

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

Tops Markets LLC,
a limited liability company,

**Morgan Stanley Capital Partners V U.S.
Holdco LLC,**
a limited liability company,

and

The Penn Traffic Company,
a corporation

File No. 101-0074

**PETITION FOR APPROVAL OF PROPOSED DIVESTITURES
TO HOMETOWN MARKETS, LLC**

Pursuant to Section 2.41(f) of the Federal Trade Commission (“Commission”) Rules of Practice and Procedure, 16 C.F.R. § 2.41(f) (2006), and Paragraph II.A. of the Decision and Order contained in the Agreement Containing Consent Orders accepted for public comment in this matter (“Decision and Order”), Respondents Tops Markets, LLC and Morgan Stanley Capital Partners V U.S. (“Tops”) hereby Petition the Commission to approve the divestiture to Hometown Markets, LLC (“Hometown Markets”) of three (3) grocery stores formerly owned by The Penn Traffic Company (“Penn Traffic”): #3107 (315 Pine Tree Rd., Ithaca, N.Y.); #3195 (1730 Elmira St, Sayre, PA.) and #3095 (160 Clinton Ave., Cortland, N.Y.)(collectively the “Three Stores”).

The Penn Traffic Supermarket Business Assets (as defined in the Decision and Order) (“Business Assets”) associated with the Three Stores will be sold pursuant to an Asset Purchase Agreement (the “Purchase Agreement”), dated May 2, 2011, by and among Tops Markets, LLC, Tops PT, LLC and Hometown Markets. The Purchase Agreement is attached as Confidential Exhibit A to the Non-Public Version of this Petition.

I. Background

On January 25, 2010, Tops executed a Consent Agreement that included an Interim Order and an Order to Hold Separate and Maintain Assets to settle the Commission’s charges that Tops’ proposed acquisition of Penn Traffic Assets would violate 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. On August 4, 2010, the Commission accepted the Interim Order for public comment.

This matter arose from Tops’ acquisition of Penn Traffic’s 79 grocery stores and other assets through a Chapter 11 bankruptcy process. More particularly, on November 18, 2009, Penn Traffic filed for protection under Chapter 11 (the third time that Penn Traffic had filed for bankruptcy in the recent past). Accordingly, Penn Traffic’s assets were subjected to a bankruptcy court auction that occurred in December 2009. During the auction process there was only one strategic bidder other than Tops. The other bidder, however, offered to buy only 22 stores; while Tops’ offer was for all 79 Penn Traffic stores. Tops’ offer was accepted and Tops then made a filing pursuant to the Hart-Scott-Rodino Antitrust Improvements Act.

Early in the FTC’s review process, the FTC Staff identified stores that it considered raised possible competitive concerns. In order to meet the expedited timing

obligations in the bankruptcy proceeding, in January 2010 Tops agreed with FTC Staff to place 11 stores on a Divestiture Schedule and to maintain their viability, marketability and competitiveness with the understanding that the parties would work towards narrowing the number of stores on the Divestiture Schedule. Following an extensive investigation, during which time Tops made available its executives for interviews on several occasions, produced thousands of pages of documents and submitted various “white papers,” FTC Staff removed four stores from the Divestiture Schedule prior to the acceptance of the Interim Order for public comments in August 2010. The public comment period is completed. Seven stores remain on the Divestiture Schedule.

Tops requests that Hometown Markets be approved to purchase the Three Stores. Hometown Markets’ owners have extensive experience in the grocery store business, a comprehensive strategic plan customized to the local market requirements for each of the Three Stores, the support of the Union (UFCW, Local One), and **[CONFIDENTIAL MATERIAL REDACTED]** and supply commitments from C&S Wholesale Grocers, the largest grocery wholesale firm in the U.S. The key executives of Hometown Markets, Gregory Young and Myles da Cunha, have the necessary operating expertise, support services and strategic plan to ensure the continued viability of the Three Stores and to enhance their competitive presence in the relevant areas. Additionally, both Messrs. Young and da Cunha have a strong working relationship with C&S Wholesale Grocers, having been employed by it in the early to mid-2000s. Accordingly, Hometown Markets meets the Commission’s requirements of being competitively and financially viable. In sum, a sale to Hometown Markets would achieve the Commission’s stated purposes of ensuring the continued operations of the Three Stores and remedying the lessening of competition as alleged in the Commission’s Complaint.

