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December 20, 2002

BY FAX AND CERTIFIED MAIL

Mr. Donald Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, D.C. 20580

Re: *In the Matter of Wal-Mart Stores, Inc. and Supermercados Amigo, Inc.*, File No. 021 0090, Docket No. C-406.

Dear Mr. Clark:

This is a public comment by Cooperativa de Consumidores Del Noroeste, Inc.; Alma Rivera; Supermercados Conchita Hato Rey, Inc.; Plaza Loíza Inc.; Mayaguez & Quebradillas Food Warehouse, Inc.; Luis Nuñez, Inc.; Supermercado Morales, Inc.; Riago, Inc.; Pablo Quiñones; Ralph's Food Warehouse Inc.; Edwin Ortiz, Inc.; Manuel Rosa e Hijo, Inc.; Supermercados Plaza Guayama Inc.; A. Cordero Badillo, Inc.; and Pueblo International LLC (hereinafter referred to collectively as "PR SUPERMARKETS AND CONSUMERS") regarding *In the Matter of Wal-Mart Stores, Inc. and Supermercados Amigo, Inc.*, File No. 021 0090, Docket No. C-406.

The PR SUPERMARKETS AND CONSUMERS are a group of owners of supermarkets and consumers of the product market of retail sale of food and grocery stores in Puerto Rico. On October 25, 2002, the PR SUPERMARKETS AND CONSUMERS filed a Complaint before the Court of First Instance, San Juan Part, Puerto Rico, Civil Num. KPE02-2503, requesting a preliminary and permanent injunction against Wal-Mart Stores, Inc.'s ("Wal-Mart") proposed acquisition of all the outstanding voting stock of Supermercados Amigo, Inc. ("Amigo").

I. Introduction

The Federal Trade Commission's ("FTC") November 21, 2002 acceptance of a Proposed Consent Order ("Consent Order") permitting Wal-Mart to proceed with its acquisition of Amigo in Puerto Rico fails to adequately address and resolve all the substantial anticompetitive effects of the proposed acquisition. In particular, the Consent Order fails to recognize and address the anti-competitive effects of the proposed merger in various geographic markets, such as the Bayamón area, where the merger, as determined by the Puerto Rico Justice Department ("PRDOJ"), would substantially eliminate competition and have anticompetitive effects; and the Humacao area, where, as a result of the acquisition of the Amigo store located in Juncos, the Herfindal-Hirschman index (HHI) will increase in an amount similar to the geographic markets in which the FTC required a divestiture. Therefore, the divestiture ordered by the FTC in the Consent Order is clearly insufficient to remedy the harmful anticompetitive effects of the proposed merger in the relevant geographic markets.

The four geographic markets identified by the FTC in its Consent Order (Cidra, Ponce, Manatí and Vega Baja) only represent less than ten percent of the total population on the island of Puerto Rico. The proposed divestiture fails to protect most Puerto Rican consumers. The Consent Order fails to address competitive concerns in the San Juan Metropolitan Area (e.g., Bayamón), the largest population center in Puerto Rico. It is inconceivable that the divestiture would provide and adequate base to fully restore competition lost as a result of the acquisition of Amigo by Wal-Mart.

In particular, under the terms of the Consent Order, Wal-Mart may purchase Amigo, the largest supermarket chain in Puerto Rico, with the totally inadequate condition of divestiture of only four existing Amigo stores, located in Cidra, Ponce, Manatí and Vega Baja ("divested stores") to not only an unproven and untested operator, but also a sham corporation, Supermercados Máximo, Inc. ("Máximo"). For these reasons, the divestiture ordered by the FTC in the Consent Order, fails to remedy the competitive problems created by the merger, as identified by the FTC and the PRDOJ and

would, therefore, be insufficient to reestablish the competition that existed before the proposed transaction.

The Consent Order fails to recognize the competitive significance of the large draw areas of Wal-Mart Supercenters and Sam's Clubs, which is conservatively estimated to be 20 miles or more. Also, the existing overlap between Wal-Mart's stores and the Amigo chain will only intensify as Wal-Mart adds additional Supercenters, Sam's Clubs and converts its Discount Stores into Supercenters, as evidenced by Wal-Mart's expansion and conversion of Discount Stores on the mainland United States over the past decade.

Furthermore, Máximo should not be accepted by the FTC as the purchaser of the divested stores because, far from being a viable effective competitor, it is clearly a sham corporation exclusively created by the principal stockholder of Amigo to inducè the FTC into approving a 223 million dollar transaction where these stockholders are the principal beneficiaries.

For these reason, as further explained below, the PR Supermarkets and Consumers respectfully request that the FTC withdraw from the Agreement Containing Court Order and proposed Consent Order.

