

Complaint

IN THE MATTER OF

**ETABLISSEMENTS DELHAIZE FRERES
ET CIE “LE LION” S.A., ET AL.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3962; File No. 9910308
Complaint, July 24, 2000--Decision, May 30, 2001*

This consent order addresses the acquisition by Respondent Etablissements Delhaize Freres et Cie “Le Lion” S.A. and its subsidiary, Respondent Delhaize America – a North Carolina corporation that operates most of its stores under the names of “Food Lion” and “Kash N’ Karry” in the Southeast and Mid-Atlantic regions of the United States – of Hannaford Bros. Company, which operates stores under the “Hannaford” or “Shop ‘N Save” banner in New England, New York, Virginia and North Carolina. The order, among other things, requires the respondents to divest 37 Hannaford supermarkets and one Hannaford supermarket site in the relevant markets to three different buyers selected by the respondents – The Kroger Company, Lowe’s Food Stores, Inc., and the Sylvester Group – subject to the approval of the Commission. The order also requires the respondents, for ten years, to provide written notice to the Commission prior to acquiring supermarket assets located in, or any interest in any entity that owns or operates a supermarket located in, the county or counties that include the relevant geographic markets. An accompanying Order to Maintain Assets requires the respondents to maintain the viability, competitiveness and marketability of the assets to be divested, and prohibits them from causing the wasting or deterioration of those assets, pending completion of the required divestitures.

Participants

For the Commission: *Alan B. Loughnan, Michael Joel Bloom, Kay Taylor Hightower, Susan E. Raitt, Theodore Zang, Dara Diomande, Barbara Anthony, David A. von Nirschl, Roberta S. Baruch and Daniel Hosken.*

For the Respondents: *Andrew Berg and Anthony Swisher, Akin, Gump, Strauss, Hauer & Feld, L.L.P., and Christopher MacAvoy, Howrey, Simon, Arnold & White.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent Delhaize America, Inc. ("Delhaize America"), of which respondent Etablissements Delhaize Freres et Cie "Le Lion" S.A. ("Delhaize") is the majority owner, have entered into an agreement to acquire all of the outstanding voting stock of respondent Hannaford Bros. Co. ("Hannaford"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Definition

1. For the purposes of this complaint:

"Supermarket" means a full-line retail grocery store with annual sales of at least \$2 million 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; 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.

Complaint

Etablissements Delhaize Freres et Cie "Le Lion" S.A.

2. Respondent Delhaize is a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at rue Osseghem, 1080 Brussels, Belgium.
3. Respondent Delhaize, through Delhaize America, of which Delhaize is the majority owner, is, and at all times relevant herein has been, engaged in the operation of supermarkets in Virginia, North Carolina, South Carolina, Georgia, Florida, Tennessee, Kentucky, West Virginia, Pennsylvania, Delaware, and Maryland. Delhaize through Delhaize America operates more than 1200 supermarkets in these states under the trade names "Food Lion," "Save 'N Pack," and Kash n' Karry. Delhaize had \$11 billion in total sales in the United States for 1999.
4. Respondent Delhaize is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Hannaford Bros. Co.

5. Respondent Hannaford is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located in Portland, ME.
6. Respondent Hannaford is, and at all times relevant herein has been, engaged in the operation of supermarkets in Virginia, North Carolina, South Carolina, Maine, Massachusetts, New Hampshire, Vermont, and New York. Hannaford operates

Complaint

approximately 50 supermarkets in Virginia, North Carolina, and South Carolina under the "Hannaford" trade name. Hannaford had \$3.46 billion in total sales for 1999.

7. Respondent Hannaford is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Acquisition

8. On August 17, 1999, Delhaize America and Hannaford entered into an Agreement and Plan of Merger. Delhaize America will acquire all of the outstanding voting stock of Hannaford for approximately \$3.5 billion.

Trade and Commerce

9. The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

10. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")) as well as a deep inventory of those SKUs. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

11. Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at nearby supermarkets.

Complaint

Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

12. Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets because they operate significantly different retail formats. None of these stores offers a supermarket's distinct set of products and services that enable consumers to one-stop shop for food and grocery products.

13. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the county or counties that include the following incorporated cities and towns in North Carolina:

- a) the Wilmington, NC MSA;
- b) Columbus County, NC;
- c) Pender County, NC;
- d) Duplin County;
- e) the Greater Raleigh area, consisting of Wake County excluding the cities and towns of Wake Forest, Rolesville, Zebulon, and Wendell;
- f) the Richmond, VA MSA;
- g) the portion of the Norfolk-Virginia Beach-Newport News VA MSA that includes Newport News,

Complaint

Hampton, and other parts of the MSA north of the James River: and

- h) the portion of the Norfolk-Virginia Beach-Newport News VA MSA that includes Norfolk, Virginia Beach, Portsmouth, and other parts of the MSA south of the James River.

