

ANTITRUST LAW

Unit 14: Merger Antitrust Litigation and Settlements

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Georgetown University Law Center
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DOJ Merger Challenges

FEDERAL COURT INJUNCTIONS

CLAYTON ACT

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]

FEDERAL COURT INJUNCTIONS

FEDERAL RULES OF CIVIL PROCEDURE

Rule 65. Injunctions and Restraining Orders

- (a) Preliminary Injunction.
 - (1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.
 - (2) *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.
- (b) Temporary Restraining Order.
 - (1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
 - (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
 - (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.
 - (2) *Contents; Expiration.* Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.
 - (3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.
 - (4) *Motion to Dissolve.* On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the

adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires

(c) *Security*. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) *Contents and Scope of Every Injunction and Restraining Order*.

(1) *Contents*. Every order granting an injunction and every restraining order must:

- (A) state the reasons why it issued;
- (B) state its terms specifically; and
- (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound*. The order binds only the following who receive actual notice of it by personal service or otherwise:

- (A) the parties;
- (B) the parties' officers, agents, servants, employees, and attorneys; and
- (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) *Other Laws Not Modified*. These rules do not modify the following:

- (1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;
- (2) 28 U.S.C. §2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or
- (3) 28 U.S.C. §2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) *Copyright Impoundment*. This rule applies to copyright-impoundment proceedings.

FTC Merger Challenges

FTC SECTION 13(b) PRELIMINARY INJUNCTIONS**FTC Act § 13. False advertisements; injunctions and restraining orders**

(a) *Power of Commission; jurisdiction of courts* [omitted—deals with false and deceptive advertising]

(b) *Temporary restraining orders; preliminary injunctions.* Whenever the Commission has reason to believe—

- (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
- (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found. [15 U.S.C. § 53(b)]

(c) *Service of process; proof of service.* Any process of the Commission under this section may be served by any person duly authorized by the Commission—

- (1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;
 - (2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation;
- or

- (3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same. [15 U.S.C. § 53(c)]

(d) *Exception of periodical publications* [omitted—deals with false and deceptive advertising]

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ARDAGH GROUP, S.A.,
COMPAGNIE DE SAINT-GOBAIN, and
SAINT-GOBAIN CONTAINERS, INC.,

Defendants.

Case No. 1:13-CV-01021 (BJR)

PUBLIC VERSION

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR PRELIMINARY INJUNCTION**

**REDACTED VERSION
FOR PUBLIC FILING***

*The Federal Trade Commission filed this non-confidential redacted version of its Memorandum of Law in Support of its Motion for Preliminary Injunction, filed August 28, 2013. The Protective Order requires all information designated "Confidential" to be redacted from the public version of the pleading filed with the court. Although Defendants designated all information and documents redacted in this Memorandum as "Confidential," most of the information does not appear to be commercial information, the disclosure of which would cause injury to their businesses.

The Federal Trade Commission (“FTC” or the “Commission”) has commenced an action in this Court under Section of 13(b) of the FTC Act seeking to enjoin preliminarily Ardagh Group S.A. (“Ardagh”) from completing its acquisition of Saint-Gobain Containers, Inc. (“Saint-Gobain” or “Verallia North America”) until the resolution of the Commission’s pending administrative case to determine the legality of the proposed acquisition. The Commission respectfully submits this memorandum of law in support of its preliminary injunction motion.

INTRODUCTION

The Commission seeks to halt an acquisition that, if consummated, would dramatically concentrate the glass container industry in the hands of two manufacturers and lead to higher prices for glass beer and spirits bottles. For years, three manufacturers have dominated the \$5 billion glass container industry in the United States. The second- and third-largest of these manufacturers, Ardagh and Saint-Gobain, now propose to merge in a transaction that would create a durable duopoly. Under well-settled precedent and the Commission’s merger guidelines, this merger to duopoly is presumptively unlawful. Indeed, a top Ardagh sales executive stated in June 2013 that Ardagh believes the transaction “may not get approved” since “it is going from 3 to 2 major suppliers.”¹

The Commission has initiated an administrative proceeding to adjudicate the legality of the proposed transaction under the antitrust laws, and the trial in that proceeding begins on December 2, 2013. Thus, the only issue for this Court is whether to grant interim relief by enjoining the Defendants from consummating the proposed acquisition pending the upcoming merits trial. The Court should do so because such interim relief is necessary to prevent consumer harm and to preserve the possibility of an effective remedy.

¹ PX 1574.

Under Section 13(b) of the FTC Act, the Commission is entitled to a preliminary injunction “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” 15 U.S.C. § 53(b). At this stage, the Commission is *not* required to prove whether the acquisition, is, in fact, illegal under the antitrust laws. “That responsibility lies with the FTC” after a full administrative hearing. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (Brown, J.). The FTC creates a strong “presumption in favor of preliminary injunctive relief” by raising “questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001). The Commission undoubtedly has met that standard here.

To counter this strong presumption, coupled with the strong “public interest in effective enforcement of the antitrust laws,” defendants must show “particularly strong equities” that favor allowing the acquisition to close before trial. *Id.* at 726-27; *Whole Foods*, 548 F.3d at 1035 (Brown, J.). Defendants cannot do so. At best, Defendants’ arguments only underscore the “serious, substantial” questions to be resolved in the administrative trial.

This acquisition will likely cause anticompetitive effects in at least two relevant antitrust product markets: the manufacture and sale of glass containers to (1) beer brewers (“Brewers”) and (2) spirits distillers (“Distillers”). Both are relevant antitrust markets for the purposes of assessing the acquisition’s competitive impact because other types of containers, such as aluminum cans or plastic bottles, are not economically viable substitutes for glass.

The proper delineation of the relevant market is ultimately “a matter of business reality – a matter of how the market is perceived by those who strive to profit in it.” *FTC v. Coca-Cola*

Co., 641 F. Supp. 1128, 1132 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987).

On that question, the evidence leaves little doubt.

- Glass container manufacturers refer to the “three majors” of glass container manufacturing, tell the investment community they operate in a glass container market, and calculate market shares based only on glass container sales.
- Aluminum and plastic container manufacturers have testified that they do not compete directly with glass.
- Glass container manufacturers bid for contracts knowing their customers have already excluded aluminum cans or plastic bottles from consideration.
- Brewers and Distillers who sell products in glass bottles want glass – not cans or plastic – because their customers demand it. As one Brewer explained when asked: “Who determines the mix of packaging? Consumers.”²
- Brewers and Distillers do not change their brands’ packaging based on variations in the relative prices of glass, metal, or plastic containers.

Unless enjoined, Ardagh’s planned \$1.7 billion acquisition of Saint-Gobain would produce a single firm controlling █ percent of the U.S. glass container industry, according to Ardagh’s own assessment. The only other major U.S. manufacturer – Owens-Illinois, Inc. (“O-I”) – controls roughly █ percent of the industry. The post-acquisition duopolists would collectively control approximately █ percent of the glass container market for Brewers and █ percent for Distillers, easily exceeding the levels required to establish a presumption that the acquisition violates the antitrust laws. The remaining competitors are fringe importers and small-scale or niche manufacturers.

Today, Ardagh, Saint-Gobain, and O-I – the “three majors,” to borrow a term from Ardagh’s documents – recognize their mutual incentives to avoid excess capacity that could lead to greater price competition. Indeed, Ardagh’s North American President described the glass container industry as having “evolved” to be “very disciplined with ‘well-balanced’ if not tight

² █

supply demand dynamics.”³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Still, Brewers and Distillers today benefit from competition among the major glass manufacturers by encouraging those manufacturers to bid for their business, and those benefits accrue to consumers. The proposed acquisition would end that competition between Ardagh and Saint-Gobain and lead to higher prices for beer and spirits bottles. It would also dramatically increase the ease and likelihood of coordination between the only two remaining Majors in a “highly concentrated market, with stable market shares, low growth rates and significant barriers to entry” – a situation that provides “few incentives to engage in healthy competition.” *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 66 (D.D.C. 2009) (Collyer, J.).

The barriers to entry in this market are extraordinarily high. Glass plants cost hundreds of millions of dollars and take years to build. Not surprisingly, Defendants tout the fact that “new market entrants are faced with meaningful barriers to entry, including significant start-up costs (estimated at \$200 million for a new plant),” and other barriers.⁶ Where, as here, the market is ripe for coordination and new entry is improbable, “no court has ever approved a merger to duopoly.” *Heinz*, 246 F.3d at 717.

³ PX 1260-004; Fredlake Dep. at 126-27.

⁴ [REDACTED]

⁵ [REDACTED] *see also* Grewe Dep. at 128 [REDACTED]

⁶ PX 1247-008.

Ed.: Statement of Facts omitted

V. The Commission Challenges Ardagh's Acquisition Of Saint-Gobain.

Ardagh and Compagnie de Saint-Gobain, Saint-Gobain's parent company, entered into a Share Purchase Agreement on January 17, 2013, pursuant to which Ardagh proposes to acquire Saint-Gobain for approximately \$1.7 billion on or before January 13, 2014. On June 28, 2013, the Commission voted to file an administrative complaint challenging the acquisition and authorized Commission staff to seek a preliminary injunction enjoining the acquisition pending the resolution of the Commission's administrative trial.

ARGUMENT

The question before this Court is whether it is in the public interest to order Defendants to refrain from closing their transaction until the FTC has concluded its ongoing administrative proceeding. Under controlling law, the answer is plainly yes.

I. THE FTC HAS RAISED "SERIOUS, SUBSTANTIAL" ISSUES APPROPRIATE FOR AN ADMINISTRATIVE TRIAL.

The Commission has determined that it has "reason to believe" that Ardagh's proposed acquisition of Saint-Gobain violates Section 7 of the Clayton Act and Section 5 of the FTC Act.

⁵⁵ PX 1379 ¶¶ 1, 10-13 (Complaint, *Anchor Glass Container Corp. v. Owens-Illinois, Inc.*, No. 8:01-cv-1849 (M.D. Fla. Sep. 26, 2001)).

In these circumstances, Section 13(b) of the FTC Act authorizes the Commission to seek a preliminary injunction halting the merger until the Commission “has had an opportunity to adjudicate the merger’s legality in an administrative proceeding.” *CCC Holdings*, 605 F. Supp. 2d at 35 (citing 15 U.S.C. § 53(b)). The merits trial is scheduled to begin on December 2, 2013 before an administrative law judge, and discovery in that action is nearly complete. Although the acquisition agreement permits Defendants to close in early 2014 (and could presumably be extended), Defendants have threatened to close their acquisition before the completion of the administrative trial. Ardagh intends to litigate the merits trial to conclusion regardless of whether this Court grants the Commission injunctive relief. Ardagh’s counsel told the administrative law judge: “[i]f the injunction issues, the parties intend to continue on the administrative proceeding. We will continue to litigate. . . .That is not bluster, Your Honor.”⁵⁶ Thus, the only issue for this Court is whether the Commission is entitled to a preliminary injunction to preserve its ability to obtain effective relief and to prevent consumer harm.

