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charges against them, we have concluded that said respondents are entitled to appointed counsel. Accordingly,

*It is ordered*, That the general counsel for the Commission take all necessary and appropriate measures to secure adequate legal representation for the above-named respondents.

Commissioners Dixon and Thompson would have closed this matter for lack of public interest in further proceedings.

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IN THE MATTER OF  
CUBCO, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-2670. Complaint, May 22, 1975—Decision, May 22, 1975*

Consent order requiring a Nutley, N.J., manufacturer and distributor of ski bindings and related items, among other things to cease anticompetitive practices having the effect of enforcing and fixing the dealers' resale prices for certain of respondents' products.

*Appearances*

For the Commission: *David W. DiNardi*

For the Respondents: *Richard F. McMahon, Lafferty, Rowe, McMahon, McKeon*, Newark, N.J.

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 Cubco, Inc., a corporation, and Mitchell H. Cubberley, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. §45), 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 with respect thereto as follows:

PARAGRAPH 1. Respondent Cubco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located on Baltimore St., Nutley, N.J.

Respondent Mitchell H. Cubberley is an officer of the corporate

respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices herein-after set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents have been and are now engaged in the manufacture, sale and distribution of Cubco ski bindings and related items, hereinafter referred to as said products. Respondents' products are subsequently distributed and sold to authorized dealers throughout the United States for resale to the general public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have been and are now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that respondents have sold and caused and now cause said products to be shipped from the state in which they are manufactured or warehoused to other States of the United States for resale and distribution through authorized dealers.

PAR. 4. Except to the extent that competition has been hampered or restrained as set forth in this complaint, respondents have been and are now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of said products.

PAR. 5. Respondents, in combination, agreement or understanding with certain of their authorized dealers, or with the cooperation or acquiescence of other of their dealers, have for the last several years been engaged in a planned course of action to fix, establish and maintain certain specified uniform prices at which said products are resold. In furtherance of said planned course of action, respondents have for the past several years engaged in the following acts and practices, among others:

(a) Regularly furnishing their dealers with price lists and necessary supplements thereto containing certain resale or retail prices;

(b) Establishing agreements, understandings, arrangements with their dealers, one or more of whom are located in states which do not have fair trade laws, as a condition precedent to the granting of a dealership, that such dealers will maintain certain resale or retail prices;

(c) Informing their dealers, by direct and indirect means, that respondents expect and require such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated.

(d) Requiring their dealers to agree not to sell or otherwise supply or furnish their products to anyone who is not an authorized dealer of the respondents;

(e) Soliciting and obtaining from their dealers, cooperation and assistance in identifying and reporting any dealer who advertises, or

offers to sell, or sells said products at prices lower than certain resale or retail prices; and

(f) Directing their salesmen, representatives and other employees to secure and report information identifying any dealer who fails to adhere to and maintain certain resale or retail prices.

PAR. 6. By means of such acts and practices, including but not limited to the foregoing, respondents, in combination, agreement, or understanding with certain of their authorized dealers and with the acquiescence of other authorized dealers, have established, maintained and pursued a planned course of action to fix and maintain certain resale or retail prices at which said products will be resold.

PAR. 7. The aforementioned acts and practices of respondents have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and constitute unfair methods of competition in commerce, all in derogation of the public interest and in violation of Section 5 of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; 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 aforesaid draft of 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order;

1. Respondent Cubco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 20 Baltimore St., Nutley, N.J.

Respondent Mitchell H. Cubberley is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

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

I. *It is ordered*, That respondents Cubco, Inc., a corporation, its successors and assigns, and its officers, and Mitchell H. Cubberley, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, distribution, offering for sale or sale of ski bindings, ski equipment and related items or any other product (hereinafter referred to in this order as "said products") in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Establishing, maintaining or enforcing any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling, influencing or enforcing in any way or to any extent, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Requiring any dealer or prospective dealer to enter into an oral or written agreement or understanding that such dealer or prospective dealer will maintain any resale or retail price for any of said products as a condition of buying any of said products.

C. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any resale or retail price for any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

D. Directing or requiring any of respondents' salesmen, or any other agent, representative, or employee, directly or indirectly, to report any dealer who does not adhere to any resale or retail price for any of said products, or to act on such reports by refusing or threatening to refuse sales to dealers so reported.

E. Refusing or threatening to refuse any sales to any dealer or prospective dealer, either directly or indirectly, or threatening to cancel or terminate, or cancelling or terminating any dealer or prospective dealer because of any resale or retail price observed, maintained, or advertised by the dealer or prospective dealer for any of said products.

F. Suggesting, for three (3) years from the date on which this order becomes final, any resale price whatsoever for any of said products, by price list, discount schedule, invoicing procedure, pre-pricing of commodities or their containers, or by any other means, to any reseller whose resale prices are not or cannot lawfully be controlled by respondents in the manner prescribed by law and this order.

G. Requiring, from any dealer charged with price cutting or failure to adhere to any resale or retail price, a promise or assurance to adhere to any resale or retail price for any of said products as a condition precedent to any future sales to said dealer.

H. Publishing, disseminating or circulating any price list, price book, price tag, advertising or promotional material, or other document indicating any resale or retail price without stating on each page of such list, book, tag, advertising or promotional material or other document that the price is suggested or approximate.

I. Requiring or inducing by any means, any dealer or prospective dealer to refrain, or to agree to refrain from reselling any of said products to any other dealer or distributor.

*Provided, however,* Nothing hereinabove shall be construed to waive, limit or otherwise affect the right of respondents to enter into, establish, maintain and enforce in any lawful manner any price maintenance agreement excepted from the provisions of Section 5 of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act.

II. *It is further ordered,* That the respondent corporation herein shall within sixty (60) days after service upon it of this order, mail a copy of this order to each of its dealers in the Commonwealth of Puerto Rico, the District of Columbia, and in those states which now, or at any time in the future, do not permit fair trade contracts, and, during the five (5) year period of time following the date of service of this order, to all future dealers in these jurisdictions at the time said dealers are opened as accounts, under cover of the letter annexed hereto as Exhibit A, and furnish the Commission proof of the mailing thereof.

III. *It is further ordered,* That the respondent corporation herein shall forthwith distribute a copy of this order to each of its operating divisions and to all of its sales personnel and shall instruct each sales person employed by it now or in the future to read this order and to be familiar with its provisions.

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

V. *It is further ordered*, That the respondents herein for a period of five (5) years from the date of this signing establish and maintain a file of all records referring or relating to respondents' refusal to sell said products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondents' refusal to sell, and which file will be made available for Commission inspection on reasonable notice; and, annually, for a period of five (5) years from the date hereof, submit a report to the Commission's Boston Regional Office listing the names and addresses of all dealers with whom respondents have refused to deal over the preceding year, a description of the reason for the refusal and the date of the refusal.

VI. *It is further ordered*, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

VII. *It is further ordered*, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## EXHIBIT A

(Letterhead of Cubco, Inc.)

Dear Dealer:

Cubco, Inc. has entered into an agreement with the Federal Trade Commission relating to the distributional activities and pricing policy of Cubco, Inc. A copy of the consent order entered into pursuant to that agreement is enclosed herewith.

Cubco, Inc. has entered into this agreement solely for the purpose of settling a dispute with the Commission, and the agreement and consent order is not to be construed as an admission by Cubco, Inc. that it has violated any of the laws administered by the Commission, or that any of the allegations in the complaint are true and correct. Instead, the order merely relates to the activities of Cubco, Inc. in the future.

In order that you may readily understand the terms of the consent order, we have set forth the essentials of the agreement with the Commission, although you must realize that the consent order itself is controlling rather than the following explanation of its provisions:

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(1) Our dealers in your area are free to set their own retail or resale prices for our products.

(2) Cubco, Inc. will not solicit, invite or encourage dealers, or any other persons to report any dealer in your area not following any retail or resale price for any of said products, and, furthermore, will not act on any such reports sent to it.

(3) Cubco, Inc. will not require or induce its dealers in your area to refrain from advertising said products at any price or from selling or offering said products at any price to any person.

Sincerely yours,

Mitchell H. Cubberley  
President

Enclosure

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IN THE MATTER OF  
CIRCULATION BUILDERS, INC., ET AL.

*Docket 9004. Order, May 27, 1975*

Denial of complaint counsel's motion to amend notice order in complaint to indicate possibility that consumer redress may be sought.

*Appearances*

For the Commission: *Ralph E. Stone and Paul D. Hodge.*

For the respondents: *Stephen M. Koolpe, Mill Valley, Calif.*

ORDER DENYING MOTION TO AMEND NOTICE ORDER

By order of Apr. 28, 1975, the administrative law judge certified to the Commission complaint counsel's motion to amend the notice order accompanying the complaint in this matter to indicate the possibility that the Commission may seek consumer redress against respondents pursuant to Section 206 of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. While complaint counsel is generally free in Section 5 actions to ask for relief over and beyond that described in the notice order, if any, consumer redress under the Magnuson-Moss Act for acts or practices that occurred prior to its enactment is permitted by statute only where the Commission's intent to seek such relief is set out in the complaint or notice order. The law judge has accordingly certified complaint counsel's motion to amend to the Commission.

