



operates supermarkets under the Pathmark banner.

4. In the State of New York, A&P and Pathmark own and operate certain supermarkets that are in close proximity with each other that comprise most or all of the supermarkets within particular geographic areas. The Attorney General contends that supermarkets provide a set of products and services for consumers who desire one-stop shopping for food and grocery products distinct from that offered by specialty shops, club stores, or large mass merchandisers. 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. The Acquisition and elimination of competition among supermarkets, therefore, likely would have anticompetitive effects in such locations by, among other things, eliminating consumer choice and enabling A&P and other supermarkets to raise prices, in violation of Clayton Act § 7, 15 U.S.C. § 18, and other state and federal antitrust laws.
5. A&P shall make certain divestitures prior to or immediately following A&P's acquisition of Pathmark's operations. The purpose of the divestitures is to put ownership of the Assets to be Divested in the hands of companies engaged in the supermarket business in competition with A&P.
6. The New York Attorney General has jurisdiction over this matter under Sections 15 and 16 of the Clayton Act, 15 U.S.C. §§ 25 and 26, Section 342 of the Donnelly Act, N.Y. Gen. Bus. Law § 340 *et seq.*, and Section 63 of the N.Y. Executive Law to prevent and restrain the violation by the defendants of Section 7 of the Clayton Act, 15 U.S.C. § 18 and Section 340 of the Donnelly Act.

7. A&P agrees to resolve the investigation as set forth further below.
8. Rather than engaging in antitrust enforcement litigation respecting A&P's acquisition of Pathmark, the Attorney General has elected to accept this Assurance of Discontinuance.

#### **AGREEMENT**

A&P desires to settle and resolve this matter without admitting the Attorney General's Contentions set forth above and denying that it has committed any alleged violations of law. The Attorney General and A&P hereby enter into this Assurance of Discontinuance and agree as follows:

9. A&P consents to the jurisdiction of the Supreme Court of the State of New York as to any matters brought by the State of New York respecting this Assurance of Discontinuance.
10. The provisions of this Assurance of Discontinuance apply to A&P, its successors and assigns, subsidiaries, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Assurance of Discontinuance by personal service or otherwise.

#### **Definitions**

For purposes of this agreement only, the following definitions shall apply:

11. "A&P" means The Great Atlantic & Pacific Tea Company, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by A&P and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

12. "Pathmark" means Pathmark Stores, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Pathmark and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
13. "Assurance of Discontinuance" means this Assurance of Discontinuance.
14. "Respondents" means A&P and Pathmark, individually and collectively.
15. "Acquisition" means A&P's proposed acquisition of 100% of the outstanding voting securities of Pathmark pursuant to an agreement dated March 4, 2007.
16. "Assets To Be Divested" means the Staten Island, New York Assets and the Shirley, New York Assets.
17. "Commission-approved Acquirer" means any entity approved by the Federal Trade Commission (FTC) to acquire any or all of the Assets To Be Divested pursuant to the FTC Order.
18. "FTC Order" means individually and collectively the Agreement Containing Consent Orders, Order to Maintain Assets, and Decision and Order issued or entered into by the FTC regarding the Acquisition, and all modifications thereof.
19. "Staten Island, New York Assets" means the following Supermarkets: (1) Waldbaum's Super Market 219, 3251 Richmond Avenue South, Staten Island, NY; (2) Waldbaum's Super Market 672, 778 Manor Road, Staten Island, NY; (3) Waldbaum's Super Market 238, 4343 Amboy Road, Staten Island, NY; (4) Waldbaum's Super Market 230, 1441 Richmond Avenue, Staten Island, NY; and (5) Pathmark Supermarket, 683, 2660 Hylan Boulevard, Staten Island, NY, and all assets, leases, properties, government permits (to

the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at these locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names. Provided, however, the inventory of consumer goods and merchandise owned by the Respondents for sale in the ordinary course of the Supermarket business may be excluded from the divestiture at the option of the Commission-approved Acquirer.

20. "Shirley, New York Assets" means A&P's Waldbaum's Super Market 604, 999 Montauk Highway, Shirley, NY, and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at that location, but shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names. Provided, however, the inventory of consumer goods and merchandise owned by the Respondents for sale in the ordinary course of the Supermarket business may be excluded from the divestiture at the option of the Commission-approved Acquirer.

21. "Supermarket" means any store with substantial offerings in each of the following product categories: bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps,

detergents, paper goods, other household products, and health and beauty aids, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

22. "Supermarket to be Maintained" means any Supermarket business identified as a part of the Assets to be Divested.

## **AFFIRMATIVE OBLIGATIONS**

### **I. Divestitures**

23. A&P shall divest, absolutely and in good faith, the Staten Island, New York Assets and the Shirley, New York Assets as ongoing businesses, by January 10, 2008. As to all Assets to be Divested, compliance with the FTC Order shall constitute compliance with this obligation upon timely notice to the Attorney General.
24. Any action or inaction by A&P that is pursuant to the FTC Order or the order of any court, shall not violate this Assurance of Discontinuance. To comply with this Assurance, A&P shall not be obliged to take any action that is inconsistent with the FTC Order or the order of any court.
25. A&P shall use all reasonable commercial efforts to remove any legal impediment to divestiture. Respondents shall provide any consents necessary to divest the Assets to be Divested, and shall refrain from itself invoking any provisions in its contracts with third parties where doing so would impair its obligation to divest.
26. A&P shall not take any action that will impede in any way the operation of the Assets to be Divested as Supermarkets pending divestiture. including the exercise of any restrictive

covenants and provisions.

27. If A&P has not divested all the Assets to be Divested as required by this Assurance of Discontinuance, the applicable provisions of the FTC Order (Decision and Order, Section III - "Divestiture Trustee") shall be deemed incorporated by reference into this Assurance of Discontinuance.

## **II. Obligations During Divestiture**

28. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Divested pursuant to the terms of the FTC Order. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use reasonable best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Included in the above obligations, Respondents shall, without limitation:
- a. maintain operations and departments, and not reduce hours, at each Supermarket To Be Maintained;

- b. not transfer inventory from any Supermarket To Be Maintained, other than in the ordinary course of business consistent with past practice;
- c. make any payment required to be paid under any contract or lease, governmental law, ordinance, or regulation when due, and otherwise and pay all liabilities and satisfy all obligations associated with any Supermarket To Be Maintained, in each case in a manner consistent with past practice;
- d. maintain the books and records of each Supermarket To Be Maintained;
- e. not display any signs or conduct any advertising (e.g., direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations at a Supermarket To Be Maintained to another location, or that the business will close;
- f. not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any Supermarket To Be Maintained; and
- g. not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket To Be Maintained, other than changes in the ordinary course of business consistent with past practice for Supermarkets not being closed or relocated.

The obligations of subsections (b) and (g) shall cease upon the determination and notification by A&P to an offeror of an accepted offer of an Asset to be Divested.

### **III. Notice Obligations**

29. For a period of ten (10) years commencing on the date the FTC Order becomes final, A&P shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing thirty (30) days advance written notification to the Attorney General:
- a. acquire of 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 Staten Island (Richmond County), NY and in Shirley, New York.
  - b. acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or holds any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of the proposed acquisition, in Staten Island (Richmond County), NY and in Shirley, New York.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondents 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.

30. A&P shall notify the Attorney General at least thirty (30) days prior to: (a) any proposed dissolution; (b) any proposed acquisition, merger or consolidation; (c) or any change, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Assurance of Discontinuance.

## GENERAL PROVISIONS

31. A&P shall simultaneously submit to the Attorney General copies of any report that A&P submits to the FTC pursuant to the FTC Order. Pursuant to Paragraph VI of the FTC Decision and Order, the required reports are as follows:
- a. Within thirty (30) days after the FTC Decision and Order becomes final and every thirty days thereafter until the Respondents has complied with the provisions of Paragraphs II. and III. of the FTC Decision and Order, Respondents shall submit a verified written reports setting forth in detail the manner and form in which they intend to comply, is complying, and has complied with Paragraphs II. and III. of the FTC Decision and Order. 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 the FTC Decision and 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 non-privileged written communications to and from such parties, all non-privileged internal memoranda, and all non-privileged reports and recommendations concerning completing the obligations; and
  - b. One (1) year from the date the FTC Decision and Order becomes final, and annually for the next nine (9) years on the anniversary of the date the FTC Decision and Order becomes final, and at other times as the FTC may require, Respondents shall file verified written reports with the FTC setting forth in

detail the manner and form in which they have complied and are complying with the FTC Decision and Order.

32. During the pendency of this Assurance of Discontinuance, for the purpose of securing or determining compliance with it, and subject to any legally recognized privilege, A&P shall permit any duly authorized representative of the Attorney General:
- a. Access, following reasonable notice, during office hours and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession, custody or control of A&P relating to any part of this Assurance of Discontinuance; and
  - b. Upon five (5) days notice, and without restraint or interference from A&P, to interview, under oath and on a transcribed record, any officer, employee or other agent of A&P, who may have counsel present for that individual.
33. A&P shall provide information in response to any other written reasonable requests from the Attorney General concerning any part of this Assurance of Discontinuance.
34. For a period of ten (10) years commencing on the date the FTC Order becomes final, Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) that acquires any Supermarket, any leasehold interest in any Supermarket or any interest in any retail location used as a Supermarket on or after January 1, 2007, in Staten Island (Richmond County), NY and in Shirley, New York, to operate a supermarket at that site. if such Supermarket was formerly owned or operated by

**Respondents.**

35. This Assurance of Discontinuance shall not be construed or interpreted to signify express or implied approval by the Attorney General, or any of their agencies, departments or divisions, of any acts, practices, policies or agreements carried out or entered into by A&P or Pathmark, except those required by this agreement.
36. This Assurance of Discontinuance shall not be construed or interpreted as limiting the Attorney General's right to conduct investigations under the law of the State of New York or to bring any action that he or she is authorized to bring in the absence of this Assurance of Discontinuance.
37. A&P does not admit any of the Attorney General's factual contentions contained herein or that it has violated or will violate any law by virtue of the Acquisition.
38. The Attorney General shall not institute any proceeding or take any action based on any practice addressed by this Assurance of Discontinuance that A&P engaged in prior to the date of this Assurance unless such action is a violation of this Assurance of Discontinuance.
39. This Assurance of Discontinuance shall be governed by and construed in accordance with the laws of the State of New York applicable to an agreement negotiated, executed, entered into, and performed solely within the State of New York.
40. A&P represents and warrants that it has fully read and understands this Assurance of Discontinuance, that it understands the legal consequences of signing this Assurance of Discontinuance, and that there are no other representations or agreements not stated in writing in this Assurance of Discontinuance.

41. This Assurance of Discontinuance may be signed in counterparts, each of which shall be deemed an original.
42. Any amendments to this Assurance of Discontinuance shall be in writing and signed by all parties.
43. The parties represent that an authorized representative of each has signed the Assurance of Discontinuance with full knowledge, understanding and acceptance of its terms and that this person has done so with authority to legally bind the respective party.
44. All of the obligations of this Assurance of Discontinuance that are binding on any party or parties shall be binding upon their successors and assigns.
45. Any notice or other writing required or permitted to be given under this Assurance of Discontinuance shall be sufficient if made as follows:

To the Attorney General:

Linda J. Gargiulo  
John A. Ioannou  
Assistant Attorneys General  
Antitrust Bureau  
Office of the Attorney General  
120 Broadway  
26<sup>th</sup> Floor  
New York, NY 10271  
Ph: (212) 416-8274, 8268  
Fax: (212) 416-6015

To A&P:

Allan Richards  
Senior Vice President, Human Resources, Labor Relations and Legal Services  
The Great Atlantic & Pacific Tea Company, Inc.  
2 Paragon Drive

Montvale, NJ 07645  
Ph. (201) 571-4015  
Fax: (201) 571-8106

With copies to:

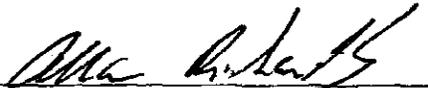
Michael Keeley, Esq.  
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and

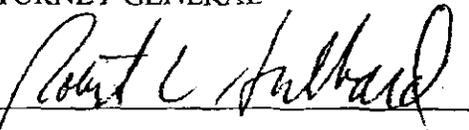
William M. Rubenstein, Esq.  
Axinn, Veltrop & Harkrider LLP  
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Ph. (860) 275-8180  
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WHEREFORE, the following signatures are affixed hereto this 26<sup>th</sup> day of November, 2007.

THE GREAT ATLANTIC & PACIFIC TEA CO.

By: 

STATE OF NEW YORK  
ANDREW M. CUOMO  
ATTORNEY GENERAL

By: 

Robert L. Hubbard  
Director of Litigation  
Antitrust Bureau