II. The Commission Should Approve Hometown Markets to Buy the Three Stores on the Divestiture Schedule.

A. Hometown Markets promises to be a strong and effective competitor.

Hometown Markets has the experience, capability and support to re-energize the associates of the stores at issue, leverage many of the successful Penn Traffic initiatives and implement several new programs, with a heavy emphasis on fresh foods, natural, organic and local products as well as an expanded service offering in order to keep existing loyal customers and attract new customers.

The Three Stores will be rebannered with the “P&C Fresh” logo.¹ The new banner will connote a more contemporary store that emphasizes Hometown Markets’ Mission Statement: “We are a locally owned supermarket, committed to offering exceptional value in a service based environment, with an unwavering focus on variety and fresh foods”. Importantly, Hometown Markets will specifically focus on the communities in which the Three Stores are located and local competitive dynamics. For example, Cortland and Ithaca each have a large college student influence. Accordingly, merchandising and operational plans will be tailored to include more natural, organic and prepared foods, expanded service offerings, targeted advertising, and weekly specials for college students and faculty. Hometown Markets also has developed (and shared with the Compliance Division Staff on a confidential basis) a pragmatic strategy for competing against each of the current grocery store operators in these two locations,

¹ Tops will rebanner the P&C stores that Hometown Markets is not purchasing located in Ithaca, NY (store #3125--2309 N. Triphammer Rd.) and in Sayre, PA, (store #3139--448 N. Keystone Ave.) to a Tops banner in order to avoid customer confusion that would result from having two stores with the same name in the same area with different owners and different marketing programs and advertisements.

whether specialty retailers or the every-day low price strategy of the Wal-Mart Super Centers. The Sayre market is more “blue collar” in terms of customer base. Accordingly, Hometown Markets will deploy a heavy emphasis on weekly specials and value offerings, while still offering high quality fresh foods and enhanced services. Hometown Markets intends to be highly engaged in each of the communities at issue, participating in numerous grass roots community activities. Indeed, Hometown Markets will establish its local executive offices in Ithaca to support its local strategies designed to re-establish the Three Stores as strong and successful competitors. Thus, Hometown Markets will create an identity that resonates with its local presence.

Hometown Markets believes a cornerstone to its success is having the right relationship and structure with the UFCW, Local One. Messrs. Young and da Cunha have agreed with the UFCW’s leadership to a new contract that is beneficial for both sides. As a result, union jobs will be saved and the new contract will greatly benefit the specific associates subject to the agreement and also the communities involved.

Hometown Markets also will have the benefit of a favorable supply agreement with C&S Wholesale Grocers. It will leverage its relationship with C&S Wholesale Grocers by utilizing C&S Wholesale Grocer’s successful independent merchandising platform. This includes a monthly fresh buying program, procurement spot buys, Best Yet private label brands, retail pricing support, weekly advertising promotions and category management. C&S Wholesale Grocers has a long history of supplying independent supermarket retailers, experience that will buoy Hometown Market’s competitiveness.

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Thus, Hometown Markets has a strong, well-developed strategic plan designed to meet the local needs of the communities at issue in a competitively superior manner. Hometown Markets has submitted to FTC Staff a detailed confidential Strategic Plan.

2. Financial Capability

Hometown Markets has secured financing through **[CONFIDENTIAL MATERIAL REDACTED]** and has developed a detailed financial model. This financing provides the necessary capital to close the transaction, make capital upgrades, and fund necessary startup expenses. The projected EBITDA for Hometown Markets shows a company with strong earnings and a healthy balance sheet that will be able to vigorously compete in each of the relevant areas. Hometown Markets has submitted to FTC Staff a confidential income statement, balance sheet, cash flow schedule, operating cash flow schedule, loan amortization schedule, consolidated pro formas, and individual store pro formas that support its financial viability.