No information was presented to the Commission at the time this complaint was issued as to why consumer redress should be sought and none is now offered. Accordingly,

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*It is ordered,* That the aforesaid motion to amend the notice order in this matter be, and it hereby is, denied.

## IN THE MATTER OF

ATLANTIC INDUSTRIES, INC. T/A ATLANTIC  
PORTRAIT PLAN, ETC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket 8941. Complaint, Oct. 31, 1973-Decision, May 28, 1975*

Consent order requiring a Miami, Fla., marketer of a photographic enlargement plan and three wholly-owned subsidiaries, among other things to cease using deceptive means to sell its photographic enlargement plan and to collect accounts.

*Appearances*

For the Commission: *Edward J. Carnot and W. Roland Campbell.*  
For the respondents: *Hogan & Hartson, Wash., D.C.*

## 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 Atlantic Industries, Inc., a corporation trading as Atlantic Portrait Plan and Atlantic Film Club, International Baby Care, Inc., Atlantic International Distributors, Inc., a corporation trading as Amalgamated Credit and Collection Bureau, National Direct Corporation, a corporation trading as National Advertised Products and International Album Plan, Jeffrey J. Weiss and Martin Osman, individually and as officers of said corporations, Lawrence Hahn, individually and as an officer of Atlantic Industries, Inc., and Richard S. Labovitz, individually and as an officer of International Baby Care, Inc. and Atlantic International Distributors, Inc., hereinafter referred to as respondents, have 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 Atlantic Industries, Inc., trading as Atlantic Portrait Plan, and Atlantic Film Club, is a corporation organized, existing and doing business under and by virtue of the laws



of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of photographs, photograph albums, photograph enlargements, photograph certificates, film and other merchandise to the public.

Trading as Atlantic Portrait Plan, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specified number of enlargements developed by respondents over a ten-year period. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

Respondent, trading as Atlantic Film Club, operates a film processing service.

PAR. 2. Respondent International Baby Care, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at 720 N.W. 27th Ave., Miami, Fla. Respondent International Baby Care, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of baby furniture products to the public.

PAR. 3. Respondent Atlantic International Distributors, Inc., trading as Amalgamated Credit and Collection Bureau, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. The corporate address is 720 N.W. 27th Ave., Miami, Fla. Respondent Atlantic International Distributors, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent Atlantic International Distributors, Inc. is now and for some time last past has been engaged in the collection of delinquent accounts for respondents Atlantic Industries, Inc. and International Baby Care, Inc.

PAR. 4. Respondent National Direct Corporation, trading as National Advertised Products and International Album Plan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla. Respondent National Direct Distributors, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of photographs,

photographic albums, photograph enlargements, photograph certificates, film and other merchandise to the public.

Trading as National Advertised Products, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specific number of enlargements developed by respondents. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

Trading as International Album Plan, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specific number of enlargements developed by respondents. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

PAR. 5. Respondents Jeffrey J. Weiss and Martin Osman are officers and directors of the four corporate respondents. Said individual respondents formulate, direct, and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of the individual respondents is 720 N.W. 27th Ave., Miami, Fla.

Respondent Lawrence Hahn is a director of the four corporate respondents and an officer of respondent Atlantic Industries, Inc. In such positions, the respondent cooperates with the other individual respondents in formulating, directing, or controlling the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of respondent Hahn is 2285 Peachtree Rd., N.W., Atlanta, Ga.

PAR. 6. Respondent Richard S. Labovitz is an officer of the corporate respondents International Baby Care, Inc. and Atlantic International Distributors, Inc. and as such cooperates with the other individual respondents in formulating, directing, and controlling the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of respondent Labovitz is 720 N.W. 27th Ave., Miami, Fla.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents and in the collection of delinquent accounts.

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## COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Four, Five and Seven hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 8. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused their said photographs, photograph albums, photograph enlargements, photograph certificates, film and other merchandise to be sold in various States of the United States, and when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in the various States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, respondents, respondents' agents, representatives, and employees have made and are now making numerous statements and representations directly or by implication:

1. That customers will receive a free prize, gift, or bonus, namely a photograph album, with the purchase of the photograph enlargement plan.

2. That certain but not all prospective customers will be offered the opportunity to purchase the plan at a "special" or "reduced" price and that those prospective customers not offered the "special" or "reduced" price must pay a higher price.

3. That the "special" or "reduced" price is below respondents' established regular retail price for the plan.

4. That the "special" or "reduced" price is an "at cost" price which includes only the cost to respondents of materials needed to print and develop the enlargements.

5. That in order to purchase the plan at the "special" or "reduced" price, the prospective customer must agree to display the photograph album in his home.

6. That the special price is being offered for the purpose of advertising and promoting respondents' product.

PAR. 10. In truth and in fact:

1. The album is not free. Its cost is included in the cost of the plan.

2. Every prospective customer is afforded the opportunity to purchase the plan at the "special" or "reduced" price and no customer has to pay any higher price.

3. The "special" or "reduced" price is not below respondents'

established regular retail price for the plan. Respondents have never offered nor sold the plan for any price higher than the so-called "special" or "reduced" price.

4. The so-called "special" or "reduced" price is not an "at cost" price. The cost of the plan includes more than the cost to respondents of materials needed to print and develop the enlargements.

5. The prospective customers agreement to display the photograph album is not a prerequisite to respondents selling the plan to the customer at the so-called "special" or "reduced" price.

6. Respondents' offer is made for the purpose of realizing a profit on the sale and not for the purpose of advertising or promoting their portrait plan.

Therefore, the statements and representations set forth in Paragraph Nine are misleading and deceptive.

PAR. 11. In the further course and conduct of their business, respondents' agents, representatives, and employees represent directly or by implication that single enlargements are regularly sold by respondents for \$7 each. Using \$7 to demonstrate value, respondents further represent:

1. That the 100 coupon plan which has a base selling price of \$189.95 is valued at over \$700.

2. That the 90 coupon plan which has a base selling price of \$149.95 is valued at over \$630.

3. That the 60 coupon plan which has a base selling price of \$89.95 is valued at over \$420.

4. That customers will save the difference between the value of the plan and the base selling price.

PAR. 12. By and through the use of the statements set out in Paragraph Eleven above, and others of similar import and meaning but not expressly set out herein, respondents have represented, and are now representing that on a regular basis for a reasonably substantial period of time in the recent regular course of their business, single enlargements have been sold for \$7 and further that \$7 per enlargement would be a fair and accurate amount to use in determining the value of respondents' plan.

PAR. 13. In truth and in fact respondents have not sold single enlargements for \$7 or any other price on a regular basis for a reasonably substantial period of time in the recent regular course of their business. Therefore, any demonstration of value or savings based on the \$7 amount such as those described in Paragraph Eleven above would be false and misleading.

In addition, when demonstrating savings to customers, respondents neglect to add to the base price of the plan an amount equal to seventy-

five cents per enlargement which respondents charge to cover mailing and handling. Respondents failure to include this extra charge is deceptive and misleading because such failure results in an inflation of the amount a customer might save by purchasing the plan.

PAR. 14. In the course and conduct of respondents' operations of the film processing service and for the purpose of inducing the purchase of their developing and printing services, respondents, respondents' agents, representatives and employees have made, and are now making statements and representations to customers that customers will receive a fresh roll of Kodak film FREE with each roll of film developed or printed by respondents. The free film has been offered by respondents continuously for a period of at least two years.

PAR. 15. By and through the use of the word "free" respondents have represented directly or through implication that the price charged by respondents is for processing alone and does not include any payment for the film.

PAR. 16. In truth and in fact, the film is not free because the continuous offer of free film over a long period of time has resulted in the price for the processing service alone becoming the regular price for the processing *and* film in combination.

Thus, the statements and representations set out in Paragraphs Fourteen and Fifteen above are false and misleading.

PAR. 17. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise because of such erroneous and mistaken belief.

PAR. 18. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

#### COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Four, Five, Six and Seven hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 19. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused their

said photographs, photograph albums, photograph enlargements, photograph certificates, film, baby furniture, and other merchandise to be sold in various States of the United States, and when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in various States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 20. In the course and conduct of respondents' business, respondents' agents, representatives and employees have made, directly or by implication, statements and representations to customers that contracts entered into between respondents and said customers are non-cancellable. However, such statements are false, misleading and deceptive because in truth and in fact state statutes provide customers a right to cancel.

PAR. 21. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true.

PAR. 22. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

### COUNT III

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four, Five, Six and Seven hereof are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 23. In the course and conduct of their aforesaid business, respondents now cause and for some time last past have caused, letters, forms, and various other kinds and types of documents relating to the collection of delinquent accounts to be deposited in the United States mail and transmitted to persons located in the various States of the United States, all of which constitute a part of the course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 24. In the furtherance of their business and for the purpose of inducing the payment of purportedly delinquent accounts, respondents, respondents' agents, representatives, and employees have sent or

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caused to be sent through the mail, letters, forms, and other printed matter in which respondents make certain statements and representations to purportedly delinquent customers. Typical, but not all inclusive of said statements and representations are the following:

1.

(Letterhead)

AMALGAMATED CREDIT AND COLLECTION BUREAU

P. O. Box 781

Bronx General Post Office

Bronx, New York 10451

Dear Debtor:

Your account has been given to us by Atlantic Portrait Plan \* \* \*. To avoid an embarrassing and expensive situation, mail your check or money order *directly* to Amalgamated Credit and Collection Bureau.

