IN THE MATTER OF

THE SOUTHLAND CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9127. Complaint, April 26, 1979—Decision, Feb. 25, 1980

This consent order requires, among other things, The Southland Corporation (Southland), a Dallas, Texas dairy processor, to refrain for seven years from acquiring, without prior Commission approval: 1) any fluid milk processing plant, distribution facility or route within a 150-mile radius of a Southland fluid milk processing plant or distribution facility; 2) any such company or plant located within a 150- to 500-mile radius of a Southland fluid milk processing plant or distribution facility, which processed more than 26 million pounds of Class I milk within any of the three years prior to the acquisition; or 3) any fluid milk processing company that processes 300 million pounds of Class I milk annually.

Appearances

For the Commission: *James R. Chamberlain* and *Robert C. Cheek.*

For the respondents: *Peter K. Bleakley, Arnold & Porter,* Wash., D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into an acquisition agreement, which, if consummated, would result in a 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; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITION

1. For the purpose of this complaint, the term "San Antonio market area" refers to the Office of Management and Budget's Standard Metropolitan Statistical Area for San Antonio, Texas which is composed of the three counties of Bexar, Comal, and Guadalupe.

II. THE SOUTHLAND CORPORATION

2. The Southland Corporation ("Southland") is a corporation organized and existing under the laws of the State of Texas with its principal office at 2828 North Haskell Ave., Dallas, Texas.

3. Southland is a major operator and franchisor of convenience food stores doing business almost exclusively under the "7-Eleven" brand name. As of December 31, 1977, Southland owned or franchised 6,357 convenience food stores throughout forty states, the District of Columbia, and Canada.

4. Southland is also one of the nation's largest dairy processors. Since 1960, Southland has acquired approximately twenty-nine other dairy processors and currently sells packaged fluid milk in thirty states and the District of Columbia under twelve strong regional brand names. In 1978 Southland processed over one billion pounds of packaged fluid milk.

5. In the fiscal year ending December 31, 1977, Southland reported total net sales of $2,536,109,000 of which approximately $344,807,000 were packaged fluid milk products.

III. KNOWLTON'S, INC.

6. Knowlton's, Inc. ("Knowlton's") is a corporation organized and existing under the laws of the State of Texas with its principal office at 1314 Fredericksburg Road, San Antonio, Texas.

7. Knowlton's, a family owned firm, is the largest, or one of the largest, independent dairy processors in the San Antonio market area. In 1978, Knowlton's processed approximately 44,857,000 pounds of packaged fluid milk.

8. Knowlton's also owns and operates nine milk and ice cream stores in the San Antonio market area.

9. In 1978 Knowlton's reported $10,988,416 total net sales of which $4,009,000 were packaged fluid milk products.

IV. JURISDICTION

10. At all times relevant herein, Southland and Knowlton's have engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, and their activities, including those challenged herein, are in or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended.

V. THE ACQUISITION AGREEMENT

11. On or about January 31, 1979, Southland and Knowlton's entered into an agreement whereby Southland would acquire 100% of Knowlton's assets, including the dairy processing plant and the nine milk and ice cream stores, for approximately $3.3 million. The acquisition is scheduled to be consummated on April 30, 1979.

VI. TRADE AND COMMERCE

12. The relevant line or relevant lines of commerce are the processing, distribution and sale of packaged fluid milk and the processing and wholesale distribution of packaged fluid milk.

13. A relevant section of the country is the San Antonio market area.

14. The lines of commerce described in Paragraph 12 in the San Antonio market area are highly concentrated.

VII. ACTUAL COMPETITION

15. From its Oak Farms plants in Dallas and Houston, Southland ships packaged fluid milk to its distribution center in San Antonio, Texas. Southland then sells packaged fluid milk from this distribution center throughout the San Antonio market area.

16. Knowlton's sells packaged fluid milk in the San Antonio market area from its one plant located in San Antonio.

17. Southland and Knowlton's are presently and have been for many years actual competitors for packaged fluid milk sales in the San Antonio market area.

VIII. EFFECTS: VIOLATIONS CHARGED

18. The effects of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant markets, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the acquisition agreement is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Southland and Knowlton's for packaged fluid milk sales in the San Antonio market area will be eliminated;

(b) already high levels of concentration will increase;

(c) Knowlton's, the largest, or one of the largest, independent dairies

in the market and a known price competitor will be eliminated from competition; and

(d) additional acquisitions and mergers between dairy processors may be fostered, causing a further substantial lessening of competition and increasing concentration.

19. The acquisition, if consummated, would for the reasons set forth herein, constitute a 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.

20. By entering into the agreement which would give rise to the violation described in Paragraph 18, herein, Southland and Knowlton's have violated Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. 45.

Commissioner Pitofsky did not participate.

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said 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, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent The Southland Corporation is a corporation organized, existing and doing business under and by virtue of the laws of

the State of Texas with its office and principal place of business located at 2828 N. Haskell Ave., Dallas, Texas.

