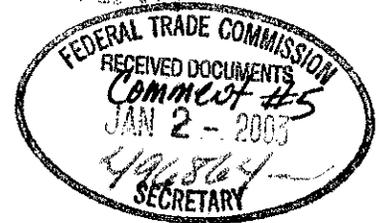


RONALD A. BLOCH
ATTORNEY AT LAW
KALIK LEWIN
5247 WISCONSIN AVENUE NW, SUITE 5
WASHINGTON, DC 20015



PHONE: 202-237-7456
FAX: 202-537-2291
E-MAIL: RONBLOCH@EROLS.COM
HOME PHONE: 301-208-0382
HOME FAX: 301-977-4865

December 20, 2002

Donald S. Clark, Esq., Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Public Record Comment
FTC File No. 021 0090

Dear Mr. Clark:

This comment is submitted on behalf of the National Grocers Association (N.G.A.), a non-profit trade association that represents, exclusively, the interests of independent, community focused grocery retailers and wholesalers. An independent, community focused retailer is a privately owned or controlled food retail company operating in a variety of formats. A few are publicly traded but with controlling shares held by the family, and others are employee owned. Most independent operators are serviced by wholesale distributors, while others may be partially or fully self-distributing.

We are pleased for this opportunity to submit our views on the acquisition and consent settlement involving the acquisition, by merger, of Supermercados Amigo, Inc. (Amigo), by Wal-Mart Stores, Inc. (Wal-Mart). In October of this year N.G.A. expressed its concerns about the legality of this merger to the Commission, and to the Department of Justice and the legislature of Puerto Rico. We urged that the merger be rejected because, from macro and micro perspectives, it will have anticompetitive effects and will ultimately harm Puerto Rican consumers. The merger will give Wal-Mart between thirty and forty percent of supermarket sales in Puerto Rico. It will eliminate the leading local supermarket chain, which has been the low-price leader in the Commonwealth. Our prior comments to the Commission are incorporated here by reference.

Our comments here will touch upon two issues: the insufficiency of the facts made available by the Commission upon which the public can evaluate the adequacy of the relief obtained, and the ability of the ordered divestiture to be completed prior to the end of the comment period and the Commission's review of the comments filed.

Insufficient Facts Are Available to Those Wishing to Comment

In the recent *Cruise Line* case, the Commission broke new ground and gave the public meaningful explanations for not challenging a merger. Those explanations were widely applauded and caused widespread optimism that future analyses of settled merger cases would give similar insight to the Commission's reasoning. Unfortunately, the long FTC history of opacity continues, and the long-overdue need for transparency remains.

A number of years ago, N.G.A. requested additional information from the Commission in order to fashion a comment on a grocery acquisition resulting from Safeway's decision to sell its El Paso Division to Furr's, Inc.¹ As in this case, N.G.A. was interested in commenting on the adequacy of the divestiture obtained. A modest divestiture was obtained in some markets, but none in others in which the parties were in direct competition. The N.G.A. request for information was denied.² The denial compelled N.G.A. to expend significant time, resources and effort to examine other geographic markets involved, markets that were totally ignored by the Commission's public analysis of the settlement, and in which, obviously, no divestiture was obtained.

The N.G.A. analysis disclosed that in some geographic markets in which there was to be no divestiture, the post-closing HHIs would be significantly higher than markets in which there would be divestiture. In other markets, resulting HHIs exceeded permissible levels under the Horizontal Merger Guidelines, yet no divestiture was required. Based on its own analysis, N.G.A. filed a comment for the public record,³ pointing out the apparent anomalies in the settlement, and asking for the Commission to reject the proposed settlement, order more divestiture, and provide meaningful information to facilitate public comments in future cases. The final disposition of the case resulted in the usual language in the Final Order that the settlement had been placed on the public record for comment, and that the Commission had received and considered the comments received. But no explanation of the comments or the Commission's reasons for ignoring them was given in the Final Order, in a separate statement issued by any Commissioner, or in any other writing emanating from the Commission.⁴ To this day, the reasons why the Commission did not require divestiture in some major metropolitan markets remain unknown to the public.⁵

In the present case, the same adequacy-of-relief question is present. It is clear from the facts that the Commission has made available, that Puerto Rico is not a single geographic

¹ Letter to Joan S. Greenbaum, Deputy Assistant Director, Bureau of Competition, from Thomas K. Zaucha, President & CEO, N.G.A., dated August 19, 1987.