3. Support

a. C&S Wholesale Grocers

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C&S Wholesale Grocers will provide Hometown Markets with competitive rates for all its wholesale functions. Moreover, both Messrs. Young and da Cunha, as former C&S Wholesale Grocers employees, have strong working relationships with C&S Wholesale Grocers.

C&S Wholesale Grocers is the largest food wholesaler in the U.S., and according to Forbes magazine, the 12th largest privately held company in the United States. The company distributes food to supermarkets, retail stores and military bases across the country. Currently, C&S Wholesale Grocers serves about 3,900 stores from more than 50 locations in 11 states. Among its customers are many of America's best known companies, including Stop & Shop, Giant of Carlisle, Giant of Landover, Shaw's, Great Atlantic & Pacific Tea Co. (A&P), Kroger, Safeway and Target.

B. The Executives Have the Incentive, Motivation and Commitment to be Successful

1. Gregory Young

Gregory Young has been employed in the supermarket business for over thirty years. After graduating from Alfred State with high honors in food marketing he became a store manager in 1980 in Syracuse for P&C Foods. He quickly advanced through the ranks at P&C becoming grocery buyer, wholesale merchandising manager, director of grocery merchandising and then Vice President Grocery Division. During these twenty years, P&C was purchased by The Penn Traffic Company, and grew from 83 stores in central New York, to 275 stores covering 5 states. During this time period (1980-1999), Mr. Young was located in Syracuse, N.Y.

In 1999, Mr. Young accepted an offer from A&P Supermarkets to be Vice President Sales and Merchandising, New England Division. At that time, A&P New England operated approximately 75 stores in 5 states. He was responsible for sales and merchandising at all A&P New England's supermarkets and liquor stores. His direct reports included the Directors of Meat/Seafood, Deli/Bakery, Produce/Floral, Pharmacy and Advertising/Marketing. His accomplishments included bringing new focus to fresh departments in variety, standards, event merchandising, and technique to drive sales to record levels; implementing category management disciplines to drive improved decision making, sales and margin results; designing and launching a loyalty card program-- an associate card with special discounts and offerings; and implementing a disciplined approach to loyalty marketing. After two years, A&P promoted Mr. Young to Vice President Store Operations. In this position his direct reports were responsible for all aspects of store operations including productivity, store automation, asset protection, real estate and maintenance. The District Managers among others reported directly to Mr. Young. His accomplishments included implementing a model store program and quarterly

department manager seminars to improve seasonal preparations and execution consistency. He improved productivity by over \$4 per associate hour through improving scheduling, training, operational disciplines and logistics to drive sales and earnings to a record level. In 2001, at a time when A&P had revenues of over \$750MM, A&P promoted Mr. Young to Group Vice President, General Manager, a position where he was responsible for Sales & Merchandising, Operations, Liquor, Pharmacy, Finance, Human Resources, Real Estate, Construction and Maintenance. His accomplishments included increasing same store sales to a three year trend of +9.3%, while increasing contribution by 11% in 2001, 18% in 2002, a record year in 2003 and ultimately positioning the group to be sold for over 7 times EBITDA.

In 2003, Mr. Young joined C&S Wholesale Grocers, first as Vice President, Perishables, and one year later as Vice President/General Manager C&S Retail and Independent Sales. He initially was located in North Hatfield, MA, and then relocated to Windsor Locks, CT. In his first year with C&S, Mr. Young was integral in approximately doubling perishable sales through new customer growth including the Fleming acquisition, the Supervalu New England acquisition, and the addition of A&P's and D'Agastino's business. Also, significantly, he was instrumental in integrating the acquired Southern Family Markets, a 110 store chain.