Section 13(b) of the FTC Act enables the Commission to seek to preserve the status quo in this precise situation. The legislation authorizes the Court to issue a preliminary injunction “where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission’s likelihood of success on the merits.” *Heinz*, 246 F.3d at 714. The Court must balance these two “public interest” considerations on a sliding scale. *See CCC Holdings*, 605 F. Supp. 2d at 35 (citing *Heinz*, 246 F.3d at 714); *Whole Foods*, 548 F.3d at 1035 (Brown, J.); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989) (Posner, J.). The greater the FTC’s showing of likelihood of success on the merits, the heavier the

⁵⁶ PX 0005 (Initial Scheduling Conference Transcript) at 9.

defendants’ burden to show “particularly strong equities” in their favor. *Whole Foods*, 548 F.3d at 1035 (Brown, J.); *Elders Grain*, 868 F.2d at 903.

In Section 13(b), Congress demonstrated its concern that “injunctive relief be broadly available to the FTC.” *Heinz*, 246 F.3d at 714 (quoting *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980)). Accordingly, Section 13(b) eases the more stringent injunction standard required of private parties. *Id.*; *see also Whole Foods*, 548 F.3d at 1042 (Tatel, J.) (“[T]he FTC – an expert agency acting on the public’s behalf – should be able to obtain injunctive relief more readily than private parties.”). Thus, at this stage, the FTC is *not* required to prove, nor is this Court required to find, that the proposed acquisition would violate the antitrust laws. *CCC Holdings*, 605 F. Supp. 2d at 35 (citing *Staples*, 970 F. Supp. at 1070). As the D.C. Circuit recognized in *Heinz*, “[t]hat adjudicatory function is vested in the FTC in the first instance.” 246 F.3d at 714 (quoting *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976)).

The Commission has met the standard for showing a likelihood of success on the merits because the evidence here raises “serious, substantial questions meriting further investigation.” *Whole Foods*, 548 F.3d at 1049 (Tatel, J.); *id.* at 1035 (Brown, J.); *Heinz*, 246 F.3d at 714-15; *see also CCC Holdings*, 605 F. Supp. 2d at 36. Defendants’ admissions alone raise serious questions of illegality surrounding this acquisition. Anchor alleged in its 2001 antitrust lawsuit that the “market for the manufacture and sale of glass containers in the United States is highly concentrated” and “the three largest producers . . . account for in excess of 90% of the domestic volume.”⁵⁷ The glass container industry remains just as concentrated today as it was then.

The proposed acquisition would create a duopoly in markets with high entry barriers and conditions ripe for coordination – an outcome “no court has ever approved.” *Heinz*, 246 F.3d at

⁵⁷ PX 1379 ¶ 13.

716-17; *see, e.g., CCC Holdings*, 605 F. Supp. 2d 26 (preliminarily enjoining three-to-two merger of insurance software providers); *FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.D.C. 2000) (preliminarily enjoining merger of loose-leaf tobacco firms where “the top two firms left. . . will have ninety percent of the market.”); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (preliminarily enjoining three-to-two merger of office supply superstores); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011) (permanently enjoining three-to-two merger of tax software firms). There is no reason for this Court to be the first to bless such a merger.

Under the second prong of the Section 13(b) analysis, there is a general presumption in favor of the FTC in the weighing of the equities because “‘the public interest in the effective enforcement of the antitrust laws’ was Congress’s specific ‘public equity consideration’ in enacting” Section 13(b). *Whole Foods*, 548 F.3d at 1035 (Brown, J.) (quoting *Heinz*, 246 F.3d at 726). No compelling public equities favor allowing this acquisition to close before the trial. Private equity considerations, such as a risk that a transaction will not occur, are given little weight. *Whole Foods*, 548 F.3d at 1034-35 (Brown, J.); *CCC Holdings*, 605 F. Supp. 2d at 75-76. Here, because Defendants confirmed that they will litigate through trial regardless of this Court’s ruling, there is nothing to weigh. Preserving the status quo will protect the public interest and will not harm Defendants, who can close their transaction if they succeed in the ongoing administrative proceeding.

[Remainder of brief omitted]

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ARDAGH GROUP, S.A.,
COMPAGNIE DE SAINT-GOBAIN, and
SAINT-GOBAIN CONTAINERS, INC.,

Defendants.

Case No. 13-CV-1021 (BJR)

PUBLIC (REDACTED)

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE
FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION**

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September 18, 2013

Excerpts--Full version may be found on class web site

Defendants Ardagh Group S.A. (“Ardagh”), Compagnie de Saint-Gobain (“CSG”), and Saint-Gobain Container, Inc. (d/b/a “Verallia” or “VNA”) (collectively, “Defendants”) respectfully submit this Memorandum of Law in Opposition to the Federal Trade Commission’s (“FTC”) Motion for a Preliminary Injunction enjoining Ardagh’s proposed acquisition of VNA.

PRELIMINARY STATEMENT

The FTC’s Motion for a Preliminary Injunction is fundamentally flawed. Ignoring directly on-point precedent, the FTC paints a picture of three powerful glass manufacturers colluding against their stranded customers—beer brewers and liquor distillers—and claims that this Court must act to prevent a merger that will convert an anticompetitive oligopoly to an uncontrollable duopoly. This picture bears no resemblance to reality. The evidence and controlling law make clear that the FTC’s motion should be denied.

First, the FTC’s alleged relevant product markets—glass containers for beer and for liquor—are legally unsustainable. The FTC’s “glass-only” markets ignore the reality that glass container manufacturers are fighting a losing battle against the makers of metal and plastic containers. Glass container manufacturers have struggled in the face of high operating costs, declining demand, and bankruptcies, always one price increase away from losing further volume to alternative packaging. More troubling, the FTC’s assertion of “glass-only” product markets ignores controlling legal precedent in which these markets have been explicitly rejected by the Supreme Court, this Court, and the FTC itself. This precedent alone requires rejection of the FTC’s market definitions. And developments since the time of this controlling precedent further prove that the relevant markets cannot comprise glass only—today, over 50% of all domestically-packaged beer is packaged in aluminum cans and over 40% of all domestically-packaged spirits is packaged in plastic containers.

Second, the FTC's alleged nationwide geographic market for beer containers ignores the high shipping costs of beer bottles and the testimony of beer customers that distant plants cannot effectively compete for their business. Courts uniformly have held that high transportation costs relative to a product's price typically result in narrow geographic markets. In this case, the geographic market for beer containers is much narrower than the United States.

Third, even if the appropriate relevant markets are glass-only (which they are not), the merger will not have an anticompetitive effect. There is limited competition between Defendants for the sale of beer or spirits containers due to high freight costs, geographically dispersed plants, specialized production lines, and lack of excess capacity, and so there is little meaningful competition that could be impacted by the merger. In addition, both the beer and spirits industries are characterized by a handful of very powerful buyers that are well-equipped to keep glass container prices low. Indeed, [REDACTED] customers account for almost [REDACTED]% of Ardagh's beer container revenues, while [REDACTED] other customers account for over [REDACTED]% of Ardagh's liquor container revenues. Moreover, these customers are protected by long-term contracts that lock in pricing terms and constrain Ardagh's ability to raise prices after the merger.

Fourth, Ardagh entered into this transaction because it will result in synergies (such as overhead costs savings, reductions in production costs, and manufacturing footprint efficiencies) of at least \$95 million annually, which have a present discounted value well in excess of [REDACTED]. Many of these gains, which will not happen absent this transaction, will be passed on to the customers and others (e.g., lower manufacturing costs) will benefit customers by enabling the combined company to better compete with nonglass packaging, ensuring its long-term survivability.

Fifth, the balance of the equities weighs against the drastic remedy of a preliminary injunction. A preliminary injunction would not simply “preserve the status quo” pending completion of the administrative proceeding; it could effectively doom the merger. While Ardagh is committed to defending the transaction to a final resolution, the merger agreement terminates if the merger is not closed by mid-January, 2014. Thus, if the merger is enjoined, Ardagh may not have the chance to pursue the case to its administrative conclusion.

Finally, Ardagh is restructuring the transaction to further demonstrate that an injunction is not warranted. The restructuring, which is contingent upon the merger closing, has two parts: (1) Ardagh is selling three beer bottle plants and one plant that makes liquor bottles to a capable and well-financed third-party that will be a new and significant competitor, and (2) Ardagh is providing craft beer customers an option to extend their existing supply contracts to 2023, locking in their premerger pricing terms (at the customer’s election) for up to ten years. The FTC could not meet its burden to obtain a preliminary injunction against the original transaction and certainly cannot meet its burden against the restructured transaction.

[Background omitted]

APPLICABLE LAW

Section 7 of the Clayton Act bars mergers “the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly’ in ‘any line of commerce or in any activity affecting commerce in any section of the country.’” *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (quoting 15 U.S.C. § 18). The FTC must establish three elements to prove a Section 7 claim: “(1) the relevant product market in which to assess the transaction, (2) the geographic market in which to assess the transaction, and (3) the transaction’s probable effect on competition in the relevant product and geographic markets.” *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 117 (D.D.C. 2004) (citing *United States v. Marine Bancorporation*, 418 U.S. 602, 618-23 (1974)). The FTC has “the burden on every element of their Section 7 challenge, and a failure of proof in any respect will mean the transaction should not be enjoined.” *Id.* at 116.

Under 15 U.S.C. § 53(b), “[t]he FTC has the burden of proof in presenting this motion for a preliminary injunction to show a likelihood of success on the merits” of its Section 7 Clayton Act claim. *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 33-34 (D.D.C. 1988), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988) (per curiam). The FTC may establish a presumption in favor of preliminary injunctive relief by raising questions “so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001). But the presumption is *rebuttable*, *id.* at 725, *see FTC v. Whole Foods Mkt, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008), and courts will deny a preliminary injunction where the FTC fails to demonstrate a likelihood of prevailing on the merits.¹⁸ Although the FTC’s burden may be somewhat lower than that of a private litigant seeking interim injunctive relief, “the FTC’s burden is not insubstantial.” *Arch Coal, Inc.*, 329 F. Supp. 2d at 116. It is certainly not the low bar the FTC wishes for itself in its papers. (*See* FTC Br. at 2, 14). A district court may not “simply rubber-stamp an injunction whenever the FTC provides some threshold evidence; it must ‘exercise independent judgment’ about the questions § 53(b) commits to it.” *Whole Foods*, 548 F.3d at 1035 (quoting *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981)). Moreover, “[a] showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief.” *Arch Coal*, 329 F. Supp. at 116 (quoting *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999)); *see FTC v. Swedish Match*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000) (same); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1072 (D.D.C. 1997) (same).

¹⁸ *See, e.g., FTC v. Lab. Corp. of Am.*, No. SACV 10–1873 AG (MLGx), 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011) (denying preliminary injunction); *FTC v. Lundbeck, Inc.*, Civ. Nos. 08-6379 (JNE/JJG), 08-6381 (JNE/JJG), 2010 WL 3810015 (D. Minn. Aug. 31, 2010) (same), *aff’d*, 650 F.3d 1236 (8th Cir. 2011); *FTC v. Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441 (D.N.M. May 29, 2007) (same); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) (same); *FTC v. Butterworth Heath Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996) (same), *aff’d*, 121 F.3d 708 (6th Cir. 1997) (unpublished); *Owens-Illinois*, 681 F. Supp. at 27 (same).