² Letter to Thomas K. Zaucha from Joan S. Greenbaum, dated September 3, 1987.

³ Statement of National Grocers Association, October 19, 1987, FTC File No. 871-0066 (N.G.A. Statement).

⁴ Compare this to the Commission's rule-making procedure in which all commenters are identified and the Commission's reasons for accepting or rejecting each comment are fully explained.

⁵ Three of the highly concentrated markets in which no divestiture was ordered were Albuquerque, NM (HHI increase 1733, post-closing HHI 4232, Furr's post-closing market share 62%); El Paso, TX (HHI increase 1249, post-closing HHI 2874, Furr's post-closing market share 51%); and Santa Fe, NM (HHI increase 977, post-closing HHI 2952, Furr's post-closing market share 46%). See, N.G.A. Statement at 19.

market.⁶ Except for the three markets in which divestiture is ordered, we are not told what other geographic markets exist in which the parties already compete, or in which they will compete when publicly announced new stores are opened. Relief is being obtained in three geographic markets named in the Complaint, in which four Amigo supermarkets will be divested. Amigo operates thirty-six supermarkets in Puerto Rico, and Wal-Mart operates eighteen stores in various formats there. Most of the parties' stores appear to be in markets other than the three involved in the divestiture. But how does one know, from the information that the Commission has made public, what the concentration levels are in the other markets? How can the public tell whether HHIs in any of those markets are higher than those in the markets in which stores will be sold, or are higher than suggested by the Merger Guidelines? Based on information provided to N.G.A. by industry members in Puerto Rico, and presumably available to the FTC, there were significant increases in the HHI in Bayamon (from 2000 to 3100), San Juan (from 1400 to 2000), Carolina (from 1600 to 2300), Caguas (from 1800 to 2700) and Cayey (from 2500 to 3550). Under the Merger Guidelines these markets are all classified as "highly concentrated" and are likely to create or enhance Wal-Mart's market power or facilitate its exercise.⁷ Without ready access to this type of industry data, it is difficult, if not impossible, for one to question why there will be no divestitures in those or other markets.⁸

The National Grocers Association reiterates the position it took more than fifteen years ago: If the public comment process in merger cases is to be meaningful, both to the public and to the Commission, the public record must contain sufficient information to allow meaningful comments to be submitted. The unavailability of that information deprives the public of any real ability to comment, despite the invitation to do so that is contained in the Commission's Rules.⁹ And the Commission does not receive comments that might move it to reject a settlement.¹⁰ The present public comment process is largely no more than a meaningless exercise: it is extraordinarily difficult for meaningful comments to be prepared due to lack of information, and when anyone goes to the trouble of gathering that information, the Commission does not respond to the comment. N.G.A. respectfully submits that the public interest demands that the public comment process undergo major revisions.

⁶ Complaint, PARAGRAPH THIRTEEN.

⁷ 1992 Horizontal Merger Guidelines, §1.51(c).

⁸ The markets in which divestitures will occur represent 6.4% of the Puerto Rico population. The largest, Ponce, has a population of 168,811. The Manati market's population is 48,978, and the Cidra population is 28,912. Among the cities without divestiture are Arecibo (49,545), Bayamon (202,103), Caguas (92,429), Carolina (162,404), Mayaguez (83,010), San Juan (426,832), and Trujillo Alto (44,336). We do not know whether these cities, constituting 27% of Puerto Rico's population of 3.8 million, constitute geographic markets for antitrust purposes, or whether Wal-Mart and Amigo compete within all of them. We note the existence of these cities only to demonstrate the problem of fashioning a meaningful comment when the FTC fails to provide the facts needed to do so - even though the existence of problems may be readily identifiable. Population data have been taken from American Map Corporation, 2001 Road Atlas, at 142.

⁹ 16 C.F.R. §2.34(c).

¹⁰ 16 C.F.R. §2.34(e)(1) expressly permits the Commission to withdraw the settlement based on comments received. And, if a Final Order has been issued prior to the end of the comment period, §2.34 (e)(2) permits modifications of the Final Order. If the respondent does not agree to the modifications, the Final Order can be reopened for the purpose of modification, or a new administrative proceeding can be commenced.