Market Structure

14. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Delhaize America and Hannaford would have a combined market share that ranges from 36.7 percent to 93.7% percent in each geographic market. The post-acquisition HHIs in the geographic markets range from 2764 points to 8817 points.

Entry Conditions

15. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

Actual Competition

16. Delhaize through Delhaize America and Hannaford are actual and direct competitors in the relevant markets.

Effects

17. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country in violation 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, in the following ways, among others:

Complaint

- a) by eliminating direct competition between supermarkets owned or controlled by Delhaize and supermarkets owned and controlled by Hannaford;
- b) by increasing the likelihood that Delhaize will unilaterally exercise market power; and
- c) by increasing the likelihood of, or facilitating, collusion or coordinated interaction,

each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

Violations Charged

18. The Agreement and Plan of Merger between Delhaize America and Hannaford to acquire all of the outstanding voting stock of Hannaford violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition would, if consummated, violate 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fourth day of July, 2000, issues its complaint against said respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition of Respondent Hannaford Bros. Co. (“Hannaford”) by Respondent Delhaize America, Inc., formerly Food Lion Inc., (“Delhaize America”) of which Respondent Etablissements Delhaize Freres et Cie “Le Lion” S.A. (“Delhaize”), a Belgian company, is the majority owner, hereinafter referred to as “Respondents,” and Respondents having been furnished with a copy of a draft of Complaint that the Bureau of Competition presented 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 of 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 as alleged in such Complaint, other than the 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 had reason to believe that the 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 agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to Commission Rule 2.34, 16 C.F.R.

Decision and Order

§ 2.34, now in further conformity with the procedure described in Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent Delhaize is a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at rue Osseghem, 1080 Brussels, Belgium.
2. Respondent Delhaize America, the majority owner of which is Delhaize, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 2110 Executive Drive, Salisbury, North Carolina 28145.
3. Respondent Hannaford is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located in Portland, Maine.
4. 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. “Delhaize” means Etablissements Delhaize Freres et Cie “Le Lion” S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Etablissements Delhaize Freres et Cie “Le Lion” S.A. (including, but not limited to, Delhaize America), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Decision and Order

B. “Delhaize America” means Delhaize America, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Delhaize America, Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. “Hannaford” means Hannaford Bros. Co., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Hannaford Bros. Co. (including, but not limited to, Boney Wilson & Sons, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. “Respondents” means Delhaize, Delhaize America, and Hannaford, individually and collectively.

E. “Commission” means the Federal Trade Commission.

F. “Acquisition” means Delhaize America’s proposed acquisition of Hannaford pursuant to the Agreement and Plan of Merger dated August 17, 1999.

G. “Schedule A Assets” means the Supermarkets identified in Schedule A of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents’ trade marks, trade dress, service marks, or trade names.

H. “Schedule B Assets” means the Supermarkets identified in Schedule B of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations,

Decision and Order

but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

I. "Schedule C Assets" means the Supermarkets identified in Schedule C of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

J. "Supermarket" means 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; frozen and refrigerated 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.

K. "Kroger" means The Kroger Co., a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 1014 Vine Street, Cincinnati, OH 45202-1100.

L. "Lowe's" means Lowe's Food Stores, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal place of business located at 1381 Old Mill Circle, Suite 200, P.O. Box 24908, Winston Salem, NC 27114-4908.

M. "The Sylvester Group" means the group of sixteen existing affiliated companies doing business as the Sylvester Group that operate twenty-six Piggly Wiggly supermarkets and

Decision and Order

three pharmacies in rural eastern North Carolina.

N. “Kroger Agreement” means the Contract of Sale between Boney Wilson & Sons, Inc., and Kroger Limited Partnership I executed on May 22, 2000, attached hereto as non-public Appendix I, for the divestiture by Respondents to Kroger of the Schedule A Assets.

O. “Lowe’s Agreement” means the Asset Purchase Agreement by and among Boney Wilson & Sons, Inc., Hannaford Bros. Co., Delhaize America, Inc, Lowes’s Food Stores, Inc., and Alex Lee, Inc. executed on May 19, 2000, attached hereto as non-public Appendix II, for the divestiture by Respondents to Lowe’s of the Schedule B Assets.

P. “Sylvester Group Agreement” means the Contract of Sale by and between Boney Wilson & Sons, Inc. and Flockhart Foods, Inc. entered into as of May 22, 2000, attached hereto as non-public Appendix III, for the divestiture by Respondents to the Sylvester Group of the Schedule C Assets.

Q. “Faison” means Faison-Food Stores, L.L.C., a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, Faison Capital Development, Inc., the controlling entity of Faison-Food Stores, L.L.C., and Faison Enterprises, Inc.

R. “Faison Agreement” means the Contract of Sale by and among Boney Wilson & Sons, Inc., and Faison Food Stores, LLC, executed on June 22, 2000, attached hereto as non-public Appendix IV, for the divestiture by Respondents of the underlying fee in the real estate for Hannaford stores numbered 415, 425, 441, 444, and 455, and the underlying lease interest in the real estate for Hannaford stores numbered 442, 426, 439, 424, 428, 436 and 444, as identified in Schedule B, to Faison to be leased back to Lowe’s.

