

ATTORNEY GENERAL OF THE STATE OF NEW YORK
ANTITRUST BUREAU

In the Matter of

Assurance No. 21-074

**Investigation by LETITIA JAMES,
Attorney General of the State of New York, of**

The Golub Corporation, Tops Markets Corporation, and
Project P Newco Holdings, Inc.

Respondents

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“OAG”) commenced an investigation pursuant to Section 343 of the New York General Business Law and Section 63(12) of the New York Executive Law into the proposed merger between two New York-based supermarket chains, the Golub Corporation (“Golub” or “Price Chopper”) and Tops Market Corporation (“Tops”), and Project P Newco Holdings, Inc. (collectively, the “Parties”). Specifically, OAG investigated whether the proposed merger would substantially lessen competition, or otherwise adversely impact competition, for retail supermarkets in any geographical area in the state of New York. After OAG identified a number of local geographic areas where it had competitive concerns, the Parties agreed to divest a number of stores to C&S Wholesale Grocers, Inc. (“C&S”).

This Assurance of Discontinuance (“Assurance”) contains the findings of the OAG’s investigation and the relief agreed to by the OAG and the Parties and C&S.

OAG's FINDINGS

A. Background

1. Respondent Golub is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 461 Nott Street, Schenectady, New York 12308.

2. Golub owns and operates a chain of over 150 retail supermarkets known as Price Chopper Supermarkets, Market 32, and Market Bistro. These retail supermarkets are located primarily in New York, but also in other states, *e.g.*, Vermont, Connecticut, Massachusetts, Pennsylvania.

3. Respondent Tops is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 1760 Wehrle Drive, Williamsville, New York 14221.

4. Tops owns, operates, and franchises over 150 retail supermarkets known as Tops Friendly Markets. These retail supermarkets are located primarily in New York, but also in other states, *e.g.*, Pennsylvania and Vermont.

5. Respondent Project P Newco Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 461 Nott Street, Schenectady, New York 12308. After the merger, both Golub and Tops will be subsidiaries of Project P Newco Holdings, Inc.

6. C&S Wholesale Grocers, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Vermont with its executive offices and principal place of business located at 7 Corporate Drive, Keene, New Hampshire 03431.

7. In addition to the retail supermarkets run by Tops and Golub, there are a number of other regional supermarkets operating in New York, including Shop Rite, Stop & Shop, Hannaford, and Wegmans. There are also a number of independent supermarkets located in New York.

8. Supermarkets provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products. In contrast to other retailers of food products and related goods, supermarkets carry a large number of products in a variety of product categories, *e.g.* bread and baked goods; dairy products; refrigerated foods and beverages; frozen foods; fresh and prepared meats and poultry; fresh fruits and vegetables; and shelf-stable foods and beverage products.

9. Supermarkets compete primarily with other supermarkets. Although retail stores other than supermarkets may also sell food and grocery products, these types of stores typically do not, individually, or collectively, provide sufficient competition to effectively constrain prices at supermarkets.

10. Competition for supermarkets tends to be local in nature. Generally, the overwhelming majority of consumers' grocery shopping occurs at stores located within a few miles of where they live.

B. OAG's Investigation

11. On or about February 8, 2021, Golub and Tops publicly announced their proposed merger.

12. Shortly after learning of the Parties' proposed merger, OAG began investigating the effects of the proposed merger in numerous geographic areas in New York. During the

investigation, OAG worked together with the Federal Trade Commission (“FTC”), which was evaluating competitive effects of the merger both in New York and in other geographic areas.

13. In evaluating the effects of the proposed merger in New York, OAG focused on geographic areas where the Parties currently both have stores, or where data and other information suggests that the Parties compete or could potentially compete (*e.g.* with stores located in nearby geographic areas).

14. In evaluating these geographic areas, OAG reviewed data and documents obtained from the Parties, spoke with numerous competitors, made personal visits to supermarkets and other retailers of food and non-food groceries, and obtained and reviewed economic analysis.

15. Based on its evaluations, OAG identified Relevant Areas where it believes that the Parties’ merger may substantially lessen competition and/or otherwise adversely impact competition for supermarkets, in violation of the Donnelly Act (N.Y. Gen. Bus. Law 340 *et seq.*), the Clayton Act (15 U.S.C. §18 *et seq.*), the Sherman Act (15 U.S.C. §2), and New York Executive Law 63(12). The Relevant Areas consist of each of the following counties in New York: Chenango, Clinton, Cortland, Franklin, Jefferson, Oneida, Otsego, Tioga, and Warren.

16. OAG also finds that in each of these Relevant Areas, entry or expansion by competitors would not be timely, likely, or sufficient in magnitude to prevent or deter the likely anticompetitive effects of the merger.

17. After OAG and the FTC raised their concerns about the effects of the Parties’ merger in these Relevant Areas, the Parties’ agreed to divest eleven (11) Tops’ stores located in the Relevant Areas. The stores to be divested are listed on Exhibit A (“Divestiture Stores”).

18. The Parties identified C&S as interested in acquiring all of the Divestiture Stores, and OAG has confirmed that C&S is interested in all of the Divestiture Stores. OAG finds that C&S, as the largest private wholesale grocery supply company, is a suitable buyer and that as structured, and with the agreed upon relief, the divestiture of the Divestiture Stores will satisfy OAG's concerns about the competitive effects of the merger and protect competition in the Relevant Areas for the benefit of consumers.

19. Based on its findings and representations by the Parties and C&S, OAG finds the relief and agreements contained in this Assurance are appropriate and in the public interest. THEREFORE, the OAG is willing to accept this Assurance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding for violations of New York Executive Law 63(12), the Donnelly Act (N.Y. Gen. Bus. Law 340 *et seq.*), the Clayton Act (15 U.S.C. §18 *et seq.*), and the Sherman Act (15 U.S.C. §2). OAG is also aware that the Parties and C&S have consented to an Agreement Containing Consent Orders with the Federal Trade Commission ("FTC Consent Agreement") that contain several other assurances and additional actions consistent with this Assurance as a condition of their approval of the merger.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

RELIEF

20. Divestiture: By February 21, 2022, the Parties shall divest all of the Divestiture Stores to C&S. Until that date, the Parties warrant that they will act consistent with their obligations under this Assurance and the FTC Consent Agreement, and not undertake any conduct that could jeopardize, impede, or delay those obligations.

21. Notice. The Parties and C&S agree to provide OAG with the same notice (and at the same time and in the same manner) that they provide the Federal Trade Commission under

any and all provisions of the FTC Consent Agreement, including, but not limited to: (a) notice of any acquisition, directly or indirectly (including by ownership or lease interest, or stock, share capital, or equity interest), of any supermarket in the Relevant Area; and (b) sale, license, conveyance, or transfer of any of the Divested Stores.

22. Compliance. The Parties agree to provide OAG with the same compliance reports and/or certifications (and at the same time and in the same manner) that they provide the Federal Trade Commission under the FTC Consent Agreement.

23. Monitor or Trustee. If any monitor or trustee is appointed pursuant to the Federal Trade Commission's approval of the merger, the Parties must submit any report received from the monitor or trustee to OAG within 10 days of receipt of the report(s).

24. Term. This AOD will terminate, without any further action by the Parties, ten (10) years from the last date signed by all signatories, unless terminated earlier by mutual agreement between OAG and all signatories.

MISCELLANEOUS

Subsequent Proceedings.

25. Respondent expressly agrees and acknowledges that the OAG may initiate a subsequent investigation, civil action, or proceeding to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to paragraph 30, and agrees and acknowledges that in such event:

- a. any statute of limitations or other time-related defenses are tolled from and after the effective date of this Assurance;

- b. the OAG may use statements, documents or other materials produced or provided by the Respondent prior to or after the effective date of this Assurance;
- c. any civil action or proceeding must be adjudicated by the courts of the State of New York, and that Respondent irrevocably and unconditionally waives any objection based upon personal jurisdiction, inconvenient forum, or venue.
- d. evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law pursuant to Executive Law § 63(15).

