiture of all of the Penn Traffic Supermarket Business Assets in a manner that fully satisfies the requirements of the Decision and Order; *provided further*, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.
- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent Tops, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent Tops, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

- G. Respondent Tops shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by each Respondent, and any reports submitted by the Acquirer with respect to the performance of each Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders.
- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same Entity appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

VI.

IT IS FURTHER ORDERED that:

- A. If Respondent Tops has not fully complied with the obligations to divest, assign, grant, license, transfer, deliver or otherwise convey the Penn Traffic Supermarket Business Assets as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to divest, assign, grant, license, transfer, deliver or otherwise convey the Penn Traffic Supermarket Business Assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest, assign, grant, license, transfer, deliver or otherwise convey the Penn Traffic Supermarket Business Assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Tops, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be an Entity with experience and expertise in acquisitions and divestitures. If Respondent Tops has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Tops of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent Tops shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent Tops shall consent to the following terms and conditions regarding the Divestiture Trustee’s powers, duties, authority, and responsibilities:
 1. subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest, assign, grant, license, transfer, deliver or otherwise convey the Penn Traffic Supermarket Business Assets;
 2. the Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be

subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times;

3. subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the Penn Traffic Supermarket Business Assets and to any other relevant information, as the Divestiture Trustee may request. Respondent Tops shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. the Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Top's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer(s) as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Entity, and if the Commission determines to approve more than one such acquiring Entity, the Divestiture Trustee shall divest to the acquiring Entity selected by Respondent Tops from among those approved by the Commission; and, *provided further, however*, that Respondent Tops shall select such Entity within five (5) days after receiving notification of the Commission's approval;
5. the Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Tops, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Tops, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent Tops, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;
6. Respondent Tops shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out

of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee;

7. the Divestiture Trustee shall have no obligation or authority to operate or maintain the Penn Traffic Supermarket Business Assets; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Entity appointed as Interim Monitor pursuant to the relevant provisions of the Order to Maintain Assets in this matter;
 8. the Divestiture Trustee shall report in writing to Respondent Tops and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
 9. Respondent Tops may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

VII.

IT IS FURTHER ORDERED that:

- A. Not later than thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II.A. and III of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II.A. and III of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II and III of the Order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports

copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

- B. One (1) year from the Order Date, annually for the next nine (9) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent Tops shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger or consolidation of a Respondent; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Decision and Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to a Respondent made to its principal United States offices or headquarter's address, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with the Orders, which copying services shall be provided by Respondent at the request authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that:

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondent Tops shall include in each Remedial Agreement related to each of the Penn Traffic Supermarket Businesses a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondent Top's obligations to the Acquirer(s) pursuant to this Order.
- D. Respondent Tops shall also include in each Remedial Agreement a representation that Respondent Tops shall use commercially reasonable efforts to assist the Acquirer to secure the Governmental Approval(s) necessary to operate the relevant Penn Traffic Supermarket Business.
- E. Respondent Tops shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Penn Traffic Supermarket Businesses a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.
- F. Respondent Tops shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

XI.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the Order Date.

By the Commission.

Donald S. Clark
Secretary

SEAL:

ISSUED:

Schedule A

The Supermarkets at the following locations:

1. Penn Traffic Store No. 3115 operating under the P&C trade name, located at 404 W. Morris St., Bath, NY;
2. Penn Traffic Store No. 3095 operating under the P&C trade name, located at 160 Clinton Ave., Cortland, NY;
3. Penn Traffic Store No. 3107 operating under the P&C trade name, located at 315 Pine Tree Rd., Ithaca, NY;
4. Penn Traffic Store No. 3123 operating under the P&C trade name, located at 2309 N. Triphammer Rd., Ithaca, NY;
5. Penn Traffic Store No. 6643 operating under the Quality Markets trade name, located at 7134 Rochester Rd., Lockport, NY;
6. Penn Traffic Store No. 3139 operating under the P&C trade name, located at 448 N. Keystone Ave., Sayre, PA; and
7. Penn Traffic Store No. 3195 operating under the P&C trade name, located at 1730 Elmira St., Sayre, PA.