S. “Relevant Areas” means the county or counties that include the following incorporated cities and towns in North Carolina and

Decision and Order

Virginia:

1. the Wilmington, NC MSA;
2. Columbus County, NC;
3. Pender County, NC;
4. Duplin County, NC;
5. the Greater Raleigh area, consisting of Wake County NC excluding the cities and towns of Wake Forest, Rolesville, Zebulon, and Wendell;
6. the Richmond, VA MSA;
7. the portion of the Norfolk-Virginia Beach-Newport News, VA MSA that includes Newport News, Hampton, and other portions of the MSA north of the James River; and
8. the portion of the Norfolk-Virginia Beach-Newport News, VA MSA that includes Norfolk, Virginia Beach, Portsmouth, and other parts of the MSA south of the James River.

T. “Third Party Consents” means all consents from any other person, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the date on which the Order becomes final, Respondents shall divest the Schedule A Assets to Kroger pursuant to and in accordance with the Kroger Agreement. The Kroger Agreement is incorporated by reference by reference into this Order and made a part hereof as non-public Appendix I. Any failure by Respondents to comply with all terms of the Kroger Agreement shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Schedule A Assets to Kroger prior to the date this Order becomes final, and if, at the time the Commission determines to make this

Decision and Order

Order final, the Commission notifies Respondents that Kroger is not an acceptable purchaser of the Schedule A Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Kroger and shall divest the Schedule A Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. Not later than ten (10) days after the date on which the Order becomes final, Respondents shall divest the Schedule B Assets to Lowe's pursuant to and in accordance with the Lowe's Agreement. Provided, however, that not later ten (10) days after the date on which the Order becomes final, Respondents shall divest the underlying fee in the real estate for Hannaford stores numbered 415, 425, 441, 444, and 455, and the underlying lease interests in the real estate for Hannaford stores numbered 442, 426, 439, 424, 428, 436, and 444, as identified in Schedule B, to Faison, a real estate developer, pursuant to the Faison Agreement, to be leased back to Lowe's. The Lowe's Agreement and the Faison Agreement are incorporated by reference into this Order and made a part hereof as non-public Appendix II. Any failure by Respondents to comply with all terms of the Lowe's Agreement or the Faison Agreement shall constitute a failure to comply with this Order.

Provided further, however, that if Respondents have divested the Schedule B Assets to Lowe's 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 Lowe's is not an acceptable purchaser of the Schedule B Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Lowe's and shall divest the Schedule B Assets within three (3) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission

Decision and Order

C. Not later than ten (10) days after the date on which the Order becomes final, Respondents shall divest the Schedule C Assets to the Sylvester Group pursuant to and in accordance with the Sylvester Group Agreement. The Sylvester Group Agreement is incorporated by reference into this Order and made a part hereof as non-public Appendix III. Any failure by Respondents to comply with all terms of the Sylvester Group Agreement shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Schedule C Assets to the Sylvester Group 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 the Sylvester Group is not an acceptable purchaser of the Schedule C Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with the Sylvester Group and shall divest the Schedule C Assets within three (3) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission

D. Respondents shall obtain all required Third Party Consents prior to the closing of each of the agreements to divest, as described in Paragraphs II.A., II.B. and II.C., or any other agreement(s) approved by the Commission to accomplish the divestitures described in Paragraphs II.A., II.B., or II.C.

E.. The purpose of the divestitures is to ensure the continuation of the Schedule A Assets, Schedule B Assets, and Schedule C 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.

Decision and Order

III.

IT IS FURTHER ORDERED that:

A. If Respondents have not, within the time periods required, complied with the requirements to divest of Paragraphs II.A., II.B. or II.C., absolutely and in good faith and with the Commission's prior approval and in the manner approved by the Commission, the Commission may appoint a person or persons as trustee or trustees (as used herein "trustee" shall mean "trustee or trustees") to effectuate the divestiture.

B. In the event that the Commission or the Attorney General brings an action pursuant to Section 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 trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a 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 trustee, pursuant to Section 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.