26. If a court of competent jurisdiction determines that the Respondent has violated the Assurance, the Respondent shall pay to the OAG the reasonable cost, if any, of obtaining such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

Effects of Assurance:

27. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of the Respondent. Respondent shall include any such successor, assignment or transfer agreement a provision that binds the successor, assignee or transferee to the terms of the Assurance. No party may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of the OAG.

28. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

29. Any failure by the OAG to insist upon the strict performance by Respondent of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions

hereof, and the OAG, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by the Respondent.

Communications:

30. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 21-074, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows:

- If to the Respondent, to: Scott Grimmett, or in his absence, to the person holding the title of Chief Executive Officer.
- If to the OAG, to: Elinor Hoffmann, or in her absence, to the person holding the title of Bureau Chief, Antitrust Bureau.

Representations and Warranties:

31. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by the Respondent and their counsel and the OAG's own factual investigation as set forth in Findings, paragraphs 1-18 above. The Respondent represents and warrants that neither it nor its counsel has made any material representations to the OAG that are inaccurate or misleading. If any material representations by Respondent or its counsel are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

32. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by the Respondent in agreeing to this Assurance.

33. The Respondents and C&S represent and warrant, through the signatures below, that the terms and conditions of this Assurance are duly approved. Respondents and C&S further represents and warrants that the following signatory to this AOD is a duly authorized officer acting at the direction of their Board of Directors:

For Respondent Golub: Scott Grimmett, President and Chief Executive Officer

For Respondent Tops: Frank Curci, President and Chief Executive Officer

For C&S: Bob Palmer, President and Chief Executive Officer

General Principles:

34. Unless a term limit for compliance is otherwise specified within this Assurance, the Respondent's obligations under this Assurance are enduring. Nothing in this Agreement shall relieve Respondent of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

35. Nothing contained herein shall be construed to limit the remedies available to the OAG in the event that the Respondent violates the Assurance after its effective date.

36. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.

37. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

38. Respondent acknowledges that they have entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.


39. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

40. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

41. This Assurance may be executed in multiple counterparts by the parties hereto. All counterparts so executed shall constitute one agreement binding upon all parties, notwithstanding that all parties are not signatories to the original or the same counterpart. Each counterpart shall be deemed an original to this Assurance, all of which shall constitute one agreement to be valid as of the effective date of this Assurance. For purposes of this Assurance, copies of signatures shall be treated the same as originals. Documents executed, scanned and transmitted electronically and electronic signatures shall be deemed original signatures for purposes of this Assurance and all matters related thereto, with such scanned and electronic signatures having the same legal effect as original signatures.

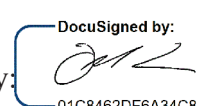
42. The effective date of this Assurance shall be November 5, 2021

LETITA JAMES
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By: Elinor Hoffmann
Chief, Antitrust Bureau

Christopher D'Angelo
Executive Deputy Director for
Economic Justice

The Golub Corporation
By: 
Scott Grimmett, President and CEO

Tops Markets Corporation
By: 
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Frank Curci, President and CEO


C&S Wholesale Grocers, Inc.
By: 
Bob Palmer, President and CEO

EXHIBIT A: DIVESTITURE STORES

<u>TOPS STORE</u>	<u>CITY</u>	<u>COUNTY</u>
#568	Cooperstown	Otsego
#517	Cortland	Cortland
#569	Norwich	Chenago
#579	Owego	Tioga
#713	Peru	Clinton
#587	Rome	Oneida
#707	Saranac Lake	Franklin
#364	Sherrill	Oneida
#701	Warrensburg	Warren
#589	Watertown	Jefferson
#597	Watertown	Jefferson