Respondent Knowlton's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 1314 Fredericksburg Road, San Antonio, Texas. Since on or about June 15, 1979, all of Knowlton's assets have been owned by Southland.

2. 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

DEFINITIONS

For purposes of this order the following definitions shall apply:

(a) "Class I Milk" means packaged fluid whole milk, partially skim milk (approximately 2% butterfat or less), skim milk, buttermilk, cultured fluid milk products (except yogurt), flavored milk, and flavored milk drinks.

(b) "Southland" refers to The Southland Corporation, its subsidiaries, divisions, affiliates, successors and assigns.

I.

It is ordered, That Southland shall refrain, for a period of seven (7) years from the date of service upon it of this order, from acquiring, directly or indirectly, without prior approval of the Federal Trade Commission: (i) Any fluid milk processing plant, distribution facility or route (except those serving fluid milk processed by Southland exclusively) within a 150-mile radius of a Southland fluid milk processing plant or distribution facility; (ii) Any fluid milk processing company or plant located within a radius of between 150 and 500 miles of a Southland fluid milk processing plant or distribution facility which in any of the three years prior to the acquisition processed more than 26 million pounds of Class I milk; or (iii) Any fluid milk processing company that processes 300 million pounds of Class I milk annually; *provided, however,* that if the Federal Trade Commission at any time during the seven (7) year period of this order should modify its Criteria for Assessing Future Mergers, as set forth in the Commission's Enforcement Policy With Respect to Mergers in the Dairy Industry, the Commission will modify this order to conform to the modified Criteria.

II.

It is further ordered, That Southland shall within thirty (30) days after service upon it of this order file with the Commission a report setting forth in detail the location of its existing fluid milk processing plants, distribution facilities and routes (including those operated by Knowlton's). Thereafter annually for seven years, Southland shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order and shall include in such report a current list of Southland's fluid milk processing plants, distribution facilities and routes.

III.

It is further ordered, That Southland shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change which may affect compliance obligations arising out of this order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

FORD MOTOR COMPANY, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9073. Decision, March 29, 1979—Modifying Order, Feb. 26, 1980

This order reopens and modifies a consent order issued on March 29, 1979, 44 FR 25630, 93 F.T.C. 402, so that Paragraph II (C) (7) of the order provides for a waiver of customers' surplus rights in the event that a dealership retains a repossessed vehicle for its own use, rather than for resale. This brings the order into conformity with one aspect of an order issued against Francis Ford, Inc. on September 21, 1979 under the same docket number, 44 FR 62481, 94 F.T.C. 564.

ORDER REOPENING AND MODIFYING CONSENT ORDER

By petition of November 26, 1979, respondents Ford Motor Company and Ford Motor Credit Company (hereafter "Ford respondents") have asked the Commission to modify Paragraph II C.(7) of the consent order entered by the Commission against these respondents on March 29, 1979, in order to conform with a less restrictive provision of the litigated order in this docket entered against respondent Francis Ford, Inc. on September 21, 1979. An "Order to Show Cause" as to why the requested change should not be made, dated January 15, 1980, has elicited no objection.

Paragraph VII B. of the consent order provides that if a final order is issued in Dkts. 9073, 9074, or 9075 that imposes less restrictive standards in certain enumerated respects than does the consent order, the Commission shall reopen the consent order within 120 days of a petition to do so and modify the consent order to conform with the less restrictive provisions contained in the other order.

Although the less restrictive order upon which Ford respondents rely for their request has not yet become final, due to the pendency of an appeal, no purpose would be served by delaying modification of the Consent Order until such time as the appeal is resolved, inasmuch as the appeal by Francis Ford is hardly likely to result in imposition of a *more* restrictive standard than the Commission has imposed. Modification now will expedite achievement of uniform treatment of automobile dealers which is a primary purpose of Paragraph VII B. Therefore,

It is ordered, That the consent order in this docket be reopened for the limited purpose of effecting the following changes.

It is further ordered, That Paragraph II of the consent order be modified to eliminate the following language:

C. The accounting system shall provide that:

7. Dealers are not to obtain waivers of surplus or redemption rights from repurchase financing customers.

It is further ordered, That Paragraph II of the consent order be modified to add the following language:

C. The accounting system shall provide that:

7. Dealers are not to take any action to obtain or to attempt to obtain or bring about a waiver of a customer's right to redeem, except in the precise manner and circumstances contemplated by the applicable state law version of Section 9–505 of the Uniform Commercial Code. Under Section 9–505 a waiver of a customer's right to a surplus may not be sought unless the dealer intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business. If a waiver is sought, the dealer shall not represent that by proposing the waiver, it proposes to forego its right to a deficiency judgment, unless it intends to seek such a judgment should the waiver not be given. No customer's waiver of rights or failure to object to any secured party's proposal to retain the repossessed vehicle, unless procured in exact conformity with this subparagraph, shall limit the provisions of the accounting system relating to accounting for and paying any surplus.