Allowing Divestiture to Occur Before the Comment Period Expires

The agreed-to Order permits Wal-Mart to divest the four Amigo stores to a Commission-approved buyer before the comment period ends and the Commission has had an opportunity to review and evaluate the comments received. The Order reserves to the Commission the right to order rescission of the divestiture should it deem it necessary because of comments received, and the stores must be re-divested within three months.

Others have raised questions that are difficult to deal with after a divestiture has been consummated. For example, On November 23, 2002, the Puerto Rican newspaper, *El Nuevo Dia*, asked, "Who is 'Supermercados Maximo, Inc.?', " the apparently approved buyer of the Amigo stores to be divested. According to documents obtained by the newspaper, "Supermercados Maximo was not registered in the [Puerto Rico] Department of State, at least not as of yesterday." The story also questioned the relationship between Maximo's principals and Amigo, their having been or still were shareholders and directors of Amigo. There are the obvious questions of the arm's length nature of the divestiture transaction, and whether Wal-Mart will exercise undue influence over the operations of the divested stores.

Premature divestiture is a problem that has serious anticompetitive implications, and to which N.G.A. has previously voiced its objection. In *Food Lion*,¹¹ the consent settlement contained a similar provision. It permitted the sale of ten Hannaford supermarkets in Richmond, Virginia, to Kroger before the end of the comment period. In its public comment on that settlement,¹² N.G.A. used Richmond as an example and hypothesized that, following the end of the comment period, the Commission exercised its rescission power and ordered the stores re-divested to another buyer. N.G.A.'s Food Lion Statement analyzed the anticompetitive implications of that scenario under the Order:¹³

Prior to the sale, the HBS stores did business under the Hannaford banner. Once the sale is completed and the stores are reopened, they will carry the Kroger banner. Once the sale to Kroger is rejected by the Commission, the sale to Kroger is rescinded, meaning they revert to Delhaize [Food Lion] ownership and, presumably, either the Food Lion or the Hannaford banner until they are resold. At that time, they carry a fourth banner . . . [requiring] these stores to do business under four different names in a period of just a few months. It is not just the name on the front of the stores that change. Merchandise layouts will be altered, requiring customers to search for products in new, constantly changing locations. They may not be able to find some products, because the selection will change each time the store changes hands. This problem is especially

¹¹ Docket No. C-3962 (Food Lion acquisition of Hannaford Bros.), Complaint issued July 24, 2000.

¹² Comment on Consent Settlement Filed by National Grocers Association, File No. 991-0308, filed September 6, 2000 (Food Lion Statement).

¹³ Food Lion Statement at 7 - 8 (emphasis added).

acute in the private label area, because each chain has its own program.

We doubt that anyone could intentionally devise a scheme more effective in angering and confusing consumers, driving customers of these stores to competing outlets, and thereby reducing the competitive value of the locations subject to divestiture. We have no way of knowing whose idea this was, but it's a bad one. The solution, *at least for supermarket divestitures*, is to retain the Commission's prior practice, and prohibit divestiture until the order becomes final and the Commission has had an opportunity to address the issues raised in the comments. Then the purchasers can be approved or rejected without subjecting the stores to unwarranted depreciation and driving the customers of those stores to other outlets.

This same issue arose on October 23rd of this year in the New York City session of the Commission's Merger Best Practices Workshop. In both its written statement and its oral testimony, N.G.A. again argued against the early divestiture practice in retail cases generally and in supermarket divestitures in particular.¹⁴

The Commission staff has often stated that the purpose of merger relief is to maintain the competitiveness of the relevant market. Assuming, without conceding, that that is so, the use of the early divestiture/rescission procedure is, if it is ever employed, antithetical to its *raison d'être*. The settlement should be rejected on this ground alone, and the provision should be eliminated. It should not be available in future grocery Orders. The provision amounts to the Commission's thumb in the eye of the consumer.

Respectfully submitted,

National Grocers Association

by 

Ronald A. Bloch
Corporate Counsel

¹⁴ Submission of the National Grocers Association to the Federal Trade Commission Regarding Merger Enforcement and Remedies, October 23, 2002, at 8; Transcript of Merger Best Practices, October 23, 2002, at pp. 27 (line 17) – 29 (line 5). Both documents can be accessed on the Commission's web site www.ftc.gov.