II. Discussion

A. The Consent Order fails to recognize and address the anticompetitive effects of the proposed merger in various geographic markets, such as the Bayamón area, where the merger, as determined by the Puerto Rico Justice Department ("PRDOJ") would substantially eliminate competition.

On November 6, 2002, PRDOJ filed a Complaint before the Superior Court of San Juan, Civil Num. KPE02-2847, seeking a preliminary and permanent injunction against Wal-Mart's proposed acquisition of Amigo. PRDOJ alleged that its investigation established that the proposed acquisition would eliminate direct competition between supercenters and club stores owned or controlled by Wal-Mart and supermarkets owned and controlled by Amigo; would increase the likelihood that Wal-Mart will

unilaterally exercise market power; and would increase the likelihood of, or facilitate, collusion or coordinated interaction, each of which increases 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 of Puerto Rico.

As also determined by the FTC in its Consent Order, the PRDOJ determined that the relevant geographic markets in which there are competitive problems related to the acquisition are the areas of Puerto Rico in and near Cayey and Cidra (the "Cayey" market), Ponce and Juana Diaz (the "Ponce market") and Barceloneta, Manatí and Vega Baja (the "Manatí market). However, the PRDOJ also determined that the acquisition would have anticompetitive effects in the area of Bayamón. In support of its allegations, the PRDOJ alleged that the Bayamón market is a highly concentrated market and that Wal-Mart and Amigo would have a combined market share of 54.80% in said area. The post acquisition HHI in said market would increase 1,380 points, from 2,150 HHI to 3,530 HHI.

The acquisition would have similar anticompetitive effects in the Humacao area, where Wal-Mart already has a market share of 50.7%. Its acquisition of the Amigo store in Juncos would give Wal-Mart an increased market share of 57.7% and the HHI in this market would increase 718 points, from 2.941 HHI to 3659 HHI.

PRDOJ's allegations regarding the anticompetitive effects of the merger in the Bayamón market and the effect in the Humacao area are substantially supported by reliable market data provided to the FTC and PRDOJ by the firm Estudios Técnicos, Inc. Notwithstanding, the Consent Order fails to address and/or remedy the anticompetitive effects of the merger within the Bayamón Area. Therefore, the FTC should not comment to the acquisition or at the very least, should request additional divestitures of stores within the Bayamón and Humacao areas, to attempt to remedy the substantial anticompetitive effects of the merger in these areas.

B. The divestiture ordered by the FTC in the Consent Order, fails to remedy the and competitive problems created by the merger, as identified by the FTC and the PRDOJ and would therefore, be insufficient to recreate the competition that existed before the proposed transaction.

The divestiture of four stores ordered by the FTC in the Consent Order fails to remedy the competitive problems created by the merger, as identified by the FTC and the PRDOJ and would therefore, be insufficient to recreate the competition that existed before the proposed transaction. In order for a divestiture to remedy the competitive problems created by a merger, the FTC must be satisfied that the assets to be divested: (1) will remedy the competitive problem, e.g., reduce or eliminate the increase in concentration in the relevant market brought about by a horizontal merger, and (2) would be sufficient in the hands of an acquirer to create or enhance a viable competitor. In other words, the FTC must ensure that the divestiture recreates the competition that existed before the proposed transaction. To that end, the FTC must be particularly concerned that the divestiture package of assets strengthens a viable and effective competitor, and not simply places a weakened competitor in the market for a limited period of time. The Merger Review Process, A Step by Step Guide to Federal Merger Review, Second Edition, page 319.

None of the requirements stated above are satisfied by the sale of the divested stores to Máximo, permitted by the FTC in the Consent Order. Ample testimony and documentary evidence indicates that Máximo is a sham corporation exclusively created by principal stockholders of Amigo to induce the FTC into approving the 223 million dollar merger, of which those shareholders are the principal beneficiaries. The facts narrated below are inconsistent with a determination that Máximo is a viable competitor, with the incentive and ability to recreate the competition that existed before the Wal-Mart/Amigo merger through its purchase of the divested stores. Indeed, the following facts show that the sale of the divested stores to Máximo is not *bona fide*:

1. Máximo is owned and was created by Mr. Steve Lausell, who together with his family, is one of the principal shareholders of Amigo and the former President of its Board of Directors. In fact Mr. Lausell was the

principal promoter of the sale of Amigo and the principal representative of all Amigo shareholders in the negotiations with Wal-Mart. His motives for purchasing the four Amigo stores are not to maintain the levels of competition existing before he sold his business to Wal-Mart; they are clearly to induce the FTC to approve the acquisition without further delay or investigation. During a hearing before the federal District Court for Puerto Rico,[1] Mr. Lausell testified that he and his family own 91% of the shares of Máximo and that they would receive approximately $40 million from the sale of Amigo.[2]

2. Contrary to what is stated in the Consent Order, Máximo was not "doing business" in Puerto Rico at the time the Consent Order was issued. Although Máximo was incorporated on September 17, 2002, as of today, Máximo has never operated a single supermarket in Puerto Rico. In fact, Máximo has not done any kind of business in Puerto Rico, other than purchase the divested stores. Its alleged principal place of business as of the day of the Consent Order, as stated by the FTC, was located at Popular Center, Suite 1822 in Hato Rey Puerto Rico. This is the address for the Law Firm of Maldonado Nicolai. No Máximo business operations takes place within that office.

