

MERGER ANTITRUST LAW

Unit 0: Introduction to Substance and Process

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THE FEDERAL MERGER ANTITRUST STATUTES

Substantive Prohibitions

Clayton Act § 7. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. [15 U.S.C. § 18]

[Remainder of section omitted]

Sherman Act § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 1]

Sherman Act § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 2]

FTC Act § 5. Unfair methods of competition unlawful; prevention by Commission^[1]

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

- (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. [15 U.S.C. § 45(a)(1)]

[Remainder of section omitted]

Causes of Action**Sherman Act § 4. Jurisdiction of courts; duty of United States attorneys; procedure**

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. [15 U.S.C. § 4]

Clayton Act § 4. Suits by persons injured

(a) *Amount of recovery; prejudgment interest.* Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [prejudgment interest provision redacted] [15 U.S.C. § 15(a)]

[Sections 4(b)-4(c) omitted]

[1] Technically, Section 5 of the FTC Act is not an antitrust law. Section 1 of the Clayton Act defines "antitrust law" to include only the Sherman Act, the Clayton Act, and the import cartel provisions of the Wilson Tariff Act, Act of Aug. 27, 1894, ch. 349, §§ 73-76, 28 Stat. 509, 570, *as amended by* Act of Feb. 12, 1913, ch. 40, 37 Stat. 667 (current version found at 15 U.S.C. §§ 8-11). 15 U.S.C. § 12.

Clayton Act § 4C. Actions by State Attorneys General

- (a) *Parens patriae*; monetary relief; damages; prejudgment interest
 - (1) Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title [the Sherman Act]. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity. [15 U.S.C. § 15c(a)(1)]

Clayton Act § 15. Restraining violations; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof. [15 U.S.C. § 25]

Clayton Act § 16. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring

suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff. [15 U.S.C. § 26]

FTC Act § 5(a). Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) [*Substantive prohibition—see above*]

(2) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations [with limited exceptions] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3)–(4) [*Omitted*]

(b) *Proceeding by Commission; modifying and setting aside orders.* Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. [*Remainder of subsection omitted*]

[*Remainder of section omitted*²]

Clayton Act § 11. Enforcement provisions

(a) *Commission, Board, or Secretary authorized to enforce compliance.* Authority to enforce compliance with sections 13, 14, 18 [Clayton Act § 7], and 19 of this title [the Clayton Act] by the persons respectively subject thereto is vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to part A of subtitle VII of title 49; in the Board of Governors of the Federal Reserve System where applicable to banks, banking

2. The remainder of Section 5 sets for the procedure for the Commission to adjudicate alleged violations of Section 5. The only relief the Commission may enter is a *cease and desist order*, which is essentially an injunction.

associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows: [*Remainder of section adopts the same quasi-adjudicative process that the Commission uses to enforce FTC Act § 5*]. [15 U.S.C. § 21]

The Merger Review Process³

Summary of the Hart-Scott-Rodino Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976⁴ and its implementing regulations require that the parties to large mergers, consolidations, tender offers, private or open-market purchases, asset acquisitions, joint ventures in corporate form, and certain other types of ownership integrations or transfers must:

1. file a notification report form with the Antitrust Division of the United States Department of Justice and the Federal Trade Commission prior to closing their transaction, and
2. observe a postnotification *waiting period* before the transaction can be consummated.

The HSR Act does not change the standards of substantive merger antitrust law, nor does it provide any remedies for anticompetitive mergers. Rather, the HSR Act simply provides the federal antitrust enforcement authorities with an opportunity to learn about and review major transactions before they are consummated.

The notification must be made on a form (not surprisingly called an “HSR form”) prescribed by the federal enforcement agencies. The HSR Act provides for an *initial waiting period* of 30 calendar days (15 days for all-cash tender offers) following the filing of the notification. The act authorizes the investigating agency to request additional documents and data from the reporting parties during the initial waiting period. This request, almost universally called a *second request*, extends the waiting period for the time it takes the parties to comply plus an additional waiting period, called the *final waiting period*, of 30 calendar days (10 days for all-cash tender offers). Second requests tend to be enormously burdensome, both because a second request may only be issued once to each reporting party so investigating agency has an incentive to ask for everything conceivably relevant to its investigation, and because the length of time the agency has to investigate the transaction is largely a function of the length of time it takes the parties to respond. It is not unusual for the response to a second request to include well over a million documents. Even so, most companies doing sophisticated transaction today can comply with a second request in six weeks to four months. If it takes the parties 10 business days to make their HSR notifications,

3. We will examine the HSR Act and the merger review process in some detail in Unit 6.

4. Hart-Scott-Rodino Antitrust Improvements Act of 1976 §201, Pub. L. No. 94-435, 90 Stat. 1390, *amended*, Pub. L. No. 98-620, Title IV, §402(10)(A), 98 Stat. 3358 (1984); Pub. L. No. 106-553, 114 Stat. 2762 (2000) (current version at Clayton Act §7A, 15 U.S.C. §18a).

then the total time from signing to the end of the final waiting period is usually four to sixth months (= 0.5 months before filing + 30 days for the initial waiting period + 1.5-4 months for second request compliance + 30 days for the final waiting period).

Since almost everyone acknowledges that 30 days of the final waiting period is not an adequate amount of time for the investigating staff to review the documents and data submitted by the parties and make a recommendation on the disposition of the investigation, and for the leadership of the agency to make a reasoned and informed decision, the parties typically enter into a *timing agreement* with the agency to provide the agency with additional time beyond the expiration of the final waiting period (often between 30 to 90 days), which extends the time from signing to the end of the investigation to five to nine months.

There are four outcomes possible at the end of the agency investigation:

1. The agency closes the investigation without taking enforcement action and allow the transaction to close without further interference
2. The agency and the parties settle the investigation with a judicial or administrative *consent decree* requiring the merging parties to restructure their deal—usually by divesting businesses or assets to a third party approved by the investigating agency—to eliminate the agency’s competitive concerns.⁵
3. The agency initiates litigation to enjoin the closing of the transaction on the grounds that the merger or acquisition, if consummated, would violate the antitrust laws.⁶
4. The parties voluntarily terminate their transaction, either because (a) the parties will not settle at the agency’s ask and will not litigate, or (b) the agency concludes that no settlement will resolve the agency’s concerns and parties will not litigate.

Contrary to popular parlance, the HSR Act is not a “clearance” statute. Satisfying the HSR Act’s reporting and waiting period requirements confers no immunity from future attack. On a number of occasions, states, takeover targets, and other private parties successfully have challenged reported mergers and acquisitions after the federal authorities have “cleared” the transaction. Indeed, even the DOJ and the FTC have challenged mergers and acquisitions after they have permitted the Act’s waiting period to expire, although in most cases to date it appears that the agency identified the potential problem prior to the expiration of the waiting period and had warned the parties that if they closed the transaction it would be at the risk of a possible subsequent challenge.

5. We will examine merger antitrust remedies and settlements in Unit 7.

6. We will examine merger litigation throughout the course, but especially in Unit 8.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright
Terrell McSweeney

In the Matter of

Cerberus Institutional Partners V, L.P.
a limited partnership;

AB Acquisition LLC,
a limited liability company;

and

Safeway Inc.,
a corporation.

Docket No. C-4504

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondents AB Acquisition LLC (“Albertson’s”), and Cerberus Institutional Partners V, L.P. (“Cerberus”), both subject to the jurisdiction of the Commission, agreed to acquire Respondent Safeway Inc. (“Safeway”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, 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. RESPONDENTS

1. Respondent Cerberus is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 875 Third Avenue, New York, New York.

2. Respondent Albertson’s is a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 250 Parkcenter Boulevard, Boise, Idaho.

3. Respondent Cerberus, through Albertson's, of which Cerberus is the majority owner, owns and operates a number of supermarkets chains throughout the United States, including supermarkets operating under the Albertsons, Lucky, and United banners.

