

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

)	
In the Matter of)	
)	
WAL-MART STORES, INC.,)	
a corporation;)	
)	
and)	
)	
SUPERMERCADOS AMIGO, INC.,)	
a corporation.)	
)	

Docket No. C-

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition of 100% of the outstanding voting securities of Respondent Supermercados Amigo, Inc. by Respondent Wal-Mart Stores, Inc., hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft 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 Orders (“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 an 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, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Wal-Mart Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 702 Southwest 8th Street, Bentonville, Arkansas 72716.
2. Respondent Supermercados Amigo, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its office and principal place of business located at Mercado Central Zona Portuaria, Edificio A-1, Puerto Nuevo, San Juan, Puerto Rico 00920.
3. 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. "Wal-Mart" means Wal-Mart Stores, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Wal-Mart Stores, Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Amigo" means Supermercados Amigo, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Supermercados Amigo, Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Respondents” means Wal-Mart and Amigo, individually and collectively.
- D. “Acquisition” means Wal-Mart’s proposed acquisition of the outstanding voting securities of Amigo pursuant to the “Merger Agreement Dated as of February 5, 2002 among Wal-Mart Puerto Rico, Inc., W-M Puerto Rico Acquisition Corp., Supermercados Amigo, Inc. and Steven C. Lausell, as the Stockholder Representative.”
- E. “Assets To Be Divested” means the Cidra Assets, the Ponce Assets and the Manati-Vega Baja Assets.
- F. “Business Day” means any day excluding Saturday, Sunday and any United States federal holiday.
- G. “Commission-approved Acquirer” means any entity approved by the Commission to acquire any or all of the Assets To Be Divested pursuant to this Order.
- H. “Divestiture Agreement” means any agreement between the Respondents and a Commission-approved Acquirer (or a trustee appointed pursuant to Paragraph III. of this Order and a Commission-approved Acquirer) 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. The term “Divestiture Agreement” includes, as appropriate, the Purchaser Agreement.
- I. “Divestiture Trustee(s)” means any person or entity appointed by the Commission pursuant to Paragraph III. of the Decision and Order to act as a trustee in this matter.
- J. “Purchaser” means Supermercados Maximo, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its offices and principal place of business located at Popular Center, Suite 1822, Hato Rey, Puerto Rico 00918.
- K. “Purchaser Agreement” means the “Asset Purchase Agreement Dated as of November 12, 2002 among Supermercados Amigo, Inc., Supermercados Maximo, Inc. and Wal-Mart Puerto Rico, Inc.,” and all amendments, exhibits, attachments, related agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.
- L. “Cidra Assets” means the Supermarket currently operated by Respondent Amigo under the Amigo trade name located at the intersection of State Road 787 and State Road 172, Barrio Bayamon, Cidra, Puerto Rico 00739, 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.

- M. “Ponce Assets” means the Supermarket currently operated by Respondent Amigo under the Amigo trade name located at Carretera #2 Kilometer 257.04, Barrio Canas, Ponce, Puerto Rico 00731, 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.

- N. “Manati-Vega Baja Assets” mean the Supermarkets currently operated by Respondent Amigo under the Amigo trade name located at Carretera 149 and Carretera 668, Hacia Morovis, Centro Comercial Plaza Monaco, Urbanación Jardines de Monaco, Manati, Puerto Rico 00674, and Carretera Estatal 2 Kilometer 39.5, Centro Comercial Las Vegas, Vega Baja, Puerto Rico 00693, 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 those 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.

- O. “Supermarket” means any store that offers a Wide Selection and Deep Inventory of Food and Grocery Products, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

- P. “Supercenter” means any Supermarket that is co-located with a mass merchandise outlet.

- Q. “Club Store” means any store that offers a Wide Selection and Deep Inventory of Food and Grocery Products and general merchandise—in large-sized packages or in packages of two or more conventional-sized items—to businesses and individuals that have purchased club memberships, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

- R. “Wide Selection and Deep Inventory of Food and Grocery Products” means 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.

- S. “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 Commission-approved Acquirer(s) of the Assets To Be Divested.

II.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) Business Days after the date on which the Acquisition is consummated, Respondents shall divest, absolutely and in good faith, the Cidra Assets, Ponce Assets, and Manati-Vega Baja Assets, as ongoing businesses to Purchaser pursuant to and in accordance with the Purchaser Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), and such agreement, if approved by the Commission, is incorporated by reference into this Order and made part hereof as non-public Appendix I. Any failure by Respondents to comply with all terms of any Divestiture Agreement related to the Cidra Assets, Ponce Assets, or Manati-Vega Baja Assets shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Cidra Assets, Ponce Assets, or Manati-Vega Baja Assets to Purchaser pursuant to the Purchaser Agreement prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Purchaser is not an acceptable purchaser of the Cidra Assets, Ponce Assets, or Manati-Vega Baja Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Purchaser and shall divest the Cidra Assets, Ponce Assets, and Manati-Vega Baja Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission.

- B. Respondents shall obtain all required Third Party Consents prior to the closing of the Divestiture Agreement pursuant to which the Assets To Be Divested are divested to a Commission-approved Acquirer.
- C. Any Divestiture Agreement between Respondents (or a trustee appointed pursuant to Paragraph III. of this Order) and a Commission-approved Acquirer of the Assets To Be Divested that has been approved by the Commission shall be deemed incorporated by reference into this Order, and

any failure by Respondents to comply with the terms of such Divestiture Agreement shall constitute a failure to comply with this Order.

- D. The purpose of the divestitures is to ensure the continuation of the Cidra Assets, the Ponce Assets and the Manati-Vega Baja Assets as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the obligations specified in Paragraph II. of this Order, the Commission may appoint a trustee or trustees to divest the relevant Assets To Be Divested pursuant to Paragraph II. in a manner that satisfies the requirements of Paragraph II. The Commission may appoint a different Divestiture Trustee to accomplish each of the divestitures required in Paragraph II. 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 Paragraph III.A. of 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 divest the relevant assets that are required by this Order to be divested.

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 and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture(s) 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, or, in the case of a court-appointed Divestiture Trustee, by the court; provided, however, the Commission may extend the divestiture period only two (2) times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities relating to the relevant assets that are required to be divested 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 his or her 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 at no minimum price. The divestiture(s) shall be made in the manner and to a Commission-approved Acquirer as required by this Order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest 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) Business 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 the 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 Assets To Be Divested.

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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture Trustee shall be appointed in the same manner as provided in Paragraph III.A. of this Order.
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. In the event that the Divestiture Trustee determines that he or she is unable to divest the relevant Assets To Be Divested pursuant to the relevant Paragraph(s) in a manner that preserves their marketability, viability and competitiveness and ensures their continued use as Supermarket businesses, the Divestiture Trustee may divest such additional assets related to the relevant Supermarket businesses of the Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.
12. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
13. The Divestiture Trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture(s).
14. Respondents may require the Divestiture Trustee to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final, Respondents shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission:

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket, Supercenter, or Club Store within six (6) months prior to the date of such proposed acquisition in the municipalities of Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, or Vega Baja in Puerto Rico.
- B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, Supercenter, or Club Store or owned any interest in or operated any Supermarket, Supercenter, or Club Store within six (6) months prior to such proposed acquisition in the municipalities of Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, or Vega Baja in Puerto Rico.

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, Supercenter, or Club Store within six (6) months prior to Respondents' offer to purchase or lease such facility.

Said notification 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.

V.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this 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, Supercenter, or Club Store, any leasehold interest in any Supermarket, Supercenter, or Club Store, or any interest in any retail location used as a Supermarket, Supercenter, or Club Store on or after January 1, 2002, in the municipalities of Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, or Vega Baja in Puerto Rico, to operate a Supermarket, Supercenter, or Club Store at that site if such Supermarket, Supercenter, or Club Store was formerly owned or operated by Respondents.

VI.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final 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 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 written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations; and
- B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, 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.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VIII.

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 with reasonable 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; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

CONFIDENTIAL APPENDIX I

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