

1310162

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright

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 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

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Lone Star” means Respondent Lone Star Fund V (U.S.), L.P., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Lone Star Fund V (U.S.), L.P. (including Respondent Bi-Lo), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Bi-Lo” means Respondent Bi-Lo Holdings, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Bi-Lo Holdings, LLC (including, after the Acquisition is consummated, the Harveys, Reid’s and Sweetbay Supermarket assets acquired from Respondent Delhaize America), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Delhaize” means Respondent Etablissements Delhaize Frères et Cie “Le Lion” (Group Delhaize), its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Delhaize (including Respondent Delhaize America), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Delhaize America” means Respondent Delhaize America, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled Delhaize America, LLC (including, prior to the Acquisition, the Harveys, Reid’s and Sweetbay Supermarket assets proposed for sale to Bi-Lo), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- E. “Respondents” means Lone Star, Bi-Lo, Delhaize and Delhaize America, individually and collectively.
- F. “Acquirer” means any entity approved by the Commission to acquire any or all of the Assets To Be Divested pursuant to this Order.
- G. “Acquisition” means Bi-Lo’s proposed acquisition of Harveys, Reid’s and Sweetbay Supermarket assets from Delhaize America, to be effectuated through eight separate closings, pursuant to the Acquisition Agreement.
- H. “Acquisition Agreement” means the Agreement and Plan of Merger by and among Delhaize America, LLC, Kash N’ Karry Food Stores, Inc., J.H. Harvey, Co., LLC, Food Lion, LLC,

Retained Subsidiary One, LLC, Bi-Lo, LLC and Samson Merger Sub, LLC, dated as of May 27, 2013, as amended and restated on January 31, 2014.

- I. “Assets To Be Divested” means the Harveys Supermarkets (Store Nos. 2336, 2349, 2370, 2374, 2375, 2378, and 2379), the Reid’s Supermarket (Store No. 442), and the Sweetbay Supermarkets (Store Nos. 1791, 1795, 1879 and 1883) identified on Schedule A of this Order, and all rights, title and interest in and to all tangible assets , relating to, used in, and/or reserved for use in, the Supermarket business operated at each of those locations, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, books and records, government approvals and permits (to the extent transferable), telephone and fax numbers, and goodwill. At each Acquirer’s option, the Assets To Be Divested shall also include any or all inventory as of the Divestiture Date.

Provided, however, that Assets To Be Divested shall not include (1) those assets consisting of or pertaining to any of the Respondents’ trademarks, trade dress, service

- Q. “Fifth Closing” means the fifth scheduled closing pursuant to Article II of the Acquisition Agreement.
- R. “Sixth Closing” means the sixth scheduled closing pursuant to Article II of the Acquisition Agreement.
- S. “Seventh Closing” means the seventh scheduled closing pursuant to Article II of the Acquisition Agreement.
- T. “Eighth Closing” means the eighth and final scheduled closing pursuant to Article II of the Acquisition Agreement.
- U. “Food Giant” means Food Giant Supermarkets, Inc., a Supermarket operator organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its offices and principle place of business located at 120 Industrial Drive, Sikeston, Missouri.
- V. “Food Giant Divestiture Agreement” means the Divestiture Agreement dated as of January 24, 2014, by and between Respondent Bi-Lo and Food Giant, attached as non-public Appendix I, for the divestiture of Harveys Store Nos. 2378 (Bainbridge, Georgia) and 2379 (Madison, Florida).
- W. “Homeland” means HAC, Inc., a Supermarket operator organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its offices and principle place of business located at 390 N.E. 36th Street, Oklahoma City, Oklahoma.
- X. “Homeland Divestiture Agreement” means the Divestiture Agreement dated as of January 28, 2014, by and between Respondent Bi-Lo and Homeland, attached as non-public Appendix II, for the divestiture of Harveys Store Nos. 2336 (Vidalia, Georgia), 2374 (Statesboro, Georgia) and 2375 (Statesboro, Georgia).
- Y. “Proposed Acquirer” means any proposed acquirer of any of the Assets To Be Divested submitted to the Commission for its approval under this Order; “Proposed Acquirer” includes, as appropriate, Food Giant, Homeland, Rowe’s and W. Lee Flowers.
- Z. “Relevant Areas” means the county or counties that include the following cities and towns in Florida, Georgia and South Carolina:
1. Arcadia, Florida;
 2. Dunnellon, Florida;
 3. Lake Placid, Florida;
 4. Madison, Florida;
 5. Wauchula, Florida;
 6. Americus, Georgia;
 7. Bainbridge, Georgia;
 8. Statesboro, Georgia;