C. If a 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 trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The 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 trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee,

Decision and Order

- Respondents shall be deemed to have consented to the selection of the proposed trustee.
2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A Assets, Schedule B Assets, and/or the Schedule C Assets.
 3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
 4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph III.C.3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods.
 5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the assets to be divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. 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 trustee, by the court.
 6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each

Decision and Order

contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to an acquirer as set out in Paragraph II of this Order; provided, however, if the 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 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 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 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 trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets to be divested.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or

Decision and Order

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 trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute 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 trustee issue such additional orders or directions as may be necessary or appropriate to accomplish each divestiture required by this Order.
11. The trustee shall have no obligation or authority to operate or maintain the assets to be divested.
12. The trustee shall report in writing to Respondents and the Commission every thirty (30) days concerning the trustee's efforts to accomplish each divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that Respondents shall maintain the viability, marketability, and competitiveness of the Schedule A Assets, Schedule B Assets, and Schedule C Assets, hereinafter collectively and individually referred to as the "Assets To Be Maintained," pending their divestiture, and shall not cause the wasting or deterioration of the Assets To Be Maintained, nor shall they cause the Assets To Be Maintained 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 Maintained. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Maintained pursuant to the terms of this Order. Respondents shall conduct or cause to be conducted the business of the Assets To Be Maintained in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with

Decision and Order

suppliers, customers, employees, and others having business relations with the Assets To Be Maintained in the ordinary course of business and in accordance with past practice. Respondents shall not terminate the operation of any of the Assets To Be Maintained. Respondents shall continue to maintain the inventory of each of the Assets To Be Maintained at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each of the Assets To Be Maintained intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, Respondents shall, without limitation:

1. maintain operations and departments and not reduce hours at each of the Assets To Be Maintained;
2. not transfer inventory from any of the Assets To Be Maintained other than in the ordinary course of business consistent with past practice;
3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations, in each case in a manner consistent with past practice;
4. maintain the books and records of each of the Assets To Be Maintained;
5. 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 to another location, or that indicates any of the Assets To Be Maintained will close;
6. not remove the trade marks, trade dress, service marks, or trade names of Respondents at any of the Assets To Be Maintained;
7. not conduct any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any of the Assets To Be Maintained; and
8. not change or modify in any material respect the existing

Decision and Order

advertising practices, programs and policies for any of the Assets To Be Maintained, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

V.

IT IS FURTHER ORDERED that, for a period of ten (10) years from 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, within six (6) months prior to the date of such proposed acquisition, in the county or counties that include the Relevant Areas.

B. 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 the county or counties that include the Relevant Areas.

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

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 (hereinafter referred to as "the Notification"), 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

Decision and Order

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 twenty (20) 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.

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final:

A. 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, 1998, in the county or counties that include the Relevant Areas to operate a Supermarket at that site if such Supermarket was formerly owned or operated by Respondents.

B. Respondents shall not remove any fixtures or equipment from a property owned or leased by Respondents in the county or counties that include the Relevant Areas that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; or (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by Respondents.

Decision and Order

VII.**IT IS FURTHER ORDERED** that:

A. Within thirty (30) days after the date Respondents signed the Agreement Containing Consent Orders and every thirty (30) days thereafter until 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 compliance 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 Order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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 it has complied and is complying with this Order.

VIII.

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 Respondents that may affect compliance obligations arising out of the Order.

Decision and Order

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and 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 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.

X.

IT IS FURTHER ORDERED that this Order shall terminate on May 30, 2011.

Decision and Order

Schedule A

The Schedule A Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in Virginia, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

Hannaford Store No. 427, located at 9480 W. Broad St.,
Richmond, VA

Hannaford Store No. 474, located at 2738 Hannaford Plaza,
Richmond, VA

Hannaford Store No. 477, located at 4816 S. Laburnum,
Richmond, VA

Hannaford Store No. 478, located at 1356 Gaskins Rd.,
Richmond, VA

Hannaford Store No. 479, located at 3507 W. Cary St., Richmond,
VA

Hannaford Store No. 480, located at 11400 Huguenot Rd.,
Midlothian, VA

Hannaford Store No. 481, located at 10921 Hull St., Midlothian,
VA

Hannaford Store No. 484, located at 7951 Brook Rd., Richmond,
VA

Hannaford Store No. 486, located at 12201 So. Chalkley, Chester,
VA

Hannaford Store No. 490, located at 1601 Willow Lawn Dr.,
Richmond, VA

Hannaford Store No. 430, located at 14246 Warwick Blvd.,
Newport News, VA

Hannaford Store No. 432, located at 4692 Columbus St., Virginia
Beach, VA

Hannaford Store No. 483, located at 4625 Shore Dr., Virginia
Beach, VA

Hannaford Store No. 487, located at 1800 Republic Dr., Virginia
Beach, VA

Hannaford Store No. 488, located at 101 Village Ave., York Co.,
VA

Hannaford Store No. 491, located at 2029 Lynnhaven Pkwy.,

Decision and Order

Virginia Beach, VA
Hannaford Store No. 492, located at 205 East Little Creek Rd.,
Norfolk, VA
Hannaford Store No. 493, located at 5237 Providence Rd.,
Virginia Beach, VA
Hannaford Store No. 494, located at 5601 High St. West,
Portsmouth, VA
Hannaford Store No. 496, located at King Richard Dr., Virginia
Beach, VA

Schedule B

The Schedule B Assets consist of all assets, leases, properties,
government permits, customer lists, businesses and goodwill,
tangible and intangible, related to or utilized in the Supermarket
business operated at the following locations in North Carolina,
excluding the trade marks, trade dress, service marks, or trade
names of Respondents:

Hannaford Store No. 410, located at 341 South College Rd.,
Wilmington, NC
Hannaford Store No. 415, located at 2316 North College Rd.,
Wilmington, NC
Hannaford Store No. 424, located at 930 High House Rd., Cary,
NC
Hannaford Store No. 425, located at 9600 Strickland Rd., Raleigh,
NC
Hannaford Store No. 426, located at 5309 Carolina Beach Rd.,
Wilmington, NC
Hannaford Store No. 428, located at 2900 Millbrook Rd., Raleigh,
NC
Hannaford Store No. 436, located at 2900 Wake Forest Rd.,
Raleigh, NC
Hannaford Store No. 439, located at 1741 Walnut St., Cary, NC
Hannaford Store No. 441, located at 5051-3 Main St., Shallotte,
NC
Hannaford Store No. 442, located at 4821 Long Beach Rd., S.E.,
Southport, NC
Hannaford Store No. 444, located at 3804 Oleander Dr.,
Wilmington, NC

Decision and Order

Hannaford Store No. 455, located at 1405 W. Williams St., Suite A, Apex, NC
Unbuilt Site, located at Ten Ten Road, Cary, NC

Schedule C

The Schedule C Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in North Carolina, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

Hannaford Store No. 402, located at 103 South Dudley Street, Burgaw, NC

Hannaford Store No. 408, located at 112A Village Road, Leland, NC

Hannaford Store No. 403, located at 107 South Pine Street, Warsaw, NC

Hannaford Store No. 420, located at 701B White's Crossing Shopping Center, Whiteville, NC

Hannaford Store No. 414, located at 604 Jefferson Street, Whiteville, NC

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 131

1175

Decision and Order

[Confidential Appendices I-IV Redacted from Public Record
Version]

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition of Respondent Hannaford Bros. Co. (Hannaford) by Respondent Delhaize America, Inc, formerly Food Lion, Inc. (“Delhaize America”), of which Respondent Etablissements Delhaize Freres et Cie “Le Lion” S.A. (“Delhaize”), a Belgian company, is the majority owner, hereinafter referred to as “Respondents,” and the Respondents having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge the 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 the proposed Decision and Order, an admission by the Respondents of all of 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 the Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than the 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 determined to accept the executed Consent Agreement and to place the Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

Order

1. Respondent Delhaize is a corporation organized, existing and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at rue Osseghem, 1080 Brussels, Belgium.
2. Respondent Delhaize America is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal place of business located at 2110 Executive Drive, Salisbury, North Carolina 28145.
3. Respondent Hannaford is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located in Portland, Maine.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Schedule A Assets, Schedule B Assets, and Schedule C Assets, hereinafter collectively and individually referred to as the “Assets To Be Maintained,” pending their divestiture, and shall not cause the wasting or

Order

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 this 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 their 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. Respondents shall not terminate the operation of any of the Assets To Be Divested. Respondents shall continue to maintain the inventory of each of the Assets To Be Divested at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each of the Assets To Be Divested intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, Respondents shall, without limitation:

1. maintain operations and departments and not reduce hours at each of the Assets To Be Divested;
2. not transfer inventory from any of the Assets To Be Divested other than in the ordinary course of business consistent with past practice;
3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and

Order

satisfy all obligations, in each case in a manner consistent with past practice;

4. maintain the books and records of each of the Assets To Be Divested;
 5. 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 to another location, or that indicates any of the Assets To Be Divested will close;
 6. not remove the trade marks, trade dress, service marks, or trade names of Respondents at any of the Assets To Be Divested;
 7. not conduct any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any of the Assets To Be Divested; and
 8. not change or modify in any material respect the existing advertising practices, programs and policies for any of the Assets To Be Divested, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.
- B. Pending the divestiture or transfer of each of the respective Assets, Respondents shall adhere to and abide by the Kroger Agreement, the Lowe’s Agreement and the Sylvester Group Agreement, which agreements are incorporated by reference into this Order to Maintain Assets and made a part hereof, and are also appended to the attached Decision and Order.

Order

III.

IT IS FURTHER ORDERED that at any time after the Commission issues this Order to Maintain Assets, the Commission may appoint an Interim Trustee as provided in the attached Decision and Order.

IV.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in Respondents that may affect compliance obligations arising out of this Order to Maintain Assets, 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.

V.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representatives 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 the Respondents relating to compliance with this Order to Maintain Assets; 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.

Order

VI.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after all of the divestitures or transfers of the Assets, as described in and required by the Decision and Order contained in the Consent Agreement, are completed.

By the Commission.

Analysis

**Analysis of the Complaint and Proposed Consent Order to
Aid Public Comment**

Issued when the Commission tentatively approved a proposed consent order on July 24, 2000

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from Etablissements Delhaize Freres et Cie "Le Lion" S.A. ("Delhaize"), Delhaize America, Inc. ("Delhaize America"), and Hannaford Bros. Co. ("Hannaford") (collectively "the Proposed Respondents"), an Agreement Containing Consent Order ("the proposed consent order"). The Proposed Respondents have also reviewed a draft complaint that the Commission contemplates issuing. The proposed consent order is designed to remedy likely anticompetitive effects arising from the proposed Agreement and Plan of Merger between Delhaize, Delhaize America, and Hannaford to acquire all of the outstanding voting stock of Hannaford.

II. Description of the Parties and the Proposed Acquisition

Delhaize America, a North Carolina corporation, which operates most of its stores under the names of "Food Lion" and "Kash N' Karry," has over 1,200 supermarkets in the Southeast and Mid-Atlantic regions of the United States. Food Lion stores are situated in Virginia, North Carolina, South Carolina, Georgia, Florida, Tennessee, Kentucky, West Virginia, Pennsylvania, Delaware, and Maryland. Delhaize America's total sales for fiscal year 1999 were \$11 billion, with most generated by Food Lion stores' operations.

Hannaford, a publicly traded firm, is a Maine corporation with executive offices located in Scarborough, Maine. Approximately one-fourth of its common stock is owned by the Sobey family of Stellarton, Nova Scotia, Canada, and its various affiliated trusts and companies. Hannaford's total sales for fiscal year 1999 were \$3.46 billion. Hannaford operates about 100 stores under the "Hannaford" or "Shop 'N Save" banner in metropolitan New

Analysis

England and New York markets, plus about 50 stores under the “Hannaford” banner in Virginia and North Carolina markets. Hannaford entered the Southeast in the mid-1990's. The company's supermarkets are located in Maine, Massachusetts, New Hampshire, Vermont, New York, North Carolina, Virginia, and South Carolina.

Under the terms of the merger agreement, dated August 17, 1999, Delhaize America will acquire all of Hannaford's outstanding voting stock for approximately \$3.6 billion.

III. The Draft Complaint

The draft complaint alleges that the relevant line of commerce (*i.e.*, the product market) is the retail sale of food and grocery items in supermarkets. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units (“SKUs”)), as well as a deep inventory of those SKUs in a variety of brand names and sizes. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space. Supermarkets in North Carolina and Virginia, where the parties propose to divest supermarkets, tend to be at least 20,000 square feet, selling some 25,000-35,000 SKUs. So called “supercenters” operated by mass merchants such as WalMart, which have full-line supermarkets attached to general merchandise stores, are included in the product market.

Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets base their food and grocery prices on the prices primarily of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores such as club stores or limited assortment stores, and do not significantly

Analysis

change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain most prices at supermarkets. These other stores operate significantly different retail formats and sell far more limited assortments of items or in the case of military commissaries are only open to a limited population base. None of these formats would constrain a price increase taken by supermarkets in the geographic markets.

The draft complaint alleges that the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are the county or counties that include the following incorporated cities and towns. In Virginia the relevant geographic markets are: (a) a market consisting of the Richmond MSA; and (b) two markets that are part of the Norfolk-Virginia Beach-Newport News MSA (also known as the Tidewater area) -- the Tidewater Peninsula (Newport News, Hampton and other portions of the peninsula north of the James River), and Southern Tidewater (including Norfolk, Virginia Beach, Portsmouth, and other parts of the MSA south of the James River). In North Carolina the relevant geographic markets are: (a) the Wilmington MSA; (b) Columbus County; (c) Duplin County; (d) Pender County; and (e) "greater Raleigh," which includes Wake County, excluding the towns of Wake Forest, Rolesville, Zebulon, and Wendell.

Food Lion and Hannaford are actual and direct competitors in all of the above listed markets. The acquisition will eliminate that competition. The draft complaint alleges that each of the post-merger markets would be highly concentrated, whether measured

Analysis

by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.¹ The acquisition would substantially increase concentration in each market. Delhaize America and Hannaford would have a combined market share that ranges from 35 percent to 94 percent in each geographic market. The post-acquisition HHIs in the geographic markets range from 2562 points to 8817 points.

Concentration levels in the geographic markets alleged in the draft complaint would not be materially different even if club stores and limited assortment stores were included in the product market. The draft complaint further alleges that entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant geographic markets.

The draft complaint alleges that Delhaize America's proposed acquisition of all of the outstanding voting stock of Hannaford, if consummated, may substantially lessen competition in the relevant markets in violation 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, by eliminating direct competition between supermarkets owned or controlled by Delhaize and supermarkets owned or controlled by Hannaford; by increasing the likelihood that Delhaize will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects raises the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the geographic markets alleged in the proposed complaint.

IV. Terms of the Agreement Containing Consent Order ("the proposed consent order")

¹ The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all the participants.

