

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO.

03-1983-E

In the Matter of:

BIG Y FOODS, INC.

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ASSURANCE OF DISCONTINUANCE

I. Introduction

1. Big Y Foods, Inc. ("Big Y") has entered into an agreement with Waldbaum, Inc., to purchase certain leasehold interests and other assets associated with four supermarkets in Springfield, South Hadley and Westfield, Massachusetts. Both Big Y and Waldbaum, doing business under the "A&P Foodmart" trade name, operate retail supermarket stores in western Massachusetts. (Waldbaum is referred to herein as "A&P.")

2. A&P's sale of these western Massachusetts stores to Big Y, as well as the sales of other Massachusetts grocery store locations to other supermarket operators, are part of A&P's announced withdrawal from northern New England food-retail markets. Until its withdrawal from these markets, A&P's stores in Springfield, South Hadley and Westfield have competed with Big Y stores in western Massachusetts for supermarket sales to customers within relevant markets.

3. Big Y plans to vacate its current retail locations on Westfield Road in West Springfield and on Wilbraham Road in Springfield, and to operate two of the locations purchased from A&P (Main Street in Westfield and Cooley Street in Springfield) as replacements for these stores.



4. The Commonwealth of Massachusetts, by its Attorney General Tom Reilly, has conducted a review of the proposed sale to Big Y of stores in Springfield, South Hadley and Westfield, Massachusetts, and has expressed concern that the proposed sales may substantially lessen competition for supermarkets in areas of the Commonwealth in violation of Section 7 of the Clayton Act, the Sherman Act, 15 U.S.C. § 1, the Massachusetts Antitrust Act, M.G.L. c. 93, § 4.

5. Before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, the Commonwealth and Big Y, by their attorneys, have consented to the entry of this Assurance of Discontinuance (“Assurance”). This Assurance resolves the concerns of the Commonwealth raised by the investigation of the sales of these stores to Big Y. The parties acknowledge that this Assurance is entered by way of settlement and compromise. Nothing herein, nor any transaction made with reference hereto, shall be deemed to constitute an admission of fact or law by any party.

II. Parties

6. The Commonwealth of Massachusetts, represented by the Attorney General, files this Assurance in the public interest. The Attorney General is authorized to investigate this transaction and to enter into this Assurance pursuant to M.G.L. c. 93, § 9.

7. Big Y is a Massachusetts corporation with headquarters at 2145 Roosevelt Avenue, P.O. Box 7840, Springfield, Massachusetts 01104. Big Y is engaged in the business of operating supermarket locations in Massachusetts and Connecticut.

III. Jurisdiction and Venue

8. This Court has jurisdiction over the subject matter and over the parties hereto.

IV. General Provisions

9. Definitions. As used in this Assurance, the following terms shall have the following meaning:

A. "Price zone" is defined as a geographic area, designated by Big Y, within which Big Y's supermarket stores use the same formula or methodology for setting prices, and within which all identical grocery items at Big Y's various stores are priced the same.

B. "Sixteen Acres site" means Big Y store no. 16, formerly operating under the Big Y trade name, located at 1941 Wilbraham Road, Springfield, but does not include any of Big Y's trade marks, trade dress, service marks or trade names, or proprietary software, systems, or equipment of Big Y.

C. "Supermarket" is defined as a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen 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.

D. "West Springfield site" means Big Y store no. 9, formerly operating under the Big Y trade name, located at 2611 Westfield Road, West Springfield, but does not include any of Big Y's trade marks, trade dress, service marks or trade names, or proprietary software, systems, or equipment of Big Y.

E. The term "Springfield area" is defined as the counties of Hampden and Hampshire and all cities and towns within those counties.

10. The provisions of this Assurance apply to the undersigned parties, their successors and assigns, subsidiaries, directors, officers, managers, agents, and employees, and all other persons in active concert of participation with any of them who shall have notice of this Assurance.

11. Nothing contained in this Assurance shall suggest that any portion of this Assurance is or has been created for the benefit of any third party and nothing in this document shall be construed to provide any rights to any third party.

12. Nothing contained in this Assurance shall be construed to limit in any manner whatsoever the authority of the Attorney General of Massachusetts under any provision of law to investigate any matter, to obtain such documents and information through subpoena, civil investigative demand, or any other lawful process, or to bring any action the Attorney General deems appropriate under such provision of law.