IN THE MATTER OF

HASTINGS MANUFACTURING COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2(A) OF THE CLAYTON ACT

Docket 4437. Decision, Dec. 9, 1944—Modifying Order, Feb. 28, 1980

This order modifies an order issued on December 9, 1944, 10 FR 773, 39 F.T.C. 498, by deleting the phrase "or all such products of any competitor of respondents" from the second paragraph of the original order which barred respondent from offering stock lifts as an inducement to dealers to carry its products exclusively or in place of a competing line stocked by the dealer. The revised order prohibits only stock lifts to induce exclusive dealing arrangements.

ORDER MODIFYING ORDER TO CEASE AND DESIST

Following extensive briefing by respondent Hastings Manufacturing Company and the Commission's Bureau of Competition, the Commission on December 20, 1979, issued an order to show cause why the cease and desist order issued in this proceeding in 1944[1] should not be modified. The Commission stated that stock lifting, when not employed to induce exclusive dealing arrangements, ordinarily is an unobjectionable form of competition by suppliers for dealers.[2] Little different from a price discount, stock lifting is likely to promote price competition and, if the market is otherwise competitive, ultimately benefit the consumer. The Commission concluded that it appeared to be in the public interest to modify the 1944 order so that it would no longer prohibit stock lifting for purposes, or with effects, other than to induce exclusive dealing. The show cause order invited interested parties to comment on the proposed change.

The Commission having considered the comments submitted by several members of the public,[3]

Now, therefore, *it is hereby ordered*, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)) and Rule 3.72(b) of the Commission's Rules of Practice (16 CFR 3.72(b)), That the 1944 cease and desist order be modified in part as follows (deleted language is hyphened out):

It is ordered, That respondent Hastings Manufacturing Co., its officers, representatives, agents, and employees, directly or through

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[1] Hastings Mfg. Co., 39 F.T.C. 498, 509 (1944).

[2] The Commission noted that there are exceptions. For example, stock lifting to encourage dealers to carry the stock lifter's goods in place of *one* of several existing lines might violate Section 3 of the Clayton Act (15 U.S.C. 14) if the practice's effect might be to substantially lessen competition. In addition, if the stock lifter possessed monopoly power and its stock lifting functioned as a form of predatory pricing, the practice might constitute monopolization.

[3] Neither the respondent nor the Bureau of Competition filed comments in response to the order to show cause.

any corporate or other device, in connection with the offering for sale, sale, and distribution of piston rings and other automotive replacement parts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from doing, directly or indirectly any of the following acts or things (when done as an inducement to the distributor of automotive parts concerned to discontinue handling all products competitive with respondent's and thereafter handle respondent's products in lieu thereof, or when done upon any express or implied condition, agreement, or understanding that such distributor will discontinue handling all products competitive with those of respondent, ~~or all such products of any competitor of respondent~~, and will handle respondent's products in lieu thereof):

1. Purchasing from any distributor or prospective distributor of respondent's piston rings or other replacement parts his stock, or stocks recalled by him from his customers, of the products of another manufacturer which are competitive with respondent's products.

2. Making any loan to a distributor or prospective distributor of respondent's piston rings or other replacement parts.

3. Guaranteeing to distributors or prospective distributors of respondent's piston rings or other replacement parts increased gross profits from the handling of respondent's products as compared with gross profits previously obtained from the handling of products competitive with those of respondent.

IN THE MATTER OF

ARTHUR MURRAY, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 7845. Decision, July 26, 1960—Modifying Order, March 10, 1980

This order modifies an order issued on July 26, 1960, 25 FR 9673, 57 F.T.C. 306, by inserting a Roman numeral one before the preamble of the original order; vacating the *It is further ordered* paragraph therein; and adding new Parts II, III, IV and V. The modified order strengthens the 1960 order by giving consumers the right to unilaterally cancel contracts with the company and receive prescribed refunds within 30 days of cancellation. Respondent is additionally required to direct franchisees and sub-franchisees to comply with the terms of the order, institute a program of continuing surveillance designed to reveal non-conformers, and terminate dealings with such parties.

ORDER MODIFYING ORDER TO CEASE AND DESIST

The Commission on September 18, 1979, issued its order to show cause why this proceeding should not be reopened and its order of July 27, 1960 (hereafter sometimes referred to as "the Commission Order of 1960"), modified.

Respondents having consented to the reopening of this proceeding and the modification of the Commission Order of 1960, as set forth in the show cause order and the Commission having considered the comments filed by interested persons,

Now, therefore, *it is hereby ordered,* That the Commission Order of 1960 be, and it hereby is, modified by inserting a Roman numeral one, I, before the preamble of the Commission Order of 1960, by vacating the *It is further ordered* paragraph therein, and by adding new Parts II, III, IV, and V so that the Modified Order will read as follows:

ORDER

I.

It is ordered, That respondent Arthur Murray, Inc., a corporation, and its officers, and respondents Arthur Murray, Kathryn Murray and David A. Teichman, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, or through any licensee, in connection with the solicitation, advertising or sale of dancing instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from: