

IN THE MATTER OF
FLOWERS INDUSTRIES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9148. Consent Order, Nov. 3, 1983—Modifying Order, April 16, 1986

The Federal Trade Commission has modified a 1983 consent order with Flowers Industries, Inc. [102 F.T.C. 1700], a Thomasville, Ga. baker, by appointing a trustee to divest two bakeries and extending for six months the deadline for the divestitures.

ORDER MODIFYING ORDER TO DIVEST

On November 3, 1983, the Commission issued its order in this matter requiring, *inter alia*, that respondent Flowers Industries, Inc. ("Flowers") "divest itself absolutely and in good faith of the High Point Bakery Plant . . . [and] of the Gadsden Bakery Plant to an Eligible Person including, without limitation, land, buildings, fixtures attached thereto, machinery and equipment." As of the date of this order, neither plant has been divested by Flowers. Because it appeared that the public interest would be served by modifying the order to allow for the appointment of a trustee to accomplish divestiture, on March 19, 1986, the Commission issued its Order To Show Cause Why Order Requiring Divestiture Should Not Be Modified ("order to show cause") pursuant to Section 3.72 of the Commission's Rules of Practice. The order to show cause proposed the insertion of a new Paragraph VII of the order to appoint Graham Humes of Mellon Bank (East) N.A. as trustee. On March 31, 1986, the order to show cause was served on Flowers, and Flowers answered on April 2, 1986, stating that it consents to the modifications.

After reviewing Flowers's answer and the materials submitted with its compliance reports, the Commission has concluded that the public interest warrants modifying the order as proposed in the order to show cause. As the Commission observed in the order to show cause, the appointment of the trustee appears likely to advance the remedial objectives of the order.

Accordingly,

It is hereby ordered, That pursuant to 15 U.S.C. 45(b), and Section 3.72 of the Commission's Rules of Practice, 16 C.F.R. 3.72, (1) Paragraphs VII, VIII, IX, X and XI of the order in this matter be modified to renumber these Paragraphs VIII, IX, X, XI, and XII respectively, and (2) a new Paragraph VII be added to the order, as follows:

VII

The Commission hereby appoints Graham Humes, of Mellon Bank (East) N.A., as Trustee to serve subject to all the terms and conditions specified herein.

A. Powers and Duties of Trustee; Conditions of Trusteeship

1. The Trustee shall have the duty and authority to effect the divestiture of the properties and assets of Flowers subject to divestiture pursuant to Paragraphs I and II of this order ("the Assets") as quickly as possible in good faith to an Eligible Person who has represented in good faith that the Assets will, if acquired, be used in accordance with subparagraphs I(B) and II(B) of the order. The Trustee may divest the plants separately or together.

2. The duty and authority of the Trustee to divest the Assets shall be at the most favorable price and terms available, but there shall be no minimum price therefor.

3. If requested by Flowers or the Commission, the Trustee shall furnish a surety bond, the cost of which may be included in the Trustee's expenses as provided in subparagraph VII(D).

4. Except for cases of misfeasance, negligence, willful or wanton acts, or bad faith by the Trustee, the Trustee shall not be liable to Flowers for any action taken or not taken in the performance of the trusteeship. Flowers shall indemnify the Trustee and hold the Trustee harmless against any liabilities, claims, or expenses arising out of performance of the trusteeship, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, claims, or expenses result from misfeasance, negligence, willful or wanton acts, or bad faith by the Trustee.

5. Rule 2.41(f) of the Commission's Rules of Practice and Procedure shall apply to the Trustee in the same manner as it would be applicable to Flowers.

6. The Trustee may seek approval of a proposed acquirer at any time during the period specified in subparagraphs VII(B)(1) and VII(B)(2), and the Trustee may seek approval for more than one proposed acquirer. After the expiration of the time for seeking approval of a proposed acquirer, the Trustee shall have no duty or authority to seek approval of a proposed acquirer.

7. Each request to the Commission for approval of a proposed acquirer shall be in writing and shall include a definitive written agreement between the proposed acquirer and the Trustee. The agreement

shall be conditional upon approval of the transaction by the Commission.

8. The Trustee shall have the power (a) to retain the services of attorneys, appraisers, consultants, investment bankers, and such others as may be reasonably necessary to assist in the divestiture of the Assets; (b) to disclose confidential information and data respecting the Assets to any person who, in the opinion of the Trustee, shows a bona fide interest in acquiring the Assets or any portion thereof; (c) to enter into such contracts and execute such documents on behalf of Flowers as may be reasonable and necessary to effect divestiture in accordance with the terms of this order, *provided*, that such contracts and documents may include representations, warranties, covenants, and indemnity agreements only as to clear title; and (d) to take such other actions as may be reasonable and necessary to effect divestiture in accordance with the terms of this order.

9. Within thirty days following appointment of the Trustee and every thirty days thereafter, until the Commission approves a proposed acquirer or the time for seeking approval of a proposed acquirer has expired, the Trustee shall submit a verified report in writing to the Commission, with a copy to Flowers, setting forth (a) the steps taken by the Trustee to make public the availability for purchase of the Assets, (b) a list of all persons or organizations to whom notice of availability for purchase has been given directly, (c) a summary of all discussions and negotiations together with the identities and addresses of all interested persons or organizations, and (d) copies of all internal memoranda, offers, counter-offers, communications, and correspondence concerning divestiture. The Trustee shall provide such other reports as may be required by the Commission.

10. The Trustee shall account for all monies derived from any divestiture. All funds received by the Trustee from a prospective acquirer shall be deposited immediately in a federally chartered bank in an interest-bearing account until settlement of the Trustee's account.

11. Within sixty days after divestiture or after expiration of the time for seeking approval of a proposed acquirer, the Trustee shall submit to the Commission a detailed final accounting, including all amounts received or paid by the Trustee and all unpaid amounts still owing to the Trustee or others. Upon approval of the accounting by the Commission, the Trustee shall pay the approved unpaid expenses and pay the balance of the funds, together with all interest earned, to Flowers. Should the amount in the Trustee's account be insufficient to pay the approved unpaid expenses and to compensate the Trustee, Flowers, within 15 days after receiving notice thereof from the Commission, shall deliver to the Trustee an amount sufficient to compen-

sate the Trustee pursuant to subparagraph VII(D) and to permit the Trustee to pay all approved unpaid expenses.

12. The Trustee may be removed by the Commission for failure to discharge the Trustee's obligations diligently or faithfully, or for other good cause. Upon the removal, death, or resignation of the Trustee, a successor Trustee shall be appointed by the Commission. Selection of such successor Trustee shall be subject to the consent of Flowers, which consent shall not be unreasonably withheld.

B. Term of Trusteeship; Extension

1. The Trustee shall have 180 days from the date of appointment to submit requests for approval of a proposed acquirer to the Commission.

2. That time period may be extended by the Commission (a) upon the removal, death, or resignation of the Trustee, for an additional thirty days plus a period equal to the time during which there was no Trustee; (b) for a period necessary to remedy any delay in the submission of a request for approval of a proposed acquirer that has been substantially caused by any violation of this order by Flowers; or (c) for a period equal to such time as there exists any unresolved dispute with Flowers over the interpretation of this order.

3. The trusteeship shall terminate upon the Trustee's discharge of the obligations set forth in subparagraph VII(A)(11).

C. Additional Obligations of Flowers

1. Flowers shall cooperate fully with the Trustee in the Trustee's efforts to effect divestiture of the Assets. Flowers will do nothing to impede or interfere with those efforts.

2. When requested to do so by the Trustee, Flowers shall promptly empower the Trustee to perform, on Flowers' behalf, every act necessary to convey clear title to the Assets from Flowers to any Eligible Person in accordance with the terms of this order. All documents to be executed in compliance with this subparagraph shall first be submitted to and approved by the Director of the Bureau of Competition.

3. When requested to do so by the Trustee, Flowers shall promptly provide the Trustee and prospective acquirers with existing information relating to the Assets, including but not limited to, written information and data, access to the Assets, access to records relating to the Assets, access to personnel for tours and inspections of the Assets, access to knowledgeable personnel for answering questions about the Assets, and information previously submitted to the Commission regarding Flowers's prior divestiture efforts.

4. Flowers shall not cause or permit the Assets to become subject

to any new lien or encumbrance, and no existing lien or encumbrance shall be increased.

D. Compensation and Expenses of Trustee

1. The Trustee's compensation shall be paid by Flowers, and the Trustee's reasonable expenses shall be reimbursed by Flowers.

2. The Trustee's compensation shall consist of a flat fee and a contingent fee, as follows:

(a) The Trustee shall be paid a flat fee of \$5000 per month from the date hereof until the first to occur of either:

- (i) divestiture of the Assets as provided for herein, or
- (ii) the expiration of the time provided for seeking approval of a proposed acquirer.

(b) In addition to the flat fee specified in subparagraph VII(D)(2)(a), the Trustee shall be paid a fee contingent upon the consummation of the divestitures contemplated hereunder from the proceeds of the divestitures.

(c) If the combined purchase price of the Assets is less than or equal to six million dollars, the contingent fee shall be \$10,000 for the divestiture of the properties and assets subject to divestiture pursuant to Paragraph I of this order and \$10,000 for the divestiture of the properties and assets subject to divestiture pursuant to Paragraph II of this order, plus an additional amount based on the combined purchase price of the Assets and calculated as follows:

- (i) 3% of that portion of the purchase price less than or equal to one million dollars; plus
- (ii) 1% of that portion of the purchase price greater than one million dollars but less than or equal to two million dollars; plus
- (iii) 2% of that portion of the purchase price greater than two million dollars but less than or equal to three million dollars; plus
- (iv) 3% of that portion of the purchase price greater than three million dollars but less than or equal to four million dollars; plus
- (v) 4% of that portion of the purchase price greater than four million dollars but less than or equal to five million dollars; plus
- (vi) 5% of that portion of the purchase price greater than five million dollars but less than or equal to six million dollars.

(d) If the combined purchase price of the Assets is greater than six million dollars, the contingent fee shall be based on the combined purchase price of the Assets and calculated as follows:

- (i) if the purchase price is greater than six million dollars but less

than or equal to seven million dollars, 6% of the purchase price;

(ii) if the purchase price is greater than seven million dollars but less than or equal to eight million dollars, 7% of the purchase price;

(iii) if the purchase price is greater than eight million dollars but less than or equal to nine million dollars, 8% of the purchase price;

(iv) if the purchase price is greater than nine million dollars but less than or equal to ten million dollars, 9% of the purchase price;

(v) if the purchase price is greater than ten million dollars, 10% of the purchase price.

3. Notwithstanding any other term of this order, Flowers shall not be obligated to reimburse the Trustee for any expenses in excess of \$30,000 unless those expenses have been approved by the Commission.

4. Each month the Trustee shall present Flowers with a detailed written statement of the Trustee's expenses for the previous month. A copy of each monthly expense statement shall be sent to the Director of the Bureau of Competition. Subject to the condition set forth in subparagraph VII(D)(3), Flowers shall reimburse the Trustee for such expenses within five days of receipt of each monthly statement.

E. Resolution of Disputes

1. If Flowers and the Trustee are unable to resolve any dispute arising out of the interpretation of this order, either party may notify the Commission thereof in writing.

2. The Commission shall resolve a dispute arising under subparagraph VII(E)(1) without unreasonable delay. With regard to any dispute arising out of the interpretation of subparagraphs VII(A)(8)(a), VII(A)(8)(b), VII(C)(3), or VII(D) of this order, the Commission's determination shall be final and binding upon Flowers and the Trustee.

3. For the purpose of subparagraph VII(B)(2)(c), an unresolved dispute shall exist as of the day the Commission (a) receives notice under subparagraph VII(E)(1), or (b) in the case of a dispute between it and Flowers, notifies Flowers in writing thereof.

F. Termination of Obligation To Divest

Except upon a showing that any act or omission by Flowers in violation of the terms of this order has contributed substantially to the Trustee's inability to divest the Assets, Flowers's obligation to divest the Assets under this order shall terminate upon the expiration of the time for seeking approval of a proposed acquirer; *provided, however*, that Flowers shall proceed to accomplish any divestiture that has been approved by the Commission, or that is subsequently approved by the Commission if the request for approval was received

by the Commission before the expiration of the time for seeking approval of a proposed acquirer.

Commissioner Strenio was recorded as not participating.

IN THE MATTER OF

SAAB-SCANIA OF AMERICA, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3183. Complaint, April 16, 1986—Decision, April 16, 1986

This consent order requires an Orange, Conn. wholly-owned subsidiary of a Swedish automobile company, among other things, to make repairs or reimburse consumers for costs they incurred because of paint problems with Saab cars assembled at the company's factory in Malines, Belgium, from 1976 to 1978. The offer to repair or reimburse will be made to consumers who bought a new Belgian-made Saab after Dec. 31, 1977 and to subsequent owners who bought their vehicle within the first 36 months after the original purchase. The repair or reimbursement cost will be up to \$2,000 per car, except for cars purchased in Massachusetts. The Attorneys General in Massachusetts, Maine and Vermont have reached separate agreements with Saab in those states over the paint problem, but Saab consumers in Maine and Vermont are eligible for the repair or reimbursement program.

Appearances

For the Commission: *Eloise Gore.*

For the respondent: *Jeremy G. Zimmermann and Linda L. Randell, Wiggin & Dana, New Haven, Conn.*

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, having reason to believe that Saab-Scania of America, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Saab-Scania of America, Inc., is a Connecticut corporation, with its principal office and place of business at Saab Drive, Orange, Connecticut.

PAR. 2. Respondent is now, and has been, engaged in the advertising, offering for sale, sale, and distribution of Saab automobiles to authorized dealers for sale to members of the public.

PAR. 3. In the course and conduct of its aforesaid business, respondent causes and has caused automobiles to be shipped to dealers in