Analysis

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition.² Under the terms of the proposed consent order, the Proposed Respondents must divest 37 identified Hannaford supermarkets and one identified Hannaford supermarket site in the relevant markets to three different up-front buyers. These buyers were selected by the parties and presented to the Commission for its review.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. When divestiture is an appropriate remedy for a supermarket merger, the Commission requires the merging parties to find a buyer for the divested stores. A proposed buyer must not itself present competitive problems. For example, the Commission is less likely to approve a buyer that already has a large retail presence in the relevant geographic area than a buyer without such a presence. The Commission is preliminarily satisfied that the purchasers presented by the parties are well qualified to run the divested stores and that divestiture to these purchasers poses no separate competitive issues. Public comments may address the suitability of the designated acquirers to acquire the supermarkets at issue.

The three up-front buyers and the number of stores each is acquiring are as follows: Kroger Co. (20 stores in Virginia), Lowe's Food Stores, Inc. (12 stores and one site in North Carolina), and the Sylvester Group (five stores in North Carolina). Kroger, headquartered in Ohio, operates 2,300 supermarkets in 31 states. Kroger is buying the stores in the Richmond and Tidewater areas where it does not currently operate supermarkets. Lowe's, a North Carolina corporation, operates 86 supermarkets throughout North Carolina and Virginia. Lowe's is buying supermarkets in

² Acceptance of the proposed consent order for public comment terminates the Hart-Scott-Rodino waiting period and enables Delhaize America to immediately acquire the Hannaford voting stock.

Analysis

Wilmington and Raleigh. Lowe's has a small presence in Raleigh, operating two supermarkets in that market, but operates no supermarkets in Wilmington. The Sylvester Group, a family-owned firm, operates 26 "Piggly Wiggly" supermarkets in rural North Carolina and will acquire five stores. The Sylvester Group operates one store in Duplin County, but the Hannaford it is acquiring is 20 miles from that store. A list of the specific supermarkets that Delhaize America and Hannaford must divest to each of the up-front buyers is attached at the end of this Analysis of the Draft Complaint and Proposed Consent Order to Aid Public Comment.

The proposed consent order requires that, no later than 10 days after the date on which the consent order becomes final, the Proposed Respondents shall divest these assets pursuant to and in accordance with their agreements with the buyers. The amount of time required for the divestitures varies with each of the buyers, based on the buyer's need to convert large numbers of new stores into its operations.

The proposed consent order also requires the Proposed Respondents to include rescission provisions in its up-front buyer agreements that allow it to rescind the transaction(s) if the Commission, after the comment period, decides to reject any of the up-front buyers. If, at the time the Commission decides to make the proposed consent order final, the Commission notifies the Proposed Respondents that any of the up-front buyers to which they have divested a supermarket or site is not an acceptable acquirer, or that any up-front buyer agreement is not an acceptable manner of divestiture, then the Proposed Respondents must immediately rescind the transaction in question and divest those assets within three months after the proposed consent order becomes final. At that time, the Proposed Respondents must divest those assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that any Commission-approved buyer is unable to take or keep possession of any of the supermarkets identified for divestiture, a trustee that

Analysis

the Commission may appoint has the power to divest any additional ancillary assets and effect such arrangements as are necessary to satisfy the requirements of the proposed consent order.

The proposed consent order specifically requires the Proposed Respondents to:

1) maintain the viability, competitiveness and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair their marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve existing relationships with suppliers, customers and employees; and (6) keep the supermarkets open for business and maintain the inventory of products in each store consistent with past practice. The proposed consent order also contains more specific details relating to maintaining store operations.

The proposed consent order also enables the Commission to appoint a trustee to divest any supermarkets or site identified in the order that Delhaize America and Hannaford have not divested to satisfy the requirements of the proposed consent order. The proposed consent order also enables the Commission to seek civil penalties against Delhaize or Delhaize America for non-compliance with the proposed consent order.

For a period of 10 years from the date the proposed consent order becomes final, the Proposed Respondents are required to provide written notice to the Commission prior to acquiring supermarket assets located in, or any interest (such as stock) in any entity that owns or operates a supermarket located in the county or counties that include the relevant geographic areas. Proposed Respondents may not complete such an acquisition until they have provided information requested by the Commission. This provision does not restrict the Proposed Respondents from constructing new supermarket facilities on their own; nor does it restrict the Proposed Respondents from leasing facilities not operated as supermarkets within the previous six months.

Analysis

For a period of 10 years, the proposed consent order also prohibits the Proposed Respondents from entering into or enforcing any agreement that restricts the ability of any person 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, 1998, to operate a supermarket at that site if such supermarket was formerly owned or operated by the Proposed Respondents in the county or counties that include the relevant geographic areas. In addition, the Proposed Respondents may not remove fixtures or equipment from a store or property owned or leased in these counties that is no longer in operation as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy, or (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by Proposed Respondents.

The Proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within 30 days following the date on which they signed the proposed consent, every 30 days thereafter until the divestitures are completed, and annually for a period of 10 years.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed consent order and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of supermarkets to the various independent buyers listed below, in order to aid the

Analysis

Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

ATTACHMENT
TO ANALYSIS OF THE COMPLAINT
AND PROPOSED CONSENT ORDER TO AID PUBLIC
COMMENT

Supermarkets Divested to Kroger:

Hannaford Store No. 427, located at 9480 W. Broad St.,
Richmond, VA

Hannaford Store No. 474, located at 2738 Hannaford Plaza,
Richmond, VA

Hannaford Store No. 477, located at 4816 S. Laburnum,
Richmond, VA

Hannaford Store No. 478, located at 1356 Gaskins Rd.,
Richmond, VA

Hannaford Store No. 479, located at 3507 W. Cary St., Richmond,
VA

Hannaford Store No. 480, located at 11400 Huguenot Rd.,
Midlothian, VA

Hannaford Store No. 481, located at 10921 Hull St., Midlothian,
VA

Hannaford Store No. 484, located at 7951 Brook Rd., Richmond,
VA

Hannaford Store No. 486, located at 12201 So. Chalkley, Chester,
VA

Hannaford Store No. 490, located at 1601 Willow Lawn Dr.,
Richmond, VA

Analysis

Hannaford Store No. 430, located at 14246 Warwick Blvd.,
Newport News, VA

Hannaford Store No. 432, located at 4692 Columbus St., Virginia
Beach, VA

Hannaford Store No. 483, located at 4625 Shore Dr., Virginia
Beach, VA

Hannaford Store No. 487, located at 1800 Republic Dr., Virginia
Beach, VA

Hannaford Store No. 488, located at 101 Village Ave., York Co.,
VA

Hannaford Store No. 491, located at 2029 Lynnhaven Pkwy.,
Virginia Beach, VA

Hannaford Store No. 492, located at 205 East Little Creek Rd.,
Norfolk, VA

Hannaford Store No. 493, located at 5237 Providence Rd.,
Virginia Beach, VA

Hannaford Store No. 494, located at 5601 High St. West,
Portsmouth, VA

Hannaford Store No. 496, located at King Richard Dr., Virginia
Beach, VA

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Supermarkets and Unbuilt Site Divested to Lowe's:

Hannaford Store No. 410, located at 341 South College Rd.,
Wilmington, NC

Hannaford Store No. 415, located at 2316 North College Rd.,
Wilmington, NC

Hannaford Store No. 424, located at 930 High House Rd., Cary,
NC

Hannaford Store No. 425, located at 9600 Strickland Rd., Raleigh,
NC

Analysis

Hannaford Store No. 426, located at 5309 Carolina Beach Rd.,
Wilmington, NC

Hannaford Store No. 428, located at 2900 Millbrook Rd., Raleigh,
NC

Hannaford Store No. 436, located at 2900 Wake Forest Rd.,
Raleigh, NC

Hannaford Store No. 439, located at 1741 Walnut St., Cary, NC

Hannaford Store No. 441, located at 5051-3 Main St., Shallotte,
NC

Hannaford Store No. 442, located at 4821 Long Beach Rd., S.E.,
Southport, NC

Hannaford Store No. 444, located at 3804 Oleander Dr.,
Wilmington, NC

Hannaford Store No. 455, located at 1405 W. Williams St., Suite
A, Apex, NC

Unbuilt Site, located at Ten Ten Road, Cary, NC

Supermarkets Divested to Ward Sylvester:

Hannaford Store No. 402, located at 103 South Dudley Street,
Burgaw, NC

Hannaford Store No. 408, located at 112A Village Road, Leland,
NC

Hannaford Store No. 403, located at 107 South Pine Street,
Warsaw, NC

Hannaford Store No. 420, located at 701B White's Crossing
Shopping Center, Whiteville, NC

Hannaford Store No. 414, located at 604 Jefferson Street,
Whiteville, NC

Complaint

IN THE MATTER OF

STOKER, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE SMOKELESS TOBACCO ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-4013; File No. 0123015
Complaint, May 31, 2001--Decision, May 31, 2001

This consent order addresses Respondent Stoker, Inc.'s manufacturing, packaging, importing, and advertising of smokeless tobacco products; these activities are subject to the Comprehensive Smokeless Tobacco Health Education Act of 1986 -- and Commission regulations promulgated pursuant to that statute -- and the Act and the regulations require smokeless tobacco product packages and advertisements to bear specified health warnings. The order, among other things, prohibits the respondent from violating any provision of the Smokeless Tobacco Act or the Commission regulations. It also requires the respondent to keep copies of relevant packaging and advertisements and to provide copies of the order to certain of its personnel.

Participants

For the Commission: *Michael Ostheimer, Maame A. Gyamfi, Anne Maher, C. Lee Peeler, and Russell Porter.*

For the Respondent: *Benjamin O. Tayloe, Jr., Patton Boggs, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Stoker, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Stoker, Inc., is a Tennessee corporation with its principal office or place of business at 3846 Sharon Highway 89, Dresden, Tennessee, 38225-1756.