2. The above account has for value received been assigned to the credit bureau for immediate collection procedure.

3.

## FINAL NOTICE

\* \* \* You are hereby notified that we intend to institute legal action to be brought against you for the entire balance of your account.

4. If you do not see fit to take care of this small matter and honor your obligations, we will have no alternative but to collect through the Small Claims Court.

PAR. 25. By and through the use of the aforesaid statements and representations described in Paragraph Twenty-Four above and others of similar import not specifically set out herein, respondents represent and have represented directly or by implication that:

1. Delinquent accounts have been turned over or assigned for value by respondents to an independent credit and collection bureau.

2. If payments are not made, respondents will institute suit or take other legal action to collect the outstanding amount due.

PAR. 26. Such statements as those set out in Paragraphs Twenty-Four and Twenty-Five above are false and misleading because in truth and in fact:

1. Accounts have not been turned over nor assigned for value to independent credit and collection bureaus. Respondent Atlantic International Distributors, Inc., trading as Amalgamated Credit and Collection Bureau, is a corporate device used by Atlantic Industries, Inc. and the individual respondents. By use of the device respondents hope to effect the collection of delinquent accounts by representing and implying that the respondent Amalgamated Credit and Collection Bureau is an independent collection agency.

2. Respondents seldom, if ever, bring legal action to collect delinquent accounts.

PAR. 27. In the further course and conduct of the collection of

delinquent accounts, respondents send or cause to be sent forms, such as the one entitled "Demand for the Payment of Debt," designed to mislead the recipient into believing that such form was sent by a government body or one of its agencies.

PAR. 28. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the payment of said delinquent accounts because of such erroneous and mistaken belief.

PAR. 29. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

#### ORDER AMENDING COMPLAINT

By motion filed Dec. 19, 1973, complaint counsel have requested that the complaint be amended in several respects and that certain amendments be made to the preamble to the form of order served with the complaint. Specifically, complaint counsel have requested that the following amendments be made:

(1) Amend subparagraph 2 of Paragraph Ten of Count I to read:  
2. Most, if not all, prospective customers are afforded the opportunity to purchase the plan at the "special" or "reduced" price and no customer has to pay any higher price.

(2) Amend subparagraph 3 of Paragraph Ten of Count I to read:  
3. The "special" or "reduced" price is not below respondents' established regular retail price of the plan. Respondents seldom, if ever, have offered or sold the plan for any price higher than the so called "special" or "reduced" price.

(3) Amend subparagraph 1 of Paragraph Eleven of Count I to read:  
1. That the 100-coupon plan, which has a base selling price of \$199.95 or \$189.95, is valued at over \$700.

(4) Add as subparagraph 7 to Paragraph Nine of Count I:  
7. That the purpose of respondents' initial contact with the prospect is to give a surprise which was sent out by respondents' public relations department, or to present an advertising promotion or to make a courtesy presentation, or is for purposes other than the sale of respondents' products or services.

(5) Add as subparagraph 7 to Paragraph Ten of Count I:



7. Respondents' sales representatives have not and are not contacting persons in their homes or places of business primarily for the purpose of giving a surprise, presenting an advertising promotion or making a courtesy presentation. To the contrary, the primary purpose for contacting such persons has been and is to sell respondents' products or services.

(6) Amend the preamble to Part I of the proposed order by substituting the word "or" for the word "and" in the tenth line thereof.

(7) Amend the preamble to Part II of the proposed order by substituting the word "or" for the word "and" in the eleventh line thereof.

Respondents have filed response to complaint counsel's motion to amend the complaint wherein they do not oppose the proposed amendments numbered (1), (2), (3), (6) and (7) as set forth above. Complaint counsel have filed a reply to respondents' response, which reply has been accepted into the record and duly considered by the undersigned.

The authority of the administrative law judge to amend a complaint is set forth in Section 3.15(a)(1) of the Commission's Rules of Practice. This section of the rules provides that the administrative law judge may allow appropriate amendments to the complaint, if a determination of the controversy on the merits will be facilitated thereby; *Provided, however,* That motions for amendments may be allowed only if the amendment is "reasonably within the scope of the original complaint." Motions for other amendments to complaints shall be certified to the Commission.

The Commission has on a number of occasions interpreted this section. In *Standard Camera Corp., et al.*, 63 F.T.C. 1238, 1266 (1963), the Commission stated:

Our Rules of Practice empower a hearing examiner to allow appropriate amendments to the pleadings. Such power is limited, however, by the caveat that the amendments must be "reasonably within the scope of the proceeding initiated by the original complaint." Where the effect of the amendment is an alteration of the underlying theory behind the complaint, or where it alleges substantially different acts or practices on the part of the respondent, or where it requires different determinations with respect to the belief that a violation has occurred and that the public interest is jeopardized, the hearing examiner is without power to authorize it. \* \* \* Thus, where an amendment impinges upon powers exercised exclusively by the Commission, it is incumbent upon the hearing examiner to certify the matter to us for determination.

Accordingly, the requested amendments to subparagraphs 2 and 3 of Paragraph Ten and subparagraph 1 of Paragraph Eleven of Count I are hereby granted. These subparagraphs will be amended as requested by complaint counsel and as set forth hereinabove. These amendments involve a restatement of the methods employed by respondents in effectuating the practices alleged to be unlawful and are so related to

the subject matter of this proceeding as to be well within the scope of the original complaint (see *Capitol Records Distributing Corporation*, 58 F.T.C. 1170, 1174 (1961)). Further, such amendments will facilitate a determination of this controversy on the merits and will not prejudice the public interest or the rights of the parties hereto.

The amendments requested to be made to the preamble of Part I and the preamble of Part II of the form of order served with the complaint are hereby denied. In the first place, the form of order served with the complaint is not a pleading as such; it does not set forth allegations of unlawful conduct. Further, it is subject to change or modification if record facts adduced during the proceeding make such further or other relief necessary.

Additionally, the proposed amendments to the form of order are insignificant. The conjunction "and" is construed to mean "as well as," and is a reference to "either or both." "And" is sometimes interpreted as if it were the word "or," which is an alternative, a choice of either.

Since the form of order, at least at this juncture, does not require such precision of language as does the complaint, and since the requested amendments are in reality insignificant, the proposed amendments to the preamble to Part I and the preamble to Part II of the form of order served with the complaint are denied.

The amendments requesting the *additions* of subparagraph 7 to Paragraph Nine and subparagraph 7 to Paragraph Ten fall in a different category. These proposed amendments allege substantially different acts and practices from those which are alleged in the complaint. The complaint in Paragraphs Nine and Ten is concerned with "free" gifts with the purchase of respondents' products, or "special" or "reduced" prices in connection with the sale of respondents' products. The amendments proposed by complaint counsel are new subparagraphs to be added to the complaint which challenge as unlawful respondents' initial contact with a prospective purchaser. There is no indication in the complaint, as issued, that the proposed respondents' initial contact with prospective purchasers is unlawful, or is to be challenged in this proceeding. Accordingly, complaint counsel's motion to add a subparagraph 7 to Paragraph Nine and a subparagraph 7 to Paragraph Ten will be certified to the Federal Trade Commission for a determination, since it appears that these proposed amendments, if warranted, are beyond the authority vested in the administrative law judge. Accordingly,

*It is ordered*, That subparagraphs 2 and 3 of Paragraph Ten and subparagraph 1 of Paragraph Eleven of Count I are amended to read as follows:

Subparagraph 2 and 3 of Paragraph Ten of Count I to read:

## Order Amending Complaint

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2. Most, if not all, prospective customers are afforded the opportunity to purchase the plan at the "special" or "reduced" price and no customer has to pay any higher price.

3. The "special" or "reduced" price is not below respondents' established regular retail price of the plan. Respondents seldom, if ever, have offered or sold the plan for any price higher than the so-called "special" or "reduced" price.

Subparagraph 1 of Paragraph Eleven of Count I to read:

1. That the 100-coupon plan, which has a base selling price of \$199.95 or \$189.95, is valued at over \$700.

## ORDER AMENDING COMPLAINT

By motion filed Dec. 19, 1973, complaint counsel moved to amend the complaint. Upon consideration of respondents' answer and complaint counsel's reply, the administrative law judge disposed of all but two of the requested amendments, concluding that they were not reasonably within the scope of the original complaint. Pursuant to Rule 3.15(a) of the Commission's Rules of Practice, the law judge certified them to the Commission on Jan. 14, 1974. The amendments in question allege misrepresentations made by respondents' sales representatives as to the purpose of their initial contacts with prospective customers.

Upon consideration of the arguments in the pleadings, and the law judge's certification, the Commission has concluded that there is reason to believe that the misrepresentations alleged in the certified amendments were made and constitute violations of Section 5 of the Federal Trade Commission Act; that it is in the public interest to try said misrepresentations together with those alleged in the original complaint rather than separately and; that any possible prejudice to respondents can be avoided through the grant of additional time. Accordingly,

*It is ordered,* That complaint counsel's motion to amend, as certified to the Commission, be, and it hereby is, granted; and that the complaint be, and it hereby is, amended as follows:

Add as subparagraph 7 to Paragraph Nine of Count I:

7. That the purpose of respondents' initial contact with the prospect is to give a surprise which was sent out by respondents' Public Relations Department, or to present an advertising promotion or to make a courtesy presentation, or is for purposes other than the sale of respondents' products or services.