9. Sylvania, Georgia;
10. Vidalia, Georgia;
11. Waynesboro, Georgia;
12. Batesburg, South Carolina; and
13. Hampton, South Carolina.

AA. "Rowe's" means Rowe's IGA Supermarkets, a Supermarket operator organized, existing and doing business under and by virtue of the laws of the State of Florida, with its offices and principle place of business located at 5435 Blanding Blvd, Jacksonville, Florida.

BB. "Rowe's Divestiture Agreement" means the Divestiture Agreement dated as of January 24, 2014, by and between Respondent Bi-Lo and Rowe's, attached as non-public Appendix III,

Georgia) and 2370 (Sylvania, Georgia), and Reid's Store No. 442 (Batesburg, South Carolina).

II.

IT IS FURTHER ORDERED that:

- A. Lone Star and Bi-Lo shall divest the Assets To Be Divested, absolutely and in good faith, as ongoing Supermarket businesses, as follows:
1. Within 10 days of the First Closing pursuant to the Acquisition Agreement, Sweetbay Store No. 1795 (Dunnellon, Florida) shall be divested to Rowe's pursuant to and in accordance with the Rowe's Divestiture Agreement;
 2. Within 10 days of the Second Closing pursuant to the Acquisition Agreement, Sweetbay Store No. 1879 (Lake Placid, Florida) shall be divested to Rowe's pursuant to and in accordance with the Rowe's Divestiture Agreement;
 3. Within 10 days of the Third Closing pursuant to the Acquisition Agreement, Sweetbay Store No. 1791 (Wauchula, Florida) shall be divested to Rowe's pursuant to and in accordance with the Rowe's Divestiture Agreement;
 4. Within 10 days of the Fourth Closing pursuant to the Acquisition Agreement, Sweetbay Store No. 1883 (Arcadia, Florida) shall be divested to Rowe's pursuant to and in accordance with the Rowe's Divestiture Agreement;
 5. Within 10 days of the Fifth Closing pursuant to the Acquisition Agreement, Harveys Store Nos. 2336 (Vidalia, Georgia), 2374 (Statesboro, Georgia) and 2375 (Statesboro, Georgia) shall be divested to Homeland pursuant to and in accordance with the Homeland Divestiture Agreement;
 6. Within 10 days of the Sixth Closing pursuant to the Acquisition Agreement, Harveys Store No. 2370 (Sylvania, Georgia) shall be divested to W. Lee Flowers pursuant to and in accordance with the W. Lee Flowers Divestiture Agreement;
 7. Within 10 days of the Seventh Closing pursuant to the Acquisition Agreement, Harveys Store No. 2349 (Waynesboro, Georgia) shall be divested to W. Lee Flowers pursuant to and in accordance with the W. Lee Flowers Divestiture Agreement;
 8. Within 10 days of the Eighth Closing pursuant to the Acquisition Agreement, Harveys Store Nos. 2378 (Bainbridge, Georgia) and 2379 (Madison, Florida) shall be divested to Food Giant pursuant to and in accordance with the Food Giant Divestiture Agreement, and Reid's Store No. 442 (Batesburg, South Carolina) shall be divested to W. Lee Flowers pursuant to and in accordance with the W. Lee Flowers Divestiture Agreement.