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[1] On December 17, 2002, Wal-Mart filed an action against PRDOJ before the federal District Court for Puerto Rico, in the matter of Wal-Mart Stores, Inc. *et al* v. Anabelle Rodríguez, *et al*, Civil NO. 02-2778(PG), requesting that the Secretary of Justice be enjoined from filing suit against Wal-Mart to invalidate the acquisition.

[2] During his deposition in the state action filed by the PR SUPERMARKETS AND CONSUMERS, José Revuelta, President of Amigo (who will now oversee supermarket operations for Wal-Mart) testified that he was hired by Mr. Lausell to run Amigo, with the agenda of selling Amigo. In the federal court proceedings, Mr. Lausell testified that it was Revuelta who suggested that he purchase the divested stores. Obviously, this sale was promoted in order to facilitate the sale of Amigo, and not as implied in the letter of August 22, 2002 from Weil, Gotshal & Manges LLP to the FTC, as the result of the purchasers' intent to "operate and grow the business."

3. The sale price of the divested stores bares no relation to the sale price paid by Wal-Mart. Wal-Mart paid approximately $223 million for 36 Amigo stores, for an average price of $6.2 million per store. However, as testified by Mr. Mark Schimidt, Wal-Mart Vice-President in charge of mergers and acquisition, Wal-Mart sold the four divested stores to Máximo for the total price of $8.5 million, that is, an average of $2.12 million per store. In addition, Wal-Mart paid the landlords of these stores the combined amount of $5.4 million for the duration of the leases, on behalf of Máximo. Between the reduced price and the donated leases, Wal-Mart received approximately $875,000 per each store divested. In exchange for the investment of $5.4 million by Wal-Mart to cover the leases, Amigo reduced the sale price by $500,000.

4. Mr. Schimidt further testified that the payment of $5.4 million by Wal-Mart was necessary because the landlords of the four stores did not consider Máximo to be creditworthy. In addition, there has been no showing that Máximo even attempted to secure separate financing to cover the leases and other expenses to run these stores. Therefore, Máximo cannot be considered a viable competitor, as required by the FTC.

5. In fact, during the federal proceedings, PRDOJ presented evidence that it had requested a "fairness opinion" from Wal-Mart to determine whether the sale price paid by Máximo was a fair price. Wal-Mart did not comply with this request. PRDOJ further required that the agreement with Máximo contain a certification that it was the result of an "arms-length" negotiation, but PRDOJ presented testimony to the fact that this language was taken out of the agreement by Wal-Mart because Wal-Mart and Amigo represented that they could not comply with this requirement.

6. During the federal court proceedings Mr. Schmidt also testified that the FTC had suggested to Wal-Mart various potential buyers for the 4 stores, including various

local competitors, such as Grande, yet Wal-Mart did not make any real attempts to negotiate with any of those buyers, who were also viable competitors. It had obviously reached a sham deal with Mr. Lausell to exclude any such viable competitors from the purchase of said stores. There is no justification for Wal-Mart not pursuing other potential buyers identified during the FTC's investigation.

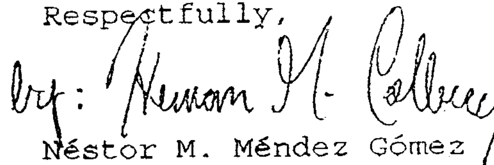
7. During the federal proceedings, Wal-Mart's expert witness, Mr. Gregory Vistnes, former Deputy Director of the Bureau of Economics at the FTC, testified that, to his knowledge, this is the first time that a seller in a merger has qualified as the buyer of divested stores. Indeed, he could not remember any case in which merging companies were allowed to divest stores to the principal stockholders of one of the merging entities.

All of these facts evidence that Máximo is not a viable competitor and that its purchase of the divested stores was not in good faith, as required by the FTC. Furthermore, the divestiture of only four stores is wholly inadequate to provide a sufficient foundation for successful entry or future growth.

Absent the acquisition of Amigo by Wal-Mart, consumers in Puerto Rico would have the benefits of enhanced competition and lower prices. The competition between Wal-Mart and Amigo, previously the two largest and fastest growing supemarket chains on the island, would have been the key driver of enhanced competition.

In summary and for the reasons stated above, the FTC should withdraw from the Agreement Containing Consent Order and the proposed Consent Order.

Respectfully,



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