Add as subparagraph 7 to Paragraph Ten of Count I:

7. Respondents' sales representatives have not and are not contacting persons in their homes or places of business primarily for the purpose of giving a surprise, presenting an advertising promotion

or making a courtesy presentation. To the contrary, the primary purpose for contacting such persons has been and is to sell respondents' products or services.

*It is further ordered*, That the administrative law judge shall cause to be served upon respondents copies of the complaint, as amended herein, and by his order of Jan. 14, 1974.

#### ORDER SERVING RESPONDENTS WITH AMENDED COMPLAINT

By order of July 9, 1974, the Commission amended the complaint herein and directed that the administrative law judge cause to be served upon respondents copies of the complaint, as amended by the Commission on July 9, 1974, and as amended by the administrative law judge by order of Jan. 14, 1974. Accordingly,

*It is ordered*, That the complaint, as amended, be herewith served upon respondents, as per copy attached hereto.

*It is further ordered*, That respondents be, and they hereby are, given ten (10) days from the date of receipt of the amended complaint in which to file an answer thereto.

#### AMENDED 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 Atlantic Industries, Inc., a corporation trading as Atlantic Portrait Plan and Atlantic Film Club, International Baby Care, Inc., Atlantic International Distributors, Inc., a corporation trading as Amalgamated Credit and Collection Bureau, National Direct Corporation, a corporation trading as National Advertised Products and International Album Plan, Jeffrey J. Weiss and Martin Osman, individually and as officers of said corporations, Lawrence Hahn, individually and as an officer of Atlantic Industries, Inc., and Richard S. Labovitz, individually and as an officer of International Baby Care, Inc. and Atlantic International Distributors, Inc., hereinafter referred to as respondents, have 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 amended complaint stating its charges in that respect as follows:

PARAGRAPH 1: Respondent Atlantic Industries, Inc., trading as Atlantic Portrait Plan, and Atlantic Film Club, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of photographs, photograph albums, photograph enlargements, photograph certificates, film and other merchandise to the public.

Trading as Atlantic Portrait Plan, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specified number of enlargements developed by respondents over a ten year period. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

Respondent, trading as Atlantic Film Club, operates a film processing service.

PAR. 2. Respondent International Baby Care, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at 720 N.W. 27th Ave., Miami, Fla. Respondent International Baby Care, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of baby furniture products to the public.

PAR. 3. Respondent Atlantic International Distributors, Inc., trading as Amalgamated Credit and Collection Bureau, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. The corporate address is 720 N.W. 27th Ave., Miami, Fla. Respondent Atlantic International Distributors, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent Atlantic International Distributors, Inc. is now and for some time last past has been engaged in the collection of delinquent accounts for respondents Atlantic Industries, Inc. and International Baby Care, Inc.

PAR. 4. Respondent National Direct Corporation, trading as National Advertised Products and International Album Plan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla. Respondent National Direct Distributors, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of photographs, photographic albums, photograph enlargements, photograph certificates, film and other merchandise to the public.

Trading as National Advertised Products, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specific number of enlargements developed by respondents. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

Trading as International Album Plan, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specific number of enlargements developed by respondents. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

PAR. 5. Respondents Jeffrey J. Weiss and Martin Osman are officers and directors of the four corporate respondents. Said individual respondents formulate, direct, and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of the individual respondents is 720 N.W. 27th Ave., Miami, Fla.

Respondent Lawrence Hahn is a director of the four corporate respondents and an officer of respondent Atlantic Industries, Inc. In such positions, the respondent cooperates with the other individual respondents in formulating, directing, or controlling the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of respondent Hahn is 2285 Peachtree Rd., N.W., Atlanta, Ga.

PAR. 6. Respondent Richard S. Labovitz is an officer of the corporate respondents International Baby Care, Inc., and Atlantic International Distributors, Inc. and as such cooperates with the other individual respondents in formulating, directing, and controlling the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of respondent Labovitz is 720 N.W. 27th Ave., Miami, Fla.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms, and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents and in the collection of delinquent accounts.

#### COUNT I

Alleging violations of Section 5 of the Federal Trade Commission

Act, the allegations of Paragraphs One, Four, Five and Seven hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 8. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused their said photographs, photograph albums, photograph enlargements, photograph certificates, film and other merchandise to be sold in various States of the United States, and when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in the various States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, respondents, respondents' agents, representatives, and employees have made and are now making numerous statements and representations directly or by implication:

1. That customers will receive a free prize, gift, or bonus, namely a photograph album, with the purchase of the photograph enlargement plan.

2. That certain but not all prospective customers will be offered the opportunity to purchase the plan at a "special" or "reduced" price and that those prospective customers not offered the "special" or "reduced" price must pay a higher price.

3. That the "special" or "reduced" price is below respondents' established regular retail price for the plan.

4. That the "special" or "reduced" price is an "at cost" price which includes only the cost to respondents of materials needed to print and develop the enlargements.

5. That in order to purchase the plan at the "special" or "reduced" price, the prospective customer must agree to display the photograph album in his home.

6. That the special price is being offered for the purpose of advertising and promoting respondents' product.

7. That the purpose of respondents' initial contact with the prospect is to give a surprise which was sent out by respondents' public relations department, or to present an advertising promotion or to make a courtesy presentation, or is for purposes other than the sale of respondents' products or services.

PAR. 10. In truth and in fact:

1. The album is not free. Its cost is included in the cost of the plan.

2. Most, if not all, prospective customers are afforded the oppor-

tunity to purchase the plan at the "special" or "reduced" price and no customer has to pay any higher price.

3. The "special" or "reduced" price is not below respondents' established regular retail price of the plan. Respondents seldom, if ever, have offered or sold the plan for any price higher than the so-called "special" or "reduced" price.

4. The so-called "special" or "reduced" price is not an "at cost" price. The cost of the plan includes more than the cost to respondents of materials needed to print and develop the enlargements.

5. The prospective customers agreement to display the photograph album is not a prerequisite to respondents selling the plan to the customer at the so-called "special" or "reduced" price.

6. Respondents' offer is made for the purpose of realizing a profit on the sale and not for the purpose of advertising or promoting their portrait plan.

7. Respondents' sales representatives have not and are not contacting persons in their homes or places of business primarily for the purpose of giving a surprise, presenting an advertising promotion or making a courtesy presentation. To the contrary, the primary purpose for contacting such persons has been and is to sell respondents' products or services.

Therefore, the statements and representations set forth in Paragraph Nine are misleading and deceptive.

PAR. 11. In the further course and conduct of their business, respondents' agents, representatives, and employees represent directly or by implication that single enlargements are regularly sold by respondents for \$7 each. Using \$7 to demonstrate value, respondents further represent:

1. That the 100-coupon plan, which has a base selling price of \$199.95 or \$189.95, is valued at over \$700.

2. That the 90-coupon plan which has a base selling price of \$149.95 is valued at over \$630.

3. That the 60-coupon plan which has a base selling price of \$89.95 is valued at over \$420.

4. That customers will save the difference between the value of the plan and the base selling price.

PAR. 12. By and through the use of the statements set out in Paragraph Eleven above, and others of similar import and meaning but not expressly set out herein, respondents have represented, and are now representing that on a regular basis for a reasonably substantial period of time in the recent regular course of their business, single enlargements have been sold for \$7 and further that \$7 per



enlargement would be a fair and accurate amount to use in determining the value of respondents' plan.

PAR. 13. In truth and in fact respondents have not sold single enlargements for \$7 or any other price on a regular basis for a reasonably substantial period of time in the recent regular course of their business. Therefore, any demonstration of value or savings based on the \$7 amount such as those described in Paragraph Eleven above would be false and misleading.

In addition, when demonstrating savings to customers, respondents neglect to add to the base price of the plan an amount equal to seventy-five cents per enlargement which respondents charge to cover mailing and handling. Respondents failure to include this extra charge is deceptive and misleading because such failure results in an inflation of the amount a customer might save by purchasing the plan.

PAR. 14. In the course and conduct of respondents' operations of the film processing service and for the purpose of inducing the purchase of their developing and printing services, respondents, respondents' agents, representatives and employees have made, and are now making statements and representations to customers that customers will receive a fresh roll of Kodak film FREE with each roll of film developed or printed by respondents. The free film has been offered by respondents continuously for a period of at least two years.

PAR. 15. By and through the use of the word "free" respondents have represented directly or through implication that the price charged by respondents is for processing alone and does not include any payment for the film.

PAR. 16. In truth and in fact, the film is not free because the continuous offer of free film over a long period of time has resulted in the price for the processing service alone becoming the regular price for the processing *and* film in combination.

Thus, the statements and representations set out in Paragraphs Fourteen and Fifteen above are false and misleading.

PAR. 17. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise because of such erroneous and mistaken belief.

PAR. 18. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and

practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

#### COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Four, Five, Six and Seven hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 19. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused their said photographs, photograph albums, photograph enlargements, photograph certificates, film, baby furniture, and other merchandise to be sold in various States of the United States, and when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in various States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 20. In the course and conduct of respondents' business, respondents' agents, representatives and employees have made, directly or by implication, statements and representations to customers that contracts entered into between respondents and said customers are non-cancellable. However, such statements are false, misleading and deceptive because in truth and in fact state statutes provide customers a right to cancel.

PAR. 21. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true.

PAR. 22. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

#### COUNT III

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four, Five, Six and Seven hereof are incorporated by reference in Count III as if fully set forth verbatim.

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PAR. 23. In the course and conduct of their aforesaid business, respondents now cause and for some time last past have caused, letters, forms, and various other kinds and types of documents relating to the collection of delinquent accounts to be deposited in the United States mail and transmitted to persons located in the various States of the United States, all of which constitute a part of the course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 24. In the furtherance of their business and for the purpose of inducing the payment of purportedly delinquent accounts, respondents, respondents' agents, representatives, and employees have sent or caused to be sent through the mail, letters, forms, and other printed matter in which respondents make certain statements and representations to purportedly delinquent customers. Typical, but not all inclusive of said statements and representations are the following:

1.

(Letterhead)

AMALGAMATED CREDIT AND COLLECTION BUREAU

P. O. Box 781

Bronx General Post Office

Bronx, New York 10451

Dear Debtor:

Your account has been given to us by Atlantic Portrait Plan \* \* \*. To avoid an embarrassing and expensive situation, mail your check or money order *directly* to Amalgamated Credit and Collection Bureau.

2. The above account has for value received been assigned to the credit bureau for immediate collection procedure.

3.

## FINAL NOTICE

\* \* \* You are hereby notified that we intend to institute legal action to be brought against you for the entire balance of your account.

4. If you do not see fit to take care of this small matter and honor your obligations, we will have no alternative but to collect through the Small Claims Court.

PAR. 25. By and through the use of the aforesaid statements and representations described in Paragraph Twenty-Four above and others of similar import not specifically set out herein, respondents represent and have represented directly or by implication that:

1. Delinquent accounts have been turned over or assigned for value by respondents to an independent credit and collection bureau.

2. If payments are not made, respondents will institute suit or take other legal action to collect the outstanding amount due.

PAR. 26. Such statements as those set out in Paragraphs Twenty-

Four and Twenty-Five above are false and misleading because in truth and in fact:

1. Accounts have not been turned over nor assigned for value to independent credit and collection bureaus. Respondent Atlantic International Distributors, Inc., trading as Amalgamated Credit and Collection Bureau, is a corporate device used by Atlantic Industries, Inc. and the individual respondents. By use of the device respondents hope to effect the collection of delinquent accounts by representing and implying that the respondent Amalgamated Credit and Collection Bureau is an independent collection agency.

2. Respondents seldom, if ever, bring legal action to collect delinquent accounts.

PAR. 27. In the further course and conduct of the collection of delinquent accounts, respondents send or cause to be sent forms, such as the one entitled "Demand for the Payment of Debt," designed to mislead the recipient into believing that such form was sent by a government body or one of its agencies.

PAR. 28. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the payment of said delinquent accounts because of such erroneous and mistaken belief.

PAR. 29. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having hereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, 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 Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Atlantic Industries, Inc., trading as Atlantic Portrait Plan, and Atlantic Film Club, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla.

2. Respondent International Baby Care, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at 720 N.W. 27th Ave., Miami, Fla. Respondent International Baby Care, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

3. Respondent Atlantic International Distributors, Inc., trading as Amalgamated Credit and Collection Bureau, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. The corporate address is 720 N.W. 27th Ave., Miami, Fla. Respondent Atlantic International Distributors, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

4. Respondent National Direct Corporation, trading as National Advertised Products and International Album Plan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla. Respondent National Direct Corporation is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

5. Respondents Jeffrey J. Weiss and Martin Osman are officers and directors of the four corporate respondents. Said individual respondents formulate, direct and control the acts and practices of the corporate respondents. The business address of the individual respondents is 720 N.W. 27th Ave., Miami, Fla.

Respondent Lawrence Hahn is a director of the four corporate respondents and an officer of respondent, Atlantic Industries, Inc. In

such positions, he cooperates with the other individual respondents in formulating, directing or controlling the acts and practices of the corporate respondents. The business address of respondent Hahn is 2285 Peachtree Rd., N.W., Atlanta, Ga.

6. Respondent Richard S. Labovitz is an officer of the corporate respondent International Baby Care, Inc., and as such cooperates with the other individual respondents in formulating, directing and controlling the acts and practices of the corporate respondent. The business address of respondent Labovitz is 720 N.W. 27th Ave., Miami, Fla.

7. 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

*It is ordered,* That respondents Atlantic Industries, Inc., a corporation trading as Atlantic Portrait Plan and Atlantic Film Club, International Baby Care, Inc., National Direct Corporation, a corporation trading as National Advertised Products and International Album Plan or under any other name, its successors and assigns and Jeffrey J. Weiss, Martin Osman and Lawrence Hahn, individually and as officers and directors of said corporations and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the advertising, offering for sale, sale or distribution of photographs, photograph albums, photograph enlargements, photograph certificates, film or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

#### I

1. Representing, orally or in writing, directly or by implication:
  - a. That any customer will receive a free prize, gift, or bonus with the purchase of a photograph enlargement plan or any other merchandise sold by respondents when the cost of such prize, gift or bonus is included in the price of the purchased merchandise.
  - b. That any offer to sell at a special or reduced price is limited to certain persons and is not available to all persons.
  - c. That any person not offered the special or reduced price must pay a higher price.
  - d. That any price of a product or service is special or reduced unless such price is below the amount at which such product or service has been sold by respondents for a reasonably substantial period of time in the recent regular course of their business.

- e. That any product is sold at cost.
  - f. That any offer is conditioned upon specified action by the customer.
  - g. That the purpose of respondents' contact or solicitation is other than to sell services or products for profit.
2. Failing, clearly, emphatically and unqualifiedly to reveal, at the outset of the initial and all subsequent contacts or solicitations of purchasers or prospective purchasers, whether directly or indirectly, or by telephone, written or printed communication, or person-to-person, that the purpose of such contact or solicitation is to sell products or services as the case may be, which shall be identified with particularity at the time of each such contact or solicitation.
  3. Representing, orally or in writing, directly or by implication, that any amount is respondents' usual and customary retail price for any product or service unless such amount is the price at which such product has been usually and customarily sold at retail by respondents for a reasonably substantial period of time in the recent regular course of business.
  4. Representing any price as respondents' usual and customary price to demonstrate the value of a photo enlargement or any other product or service when such price is in excess of the price at which such product has been usually and customarily sold at retail by respondents for a reasonably substantial period of time in the recent regular course of business.
  5. Representing, in any manner, that by purchasing any of respondents' merchandise or services, customers are afforded savings, amounting to the difference between respondents' stated price and a compared value price for comparable merchandise or service unless substantial sales of merchandise or services of like grade and quality are made in the trade area at the compared price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in the trade area in which the comparison is made which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise or services of like grade and quality.
  6. Failing to disclose any charges or costs in representing savings to customers in the purchase of any product or service.
  7. Misrepresenting in any manner the amount of savings available to purchasers of respondents' products or services.
  8. Representing, directly or by implication, in any manner, that any price is reduced from respondents' former price or that any savings will accrue to the customer through purchase of respondents' merchandise or service unless respondents' business records establish and show that

such prices constitute a significant reduction from the price at which such merchandise has been sold in substantial quantities or openly and actively offered for sale in good faith for a reasonable substantial period of time by respondents in the recent regular course of their business.

9. Making any statements or representations to film processing customers that "free" film will be given in connection with the sale of such service, unless the price charged therefor is respondents' usual and customary price for the film processing service alone.

## II

*It is further ordered,* That respondents Atlantic Industries, Inc., a corporation trading as Atlantic Portrait Plan and Atlantic Film Club, National Direct Corporation, a corporation trading as National Advertised Products and International Album Plan, or under any other name, International Baby Care, Inc., a corporation, the corporations' successors and assigns, and Jeffrey J. Weiss, Martin Osman, Lawrence Hahn and Richard S. Labovitz, individually and as officers or directors of said corporations and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the advertising, offering for sale, sale or distribution of photographs, photograph albums, photograph enlargements, photograph certificates, film, baby furniture or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or in any other manner, that contracts entered into between respondents and their customers are noncancellable.

2. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

3. Failing to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned



"NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain a 10-point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(enter date of transaction)

You may cancel this transaction, without any penalty or obligation, within three (3) business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten (10) business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within twenty (20) days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram to \_\_\_\_\_ (*name of seller*) at (*address of seller's place of business*) not later than midnight of \_\_\_\_\_ (*date*)

I hereby cancel this transaction.

\_\_\_\_\_  
(date)

\_\_\_\_\_  
(buyer's signature)

4. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

5. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

6. Misrepresenting in any manner the buyer's right to cancel.

7. Failing or refusing to honor any valid notice of cancellation by a buyer and within ten (10) business days after the receipt of such notice, to: (1) refund all payments made under the contract or sale; and (2) return any goods or property traded in, in substantially as good condition as when received by the seller.

8. Failing, within ten (10) business days of receipt of the buyer's

notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

*Provided, however,* That nothing contained in Count II of this order shall relieve respondents of any contractual obligations required by federal law or that law of the State in which the contract is negotiated. When such obligations are inconsistent, respondents may apply to the Commission for relief from this provision with respect to contract executed in the state in which such different obligations are required.

## III

*It is further ordered,* That respondents Atlantic Industries, Inc., trading as Atlantic Portrait Plan and Atlantic Film Club, or under any other name, International Baby Care, Inc., a corporation and Atlantic International Distributors, Inc., a corporation trading as Amalgamated Credit and Collection Bureau, or under any other name, National Direct Corporation, a corporation trading as National Advertised Products and International Album Plan, or under any other name, the corporations' successors and assigns, and Jeffrey J. Weiss, Martin Osman, Lawrence Hahn and Richard S. Labovitz, individually and as officers or directors of said corporations and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the collection of delinquent accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, in any manner, that an account has been turned over or assigned for value to an independent credit and collection bureau.
2. Representing, orally or in writing, directly or by implication, in order to effect payment of any account, that respondents intend to institute legal action to recover for any payment due, unless respondents establish by adequate records that a prior determination had been made in good faith to institute such legal action.
3. Using the form "Demand for the Payment of Debt" or any other form which misleads or has the tendency to mislead the recipient into believing that such form was sent by a government body or one of its agencies.

## IV

*It is further ordered,* That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

*It is further ordered,* That respondents shall:

1. Provide each of their present and future branch managers, and

other supervisory personnel engaged in the sale or supervision of persons engaged in the sale of respondents' photography products or services, written instructions with respect to the provisions of this order which are applicable to the functions of each such person.

2. Require each person so described in Paragraph (1) above to clearly and fully explain the applicable provisions of this order to all sales agents, representatives and other persons engaged in the sale of the respondents' photography products or services.

3. Provide each person so described in Paragraphs (1) and (2) above with a form returnable to the respondents clearly stating his intention to be bound by and to conform his business practices to the applicable provisions of this order; retain said statement during the period said person is so engaged and make said statement available to the Commission's staff for inspection and copying upon request.

4. Inform each person described in Paragraphs (1) and (2) above that respondents shall not use any third party, or the services of any third party, if such third party will not agree to so file and does file notice with the respondents that it will be bound by the applicable provisions of this order.

5. If such third party will not agree to so file notice with respondents and be bound by the applicable provisions of the order, respondents shall not use such third party, or the services of such third party to sell respondents' photography products or services.

6. Inform the persons described in Paragraphs (1) and (2) above that respondents are obligated by this order to discontinue dealing with those persons who continue on their own the deceptive acts or practices prohibited by this order.

7. Institute a program of continuing surveillance to reveal whether the business operations of each said person described in Paragraphs (1) and (2) above conform to the applicable provisions of this order.

8. Discontinue dealing with the persons so engaged, revealed by the aforesaid program of surveillance, who continue on their own the deceptive acts or practices prohibited by the applicable provisions of this order.

9. Upon receiving information or knowledge from any source concerning two or more bona fide complaints prohibited by the applicable provisions of this order against any of their sales agents or representatives during any one-month period, will be responsible for either ending said practices or securing the termination of the employment of the offending sales agent or representatives.

10. Submit to the Commission a detailed report every six (6) months for a period of three years from the effective date of this order

demonstrating the effectiveness of the steps or actions taken with regard to the aforesaid surveillance program.

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

*It is further ordered,* That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business or employment in which they are engaged as well as a description of their duties and responsibilities.

*It is further ordered,* That respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

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IN THE MATTER OF

THE NEW YOU, INC., ET AL

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-2671. Complaint, June 2, 1975-Decision, June 2, 1975*

Consent order requiring a Hollywood, Fla., promoter of an inherently dangerous process or treatment, involving application of a caustic chemical solution of the faces and other parts of the bodies of customers, among other things to cease misrepresenting the safety, efficacy and cost of the treatments; to clearly and conspicuously disclose the health hazards involved in the application of the process or treatment as well as the limited efficacy of the treatment; to use a licensed medical practitioner to examine, diagnose, advise, select or mentally prepare prospective patients, to supervise and direct administrations or applications of the treatment, and to provide post-operative advice or care for the patients; and to require prospective patients to consult with and obtain a certificate from an independent physician prior to treatment.

*Appearances*

For the Commission: *Robert L. Osteen, Jr.*

For the respondents: *Alfred E. Johnson, Fort Lauderdale Fla.*

Complaint

85 F.T.C.

## 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 The New You, Inc., a corporation doing business as The New You, and The New You Clinic de Facial, and Robert M. Neadel, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated Sections 5 and 12 of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The New You, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at 1601 Harrison St., Hollywood, Fla.

Respondent Robert M. Neadel is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for-sometime last past have been engaged in the operation of The New You and The New You Clinic de Facial. Respondents advertise, offer for sale, and sell to the general public a medical process called The New You system (hereinafter sometimes referred to as respondents' treatment) which involves the application of a certain caustic chemical solution to the face, or various other parts of the bodies of their clients for the purported purpose of removing or diminishing manifestations of aging such as wrinkles, lines, folds and spots and undesirable features such as blemishes, large pores, and acne marks by peeling the upper layers of skin from the treated areas. After the solution is applied to the patient's skin, bandages are then applied to the treated areas and are allowed to remain for several days; after which time, the bandages are removed and the upper layers of skin, destroyed by the process, are peeled away.

PAR. 3. Respondents' medical treatment constitutes either a drug or a cosmetic, or both, as defined in Sections 15(c) and (e) of the Federal Trade Commission Act, 15 U.S.C. §§ 55(c) and (e).

PAR. 4. In the course and conduct of their business as aforesaid, respondents advertise in newspapers of general circulation which are distributed by mail in states other than the state in which they are printed. In addition, advertising materials, contracts and agreements, business correspondence, monies and other documents travel by mail

between respondents' place of business and the residences of prospective patients. By virtue of these activities, respondents have maintained a substantial business in commerce, as "commerce" is used in Section 5 of the Federal Trade Commission Act. Also, respondents have disseminated and caused to be disseminated advertisements by United States mails, and in commerce by other means, within the meaning of Section 12(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 52(a)(1). Further, respondents' advertisements have the purpose of inducing, or are likely to induce, directly or indirectly, the purchase in commerce of The New You treatment, within the meaning of Section 12(a)(2) of said Act, 15 U.S.C. § 52(a)(2).

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of The New You treatment, respondents have made and are now making numerous statements and representations in advertisements inserted in newspapers of general circulation and in other promotional materials and sales presentations. Typical of the statements and representations contained in said advertising, promotional literature and during sales presentations, but not all inclusive, are the following:

Let us take at least 15 years off your face.

This is a unique regenerative process.

This special youth process has brought new glow and happiness to thousands throughout the world.

Now there's a new way to do something wonderful, positive, and permanent about your prematurely aged face. Now there's The New You, the dawn of a brighter day.

The New You is a system of facial rejuvenation that can literally take you back 10, 15 or even 20 years in appearance.

The New You is not cosmetic. It is not surgical. It is regeneration.

Your next 10 days will be spent in our modern clinic, where you'll be pampered 'round the clock. During that time, the years will be painlessly disappearing from your face to be miraculously replaced by youthfully glowing new skin.

We apply a special formulated solution to your skin and cover it with a mask.

During the next week and a half, lines and folds around the eyes, and wrinkles on the cheeks and forehead, diminish or disappear.

Give us 10 days of your time and we'll take at least 10 years off your face.

And the years stay off. So if we take 15 years from your appearance, you'll continue to look about 15 years younger than you really are.

Then for the next 10 days or so you simply relax at The New You facilities while the formula does its quiet work.

First understand that there's no cutting, no scraping, no machines, no abrasives, no creams, no exercises.

PAR. 6. Through the use of the above statements and representations, and others of similar import and meaning but not expressly set out herein, respondents have represented directly or by implication that:

1. Respondents' treatment is not medical or surgical in nature.

2. Respondents' treatment is generally painless and involves no abrasives or caustic chemicals.
3. Potential discomfort is virtually non-existent as one can relax without emotional or physical distress during the treatment.
4. The application of the respondents' treatment is a safe procedure free from possible serious side effects or complications.
5. Respondents' treatment will eliminate or significantly diminish acne marks, big pores, deep lines, deep wrinkles and sagging or redundant folds of skin.
6. Respondents' treatment will produce or result in new, soft, fresh, clear, healthy, fine-textured skin.
7. Respondents' treatment is clinically recommended or can be beneficial to all kinds of people.
8. Respondents' personnel are competently trained and qualified to:  
(a) examine, advise, and mentally prepare patients to undergo the treatment; (b) determine whether each patient is a proper subject for treatment; (c) administer or perform treatment without the direction and supervision of a licensed medical practitioner; and (d) provide post-operative advice and care for patients.
9. Respondents' treatment is complete in 10 days.
10. As a result of respondents' treatment, patients will appear 15 years younger than their chronological age.
11. Respondents represent that the treatment is unique, that the process is new or special, that it involves a secret formula, that it is available only through the respondents, and that these factors justify the high price of the treatment.

PAR. 7. In truth and in fact:

1. The treatment involves application of a caustic chemical solution (containing phenol, also known as carbolic acid) to the skin, causing a second-degree burn which peels off the outer layers of the skin and produces a change in skin appearance solely by the body's own wound-healing processes. This treatment is known as chemosurgery and is a serious medical procedure.
2. The treatment involves caustic chemicals and creams which burn the upper layers of skin to create peeling and is in fact painful in many cases.
3. The pain associated with the said treatment can be so severe that respondents' patients are always sedated or anesthetized during the application of acid and may require medication for days, weeks, or months afterward to reduce pain and other discomforts, such as itching and burning. During the treatment, many patients experience such discomforts as the eyes swelling shut and difficulties breathing and swallowing.

4. The treatment has a number of inherent dangers to the human body:

a. *Systemic Toxic Reaction (Poisoning)*. The chemical used in The New You treatment, phenol, is toxic to kidneys, liver, and other organs of the body when present in sufficient quantities. Phenol can be absorbed through the skin during the treatment in quantities sufficient to cause serious and even fatal illness in some people. Persons with kidney infections are particularly susceptible to adverse phenol reaction.

b. *Infection*. Like any other serious burn covering a large surface of the body, the danger of infection through the burned area is ever present during the process and for some time afterward. The "powder mask," worn for a week after the initial treatment is in reality a medical step to attempt to prevent infection.

c. *The Eyes*. If the acid gets in a patient's eyes, serious permanent damage can result, including blindness; therefore, a great deal of medical skill is required and adequate precautions must be taken to prevent such an occurrence and minimize the harm if this does happen.

d. *Other Systemic Complications*. Since phenol skin peeling is a serious, traumatic medical procedure and involves use of sedatives and other medications, clients are exposed to numerous other dangers, including heart disease and allergic reactions, which accompany procedures of this type. If patients are not properly prepared, physically, mentally and emotionally, with special emphasis on full disclosure of all that the process entails, these dangers are heightened and the prospects for improvement diminished.

5. Only certain limited conditions, such as fine lines and some skin blemishes, can be affected by the process, and only in carefully selected persons. Acne scars, big pores, deep lines, deep wrinkles, and sagging or redundant folds of skin are not eliminated or significantly diminished by the treatment.

6. As a result of the treatment, a number of undesirable changes in the skin may occur, necessitating the continual use of cosmetics or medical techniques to protect the skin, or treat or camouflage its condition, including but not limited to:

a. *Scarring*. Various types of visible scars may appear after the treatment and remain indefinitely.

b. *Pigmentation Changes*. The treatment almost always produces changes in the color of the treated area, which may persist indefinitely, such as a lighter overall color, mottling (dark areas alternating with light areas), and lines of demarcation between treated and untreated areas.

c. *Redness*. The extreme redness of the skin, which occurs mainly



during the healing process, may persist for a long time. Also, there may be a tendency, persisting indefinitely, for the treated skin to flush (suddenly appear red) during times of overheating, overexertion or emotional stress.

d. *Sensitivity To Sunlight.* During the healing process and for an indefinite period afterward, the treated skin may react abnormally to exposure to sunlight, including severe sunburn, mottling, and other pigmentation changes.

e. *Other Skin Reactions.* The treated skin may be affected by other problems associated with the traumatic impact of chemical skin peeling, such as increased or coarsened hair growth requiring further medical attention.

7. Favorable results cannot be achieved unless rigorous criteria for patient selection are followed, including but not limited to:

a. *Sex.* Most men should not undergo the treatment because of difficulties associated with beard growth and the necessity for wearing cosmetics to protect the skin and camouflage its condition. Yet respondents do perform the treatment on men.

b. *Age.* A young person whose skin has not matured should not go through the treatment nor should an elderly person who cannot stand the physical strain.

c. *Type Of Skin.* The treatment should only be performed on certain limited types of skin, and definitely not on dark-skinned persons because of the probability of drastic pigmentation changes.

d. *Other Factors.* People who are not in the proper physical, mental, and emotional health should not undergo this treatment.

8. Because of its serious medical nature, respondents who are not and do not employ professionally trained or licensed personnel are not qualified to deal with the complex physical, mental, and emotional factors involved in the treatment.

9. A period lasting weeks or months, the duration of which cannot be accurately predicted, is required before the skin is healed. During this time, a treated person has an extremely red face, may suffer various discomforts, and must restrict public activities, avoid direct or reflected sunlight and use heavy cosmetics to shield and camouflage the skin.

10. Treated persons cannot reasonably expect that their appearance will be altered by more than a year or two from their actual chronological age, even with the best results obtained by a professional plastic surgeon.

11. There is nothing unique about the respondents' treatment. The process is not new or secret, but is performed by qualified plastic

surgeons under more closely controlled hospital conditions in metropolitan areas across the country for a fraction of the respondents' price.

Therefore, representations referred to in Paragraph Five are false, misleading and deceptive.

PAR. 8. In the course and conduct of their business, respondents, directly or through agents, have represented in advertisements, during oral sales presentations, and at other times and places, the asserted advantages of their treatment, as hereinbefore described. In no case have respondents disclosed:

1. The treatment is chemical skin peeling, a serious medical procedure known as chemosurgery.

2. The treatment involves the application of an acid called phenol to the skin, causing a second-degree burn which peels off the outer layers of the skin and produces a change in skin appearance solely by the body's own wound-healing reactions.

3. The pain associated with the treatment can be very severe; thus patients are sedated or anesthetized during the application of acid. This pain, as well as other discomforts, such as burning, itching, and swollen shut eyes, may persist for days or weeks afterward, requiring medication to control.

4. The treatment has a number of known inherent dangers, including: (1) poisoning of a person's entire system by the acid absorbed through the skin, which can be a serious, even fatal illness; (b) infection; (c) blindness, if the acid gets into a patient's eyes; (d) permanent scarring; and (e) other complications resulting from the traumatic nature of the procedure or the medications used.

5. A number of undesirable changes in the skin result from chemical skin-peeling, necessitating the continual use of cosmetics or medical techniques to protect, treat, or camouflage the skin. These may include: (a) permanent scarring; (b) changes in overall color of the treated area; (c) mottling; (d) a line of demarcation at the edge of the treated area; (e) extreme redness; (f) abnormal sensitivity to sunlight; and (g) other traumatic skin reactions.

6. The most common sign of aging in the neck area, which is a stringy or "turkey-neck" condition of the skin and underlying tissues, is not improved by chemical skin-peeling.

7. Almost all plastic surgeons refuse to perform chemical skin-peeling on the neck because the neck is not likely to be improved by the process and is more likely to be worsened since the risks of undesirable side effects and skin changes described above are greater.

8. Only minor aspects of skin appearance, such as fine wrinkles and some skin blemishes, can be treated by the process.

9. Acne scars, big pores, deep lines, deep wrinkles, and sagging or

redundant folds of skin are not removed or significantly reduced by the process, yet some of these conditions may be improved by other techniques of plastic surgery, such as dermabrasion or surgical face lift.

10. Most men are not advised to undergo the process because of difficulties associated with beard growth and the necessity for continual use of cosmetics.

11. A young person whose skin has not matured should not undergo the process, because of the risk of permanent skin damage.

12. Dark-skinned persons should not undergo the process because of the probability of drastic pigmentation changes.

13. Only certain kinds of people with certain types of skin have a reasonable chance of receiving favorable results and avoiding adverse effects from chemical skin peeling, and only a licensed medical practitioner familiar with such techniques of plastic surgery and able to evaluate complex physical, mental and emotional factors is qualified to examine, diagnose, advise, select, or mentally prepare patients for chemical skin peeling, and only such a professional person can provide post-operative advice and care for patients.

14. Although a treatment of this serious nature is usually performed in a hospital, respondents apply and administer the treatment at a clinic, which they own or operate.

15. It may be weeks or months after the treatment before the skin is healed, during which time a treated person has an extremely red face, may suffer various discomforts, and must restrict public activities, avoid direct or reflected sunlight and use heavy cosmetics and sun screens.

16. If a more youthful appearance is achieved through the treatment the result may not last more than a year or two, since part of the benefit is due to temporary swelling and since the natural aging processes begin all over again after the treatment.

17. Chemical skin peeling is available from qualified plastic surgeons under closely controlled hospital conditions in metropolitan areas across the country at substantially lower cost.

The disadvantages, consequences and dangers described in the above paragraph have occurred or existed, or to a reasonable medical certainty can be expected to occur or exist, and respondents knew, or had reason to know, that they could be expected to occur or exist.

Therefore, the failure to disclose the material facts referred to in Paragraph Eight is false and misleading and the acts and practices referred to in said paragraph are unfair and deceptive.

PAR. 9. In the course and conduct of their business, the respondents have been, and are now, using persons other than a licensed medical practitioner who is familiar with techniques of plastic surgery, who is

operating within the limits of his or her profession, and who is qualified to evaluate complex physical, mental and emotional factors, to examine, diagnose, advise, select, or mentally prepare prospective patients for The New You treatment, to administer or apply the treatment without supervision or direction, or to provide post-operative advice or care for them.

The use by the respondents of the aforesaid practices is an unfair act or practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 10. Therefore the advertisements, representations, acts and practices referred to hereinabove are false, misleading, unfair and deceptive.