Provided, however, that in cases in which books or records included in the Assets To Be Divested contain information (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents or (b) such that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies or relevant excerpts of the materials containing such information. In instances where such copies are provided to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

- B. *Provided, further,* that if, prior to the date this Order becomes final, Lone Star and Bi-Lo have divested the Assets To Be Divested pursuant to Paragraph II.A and if, at the time the Commission determines to make this Order final, the Commission notifies Lone Star and Bi-Lo that:
1. Any Proposed Acquirer identified in Paragraph II.A is not an acceptable Acquirer, then Lone Star and Bi-Lo shall, within five days of notification by the Commission, rescind such transaction with that Proposed Acquirer, and shall divest such assets as ongoing Supermarket businesses, absolutely and in good faith, at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission, within 90 days of the date the Commission notifies Lone Star and Bi-Lo that such Proposed Acquirer is not an acceptable Acquirer; or
 2. The manner in which any divestiture identified in Paragraph II.A was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph III of this Order, to effect such modifications to the manner of divesting those assets to such Acquirer (including, but not limited to, entering into additional agreements or arrangements, or modifying the relevant Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.
- C. Respondents shall obtain at their sole expense all required Third Party Consents relating to the divestiture of all Assets To Be Divested prior to the applicable Divestiture Date.
- D. All Divestiture Agreements approved by the Commission:
1. Shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of any such Divestiture Agreement shall constitute a violation of this Order.
 2. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligation of Respondents under such agreement. If any term of any Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order.

E.

8. Lone Star and Bi-Lo 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph III.
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. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
12. The Divestiture Trustee shall report in writing to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture(s).
13. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
14. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, representatives, and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties and responsibilities.

IV.

IT IS FURTHER ORDERED that:

- A. For a period of ten (10) years commencing on the date this Order is issued, Lone Star and Bi-Lo shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission:

1. Acquire 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 any of the Relevant Areas.
2. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in any of the Relevant Areas.

Provided, however, that advance written notification shall not apply to the construction of new facilities or the acquisition or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Lone Star's or Bi-Lo's offer to purchase or lease such facility.

- B. Said notification under this Paragraph 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 Lone Star and Bi-Lo and not of any other party to the transaction. Lone Star and Bi-Lo 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), Lone Star and Bi-Lo 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:

- 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 material written communications to and from such parties, all non-privileged internal memoranda, 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, Lone Star and Bi-Lo shall file verified written reports with the Commission setting forth in detail the manner and form in

Schedule A
Assets To Be Divested

Harvey's Store No. 2336, located 300 W 1st St., Vidalia, Georgia
Harvey's Store No. 2349, located at 208 W 6th St., Waynesboro, Georgia
Harvey's Store No. 2370, located at 101 Mims Rd, Sylvania, Georgia
Harvey's Store No. 2374, located at 603 Northside Dr. W, Suite 2, Statesboro, Georgia
Harvey's Store No. 2375, located at 620 Fair Rd, Statesboro, Georgia
Harvey's Store No. 2378, located at 1615 E. Shotwell St., Bainbridge, Georgia
Harvey's Store No. 2379, located at 819 E. Base St., Madison, Florida
Reid's Store No. 442, located at 217 W. Columbia Ave., Batesburg, South Carolina
Sweetbay Store No. 1791, located at 1133 US Highway 17 S, Wauchula, Florida
Sweetbay Store No. 1795, located at 11352 N. Williams St., Suite 305, Dunnellon, Florida
Sweetbay Store No. 1879, located at 1519 US Highway 27 S, Lake Placid, Florida
Sweetbay Store No. 1883, located at 1737 E. Oak St., Arcadia, Florida

APPENDIX I

Food Giant Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX II

Homeland Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX III

Rowe's Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX IV

W. Lee Flowers Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]