A district court must also “balance the likelihood of the FTC’s success against the equities.”
Whole Foods, 548 F.3d at 1035.

[Remainder of brief omitted]

FTC SECTION 5

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

(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.
- (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except [*exceptions omitted*] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.
- (3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—
 - (A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—
 - (i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or
 - (ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and
 - (B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

- (4)
 - (A) For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that—
 - (i) cause or are likely to cause reasonably foreseeable injury within the United States; or
 - (ii) involve material conduct occurring within the United States.
 - (B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(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. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that

- (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and
- (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or

corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either

- (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or
- (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or
- (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final—

- (1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).
- (2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—
 - (A) the Commission;
 - (B) an appropriate court of appeals of the United States, if
 - (i) a petition for review of such order is pending in such court, and
 - (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or
 - (C) the Supreme Court, if an applicable petition for certiorari is pending.
- (3) For purposes of subsection (m)(1)(B) of this section and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed—
 - (A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

- (B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or
 - (C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.
- (4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—
- (A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;
 - (B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or
 - (C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if

- (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or
- (2) the petition for certiorari has been denied, or
- (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if

- (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or
- (2) the petition for certiorari has been denied, or
- (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) *“Mandate” defined*

As used in this section the term “mandate”, in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) *Penalty for violation of order; injunctions and other appropriate equitable relief*

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) *Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure*

(1)

- (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.
- (B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent

order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

- (1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and
- (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation

- (C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.
- (2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.
- (3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy considerations

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

“Litigating the Fix”

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ARCH COAL, INC., et al.,

Defendants.

Civil Action No. 04-0534 (JDB)

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

ARCH COAL, INC., et al.,

Defendants.

Civil Action No. 04-0535 (JDB)

(Consolidated Cases)

ORDER

Upon consideration of plaintiff Federal Trade Commission's motion in limine to exclude, for the purposes of the preliminary injunction proceeding, all evidence and argument on the issue of Arch Coal, Inc.'s proposed sale of the Buckskin mine to Peter Kiewit Sons, Inc., the opposition

filed by defendants Arch Coal, Inc., Triton Coal Co., and New Vulcan Coal Holdings, LLC,
plaintiff's reply thereto, and the entire record herein, it is this 7th day of July, 2004, hereby

ORDERED that plaintiff's motion is DENIED.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

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DOJ Settlements

ANTITRUST PROCEDURES AND PENALTIES ACT
15 U.S.C. § 16(b)-(h)
(“TUNNEY ACT”)

Clayton Act § 5. Judgments

(a) *Prima facie evidence; collateral estoppel* [omitted]

(b) *Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public.* Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

- (1) the nature and purpose of the proceeding;
- (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;
- (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
- (4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
- (5) a description of the procedures available for modification of such proposal; and
- (6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) *Publication of summaries in newspapers.* The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

- (i) a summary of the terms of the proposal for consent judgment,

- (ii) a summary of the competitive impact statement filed under subsection (b) of this section,
- (iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) *Consideration of public comments by Attorney General and publication of response.* During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that

- (1) extraordinary circumstances require such shortening and
- (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments. Upon application by the United States, the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemination of the public comments received and the response to those comments.

(e) *Public interest determination*

- (1) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider—
 - (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
 - (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.
- (2) Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.

(f) *Procedure for public interest determination.* In making its determination under subsection (e) of this section, the court may—

- (1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;
- (2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;
- (3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;
- (4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and
- (5) take such other action in the public interest as the court may deem appropriate.

(g) *Filing of written or oral communications with the district court.* Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) *Inadmissibility as evidence of proceedings before the district court and the competitive impact statement.* Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

(i) *Suspension of limitations.* [omitted]

U.S. Dep't of Justice, Antitrust Div., Antitrust Division Manual
Ch. 4 D (5th ed. updated Mar. 2014)

D. Negotiating and Entering Consent Decrees

In general, adequate relief in a civil antitrust case is relief that will (1) stop the illegal practices alleged in the complaint, (2) prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred. Normally, the Government is entitled to any relief that is reasonable and necessary to accomplish these ends. While the scope of relief obtained in prior antitrust cases may be viewed as precedent, the theory behind equitable relief is that it should be fashioned to fit the particular facts of the case at issue.

It is often possible to obtain effective relief without taking the case to trial. This section describes the procedures used by the Antitrust Division in negotiating and entering civil consent judgments under the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16 (APPA, Act, or Tunney Act).

1. Antitrust Procedures and Penalties Act

The APPA was enacted in 1974 and amended in 2004. The APPA subjects the Division's consent judgments to public scrutiny and

comment. The Division must ensure complete compliance with the requirements of the APPA.

a. The Competitive Impact Statement

The first significant requirement of the APPA is that the Government file with the court a Competitive Impact Statement (CIS) at the time the proposed consent judgment is filed. This document must be self-contained, setting forth the information necessary to enable the court and the public to evaluate the proposed judgment in light of the Government's case. Its object is to explain why the proposed judgment is appropriate under the circumstances and why it is in the public interest. Because the CIS is directed to the public, as well as to the court, it should be written in a narrative style that avoids technical jargon. As a general rule, the CIS should not use extensive verbatim quotations from the complaint and judgment. Rather, care should be taken to make the CIS as understandable and persuasive as possible. Although the CIS should be tailored to each matter, the Division has developed standard language that should be used to reduce the drafting burden.

The CIS is the Division's explanation of its case, the judgment, and the circumstances surrounding the judgment. Therefore, it should not be the subject of discussion or negotiation with defense counsel, and defense counsel will not be permitted to review the CIS prior to its filing with the court.

The APPA requires that the CIS "recite" certain topics, and all CISs are organized according to the statutory requirements: (1) the nature and purpose of the proceeding; (2) a description of the practices giving rise to the alleged violation; (3) an explanation of the proposed final judgment; (4) the remedies available to potential private litigants; (5) a description of the procedures available for modification of the judgment; and (6) the alternatives to the proposed final judgment considered by the Division. Although the statute does not specify that the CIS must discuss determinative documents, a seventh section on determinative documents is usually added to the CIS as this is a convenient place to publicly state what the determinative documents are or, more commonly, that there are no determinative documents. *See Massachusetts School of Law v. United States*, 118 F.3d 776, 784-85 (D.C. Cir. 1997) (discussing what qualifies as a determinative document). CISs also routinely discuss the standard of judicial review under the Tunney Act, even though this discussion is not required by the APPA.

The CIS's description of the nature and purpose of the proceeding and the practices or events giving rise to the alleged violation should go beyond the allegations in the complaint. The CIS should describe the defendants, the trade and commerce involved, and the challenged activity in sufficient detail to convey the essence of the alleged violation. For instance, in a merger case, the industry, the parties'

relationship to the industry and to each other, and the theory of the violation should be explained. In a nonmerger case, the CIS should make clear what the defendant did and explain the resulting competitive harm. The Division drafts CISs not only to meet the requirements of the APPA, but also to provide the bar with useful instruction and guidance on the Division's enforcement intentions.

The CIS should describe the proposed relief in a manner that the public will understand. All material provisions of the proposed judgment should be discussed. The reasoning behind the Division's acceptance of the proposed relief and the anticipated competitive effect of the relief must also be set forth. Although this discussion should be persuasive, it should be candid as well.

The CIS must also describe and evaluate alternative forms of relief actually considered. This does not mean that negotiated language changes must be discussed unless such changes significantly alter the judgment's scope. Similarly, defendant's proposals which were unacceptable need not be discussed, unless they would have provided significantly broader relief than that ultimately accepted. Even if a proposal met either of these two criteria, in general it would not qualify as an alternative form of relief actually considered unless it was (a) in the prayer of the complaint, (b) submitted to defense counsel in writing during negotiations, or (c) submitted to the Assistant Attorney General in final form for approval. In rare instances, a seriously considered alternative that does not meet these three criteria may exist (*i.e.*, where extended negotiations were conducted with the defendant concerning a specific relief proposal). In such cases, staff should consult with the chief, the Director of Civil Enforcement, and the General Counsel about whether it is appropriate to include a discussion of that proposal in the CIS. The discussion of alternatives and the Division's reasons for not adopting them should be candid.

The court must approve the relief accepted by the Government if it is within the "reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995) (citations omitted). In making that determination, the Court is required to consider:

- The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
- The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the

complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the Government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F.Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act). "More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981) (citations omitted). With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *Bechtel Corp.*, 648 F.2d at 666); *see also Microsoft*, 56 F.3d at 1460-62. Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint. The United States District Court for the District of Columbia recently confirmed in *SBC Communications*, that courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: [t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.

The CIS must also discuss the remedies available to potential private plaintiffs. This discussion will be brief and in most instances will be standardized.

b. Materials and Documents

The APPA requires the Division to file with any proposed consent judgment all materials and documents considered determinative in formulating the judgment. This is to be distinguished from materials and

documents supportive of the litigation. *See Massachusetts School of Law v. United States*, 118 F.3d 776, 784-85 (D.C. Cir. 1997). In most cases, the relief is determined by the sum total of the Division's investigation and evidence. There will seldom be any particular document or documents that influenced the formulation or rejection of a particular item of relief. The materials and documents to be filed, if any, might consist of submissions by the defendants or other persons, including other Government agencies or experts' studies that were determinative in formulating the judgment, or contracts that embody the terms of a divestiture. Staff should consult with the Director of Civil Enforcement and the General Counsel if there is any question about interpreting this requirement in a given case.

c. Publications in the Federal Register

The APPA requires that the proposed judgment and the CIS be published in the Federal Register "at least 60 days prior to the effective date of such judgment." There is, however, at least a five-working-day delay between submission of materials to the Federal Register and their publication. Because the Division does not request publication until the filings are made with the court, there consequently will usually be at least an additional five days added to the 60-day waiting period.

The APPA also requires that before the judgment can be entered, the Division must publish in the Federal Register any public comments the Division receives about the proposed judgment during the notice and comment period and the Division's reply to them. The Division may respond to each comment directly by letter and attach each letter to a court filing, or it may have a unified response. Although which choice is appropriate depends on the circumstances, it is generally preferable to answer comments by a single response, filed and published, if possible, before the expiration of the waiting period. If meeting that target date is not practicable because of, for example, the actual or possible receipt of comments just prior to the close of the waiting period, the Division should file and publish all comments and one unified response as promptly as possible after the period has expired. As a matter of policy, the Division calculates the 60-day comment period from the date of publication in the Federal Register, or the last date of publication in the newspaper, whichever occurred later.

The Office of Operations will arrange for the necessary Federal Register publications. Federal Register notices are standardized, and should be prepared for the signature of the Director of Civil Enforcement. *See [Sample Federal Register Notice](#)*. This sample is typical of a merger case requiring a divestiture. Notices for civil nonmerger cases are similar but tend to exhibit more variation given the diversity of practices being challenged and of proposed relief. Staff can obtain copies of recent published Federal Register notices from the appropriate special assistant.

d. Newspaper Publication

The newspaper notices required by the APPA, which summarize the proposed judgment and CIS and outline procedures available for the submission of comments, must begin appearing at least 60 days prior to the effective date of the judgment and must appear in the legal notice section. To provide interested persons with at least 60 days to submit comments, the Division calculates the 60-day comment period from the date of publication in the Federal Register, or the last date of publication in the newspaper, whichever occurred later.

Newspaper notices should be brief—if at all possible limited to 30 typewritten lines—to reduce the costs of publication. See [Sample Newspaper Notice](#). As with the sample Federal Register notice, the same newspaper notice is typical of a merger case requiring a divestiture. Staff can obtain copies of recent notices from the appropriate special assistant.

The APPA requires that in every case a newspaper notice be placed in a newspaper in general circulation in the district where the action was filed and in a newspaper of general circulation in the District of Columbia. The Court may also order additional publications. Normally, the defendants are expected to arrange and pay for publication of a newspaper notice written by the Division in its sole discretion. The defendants are also required to submit the necessary affidavits of publication that will provide the basis for the Division to certify to the court that such publication has occurred.

Because newspapers occasionally fail to publish a notice or do so inaccurately, staff should check the text of the copy of the notice that the defendants will send them from the newspaper in which publication is made, to ensure the correctness of the notice. If the newspaper notice is incorrect, the Office of Operations should be notified immediately and the defendants should be advised to take corrective action.

2. Internal Procedures

It is the general practice of the Division not to begin settlement discussions until the Assigned DAAG has decided that there is good cause to believe that the antitrust laws have been broken. Once defense counsel has broached the issue, however, the component to which the case is assigned is free to prepare a proposed first draft of a judgment if its chief believes it is advisable for the Government to make a proposal.

The chief and the staff must submit to the Director of Civil Enforcement any written settlement proposal they want to submit to defense counsel. Under no circumstances should a draft settlement proposal be submitted to the defendants without the approval of the Director of Civil Enforcement and concurrence of the General Counsel and the Assigned DAAG.

Judgment negotiations are conducted by staff under the immediate supervision of the chief. In some cases, the negotiations will be fairly straightforward and follow the general parameters of the original written settlement proposal. Where negotiations raise significant issues that were not addressed in drafting the original proposal, staff should seek further consultation with the Director of Civil Enforcement, the General Counsel, and the Assigned DAAG. The chief should provide a summary of the new issues involved, describe any areas of disagreement, and recommend the appropriate scope of relief.

Staff should make clear to defense counsel that final authority to approve the judgment rests with the Assistant Attorney General and, pursuant to the APPA, the judgment is subject to withdrawal or change at any time prior to its formal entry by the court. Defense counsel should also be advised that the APPA requires each defendant to file a description of specified oral and written communications with the Government concerning the decree. 15 U.S.C. § 16(g). Defense counsel should also be informed that they will not be permitted to review court papers, other than the proposed judgment and hold separate stipulation and order, prior to filing with the court.

In preparing its proposed draft decree, staff should consult the Division's Internet site and Work Product Document Bank for form and language used by the Division in its recent decrees. For merger decrees, staff should start with the model consent decree. Once staff's proposed draft decree has been approved, staff should conduct negotiations consistent with the overall plan of relief contained in the approved draft. Staff may consult informally with the Director of Civil Enforcement and the General Counsel to determine current Division practice and alternative relief proposals. Also highly useful to staff in framing appropriate relief is the [Division's Policy Guide to Merger Remedies](#).

With regard both to the preparation of proposed draft decrees by staff as well as to decree proposals that may be made by defendants, note that the Division's standard decree language requires that the consent decree expire on the tenth anniversary of its entry by the court. Staff should not negotiate any decree of less than 10 years' duration absent unusual circumstances and the approval of the Front Office, although decrees of longer than 10 years may be appropriate in certain circumstances.

When the proposed final version of the consent judgment is submitted for approval, the chief will submit a recommendation to the Director of Civil Enforcement. The recommendation should be processed through the General Counsel and the Assigned DAAG and requires the approval of the Assistant Attorney General. The recommendation should include all necessary papers, including the stipulation, the decree, the competitive impact statement, the Federal Register, and the proposed press release. The Federal Register notice should be prepared for the

signature of the Director of Civil Enforcement. All papers should be forwarded for review with the recommended consent judgment. In many merger cases, a hold-separate order has been appropriate. The hold-separate order and stipulation should be combined into the same document.

At the time of filing the judgment with the court, the requirements of the APPA and the procedures for complying with the Act should be explained to the court by filing an explanation of the procedures, with a copy to counsel, if local practice permits. It should be emphasized that the waiting period may exceed 60 days because of the publication requirements and the possibility of receiving last-minute comments and that the judgment cannot validly be entered before the comment period is complete. The court should not sign and enter the decree until the requirements of the APPA have been met. Staff will file a certificate of compliance when the requirements are met. The Office of Operations must be notified immediately after the case has been filed and provided with the name of the judge and the file number. In addition, the Office of Operations must be notified as soon as the decree has been entered.

3. Consent Decree Checklist

Staff should keep track of the various requirements of the APPA for each consent decree. See [sample checklist](#).

4. Consent Decree Standard Provisions

The Antitrust Division uses a number of decree provisions that are essentially standardized in form and that appear in virtually all decrees. Such provisions cover matters such as the form of stipulation, the preamble to the decree, jurisdictional and applicability clauses, notice of corporate changes provisions, the visitorial clause, the term of the judgment, and retention of jurisdiction. Division decrees also contain provisions (*e.g.*, the compliance provisions) that may vary somewhat from one decree to another, due to the nature of the violation alleged or the specific circumstances of the industry or defendant involved. To ensure appropriate Division consistency in the selection and wording of decree provisions, staff should always (1) consult the Division's Policy Guide to Merger Remedies, (2) review several of the most recent decrees contained in the Division's Internet site and Work Product Document Bank that closely parallel the case being settled; and (3) obtain from Operations the current standardized decree provisions. The Work Product Document Bank may also be reviewed to obtain recent copies of pleadings that are filed with the court during the process of entering consent decrees.

5. Certificate of Compliance with Provisions of APPA

Upon completion of compliance with the APPA, staff should file a Certificate of Compliance setting forth precisely how compliance was accomplished. See, *e.g.*, sample [Certificate of Compliance, United](#)

[State's Revised Certificate of Compliance with the Antitrust Procedures and Penalty Act](#) (*United States v. Alcan Inc., et al*). The Certificate serves as a check-off schedule, assuring that compliance has actually been effected and serving as a court record of that compliance. When appropriate, staff may wish to send an accompanying letter to the court explaining the significance of the Certificate of Compliance.

At the time of filing the proposed Final Judgment, counsel for each of the defendants should be reminded of his or her responsibilities under Section 16(g) of the APPA. If there have been no reportable communications, counsel should file a statement to that effect. Because the Certificate of Compliance certifies compliance with the APPA, staff should ascertain that the necessary filings have been made under Section 16(g).

Because circumstances in each case will vary and the Antitrust Division does not have complete control of the mechanics of complying with the APPA, there should be constant communication during this period between the office of the appropriate Director of Enforcement and the section or field office handling the case in order to prevent mistakes.

FTC Settlements

FTC CONSENT ORDERS

CODE OF FEDERAL REGULATIONS

16 C.F.R. 2, Subpart C—Consent Order Procedure [Nonadjudicative proceedings]

16 C.F.R. § 2.31. Opportunity to submit a proposed consent order

(a) Where time, the nature of the proceeding, and the public interest permit, any individual, partnership, or corporation being investigated shall be afforded the opportunity to submit through the operating Bureau or Regional Office having responsibility in the matter a proposal for disposition of the matter in the form of a consent order agreement executed by the party being investigated and complying with the requirements of § 2.32, for consideration by the Commission in connection with a proposed complaint submitted by the Commission's staff.

(b) After a complaint has been issued, the consent order procedure described in this part will not be available except as provided in § 3.25(b).

16 C.F.R. § 2.32. Agreement

Every agreement in settlement of a Commission complaint shall contain, in addition to an appropriate proposed order, either an admission of the proposed findings of fact and conclusions of law submitted simultaneously by the Commission's staff or an admission of all jurisdictional facts and an express waiver of the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law. Every agreement also shall waive further procedural steps and all rights to seek judicial review or otherwise to challenge or contest the validity of the order. In addition, where appropriate, every agreement in settlement of a Commission complaint challenging the lawfulness of a proposed merger or acquisition shall also contain a hold-separate or asset-maintenance order. The agreement may state that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint. Every agreement shall provide that:

(a) The complaint may be used in construing the terms of the order;

(b) No agreement, understanding, representation, or interpretation not contained in the order or the aforementioned agreement may be used to vary or to contradict the terms of the order;

(c) The order will have the same force and effect and may be altered, modified or set aside in the same manner provided by statute for Commission orders issued on a litigated or stipulated record;

(d) Except as provided by order of the Commission, any order issued pursuant to the agreement will become final upon service;

(e) The agreement will not become a part of the public record unless and until it is accepted by the Commission; and

(f) If the Commission accepts the agreement, further proceedings will be governed by § 2.34.

16 C.F.R. § 2.33. Compliance Procedure

The Commission may in its discretion require that a proposed agreement containing an order to cease and desist be accompanied by an initial report signed by the respondent setting forth in precise detail the manner in which the respondent will comply with the order when and if entered. Such report will not become part of the public record unless and until the accompanying agreement and order are accepted by the Commission. At the time any such report is submitted a respondent may request confidentiality for any portion thereof with a precise showing of justification therefor as set out in § 4.9(c) and the General Counsel or the General Counsel's designee will dispose of such requests in accordance with that section.

16 C.F.R. § 2.34. Disposition

(a) *Acceptance of proposed consent agreement.* The Commission may accept or refuse to accept a proposed consent agreement. Except as otherwise provided in paragraph (c) of this section, acceptance does not constitute final approval, but it serves as the basis for further actions leading to final disposition of the matter.

(b) *Effectiveness of hold-separate or asset-maintenance order.* Following acceptance of a consent agreement, the Commission will, if it deems a hold-separate or asset-maintenance order appropriate, issue a complaint and such an order as agreed to by the parties. Such order will be final upon service. The issuance of a complaint under this paragraph will neither commence an adjudicatory proceeding subject to part 3 of this chapter nor subject the consent agreement proceeding to the prohibitions specified in § 4.7 of this chapter.

(c) *Public comment.* Promptly after its acceptance of the consent agreement, the Commission will place the order contained in the consent agreement, the complaint, and the consent agreement on the public record for a period of 30 days, or such other period as the Commission may specify, for the receipt of comments or views from any interested person. At the same time, the Commission will place on the public record an explanation of the provisions of the order and the relief to be obtained thereby and any other information that it believes may help interested persons understand the order. The Commission also will publish the explanation in the Federal Register. The Commission retains the discretion to issue a complaint and a Final Decision and Order, incorporating the order contained in a consent agreement, in appropriate cases before seeking public comment. Unless directed otherwise by the Commission, such Decision and Order will be final upon service.

(d) *Comment on initial compliance report.* If respondents have filed an initial report of compliance pursuant to § 2.33, the Commission will place that report on the public record, except for portions, if any, granted confidential treatment pursuant to § 4.9(c) of this chapter, with the complaint, the order, and the consent agreement.

- (e) *Action following comment period.*
- (1) Following the comment period, on the basis of comments received or otherwise, the Commission may either withdraw its acceptance of the agreement and so notify respondents, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint in such form as the circumstances may require and its decision in disposition of the proceeding.
 - (2) The Commission, following the comment period, may determine, on the basis of the comments or otherwise, that a Final Decision and Order that was issued in advance of the comment period should be modified. Absent agreement by respondents to the modifications, the Commission may initiate a proceeding to reopen and modify the decision and order in accordance with § 3.72(b) of this chapter or commence a new administrative proceeding by issuing a complaint in accordance with § 3.11 of this chapter.

**16 C.F.R. 3, Subpart C—Prehearing Procedures; Motions; Interlocutory Appeals; Summary Decisions
[Adjudicative proceedings]**

16 C.F.R. § 3.25. Consent agreement settlements

(a) The Administrative Law Judge may, in his or her discretion and without suspension of prehearing procedures, hold conferences for the purpose of supervising negotiations for the settlement of the case, in whole or in part, by way of consent agreement.

(b) A proposal to settle a matter in adjudication by consent shall be submitted by way of a motion to withdraw the matter from adjudication for the purpose of considering a proposed settlement. Such motion shall be filed with the Secretary of the Commission, as provided in § 4.2. Any such motion shall be accompanied by a consent proposal; the proposal itself, however, shall not be placed on the public record unless and until it is accepted by the Commission as provided herein. If the consent proposal affects only some of the respondents or resolves only some of the charges in adjudication, the motion required by this paragraph shall so state and shall specify the portions of the matter that the proposal would resolve.

(c) If a consent agreement accompanying the motion has been executed by one or more respondents and by complaint counsel, has been approved by the appropriate Bureau Director, and conforms to § 2.32, and the matter is pending before an Administrative Law Judge, the Secretary shall issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve and all proceedings before the Administrative Law Judge shall be stayed with respect to such portions, pending a determination by the Commission pursuant to paragraph (f) of this section. If a consent proposal is not in the form of a consent agreement executed by a respondent, does not otherwise conform to § 2.32, or has not been executed by complaint counsel, and the matter is pending before the Administrative

Law Judge, he or she shall certify the motion and proposal to the Commission upon a written determination that there is a reasonable possibility of settlement. The certification may be accompanied by a recommendation to the Commission as to the disposition of the motion. The Administrative Law Judge shall make a determination as to whether to certify the motion within 5 days after the filing of the motion. The filing of a motion under paragraph (b) of this section and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission shall so order. Upon certification of such motion, the Commission in its discretion may issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve for the purpose of considering the consent proposal.

(d) If the matter is no longer pending before the Administrative Law Judge, the Commission in its discretion may, upon motion filed under paragraph (b) of this section, issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve for the purpose of considering the consent proposal. Such order may issue whether or not the consent proposal is in the form of a consent agreement executed by a respondent, otherwise conforms to § 2.32, or has been executed by complaint counsel.

(e) The Commission will treat those portions of a matter withdrawn from adjudication pursuant to paragraphs (c) or (d) of this section as being in a nonadjudicative status. Portions not so withdrawn shall remain in an adjudicative status.

(f) After some or all of the allegations in a matter have been withdrawn from adjudication, the Commission may accept a proposed consent agreement, reject it and return the matter or affected portions thereof to adjudication for further proceedings, or take such other action as it may deem appropriate. If an agreement is accepted, it will be disposed of as provided in § 2.34 of this chapter, except that if, following the public comment period provided for in § 2.34, the Commission decides, based on comments received or otherwise, to withdraw its acceptance of the agreement, it will so notify the parties and will return to adjudication any portions of the matter previously withdrawn from adjudication for further proceedings or take such other action it considers appropriate.

(g) This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the Administrative Law Judge on a stipulation of facts and an agreed order.

Albertsons/Safeway



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger

Agency's Largest Supermarket Divestiture Order to Date Requires Sales to Four Buyers

FOR RELEASE

January 27, 2015

TAGS: [Retail](#) | [Grocery/Supermarkets](#) | [Bureau of Competition](#) | [Competition](#) | [Merger](#)

Supermarket operators Albertsons and Safeway Inc. have agreed to sell 168 supermarkets to settle Federal Trade Commission charges that their proposed \$9.2 billion merger would likely be anticompetitive in 130 local markets in Arizona, California, Montana, Nevada, Oregon, Texas, Washington, and Wyoming.

According to the FTC's complaint, Albertsons and Safeway compete vigorously on the bases of price, quality, product variety, and services, and offer consumers the convenience of one-stop shopping for food and other grocery products. Without a remedy, according to the FTC, the acquisition will lessen supermarket competition to the detriment of consumers in 130 local markets.

"Consumers everywhere rely on local supermarkets for their weekly shopping needs," said FTC Chairwoman Edith Ramirez. "Absent a remedy, this acquisition would likely lead to higher prices and lower quality for supermarket shoppers in 130 communities. This settlement will ensure that consumers in those communities continue to benefit from competition among their local supermarkets."

At the time the proposed acquisition was announced, Albertson's LLC operated 630 supermarkets under the Albertsons banner in 15 states, and under the Market Street, Amigos, and United Supermarkets banners in Texas. New Albertson's, Inc., operated 445 supermarkets under the Jewel-Osco, ACME, Shaw's, and Star Market banners, in the eastern United States. Safeway operated 1,332 supermarkets under the Safeway, Tom Thumb, Randall's, Pak 'n Save, The Market, Vons, Pavilions, and Genuardi's banners located throughout the country.

Under the proposed settlement, Haggen Holdings, LLC will acquire 146 Albertsons and Safeway stores located in Arizona, California, Nevada, Oregon, and Washington; Supervalu Inc. will acquire two Albertsons stores in Washington; Associated Wholesale Grocers, Inc. will acquire 12 Albertsons and Safeway stores in Texas; and Associated Food Stores Inc. will acquire eight Albertsons and Safeway stores in Montana and Wyoming. It is expected that Associated Wholesale Grocers, Inc. will assign its operating rights in the 12 Texas stores it is acquiring to RLS Supermarkets, LLC (doing business as Minyard Food Stores) and that Associated Food Stores Inc. will assign its rights in the eight Montana and Wyoming stores it is acquiring to Missoula Fresh Market LLC, Ridley's Family Markets, Inc., and Stokes Inc.

Also under the proposed settlement, the divestitures to Haggen must be completed within 150 days of the date of the merger; the divestitures to Supervalu Inc. must be completed within 100 days of the date of the merger; and the divestitures to Associated Food Stores Inc. and Associated Wholesale Grocers, Inc. must be completed within 60 days of the date of the merger.

The proposed settlement includes an Order to Maintain Assets, to help ensure that Albertsons maintains the stores until they are divested. The proposed settlement also appoints a monitor to oversee the merging parties' compliance with their obligations under the settlement agreement. Details about the divestitures, including a list of stores and the local markets affected, are set forth in the analysis to aid public comment for this matter.

The Commission vote to issue the complaint and accept the proposed consent order for public comment was 5-0. The FTC will publish the consent agreement package in the Federal Register shortly. The agreement will be subject to public comment for 30 days, beginning today and continuing through February 26, 2015, after which the Commission will decide whether to make the proposed consent order final. Comments can be filed electronically or in paper form by following the instructions in the "Supplementary Information" section of the Federal Register notice.

NOTE: The Commission issues an administrative complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to \$16,000 per day.

The FTC's Bureau of Competition works with the Bureau of Economics to investigate alleged anticompetitive business practices and, when appropriate, recommends that the Commission take law enforcement action. To inform the Bureau about particular business practices, call 202-326-3300, send an e-mail to antitrust@ftc.gov, or write to the Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave., NW,

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**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 supermarket 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 called 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 called 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:

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

**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

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondents AB Acquisition LLC (“Albertson’s”) and Cerberus Institutional Partners V, L.P. (“Cerberus”), of Respondent Safeway Inc. (“Safeway”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing 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 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 has reason to believe that 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 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, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Cerberus Institutional Partners V, L.P. 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 AB Acquisition LLC 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 Safeway Inc. 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.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

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

- A. “Cerberus” means Respondent Cerberus Institutional Partners V, L.P., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Cerberus Institutional Partners V, L.P. (including Respondent Albertson’s), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Albertson’s” means Respondent AB Acquisition LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by AB Acquisition LLC (including Albertson’s LLC, Albertson’s Holdings LLC and, after the Acquisition is consummated, Safeway), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Safeway” means Respondent Safeway Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Safeway Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Respondents” means Cerberus, Albertson’s, and Safeway, individually and collectively.
- E. “Acquirer” means any entity approved by the Commission to acquire any or all of the Assets To Be Divested pursuant to this Order.
- F. “Acquisition” means Albertson’s proposed acquisition of Safeway pursuant to the Acquisition Agreement.
- G. “Acquisition Agreement” means the Agreement and Plan of Merger by and among AB Acquisition LLC, Albertson’s Holdings LLC, Albertson’s LLC, Saturn Acquisition Merger Sub, Inc., and Safeway Inc., dated as of March 6, 2014, as amended on April 7, 2014, and June 13, 2014.
- H. “Assets To Be Divested” means the Supermarkets identified on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, or any portion thereof, and all rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, the Supermarket business operated at each of those locations, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, books and records, government approvals and permits (to the extent transferable), telephone and fax numbers, and goodwill. Assets To Be Divested includes any of Respondents’ other businesses or assets associated with, or operated in conjunction with, the Supermarket locations listed on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, including any fuel centers (including any convenience store and/or car wash associated with such fuel center), pharmacies, liquor stores, beverage centers, gaming or slot machine parlors, store cafes, or other related business(es) that customers reasonably associate with the Supermarket business operated at each such location. At each Acquirer’s option, the Assets To Be Divested shall also include any or all inventory as of the Divestiture Date.

Provided, however, that the Assets To Be Divested shall not include those assets consisting of or pertaining to any of the Respondents’ trademarks, trade dress, service marks, or trade names, *except* with respect to any purchased inventory (including private label inventory) or as may be allowed pursuant to any Remedial Agreement(s).

Provided, further, that in cases in which books or records included in the Assets To Be Divested contain information (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents or (b) such that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies or relevant excerpts of the materials containing such information. In instances where such copies are provided to an Acquirer, the Respondents shall provide

to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

- I. “Associated Food Stores” means Associated Food Stores, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Utah, with its offices and principal place of business located at 1850 West 2100 South, Salt Lake City, Utah.
- J. “Associated Food Stores Divestiture Agreement” means the Amended and Restated Asset Purchase Agreement dated as of December 5, 2014, by and between Respondent Albertson’s and Associated Food Stores, attached as non-public Appendix I, for the divestiture of the Schedule A Assets.
- K. “AWG” means Associated Wholesale Grocers, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Kansas, with its offices and principal place of business located at 5000 Kansas Avenue, Kansas City, Kansas, and its direct and indirect subsidiaries, including LAS Acquisitions, LLC.
- L. “AWG Divestiture Agreement” means the Amended and Restated Asset Purchase Agreement dated as of December 11, 2014, by and between Respondent Albertson’s, AWG, and LAS Acquisitions, LLC (a wholly owned subsidiary of AWG) (“LAS”), attached as non-public Appendix II, for the divestiture of the Schedule B Assets.
- M. “Divestiture Agreement” means any agreement between Respondents and an Acquirer (or a Divestiture Trustee appointed pursuant to Paragraph III of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to any of the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order. The term “Divestiture Agreement” includes, as appropriate, the Associated Food Stores Divestiture Agreement, the AWG Divestiture Agreement, the Haggen Divestiture Agreement, and the Supervalu Divestiture Agreement.
- N. “Divestiture Date” means a closing date of any of the respective divestitures required by this Order.
- O. “Divestiture Trustee” means any person or entity appointed by the Commission pursuant to Paragraph III of this Order to act as a trustee in this matter.
- P. “Haggen” means Haggen Holdings, LLC, a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 2221 Rimland Drive, Bellingham, Washington.
- Q. “Haggen Divestiture Agreement” means the Asset Purchase Agreement dated as of December 10, 2014, by and between Respondent Albertson’s and Haggen, attached as non-public Appendix III, for the divestiture of the Schedule C Assets.

- R. “Proposed Acquirer” means any proposed acquirer of any of the Assets To Be Divested submitted to the Commission for its approval under this Order; “Proposed Acquirer” includes, as appropriate, Associated Food Stores, AWG, Haggen, and Supervalu.
- S. “Remedial Agreement(s)” means the following:
1. Any Divestiture Agreement; and
 2. Any other agreement between Respondents and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer), including any Transition Services Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order.
- T. “Relevant Areas” means: Coconino, Maricopa, Mohave, Pima, and Yavapai Counties in Arizona; Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura Counties in California; Deer Lodge, Missoula, and Silver Bow Counties in Montana; Clark County in Nevada; Baker, Clackamas, Deschutes, Jackson, Josephine, Klamath, Lane, Marion, and Washington Counties in Oregon; Collin, Denton, Dallas, and Tarrant Counties in Texas; Chelan, Clallam, Island, King, Kitsap, Pierce, Snohomish, Spokane, Thurston, and Walla Walla Counties in Washington; and Albany, Natrona, and Sheridan Counties in Wyoming.
- U. “Schedule A Assets” means the Assets To Be Divested identified on Schedule A of this Order.
- V. “Schedule B Assets” means the Assets To Be Divested identified on Schedule B of this Order.
- W. “Schedule C Assets” means the Assets To Be Divested identified on Schedule C of this Order.
- X. “Schedule D Assets” means the Assets To Be Divested identified on Schedule D of this Order.
- Y. “Supervalu” means Supervalu Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 7075 Flying Cloud Drive, Eden Prairie, Minnesota.
- Z. “Supervalu Divestiture Agreement” means the Asset Purchase Agreement dated as of December 5, 2014, by and between Respondent Albertson’s and Supervalu, attached as non-public Appendix IV, for the divestiture of the Schedule D Assets.

- AA. “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.
- BB. “Third Party Consents” means all consents from any person other than the Respondents, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.
- CC. “Transition Services Agreement” means an agreement that receives the prior approval of the Commission between one or more Respondents and an Acquirer of any of the assets divested under this Order to provide, at the option of each Acquirer, any services (or training for an Acquirer to provide services for itself) necessary to transfer the divested assets to the Acquirer in a manner consistent with the purposes of this Order.

II.

IT IS FURTHER ORDERED THAT:

- A. Respondents shall divest the Assets To Be Divested, absolutely and in good faith, as ongoing Supermarket businesses, as follows:
1. Within 60 days of the date the Acquisition is consummated, the Schedule A Assets shall be divested to Associated Food Stores pursuant to and in accordance with the Associated Food Stores Divestiture Agreement;
 2. Within 60 days of the date the Acquisition is consummated, the Schedule B Assets shall be divested pursuant to and in accordance with the AWG Divestiture Agreement to either (i) LAS or (ii) RLS Supermarkets, LLC (d/b/a Minyard Food Stores) (as LAS’s assignee, pursuant to the acquisition agreement between LAS and RLS Supermarkets, LLC);
 3. Within 150 days of the date the Acquisition is consummated, the Schedule C Assets shall be divested to Haggen pursuant to and in accordance with the Haggen Divestiture Agreement;

Provided, however, that if any permit or license necessary for the divestiture of pharmacy assets has not been secured by Haggen as of the divestiture deadline, then the pharmacy assets may be divested following receipt of the necessary

permit(s) and/or license(s), pursuant to and in accordance with the terms of the Pharmacy Transitional Services Agreement (attached as Exhibit 9(a) to the Haggen Divestiture Agreement);

4. Within 100 days of the date the Acquisition is consummated, the Schedule D Assets shall be divested to Supervalu pursuant to and in accordance with the Supervalu Divestiture Agreement.
- B. *Provided, that*, if prior to the date this Order becomes final, Respondents have divested the Assets To Be Divested pursuant to Paragraph II.A and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
1. Any Proposed Acquirer identified in Paragraph II.A is not an acceptable Acquirer, then Respondents shall, within five days of notification by the Commission, rescind such transaction with that Proposed Acquirer, and shall divest such assets as ongoing Supermarket businesses, absolutely and in good faith, at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission, within 90 days of the date the Commission notifies Respondents that such Proposed Acquirer is not an acceptable Acquirer; or
 2. The manner in which any divestiture identified in Paragraph II.A was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph III of this Order, to effect such modifications to the manner of divesting those assets to such Acquirer (including, but not limited to, entering into additional agreements or arrangements, or modifying the relevant Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.
- C. Respondents shall obtain at their sole expense all required Third Party Consents relating to the divestiture of all Assets To Be Divested prior to the applicable Divestiture Date.
- D. All Remedial Agreements approved by the Commission:
1. Shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of any such Remedial Agreement(s) shall constitute a violation of this Order; and
 2. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligation of Respondents under such agreement. If any term of any Remedial Agreement(s) varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order.

- E. At the option of each Acquirer of any Assets To Be Divested, and subject to the prior approval of the Commission, Respondents shall enter into a Transition Services Agreement for a term extending up to 180 days following the relevant Divestiture Date. The services subject to the Transition Services Agreement shall be provided at no more than Respondents' direct costs and may include, but are not limited to, payroll, employee benefits, accounting, IT systems, distribution, warehousing, use of trademarks or trade names for transitional purposes, and other logistical and administrative support.
- F. Pending divestiture of any of the Assets To Be Divested, Respondents shall:
1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Divested, to minimize any risk of loss of competitive potential for the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested, except for ordinary wear and tear; and
 2. Not sell, transfer, encumber, or otherwise impair the Assets To Be Divested (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 Assets To Be Divested.
- G. With respect to each Divestiture Agreement:
1. Respondents shall provide sufficient opportunity for the Proposed Acquirer to:
 - a. Meet personally, and outside of the presence or hearing of any employee or agent of any Respondents, with any or all of the employees of the Supermarket Assets To Be Divested pursuant to the Divestiture Agreement; and
 - b. Make offers of employment to any or all of the employees of the Supermarket Assets To Be Divested pursuant to the Divestiture Agreement; and
 2. Respondents shall: not interfere with the hiring or employing by the Acquirer of employees of the divested Supermarkets; remove any impediments within the control of Respondents that may deter those employees from accepting employment with such Acquirer (including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by such Acquirer); and not make any counteroffer to any employee who has an outstanding offer of employment, or who has accepted an offer of employment, from such Acquirer.
- H. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing, viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED THAT:

- A. If Respondents have not divested all of the Assets To Be Divested in the time and manner required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the remaining Assets To Be Divested 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. 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 the Respondents to comply with this Order.
- B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have 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 Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
 2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, contract, deliver, or otherwise convey the relevant assets or rights that are required to be assigned, granted, licensed, divested, transferred, contracted, delivered, or otherwise conveyed by this Order.
 3. Within ten (10) days after appointment of the Divestiture Trustee, Respondents 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 relevant divestitures or transfers required by the Order.
 4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.3. to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission. If,

however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture(s) 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.

5. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities relating to the assets that are required to be assigned, granted, licensed, divested, transferred, contracted, delivered, or otherwise conveyed by this Order or to any other relevant information, as the Divestiture Trustee may request. Respondents 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(s). 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.
6. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture(s) shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for any of the relevant Assets To Be Divested, and if the Commission determines to approve more than one such acquiring entity for such assets, the Divestiture Trustee shall divest such assets to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.
7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, 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 Respondents, 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(s) and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents, 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 required to be divested by this Order.

8. Respondents 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Commission determines that the 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 III.
10. The Commission or, in the case of a court-appointed 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(s) required by this Order.
11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
12. The Divestiture Trustee shall report in writing to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture(s).
13. Respondents 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.
14. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, representatives, and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties and responsibilities.

IV.

IT IS FURTHER ORDERED THAT:

- A. Richard King shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix V ("Monitor Agreement") and Non-Public Appendix V-1 ("Monitor Compensation"). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Remedial Agreement(s);

- B. No later than one (1) day after the date the Acquisition is consummated, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Remedial Agreement(s), in a manner consistent with the purposes of the orders.
- C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order, the Order to Maintain Assets, and the Remedial Agreement(s), and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the orders and in consultation with the Commission.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Monitor shall serve until at least the latter of (i) the completion of all divestitures required by this Order, (ii) the end of any Transition Services Agreement in effect with any Acquirer, and (iii) September 30, 2015.
- D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order, the Order to Maintain Assets, and the Remedial Agreement(s).
- E. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order, the Order to Maintain Assets, and the Remedial Agreement(s).
- F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
- G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the 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 Monitor. For purposes of this Paragraph IV.G., the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph IV.F. of this Order.

- H. Respondents shall report to the Monitor in accordance with the requirements of this Order or the Order to Maintain Assets, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order and the Order to Maintain Assets. Within thirty (30) days from the date the Monitor receives the first such report, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders.
- I. Respondents may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement. *Provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.
- J. The Commission may require, among other things, the Monitor and each of the 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 Monitor's duties.
- K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after the notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.
 2. Not later than ten (10) days after the appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant terms of this Order, the Order to Maintain Assets, and the Remedial Agreement(s) in a manner consistent with the purposes of orders and in consultation with the Commission.
- L. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- M. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

V.

IT IS FURTHER ORDERED THAT if Associated Food Stores purchases the Schedule A Assets pursuant to Paragraph II.A.1, Associated Food Stores shall not sell or otherwise convey, directly or indirectly, any of the Schedule A Assets, except to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. *Provided, however,* that prior approval of the Commission is not required for the following buyers to acquire the following Supermarkets:

- A. Missoula Fresh Market LLC may acquire Safeway Store Nos. 1573 and 2619, pursuant to the assignment and assumption agreement between Missoula Fresh Market LLC and Associated Food Stores;
- B. Ridley's Family Markets, Inc. may acquire Albertson's Store No. 2063 and Safeway Store Nos. 433, 2468, and 2664, pursuant to the assignment and assumption agreement between Ridley's Family Markets and Associated Food Stores; and
- C. Stokes Inc. may acquire Albertson's Store No. 2007 and Safeway Store No. 3256, pursuant to the assignment and assumption agreement between Stokes Inc. and Associated Food Stores.

Associated Food Stores shall comply with this Paragraph until three (3) years after the date this Order is issued.

VI.

IT IS FURTHER ORDERED THAT if LAS purchases the Schedule B Assets pursuant to Paragraph II.A.2, LAS shall not sell or otherwise convey, directly or indirectly, such Schedule B Assets, except to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. *Provided, however,* that prior approval of the Commission is not required for RLS Supermarkets, LLC (d/b/a Minyard Food Stores) to acquire the Schedule B Assets, pursuant to the acquisition agreement between RLS Supermarkets, LLC and LAS. LAS shall comply with this Paragraph until three (3) years after the date this Order is issued.

VII.

IT IS FURTHER ORDERED THAT if Supervalu purchases the Schedule D Assets pursuant to Paragraph II.A.4, Supervalu shall not sell or otherwise convey, directly or indirectly, any of the Schedule D Assets, except to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. Supervalu shall comply with this Paragraph until three (3) years after the date this Order is issued.

VIII.

IT IS FURTHER ORDERED THAT:

A. For a period of ten (10) years commencing on the date this Order is issued, Respondents shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission:

1. 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 any of the Relevant Areas.
2. 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 any of the Relevant Areas.

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

Provided, further, that advance written notification shall not be required for acquisitions resulting in total holdings of one (1) percent or less of the stock, share capital, equity, or other interest in an 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 any of the Relevant Areas.

B. Said notification under this Paragraph 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, 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 Respondents and not of any other party to the transaction. Respondents 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), Respondents shall not consummate the transaction until thirty (30) 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 prior notification shall not be required by this Paragraph for a 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.

IX.

IT IS FURTHER ORDERED THAT:

- A. Within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until the Respondents have fully complied with the provisions of Paragraphs II 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 and III of this Order. Respondents shall submit at the same time a copy of their reports concerning compliance with this Order to the Monitor. Respondents shall include in their 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 this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their reports copies of all material written communications to and from such parties, all non-privileged internal memoranda, reports, and recommendations concerning completing the obligations; and
- B. One (1) year from the date this Order is issued, annually for the next nine (9) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

X.

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

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

XI.

IT IS FURTHER ORDERED THAT, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and upon five (5) days' notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondents 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 Respondents

relating to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and

- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

XII.

IT IS FURTHER ORDERED THAT this Order shall terminate on July 2, 2025.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: July 2, 2015

Schedule A Assets

Montana Stores:

1. Safeway Store No. 1573, located at 3801 S. Reserve Street, Missoula, Montana (Missoula County).
2. Albertson's Store No. 2007, located at 1301 Harrison Avenue, Butte, Montana (Silver Bow County).
3. Safeway Store No. 2619, located at 800 W. Broadway Street, Missoula, Montana (Missoula County).
4. Safeway Store No. 3256, located at 1525 West Park, Anaconda, Montana (Deer Lodge County).

Wyoming Stores:

5. Albertson's Store No. 2063, located at 3112 East Grand Avenue, Laramie, Wyoming (Albany County).
6. Safeway Store No. 433, located at 1375 Cy Avenue, Casper, Wyoming (Natrona County).
7. Safeway Store No. 2468, located at 300 S.E. Wyoming Boulevard, Casper, Wyoming (Natrona County).
8. Safeway Store No. 2664, located at 169 Coffeen, Sheridan, Wyoming (Sheridan County).

Schedule B Assets

Texas Stores:

1. Albertson's Store No. 4182, located at 3630 Forest Lane, Dallas, Texas (Dallas County).
2. Albertson's Store No. 4132, located at 6464 E. Mockingbird Lane, Dallas, Texas (Dallas County).
3. Albertson's Store No. 4134, located at 4349 W. Northwest Highway, Dallas, Texas (Dallas County).
4. Albertson's Store No. 4140, located at 7007 Arapaho Road, Dallas, Texas (Dallas County).
5. Albertson's Store No. 4149, located at 1108 N. Highway 377, Roanoke, Texas (Denton County).
6. Albertson's Store No. 4168, located at 3524 McKinney Avenue, Dallas, Texas (Dallas County).
7. Albertson's Store No. 4197, located at 8505 Lakeview Parkway, Rowlett, Texas (Dallas Counties).
8. Albertson's Store No. 4297, located at 10203 E. Northwest Highway, Dallas, Texas (Dallas County).
9. Safeway (Tom Thumb) Store No. 2568, located at 4836 West Park Boulevard, Plano, Texas (Collin County)
10. Safeway (Tom Thumb) Store No. 3555, located at 3300 Harwood Road, Bedford, Texas (Tarrant County).
11. Safeway (Tom Thumb) Store No. 3573, located at 3001 Hardin Boulevard, McKinney, Texas (Collin County).
12. Safeway (Tom Thumb) Store No. 3576, located at 4000 William D. Tate Avenue., Grapevine, Texas (Tarrant County).

Schedule C Assets

Arizona Stores:

1. Albertsons Store No. 967, located at 1416 E Route 66, Flagstaff, Arizona (Coconino County).
2. Albertsons Store No. 979, located at 34442 N. Scottsdale Road, Scottsdale, Arizona (Maricopa County).
3. Albertsons Store No. 983, located at 11475 E. Via Linda, Scottsdale, Arizona (Maricopa County).
4. Safeway Store No. 1726, located at 3655 W. Anthem Way, Anthem, Arizona (Maricopa County).
5. Albertsons Store No. 1027, located at 1980 McCulloch Boulevard, Lake Havasu City, Arizona (Mohave County).
6. Safeway Store No. 234, located at 8740 East Broadway, Tucson, Arizona (Pima County).
7. Safeway Store No. 2611, located at 10380 East Broadway Boulevard, Tucson, Arizona (Pima County).
8. Albertsons Store No. 972, located at 1350 N. Silverbell Road, Tucson, Arizona (Pima County).
9. Albertsons Store No. 953, located at 174 East Sheldon Street, Prescott, Arizona (Yavapai County).
10. Albertsons Store No. 965, located at 7450 E. Highway 69, Prescott Valley, Arizona (Yavapai County).

California Stores:

11. Albertsons Store No. 6323, located at 3500 Panama Lane, Bakersfield, California (Kern County).
12. Albertsons Store No. 6325, located at 7900 White Lane, Bakersfield, California (Kern County).

13. Albertsons Store No. 6379, located at 8200 East Stockdale Highway, Bakersfield, California (Kern County).
14. Albertsons Store No. 6315, located at 3830 W. Verdugo Avenue, Burbank, California (Los Angeles County).
15. Albertsons Store No. 6168, located at 3443 S. Sepulveda Boulevard, Los Angeles, California (Los Angeles County).
16. Albertsons Store No. 6169, located at 8985 Venice Boulevard Suite B, Los Angeles, California (Los Angeles County).
17. Safeway (Vons) Store No. 2062, located at 240 S. Diamond Bar Boulevard, Diamond Bar, California (Los Angeles County).
18. Albertsons Store No. 6329, located at 5038 W. Avenue North, Palmdale, California (Los Angeles County).
19. Albertsons Store No. 6107, located at 2130 Pacific Coast Highway, Lomita, California (Los Angeles County).
20. Albertsons Store No. 6127, located at 1516 S. Pacific Coast Highway, Redondo Beach, California (Los Angeles County).
21. Albertsons Store No. 6138, located at 615 N. Pacific Coast Highway, Redondo Beach, California (Los Angeles County).
22. Albertsons Store No. 6153, located at 21035 Hawthorne Boulevard, Torrance, California (Los Angeles County).
23. Albertsons Store No. 6189, located at 2115 Artesia Boulevard, Redondo Beach, California (Los Angeles County).
24. Albertsons Store No. 6160, located at 1636 W. 25th Street, San Pedro, California (Los Angeles County).
25. Albertsons Store No. 6164, located at 28090 South Western Avenue, San Pedro, California (Los Angeles County).

26. Albertsons Store No. 6388, located at 5770 Lindero Canyon Road, Westlake Village, California (Los Angeles County).
27. Albertsons Store No. 6397, located at 6240 Foothill Boulevard, Tujunga, California (Los Angeles County).
28. Albertsons Store No. 6162, located at 2627 Lincoln Boulevard, Santa Monica, California (Los Angeles County).
29. Albertsons Store No. 6154, located at 6235 East Spring Street, Long Beach, California (Los Angeles County).
30. Safeway (Vons) Store No. 2031, located at 23381 Mulholland Drive, Woodland Hills, California (Los Angeles County).
31. Safeway (Vons) Store No. 1669, located at 26518 Bouquet Canyon Road, Saugus, California (Los Angeles County).
32. Safeway (Pavilions) Store No. 1961, located at 27095 McBean Parkway, Santa Clarita, California (Los Angeles County).
33. Safeway (Pavilions) Store No. 2703, located at 25636 Crown Valley Parkway, Ladera Ranch, California (Orange County).
34. Albertsons Store No. 6575, located at 30922 Coast Highway, Laguna Beach, California (Orange County).
35. Safeway (Vons) Store No. 1676, located at 30252 Crown Valley Parkway, Laguna Niguel, California (Orange County).
36. Safeway (Vons) Store No. 1670, located at 28751 Los Alisos Boulevard, Mission Viejo, California (Orange County).
37. Albertsons Store No. 6517, located at 25872 Muirlands Boulevard, Mission Viejo, California (Orange County).
38. Albertsons Store No. 6504, located at 3049 Coast Highway, Corona Del Mar, California (Orange County).

39. Safeway (Pavilions) Store No. 2822, located at 3901 Portola Parkway, Irvine, California (Orange County).
40. Albertsons Store No. 6510, located at 21500 Yorba Linda Boulevard, Yorba Linda, California (Orange County).
41. Albertsons Store No. 6521, located at 21672 Plano Trabuco Road, Trabuco Canyon, California (Orange County).
42. Safeway (Vons) Store No. 2146, located at 550 E. First Street, Tustin, California (Orange County).
43. Safeway (Vons) Store No. 2324, located at 17662 17th Street, Tustin, California (Orange County).
44. Safeway (Vons) Store No. 2383, located at 72675 Highway 111, Palm Desert, California (Riverside County).
45. Safeway (Pavilions) Store No. 3218, located at 36-101 Bob Hope Drive, Rancho Mirage, California (Riverside County).
46. Safeway (Vons) Store No. 2597, located at 4200 Chino Hills Parkway Suite 400, Chino Hills, California (San Bernardino County).
47. Albertsons Store No. 6523, located at 8850 Foothill Boulevard, Rancho Cucamonga, California (San Bernardino County).
48. Albertsons Store No. 6589, located at 1910 N. Campus Avenue, Upland, California (San Bernardino County).
49. Albertsons Store No. 6701, located at 955 Carlsbad Village Drive, Carlsbad, California (San Diego County).
50. Albertsons Store No. 6720, located at 7660 El Camino Real, Carlsbad, California (San Diego County).
51. Safeway (Vons) Store No. 2006, located at 505 Telegraph Canyon Road, Chula Vista, California (San Diego County).