In 2006, Penn Traffic offered Mr. Young the position of Executive Vice President, Chief Operating Officer. He relocated to Syracuse, N.Y., and was responsible for Sales, Marketing, Merchandising, IT, Operations, Distribution, Wholesale, Manufacturing and Asset Protection for Penn Traffic which had sales of \$1.3BB. After slightly more than a year, he was promoted to President, Chief Executive Officer, a position he held from 2007 until Penn Traffic was sold to Tops. His many accomplishments during this period include:

- Designed a new "Fresh" store format that saw sales grow over 30% in its debut stores and then rolled the format out to additional successful locations. The new

format had a heavy emphasis on superior fresh foods, natural and organic products and expanded service offering.

- Worked with the internal team to prioritize and implement strategic upgrades to an aging IT infrastructure, including mainframe replacement, EME / Market Expert loyalty systems, Demand Tec price optimization, Lawson suite upgrades, and inbound freight management.
- Led the strategic restructuring of business, designed to bring total focus on the retail segment through a \$43MM divestiture of the wholesale business segment, closed an unprofitable bakery manufacturing facility, closed a warehouse, implemented an outsourced solution for all warehouse procurement and directed the closure/conversion of unprofitable retail stores.
- Implemented a significant re-engineering effort to further reduce SG&A and improve processes to gain further efficiencies in finance, advertising, energy management, and operations. Also led the restructuring of administrative functions (over 150 fewer FTEs) creating a lean and more efficient organization. This effort resulted in annualized savings of over \$8MM.
- Implemented a new pricing strategy to better position the company from a value perspective that at run-rate delivered +1.5% in sales and implemented a SKU optimization effort designed to gain efficiencies in working capital and sales growth at run-rate of +1.25% in sales.
- Repaired and improved relationships with labor unions through consistent communication and application of policies and procedures.

Thus, Mr. Young unquestionably has the experience, the vision and very specific goals to make Hometown Markets a strong competitor.

2. Myles L. da Cunha

Myles L. da Cunha will be the Chief Merchandising Officer for Hometown Markets. Mr. da Cunha also has over 30 years of supermarket experience beginning with operational and merchandising positions at A&P Tea Company in 1975. He progressed through a variety of promotions at A&P New England, holding key management positions in store operations, produce, deli, bakery, meat, and seafood. In 2003, Mr. da Cunha accepted a

promotion to Director of Meat Merchandising and Operations for The Food Emporium division of A&P and relocated to the NY metro market. His responsibilities included procurement, strategy development, and operational execution, and P&L results for 37 upscale meat departments.

Mr. da Cunha joined C&S Wholesale Grocers in 2004 as Senior Director of Merchandising where his accomplishments included:

- Developed merchandising and marketing programs for 36 corporate stores as well as 250 independent supermarkets.
- Managed internal sales, merchandising and marketing team of 22 people and 8 field operation individuals.
- Developed strategic planning, pricing, merchandising and new item opportunities.

Two years later, Mr. da Cunha was recruited by Penn Traffic and became Sr. Vice President of Merchandising and Marketing in 2006. He held that position until Penn Traffic was sold to Tops. Among his many accomplishments were:

- Delivered a targeted marketing program designed to reward and retain top decile customers. This program resulted in improved average transaction size from \$36.75 to \$39.40 within the top 30% of the total customer base.
- Increased Private Label penetration from 16% to over 22% in three years by improving assortment and merchandising programs.
- Designed and implemented a strategic pricing initiative targeted at driving sales and improving price image including center store and fresh departments. This initiative was focused on the top five hundred items or 2700 stock keeping units covering over 144 total categories.
- Developed cooperative merchandising and operations implementation programs.
- Developed and implemented an assortment and space optimization strategy structured on utilizing market and internal data. This positively impacted sales, margin and working capital.

3. Eric J. Sattler

Eric J. Sattler will be the Chief Financial Officer of the Hometown Markets. Mr. Sattler has extensive supermarket experience having worked for Penn Traffic in a variety of operational financial positions. Mr. Sattler earned his Bachelor of Science degree from SUNY Genesee in 1989, and received an MBA from Syracuse University in 1991. His career began as a manager trainee for P&C Foods where he spent two years assisting in managing all aspects of supermarket store operations. He subsequently focused on finance and accounting operations, progressing from positions of analyst to accountant to controller. Mr. Sattler's most recent position at Penn Traffic was Vice President of Finance and Interim CFO.

Thus, the three key executives at Hometown Markets have combined over 75 years in the supermarket business. Even more significantly, they have direct experience with the stores and communities at issue, each having held important positions at Penn Traffic. They intimately know the intricacies of the stores and markets at issue.

III. Hometown Markets Would Create a Stand-alone Entity with the Capability and Wherewithal to Achieve the Purposes of the Decision and Order

The proposed divestiture of the Three Stores to Hometown Markets will achieve the purposes of the Decision and Order. Hometown Markets [CONFIDENTIAL MATERIAL REDACTED] will enjoy a strong financial position that will enable it to complete this acquisition, continue the operation of the Three Stores and enhance their competitiveness. The management team of Hometown Markets as described above is experienced and highly capable. Combining the Three Stores with this management team's experience and financial wherewithal will ensure that the objectives of the Commission's Decision and Order will be realized.

The proposed divestiture also will maintain competition at least at the level it was prior to Tops' purchase of the Penn Traffic stores. Messrs. Young and da Cunha do not currently compete in any market, as defined in the Commission's Complaint. Consequently, there is no current overlap between the operations of Hometown Markets and the Three Stores, and the proposed divestiture does not raise any competitive issues.

Tops desires to complete the proposed divestiture of the Three Stores and relevant Business Assets as soon as possible, following Commission approval thereof. Mr. Young has met with the landlords of each of the respective locations, established a working relationship with them, and received the necessary approvals. He also has met with the UFCW, Local 1, and resolved a collective bargaining agreement for the relevant stores.

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Tops and Hometown Markets are in a position to close the divestiture promptly upon the Commission's approval. Prompt consummation will further the purposes of the Consent Agreement and is in the interests of the public, Tops, and Hometown Markets because it will allow Hometown Markets to move forward with its business plans for the competitive operation of the respective Three Stores that have been in limbo for over a year. Tops requests that the Commission now deem Hometown Markets to be a competitively and financially viable buyer and accordingly requests that the Commission promptly commence the period of public comments pursuant to Section 2.41(f)(2) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(2) (2006), limit the public comment period to the customary 30-day period, and grant this Petition by approving the divestiture of the Three Stores listed on Schedule A as Ithaca # 3107, Sayre # 3195 and Cortland # 3095 and respective Business Assets

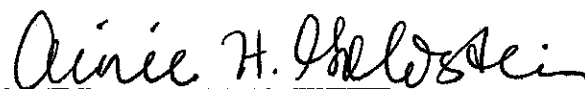
to Hometown Markets, pursuant to the Purchase Agreement as soon as practicable after the close of the public comment period.

Because the Petition contains confidential and competitively sensitive business information relating to the Three Stores and respective Business Assets, the disclosure of which may prejudice Tops and Hometown Markets, cause harm to the ongoing competitiveness of the Three Stores, and impair Tops' ability to comply with its obligations under the Consent Agreement, Tops has redacted such confidential information from the public version of this Petition. Pursuant to Sections 2.41(f)(4) and 4.9(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(4) and 4.9(c) (2006), Tops requests that the confidential version of this Petition and the information contained herein be accorded confidential treatment under 5 U.S.C. § 552 and Section 4.10(a)(2) of the Commission's Rules and Practice and Procedure, 16 C.F.R. § 4.10(a)(2) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 4.10(a)(2) (2006). The confidential version of this Petition and Confidential Exhibit is also exempt from disclosure under Exemptions 4, 7(A), 7(B), and 7(C) of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(4), 552(b)(7)(A), 552(b)(7)(B), and 552(b)(7)(C), and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a(h).

IV. Conclusion

For the foregoing reasons, Tops respectfully requests that the Commission approve the proposed divestitures of the Three Stores and their Business Assets to Hometown Markets, as embodied in the Purchase Agreement, as soon as practicable after expiration of the public comment period.

Respectfully submitted,



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Dated: May 3, 2011

Exhibit A

(Asset Purchase Agreement)

Asset Purchase Agreement Deleted