V. Provisions Relating To Store Pricing And Marketing Of Vacated Sites

13. Pricing Restriction. With respect to the three stores that it will acquire from A&P and operate as “Big Y” supermarkets, Big Y will maintain the same price zone policies or pricing format utilized at its other stores in the Springfield area for a period of three years. In the event of a new store opening within two miles of an existing Big Y location in the Springfield area, Big Y may *lower* prices of Big Y stores in the relevant market to meet the new competitive opening without lowering prices at all stores in the Springfield area.

14. Sale of Interest in Vacated Stores. Big Y agrees to make available for sale its leasehold interest in the West Springfield site and in the Sixteen Acres site upon completing the purchase of A&P locations in Westfield and Cooley Street in Springfield. For a period of up to three months, Big Y shall market its interest in the West Springfield site and the Sixteen Acres site by commercially reasonable means to prospective purchasers for use as a supermarket. Within that time, that Big Y may reject any offer for use as a supermarket that does not provide for market rent or payment of market value for fixtures, equipment and leasehold improvements. If, after marketing the West Springfield site and Sixteen Acres sites for a period of three months, Big Y has not received a reasonably acceptable offer for use of either or both of the sites as a supermarket, Big Y may market the site for non-supermarket use or may itself retain the site. Notwithstanding the foregoing, Big Y shall not be required to market its interest in the West

Springfield site and in the Sixteen Acres site to The Stop & Shop Supermarket Company or any of its corporate affiliates.

15. Big Y shall be required to undertake reasonable efforts and to act in good faith to assist a prospective purchaser of its interest in the West Springfield site and/or the Sixteen Acres site in securing approval of the Lessor, if required, and other necessary approvals. Big Y agrees to take all reasonable steps to accomplish the transfer of its interests in either or both of the sites in as prompt and timely a manner as possible, as contemplated by this Assurance.

16. Except as permitted herein, Big Y shall refrain from selling, subleasing or otherwise encumbering the store locations pending completion of the required marketing efforts. Big Y shall be required to preserve and protect the locations to be marketed hereunder.

17. Pending completion of the required marketing efforts, Big Y shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the West Springfield site and the Sixteen Acres site consistent with this Assurance and to prevent the destruction, removal, wasting, deterioration, or impairment of the sites except in the ordinary course of business and except for ordinary wear and tear; provided, however, that Big Y shall not be required to continue operating the West Springfield site or the Sixteen Acres site as a supermarket pending completion of the required marketing efforts, nor shall Big Y be prevented from removing its trade marks, trade dress, service marks or trade names, or proprietary software, systems, or equipment prior to completion of the required marketing efforts.

18. Big Y shall report in writing to the Attorney General every thirty (30) days concerning its efforts to accomplish the sale of its leasehold interest in the West Springfield site and Sixteen Acres site for use as a supermarket, including, but not limited to (a) a list of persons in the supermarket or food retail industry to whom notice of the availability of the sites has been presented; (b) any responses or offers received by Big Y regarding use of either or both of the sites as supermarkets; and (c) the status of any negotiations regarding the sites.

19. In the event that Big Y is unsuccessful in accomplishing a sale of its interest in the West Springfield site and/or the Sixteen Acres site for use as a supermarket, Big Y shall report to the Attorney General the reasons for its failure, in good faith, to do so.

20. Request for Information. Throughout the term of this Assurance, Big Y shall respond promptly to any reasonable requests for information or documents made by the Attorney General to ensure compliance with this Assurance.

VI. Termination

21. The terms of this assurance shall terminate on the third anniversary of the date signed below.

Dated: 4/18/03

COMMONWEALTH OF MASSACHUSETTS

THOMAS F. REILLY
Attorney General

By: Mary B. Freeley

Mary B. Freeley (Mass. BBO #544788)
Timothy Moran (Mass. BBO #638082)
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

BIG Y FOODS, INC.

By its Attorneys,

[Signature]
David A. Shirair (Mass. BBO #459880)
Cooley Shirair, PC
1380 Main Street
Springfield, Massachusetts 01103
(413) 735-8000

[Signature]
Christopher J. MacAvoy
Howrey Simon Arnold & White, LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 783-0800