4. Respondent Safeway is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, California.

5. Respondent Safeway owns and operates a number of supermarket chains throughout the United States, including supermarkets operating under the Safeway, Vons, Pavilions, and Tom Thumb banners.

6. Albertson's and Safeway own and operate supermarkets in each of the geographic markets relevant to this Complaint and compete and promote their businesses in these areas.

II. JURISDICTION

7. Respondents, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have 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 FTC Act, 15 U.S.C. § 44.

III. THE ACQUISITION

8. Pursuant to an Agreement and Plan of Merger dated as of March 6, 2014, as amended on April 7, 2014, and June 13, 2014, Albertson's proposes to purchase all of the issued and outstanding common stock of Safeway in a transaction valued at approximately \$9.2 billion ("the Acquisition").

IV. THE RELEVANT PRODUCT MARKET

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

10. For purposes of this Complaint, the term "supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed, and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea, and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer, and/or distilled spirits.

11. 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 items, typically referred to as stock-keeping units (SKUs), 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.

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

13. Although retail stores other than supermarkets may also sell food and grocery products, these types of stores—including convenience stores, specialty food stores, limited assortment stores, hard-discounters, and club stores—do not, individually or collectively, provide sufficient competition to effectively constrain prices at supermarkets. These 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 at other types of stores, or significantly increase grocery purchases at other types of stores, in response to a small but significant price increase by supermarkets.

V. THE RELEVANT GEOGRAPHIC MARKETS

14. Customers shopping at supermarkets are motivated by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers’ grocery shopping occurs at stores located very close to where they live.

15. Respondents currently operate supermarkets under the Safeway, Vons, Pavilions, Tom Thumb, Albertsons, and United banners within approximately two-tenths of a mile to ten miles of each other in each of the relevant geographic markets. The primary trade areas of Respondents’ banners in each of the relevant geographic markets overlap significantly.

16. The 130 geographic markets in which to assess the competitive effects of the Acquisition are localized areas in (1) Anthem, Arizona; (2) Carefree, Arizona; (3) Flagstaff, Arizona; (4) Lake Havasu, Arizona; (5) Prescott, Arizona; (6) Prescott Valley, Arizona; (7) Scottsdale, Arizona; (8) Tucson (Eastern), Arizona; (9) Tucson (Southwest), Arizona; (10) Alpine, California; (11) Arroyo Grande/Grover Beach, California; (12) Atascadero, California; (13) Bakersfield, California; (14) Burbank, California; (15) Calabasas, California; (16) Camarillo, California; (17) Carlsbad (North), California; (18) Carlsbad (South), California; (19) Carpinteria, California; (20) Cheviot Hills/Culver City, California; (21) Chino Hills, California; (22) Coronado Island, California; (23) Diamond Bar, California; (24) El Cajon, California; (25) Hermosa Beach, California; (26) Imperial Beach, California; (27) La Jolla, California; (28) La

Mesa, California; (29) Ladera Ranch, California; (30) Laguna Beach, California; (31) Laguna Niguel, California; (32) Lakewood, California; (33) Lemon Grove, California; (34) Lomita, California; (35) Lompoc, California; (36) Mira Mesa (North), California; (37) Mira Mesa (South), California; (38) Mission Viejo/Laguna Hills, California; (39) Mission Viejo (North), California; (40) Morro Bay, California; (41) National City, California; (42) Newbury Park, California; (43) Newport Beach, California; (44) Oxnard, California; (45) Palm Desert/Rancho Mirage, California; (46) Palmdale, California; (47) Paso Robles, California; (48) Poway, California; (49) Rancho Cucamonga/Upland, California; (50) Rancho Santa Margarita, California; (51) San Diego (Clairemont), California; (52) San Diego, (Hillcrest/University Heights), California; (53) San Diego (Tierrasanta), California; (54) San Luis Obispo, California; (55) San Marcos, California; (56) San Pedro, California; (57) Santa Barbara, California; (58) Santa Barbara/Goleta Heights, California; (59) Santa Clarita, California; (60) Santa Monica, California; (61) Santee, California; (62) Simi Valley, California; (63) Solana Beach, California; (64) Thousand Oaks, California; (65) Tujunga, California; (66) Tustin (Central), California; (67) Tustin/Irvine, California; (68) Ventura, California; (69) Westlake Village, California; (70) Yorba Linda, California; (71) Butte, Montana; (72) Deer Lodge, Montana; (73) Missoula, Montana; (74) Boulder City, Nevada; (75) Henderson (East), Nevada; (76) Henderson (Southwest), Nevada; (77) Summerlin, Nevada; (78) Ashland, Oregon; (79) Baker County, Oregon; (80) Bend, Oregon; (81) Eugene, Oregon; (82) Grants Pass, Oregon; (83) Happy Valley/Clackamas, Oregon; (84) Keizer, Oregon; (85) Klamath Falls, Oregon; (86) Lake Oswego, Oregon; (87) Milwaukie, Oregon; (88) Sherwood, Oregon; (89) Springfield, Oregon; (90) Tigard, Oregon; (91) West Linn, Oregon; (92) Colleyville, Texas; (93) Dallas (Far North), Texas; (94) Dallas (Farmers Branch/North Dallas), Texas; (95) Dallas (University Park/Highland Park), Texas; (96) Dallas (University Park/Northeast Dallas), Texas; (97) McKinney, Texas; (98) Plano, Texas; (99) Roanoke, Texas; (100) Rowlett, Texas; (101) Bremerton, Washington; (102) Burien, Washington; (103) Everett, Washington; (104) Federal Way, Washington; (105) Gig Harbor, Washington; (106) Lake Forest, Washington; (107) Lake Stevens, Washington; (108) Lakewood, Washington; (109) Liberty Lake, Washington; (110) Milton, Washington; (111) Monroe, Washington; (112) Oak Harbor, Washington; (113) Olympia (East), Washington; (114) Port Angeles, Washington; (115) Port Orchard, Washington; (116) Puyallup, Washington; (117) Renton (New Castle), Washington; (118) Renton (East Hill-Meridian), Washington; (119) Sammamish, Washington; (120) Shoreline, Washington; (121) Silverdale, Washington; (122) Snohomish, Washington; (123) Tacoma (Eastside), Washington; (124) Tacoma (Spanaway), Washington; (125) Walla Walla, Washington; (126) Wenatchee, Washington; (127) Woodinville, Washington; (128) Casper, Wyoming; (129) Laramie, Wyoming; and (130) Sheridan, Wyoming. A hypothetical monopolist controlling all supermarkets in these areas could profitably raise prices by a small but significant amount.

VI. MARKET CONCENTRATION

17. Under the 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”) and relevant case law, the Acquisition is presumptively unlawful in the markets for the retail sale of food and other grocery products in supermarkets in all 130 geographic markets listed in Paragraph 16. Under the Merger Guidelines’ standard measure of market concentration, the Herfindahl-Hirschman Index (“HHI”), an acquisition is presumed to create or enhance market power or facilitate its exercise if

it increases the HHI by more than 200 points and results in a post-acquisition HHI that exceeds 2,500 points. The Acquisition would result in market concentration levels well in excess of these thresholds.

18. Post-acquisition HHI levels in the relevant geographic markets would range from 2,562 to 10,000, and the Acquisition would result in HHI increases ranging from 225 to 5,000. Exhibit A presents market concentration levels for each of the relevant geographic markets.

19. The Acquisition would reduce the number of meaningful competitors from two to one in 13 relevant geographic markets, three to two in 42 relevant geographic markets, and 4 to 3 (or greater) in 75 relevant geographic markets.

VII. ENTRY CONDITIONS

20. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude to prevent or deter the likely anticompetitive effects of the Acquisition. Significant entry barriers include the time and costs associated with conducting necessary market research, selecting an appropriate location for a supermarket, obtaining necessary permits and approvals, constructing a new supermarket or converting an existing structure to a supermarket, and generating sufficient sales to have a meaningful impact on the market.

VIII. EFFECTS OF THE ACQUISITION

21. The Acquisition, if consummated, is likely to substantially lessen competition for the retail sale of food and other grocery products in supermarkets in the relevant geographic markets identified in Paragraph 16 in the following ways, among others:

- (a) by eliminating direct and substantial competition between Respondents Albertson's and Safeway;
- (b) by increasing the likelihood that Respondent Albertson's will unilaterally exercise market power; and
- (c) by increasing the likelihood of, or facilitating, coordinated interaction between the remaining participants in each of the relevant markets.

22. The ultimate effect of the Acquisition would be to increase the likelihood that the prices of food, groceries, or services will increase, and that the quality and selection of food, groceries, or services will decrease, in the relevant geographic markets.

IX. VIOLATIONS CHARGED

23. The agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of January, 2015, issues its complaint against said Respondents.

By the Commission.

Donald S. Clark
Secretary

SEAL:

EXHIBIT A

Area Number (See Para. 16 of Complaint)	City	State	Merger Result	HHI (pre)	HHI (post)	Delta
1	Anthem	AZ	4 to 3	2768	3423	655
2	Carefree	AZ	5 to 4	2298	2976	678
3	Flagstaff	AZ	5 to 4	2744	3365	621
4	Lake Havasu	AZ	4 to 3	2609	3401	792
5	Prescott	AZ	4 to 3	2675	3405	730
6	Prescott Valley	AZ	4 to 3	2828	3340	512
7	Scottsdale	AZ	3 to 2	3797	5001	1204
8	Tucson (Eastern)	AZ	4 to 3	3341	4130	789
9	Tucson (Southwest)	AZ	5 to 4	2018	2909	891
10	Alpine	CA	3 to 2	3857	5002	1145
11	Arroyo Grande/ Grover Beach	CA	3 to 2	3690	6864	3174
12	Atascadero	CA	3 to 2	3456	6242	2786
13	Bakersfield	CA	6 to 5	1923	2562	639
14	Burbank	CA	3 to 2	4199	5011	812
15	Calabasas	CA	3 to 2	3400	5415	2015
16	Camarillo	CA	5 to 4	2950	4215	1265
17	Carlsbad (North)	CA	4 to 3	2977	3888	911
18	Carlsbad (South)	CA	5 to 4	2209	3210	1001
19	Carpinteria	CA	2 to 1	5012	10,000	4988
20	Cheviot Hills/ Culver City	CA	4 to 3	2394	3914	1520
21	Chino Hills	CA	4 to 3	3596	4047	451
22	Coronado Island	CA	2 to 1	5025	10,000	4975
23	Diamond Bar	CA	3 to 2	4466	5231	765
24	El Cajon	CA	4 to 3	2983	3597	614
25	Hermosa Beach	CA	5 to 4	2752	4371	1619
26	Imperial Beach	CA	2 to 1	5869	10,000	4131

27	La Jolla	CA	3 to 2	5505	7083	1578
28	La Mesa	CA	3 to 2	3382	5997	2615
29	Ladera Ranch	CA	2 to 1	5081	10,000	4919
30	Laguna Beach	CA	3 to 2	3335	5799	2464
31	Laguna Niguel	CA	4 to 3	3190	3883	693
32	Lakewood	CA	6 to 5	2073	2581	508
33	Lemon Grove	CA	3 to 2	3581	6059	2478
34	Lomita	CA	3 to 2	3695	5040	1345
35	Lompoc	CA	4 to 3	2566	3713	1147
36	Mira Mesa (North)	CA	5 to 4	2412	3808	1396
37	Mira Mesa (South)	CA	2 to 1	6904	10,000	3096
38	Mission Viejo/ Laguna Hills	CA	4 to 3	3157	3784	627
39	Mission Viejo (North)	CA	3 to 2	3933	5012	1079
40	Morro Bay	CA	5 to 4	2965	4056	1091
41	National City	CA	3 to 2	3748	5013	1265
42	Newbury Park	CA	3 to 2	3629	5833	2204
43	Newport Beach	CA	5 to 4	3160	3811	651
44	Oxnard	CA	4 to 3	2939	3375	436
45	Palm Desert/ Rancho Mirage	CA	6 to 5	2196	3094	898
46	Palmdale	CA	4 to 3	3056	4039	983
47	Paso Robles	CA	4 to 3	2851	5427	2576
48	Poway	CA	4 to 3	2540	3526	986
49	Rancho Cucamonga/ Upland	CA	4 to 3	3266	4118	852
50	Rancho Santa Margarita	CA	4 to 3	2628	4300	1672
51	San Diego (Clairemont)	CA	3 to 2	4066	6374	2308
52	San Diego (Hillcrest/ University Heights)	CA	3 to 2	4436	6571	2135
53	San Diego, CA (Tierrasanta)	CA	2 to 1	5586	10,000	4414
54	San Luis Obispo	CA	4 to 3	2896	5306	2410
55	San Marcos	CA	3 to 2	5991	6282	291

56	San Pedro	CA	3 to 2	3518	6442	2924
57	Santa Barbara	CA	4 to 3	2741	3462	721
58	Santa Barbara/ Goleta	CA	3 to 2	3909	7469	3560
59	Santa Clarita	CA	4 to 3	2646	3732	1086
60	Santa Monica	CA	4 to 3	3293	4879	1586
61	Santee	CA	3 to 2	3477	6133	2656
62	Simi Valley	CA	5 to 4	3633	7101	3468
63	Solana Beach	CA	3 to 2	3830	6188	2358
64	Thousand Oaks	CA	3 to 2	4057	6047	1990
65	Tujunga	CA	3 to 2	3688	3969	281
66	Tustin (central)	CA	4 to 3	3474	4348	874
67	Tustin/Irvine	CA	4 to 3	3939	4485	546
68	Ventura	CA	4 to 3	2732	3550	818
69	Westlake Village	CA	5 to 4	1955	3563	1608
70	Yorba Linda	CA	4 to 3	2803	4588	1785
71	Butte	MT	3 to 2	4701	5189	488
72	Deer Lodge	MT	2 to 1	5000	10,000	5000
73	Missoula	MT	4 to 3	3107	4063	956
74	Boulder City	NV	2 to 1	5051	10,000	4949
75	Henderson (East)	NV	4 to 3	2705	3356	651
76	Henderson (Southwest)	NV	3 to 2	3653	5042	1389
77	Summerlin	NV	4 to 3	3107	4367	1260
78	Ashland	OR	2 to 1	5013	10,000	4987
79	Baker County	OR	2 to 1	5102	10,000	4898
80	Bend	OR	6 to 5	2632	3824	1192
81	Eugene	OR	5 to 4	2392	3414	1022
82	Grants Pass	OR	4 to 3	2769	3537	768
83	Happy Valley/ Clackamas	OR	2 to 1	5006	10,000	4994
84	Keizer	OR	5 to 4	2852	3367	515