52. Safeway (Vons) Store No. 2336, located at 360 East H Street, Chula Vista, California (San Diego County).
53. Safeway (Vons) Store No. 3063, located at 870 Third Avenue, Chula Vista, California (San Diego County).
54. Albertsons Store No. 6747, located at 150 B Avenue, Coronado, California (San Diego County).
55. Albertsons Store No. 6771, located at 1608 Broadway Street, El Cajon, California (San Diego County).
56. Safeway (Vons) Store No. 2064, located at 2800 Fletcher Parkway, El Cajon, California (San Diego County).
57. Safeway (Vons) Store No. 2137, located at 5630 Lake Murray Boulevard, La Mesa, California (San Diego County).
58. Albertsons Store No. 6741, located at 14837 Pomerado Road, Poway, California (San Diego County).
59. Albertsons Store No. 6763, located at 12475 Rancho Bernardo Road, Rancho Bernardo, California (San Diego County).
60. Albertsons Store No. 6760, located at 10633 Tierrasanta Boulevard, San Diego, California (San Diego County).
61. Albertsons Store No. 6714, located at 2235 University Avenue, San Diego, California (San Diego County).
62. Albertsons Store No. 6715, located at 422 W. Washington Street, San Diego, California (San Diego County).
63. Albertsons Store No. 6742, located at 7895 Highland Village Place, San Diego, California (San Diego County).
64. Albertsons Store No. 6770, located at 10740 Westview Parkway, San Diego, California (San Diego County).

65. Albertsons Store No. 6772, located at 14340 Penasquitos Drive, San Diego, California (San Diego County).
66. Albertsons Store No. 6788, located at 730 Turquoise Street, San Diego, California (San Diego County).
67. Albertsons Store No. 6781, located at 5950 Balboa Avenue, San Diego, California (San Diego County).
68. Safeway (Vons) Store No. 2174, located at 671 Rancho Santa Fe Road, San Marcos, California (San Diego County).
69. Albertsons Store No. 6727, located at 9870 Magnolia Avenue, Santee, California (San Diego County).
70. Albertsons Store No. 6702, located at 2707 Via De La Valle, Del Mar, California (San Diego County).
71. Safeway (Vons) Store No. 2365, located at 3681 Avocado Avenue, La Mesa, California (San Diego County).
72. Albertsons (Lucky) Store No. 6228, located at 350 W. San Ysidro Boulevard, San Ysidro, California (San Diego County).
73. Safeway (Vons) Store No. 2333, located at 13439 Camino Canada, El Cajon, California (San Diego County).
74. Albertsons Store No. 6304, located at 1132 West Branch Street, Arroyo Grande, California (San Luis Obispo County).
75. Albertsons Store No. 6390, located at 8200 El Camino Real, Atascadero, California (San Luis Obispo County).
76. Safeway (Vons) Store No. 2312, located at 1130 Los Osos Valley Road, Los Osos, California (San Luis Obispo County).
77. Safeway (Vons) Store No. 2317, located at 1191 E. Creston Road, Paso Robles, California (San Luis Obispo County).
78. Albertsons Store No. 6372, located at 771 Foothill Boulevard, San Luis Obispo, California (San Luis Obispo County).

79. Albertsons Store No. 6409, located at 1321 Johnson Avenue, San Luis Obispo, California (San Luis Obispo County).
80. Safeway (Vons) Store No. 2425, located at 850 Linden Avenue, Carpinteria, California (Santa Barbara County).
81. Albertsons Store No. 6339, located at 1500 North H Street, Lompoc, California (Santa Barbara County).
82. Albertsons Store No. 6351, located at 2010 Cliff Drive, Santa Barbara, California (Santa Barbara County).
83. Albertsons Store No. 6352, located at 3943 State Street, Santa Barbara, California (Santa Barbara County).
84. Safeway (Vons) Store No. 2048, located at 163 S. Turnpike Road, Goleta, California (Santa Barbara County).
85. Safeway (Vons) Store No. 2691, located at 175 N. Fairview Avenue, Goleta, California (Santa Barbara County).
86. Albertsons Store No. 6369, located at 1736 Avenida De Los Arboles, Thousand Oaks, California (Ventura County).
87. Albertsons Store No. 6318, located at 7800 Telegraph Road, Ventura, California (Ventura County).
88. Albertsons Store No. 6317, located at 5135 Los Angeles Avenue, Simi Valley, California (Ventura County).
89. Albertsons Store No. 6363, located at 2800 Cochran Street, Simi Valley, California (Ventura County).
90. Safeway (Vons) Store No. 2163, located at 660 E. Los Angeles Avenue, Simi Valley, California (Ventura County).
91. Albertsons Store No. 6385, located at 2400 East Las Posas Road, Camarillo, California (Ventura County).

92. Albertsons Store No. 6217, located at 920 N. Ventura Road, Oxnard, California (Ventura County).

93. Safeway (Vons) Store No. 1793, located at 2100 Newbury Road, Newbury Park, California (Ventura County).

Nevada Stores:

94. Safeway (Vons) Store No. 2391, located at 1031 Nevada Highway, Boulder City, Nevada (Clark County).

95. Albertsons Store No. 6028, located at 2910 Bicentennial Parkway, Henderson, Nevada (Clark County).

96. Safeway (Vons) Store No. 1688, located at 820 S. Rampart Boulevard, Las Vegas, Nevada (Clark County).

97. Safeway (Vons) Store No. 2392, located at 7530 W. Lake Mead Boulevard, Las Vegas, Nevada (Clark County).

98. Safeway (Vons) Store No. 2395, located at 1940 Village Center Circle, Las Vegas, Nevada (Clark County).

99. Albertsons Store No. 6014, located at 575 College Drive, Henderson, Nevada (Clark County).

100. Albertsons Store No. 6019, located at 190 North Boulder Highway, Henderson, Nevada (Clark County).

Oregon Stores:

101. Albertsons Store No. 261, located at 1120 Campbell Street, Baker City, Oregon (Baker County).

102. Albertsons Store No. 503, located at 14800 S.E. Sunnyside Road, Clackamas, Oregon (Clackamas County).

103. Albertsons Store No. 521, located at 16199 Boones Ferry Road, Lake Oswego, Oregon (Clackamas County).

104. Albertsons Store No. 506, located at 1855 Blankenship Road, West Linn, Oregon (Clackamas County).
105. Albertsons Store No. 566, located at 10830 S.E. Oak Street, Milwaukie, Oregon (Clackamas County).
106. Albertsons Store No. 587, located at 1800 N.E. 3rd Street, Bend, Oregon (Deschutes County).
107. Albertsons Store No. 588, located at 61155 S. Highway 97, Bend, Oregon (Deschutes County).
108. Safeway Store No. 4292, located at 585 Siskiyou Boulevard, Ashland, Oregon (Jackson County).
109. Albertsons Store No. 501, located at 340 N.E. Beacon Drive, Grants Pass, Oregon (Josephine County).
110. Albertsons Store No. 537, located at 1690 Allen Creek Road, Grants Pass, Oregon (Josephine County).
111. Safeway Store No. 1766, located at 2740 S. 6th Street, Klamath Falls, Oregon (Klamath County).
112. Safeway Store No. 4395, located at 211 North Eighth Street, Klamath Falls, Oregon (Klamath County).
113. Albertsons Store No. 507, located at 1675 W. 18th Avenue, Eugene, Oregon (Lane County).
114. Albertsons Store No. 568, located at 3075 Hilyard Street, Eugene, Oregon (Lane County).
115. Safeway Store No. 311, located at 5415 Main Street, Springfield, Oregon (Lane County).
116. Albertsons Store No. 562, located at 5450 River Road North, Keizer, Oregon (Marion County).
117. Albertsons Store No. 559, located at 8155 S.W. Hall Boulevard, Beaverton, Oregon (Washington County).

118. Albertsons Store No. 565, located at 16200 S.W. Pacific Highway, Tigard, Oregon (Washington County).

119. Albertsons Store No. 576, located at 14300 S.W. Barrows Road, Tigard, Oregon (Washington County).

120. Albertsons Store No. 579, located at 16030 S.W. Tualatin Sherwood Road, Sherwood, Oregon (Washington County).

Washington Stores:

121. Albertsons Store No. 244, located at 1128 N. Miller, Wenatchee, Washington (Chelan County).

122. Albertsons Store No. 404, located at 114 E. Lauridsen Boulevard, Port Angeles, Washington (Clallam County).

123. Safeway Store No. 3518, located at 31565 SR 20 #1, Oak Harbor, Washington (Island County).

124. Albertsons Store No. 411, located at 15840 1st Avenue South, Burien, Washington (King County).

125. Albertsons Store No. 473, located at 12725 First Avenue South, Burien, Washington (King County).

126. Albertsons Store No. 425, located at 17171 Bothell Way NE, Seattle, Washington (King County).

127. Albertsons Store No. 470, located at 14215 SE Petrovitsky Road, Renton, Washington (King County).

128. Safeway Store No. 1468, located at 4300 N.E. 4th Street, Renton, Washington (King County).

129. Albertsons Store No. 403, located at 3925 236th Avenue NE, Redmond, Washington (King County).

130. Safeway Store No. 442, located at 15332 Aurora Avenue North, Shoreline, Washington (King County).

131. Albertsons Store No. 496, located at 31009 Pacific Highway South, Federal Way, Washington (King County).
132. Albertsons Store No. 443, located at 2900 Wheaton Way, Bremerton, Washington (Kitsap County).
133. Albertsons Store No. 492, located at 2222 NW Bucklin Hill Road, Silverdale, Washington (Kitsap County).
134. Safeway Store No. 1082, located at 3355 Bethel Road SE, Port Orchard, Washington (Kitsap County).
135. Safeway Store No. 2949, located at 4831 Point Fosdick Drive NW, Gig Harbor, Washington (Pierce County).
136. Albertsons Store No. 472, located at 2800 Milton Way, Milton, Washington (Pierce County).
137. Albertsons Store No. 468, located at 11012 Canyon Road East, Puyallup, Washington (Pierce County).
138. Safeway Store No. 551, located at 15805 Pacific Avenue South, Tacoma, Washington (Pierce County).
139. Albertsons Store No. 498, located at 111 S. 38th Street, Tacoma, Washington (Pierce County).
140. Albertsons Store No. 465, located at 8611 Steilacoom Boulevard SW, Tacoma, Washington (Pierce County).
141. Safeway Store No. 517, located at 7601 Evergreen Way, Everett, Washington (Snohomish County).
142. Albertsons Store No. 476, located at 19881 SR 2, Monroe, Washington (Snohomish County).
143. Albertsons Store No. 401, located at 17520 SR 9 Southeast, Snohomish, Washington (Snohomish County).

144. Safeway Store No. 1741, located at 1233 N. Liberty Lake Road, Liberty Lake, Washington (Spokane County).

145. Albertsons Store No. 415, located at 3520 Pacific Avenue SE, Olympia, Washington (Thurston County).

146. Albertsons Store No. 225, located at 450 N. Wilbur Avenue, Walla Walla, Washington (Walla Walla County).

Schedule D Assets

Washington Stores:

1. Albertson's Store No. 459, located at 14019 Woodinville-Duvall Road, Woodinville, Washington (King County).
2. Albertson's Store No. 477, located at 303 91st Avenue NE, Lake Stevens, Washington (Snohomish County).

APPENDIX I
Associated Food Stores Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX II

AWG Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX III

Haggen Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX IV

Supervalu Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX V
Monitor Agreement

APPENDIX V-1

Monitor Compensation

[Redacted From the Public Record Version]