85	Klamath Falls	OR	5 to 4	2511	2917	406
86	Lake Oswego	OR	4 to 3	3176	5604	2428
87	Milwaukie	OR	3 to 2	5729	6082	353
88	Sherwood	OR	3 to 2	3989	5028	1039
89	Springfield	OR	3 to 2	4400	5197	797
90	Tigard	OR	5 to 4	2261	2984	723
91	West Linn	OR	3 to 2	3611	6268	2657
92	Colleyville	TX	5 to 4	2686	3465	779
93	Dallas (Far North)	TX	5 to 4	2413	2891	478
94	Dallas (Farmers Branch/ North Dallas)	TX	4 to 3	3746	5175	1429
95	Dallas (University Park/ Highland Park)	TX	4 to 3	2755	4261	1506
96	Dallas (University Park/ Northeast Dallas)	TX	5 to 4	2345	3065	720
97	McKinney	TX	5 to 4	2692	3613	921
98	Plano	TX	4 to 3	3105	3541	436
99	Roanoke	TX	3 to 2	4680	5351	671
100	Rowlett	TX	3 to 2	3386	5450	2064
101	Bremerton	WA	4 to 3	2721	3399	678
102	Burien	WA	5 to 4	1979	4489	2510
103	Everett	WA	5 to 4	2301	2586	285
104	Federal Way	WA	5 to 4	2312	2709	397
105	Gig Harbor	WA	3 to 2	3396	5235	1839
106	Lake Forest Park	WA	5 to 4	3889	4352	463
107	Lake Stevens	WA	5 to 4	2646	3455	809
108	Lakewood	WA	5 to 4	2333	3170	837
109	Liberty Lake	WA	3 to 2	3483	5090	1607
110	Milton	WA	3 to 2	3960	5010	1050
111	Monroe	WA	4 to 3	2911	3352	441
112	Oak Harbor	WA	3 to 2	4296	6446	2150
113	Olympia (East)	WA	6 to 5	2205	2566	361

114	Port Angeles	WA	3 to 2	3773	5588	1815
115	Port Orchard	WA	4 to 3	2747	3362	615
116	Puyallup	WA	3 to 2	4160	5072	912
117	Renton (East Hill-Meridian)	WA	4 to 3	3304	3719	415
118	Renton (New Castle)	WA	4 to 3	4417	5274	857
119	Sammamish	WA	2 to 1	5761	10,000	4239
120	Shoreline	WA	4 to 3	3792	4017	225
121	Silverdale	WA	4 to 3	2845	3516	671
122	Snohomish	WA	2 to 1	5595	10,000	4405
123	Tacoma (Eastside)	WA	4 to 3	3260	3727	467
124	Tacoma (Spanaway)	WA	5 to 4	2707	3360	653
125	Walla Walla	WA	5 to 4	2624	3417	793
126	Wenatchee	WA	3 to 2	3744	5047	1303
127	Woodinville	WA	3 to 2	3568	5192	1624
128	Casper	WY	4 to 3	3816	4353	537
129	Laramie	WY	3 to 2	3793	5000	1207
130	Sheridan	WY	3 to 2	4802	5421	619

THE HERFINDAHL–HIRSCHMAN INDEX

Market concentration and changes in market concentration are important variables in merger antitrust analysis. The original measure of market concentration in merger analysis was the four-firm concentration ratio (“4FCR”), which is simply the sum of the market shares of the four largest firms in the market. So if the four largest firms have shares of 30%, 20%, 15%, and 10%, the 4FCR is 75%.

The 1982 DOJ Merger Guidelines introduce a new market concentration measure call the *Herfindahl–Hirschman Index* (“HHI”). The HHI, which had been used by industrial organization economists long before 1982, is calculated by squaring the market share of each firm in the market and then summing the resulting squares. So, for example, for a market consisting of five firms with shares of 30%, 30%, 20%, 10%, and 10%, the HHI is calculated as follows:

<u>Share</u>	<u>HHI contribution</u>
30	900
30	900
20	400
10	100
10	100
100	2400

So the HHI is equal to 2400. Symbolically,

$$\text{HHI} = \sum_{i=1}^N s_i^2$$

where there are N firms in the market and the i th firm has a market share of s_i .

The change in the HHI resulting from a merger—commonly call the *delta* (Δ)—is equal to the HHI of the market after the merger (postmerger HHI) minus the HHI of the market before the merger (premerger HHI). If the second and third firms in our example, the postmerger HHI calculation is:

<u>Share</u>	<u>HHI contribution</u>
30	900
50	2500
10	100
10	100
100	3600

The postmerger HHI is 3600, so that the delta is 1200. A simple way to calculate the delta is to multiply the market shares of the merging firms and then multiply the result by two:

$$\Delta = 2ab = 2 \cdot 30 \cdot 20 = 1200.$$