PAR. 11. The use by respondents of the aforesaid false, misleading, unfair and deceptive representations, acts and practices has the capacity and tendency to mislead consumers into the mistaken belief that said representations are true and to unfairly influence consumers, with the result that consumers are induced to undergo The New You treatment and be subjected to severe pain, discomfort, inconvenience of traveling, exorbitant charges, and risks of disease or disfigurement, without being afforded reasonable opportunity to comprehend and consider the seriousness of the treatment or to compare facial improvement treatments available from other sources under more closely controlled medical conditions, at lower prices.

PAR. 12. The respondents' acts and practices alleged herein, including the dissemination of false advertisements, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents 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 aforesaid draft of 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 Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The New You, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 1601 Harrison St., Hollywood, Fla.

2. Respondent Robert M. Neadel is an individual and officer of the said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above address.

3. 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

*It is ordered,* That respondents The New You, Inc., a corporation, doing business as The New You Clinic de Facial or any other trade name or names, its successors and assigns, and Robert M. Neadel, individually and as an officer of said corporation (hereinafter sometimes referred to as "respondents"), and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or dispensing of The New You treatment (hereinafter sometimes referred to as respondents' treatment) or any similar cosmetic chemosurgical process of face lifting or skin peeling, which involves the topical application of a caustic chemical solution containing carbolic acid (also known as phenol) or other substances on the face, neck, arms, hands or other parts of the human body for the purpose of inducing superficial skin burns, the result of which is the peeling or removal of the outer layers of skin, in commerce, as "commerce" is defined in the Federal Trade Commission Act, or by the United States mails within the meaning of Section 12(a)(1) of the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication that:

1. Respondents' treatment or process is solely a cosmetic process, not a medical process, or does not involve chemical surgery.
  2. Respondents' treatment or process is painless or involves no abrasives or caustic chemicals.
  3. Potential discomfort is virtually non-existent as one can relax without emotional or physical distress during the treatment.
  4. Respondents' treatment is safe or free from possible serious side effects or complications.
  5. Respondents' treatment or process will remove or significantly reduce acne scars, big pores, deep lines, deep wrinkles, or sagging, redundant folds of skin.
  6. Respondents' treatment will produce or result in new soft, fresh, clear, healthy, fine-textured skin.
  7. Respondents' process can be clinically recommended to or safely or successfully performed on men, young people, elderly people, or dark-skinned people.
  8. Respondents' personnel are competently trained and qualified to:
    - (a) examine, advise, and mentally prepare patients to undergo the treatment;
    - (b) determine whether each patient is a proper subject for treatment;
    - (c) administer or perform treatment without direction and supervision of a licensed medical practitioner; and
    - (d) provide post-operative advice and care for patients.
  9. Respondents' treatment is complete within any specified period of time.
  10. Respondents' treatment will cause clients to appear any specified number of years younger than their actual chronological age.
  11. Respondents' process is unique, new or special in the following or other ways:
    - a. That it involves a secret formula or secret solution;
    - b. That it or similar processes are only available through respondents; and
    - c. That it is not available through qualified plastic surgeons under more closely controlled hospital conditions in metropolitan areas across the country at a substantially lower cost.
- B. Failing or refusing to make clear and conspicuous disclosures in all advertising and in all oral sales presentations, that:
1. The treatment is chemical skin-peeling, a serious medical procedure known as chemosurgery.
  2. The treatment involves the application of an acid called phenol to the skin, causing a second-degree burn which peels off the outer layers of the skin and produces a change in skin appearance solely by the body's own wound-healing reactions.
  3. The pain associated with the treatment can be very severe; thus

patients are sedated or anesthetized during the application of acid. This pain, as well as other discomforts, such as burning, itching, and swollen shut eyes, may persist for days or weeks afterward, requiring medication to control.

4. The treatment has a number of known inherent dangers, including: (a) poisoning of a person's entire system by the acid absorbed through the skin, which can be a serious, even fatal illness; (b) infection; (c) blindness, if the acid gets into a patient's eyes; (d) permanent scarring; and (e) other complications resulting from the traumatic nature of the procedure or the medications used.

5. A number of undesirable changes in the skin result from chemical skin-peeling, necessitating the continual use of cosmetics or medical techniques to protect, treat, or camouflage the skin. These may include: (a) permanent scarring; (b) changes in overall color of the treated area; (c) mottling; (d) a line of demarcation at the edge of the treated area; (e) extreme redness; (f) abnormal sensitivity to sunlight; and (g) other traumatic skin reactions.

6. The most common sign of aging in the neck area, which is a stringy or "turkey-neck" condition of the skin and underlying tissues, is not improved by chemical skin-peeling.

7. Almost all plastic surgeons refuse to perform chemical skin-peeling on the neck because the neck is not likely to be improved by the process and is more likely to be worsened since the risks of undesirable side effects and skin changes described above are greater.

8. Only minor aspects of skin appearance, such as fine wrinkles and some skin blemishes, can be treated by the process.

9. Acne scars, big pores, deep lines, deep wrinkles, and sagging or redundant folds of skin are not removed or significantly reduced by the process, yet some of these conditions may be improved by other techniques of plastic surgery, such as dermabrasion or surgical face lift.

10. Most men are not advised to undergo the process because of difficulties associated with beard growth and the necessity for continual use of cosmetics.

11. A young person whose skin has not matured should not undergo the process, because of the risk of permanent skin damage.

12. Dark-skinned persons should not undergo the process because of the probability of drastic pigmentation changes.

13. Only certain kinds of people with certain types of skin have a reasonable chance of receiving favorable results and avoiding adverse effects from chemical skin-peeling, and only a licensed medical practitioner familiar with such techniques of plastic surgery and able to evaluate complex physical, mental and emotional factors is qualified to examine, diagnose, advise, select, or mentally prepare patients for

chemical skin-peeling, and only such a professional person can provide post-operative advice and care for patients.

14. Although a treatment of this serious nature is usually performed in a hospital, respondents' treatment is given at a clinic, which they own or operate.

15. It may be weeks or months after the treatment before the skin is healed, during which time a treated person has an extremely red face, may suffer various discomforts, and must restrict public activities, avoid direct or reflected sunlight and use heavy cosmetics and sun screens.

16. If a more youthful appearance is achieved through the treatment, the results may not last more than a year or two, since part of the benefit is due to temporary swelling and since the natural aging processes begin all over again after the treatment.

17. Chemical skin-peeling is available from qualified plastic surgeons under closely controlled hospital conditions in metropolitan areas across the country at substantially lower cost.

Respondents shall set forth the above disclosures separately and conspicuously from the balance of each advertisement and each presentation used in connection with the advertising, offering for sale, sale, or dispensing of respondents' cosmetic process, and shall devote no less than fifteen percent of each advertisement or presentation to such disclosures. *Provided, however,* That in advertisements which consist of less than forty-eight column inches in newspapers or periodicals, and in radio or television advertisements with a running time of two minutes or less, respondents may substitute the following statement, in lieu of the above requirements:

WARNING: This is a medical procedure—basically a chemical burn which peels skin away. It is extremely painful, takes a long time to heal, and exposes a person to risks of poisoning, infection, permanent scarring, and other medical complications. If performed on the neck, the process may make it look worse. Many signs of aging are not improved by this process, and the benefit, if any, is mainly temporary. Only certain kinds of people can benefit from this process, and they should be diagnosed, selected, treated, and continually cared for by a qualified doctor under closely controlled medical conditions. (Statement required by order of the Federal Trade Commission.)

Respondents shall set forth the above disclosure separately and conspicuously from the balance of each advertisement, stating nothing to the contrary or in mitigation thereof, and shall devote no less than fifteen percent of each advertisement to such disclosure, and if such disclosure is made in print, it shall be in at least eleven-point type.

*It is further ordered,* That respondents:

1. Recall and retrieve, from each and every licensee and sales representative, all advertisements and materials upon which advertisements or oral sales presentations are based, which contain any of the



representations prohibited by Paragraph A of this order or which fail to make the disclosures required by Paragraph B.

2. Deliver a copy of this order to each present and future franchisee, licensee, and sales representative, and to each licensed medical practitioner associated with respondents or their licensees; and obtain a written acknowledgement from each of the receipt thereof.

3. Obtain from each present and future franchisee, licensee, or sales representative an agreement in writing (a) to abide by the terms of this order, and (b) to the cancellation of their license or franchise for failure to do so; and that respondents cancel the license or franchise of any licensee or franchisee that fails to abide by the terms of this order.

*It is further ordered,* That respondents:

1. Provide prospective and present patients, as soon as possible after initial sales contact is made with such person and before such person signs any document relating to respondents' process, an information sheet which shall be furnished to the prospective patient and which contains nothing but the disclosures, numbered 1 to 17, set forth in Paragraph B. Respondents shall allow these persons ample, uninterrupted opportunity to read and consider the contents of this information sheet. Respondents shall retain a copy of this information sheet, after it is signed and dated by the person, for a period of two (2) years.

2. Require that each such prospective patient, after receipt of the information sheet described above and before he or she signs any contract for respondents' treatment, consult with a licensed physician, who is not in any way associated with or recommended by the respondents, regarding the nature of chemical skin-peeling, its dangers, discomforts, limitations, and alternatives. Respondents shall obtain from each prospective patient a certificate, signed by the physician who was thus consulted, specifying that the physician:

- a. Understands what respondents' treatment is and the conditions under which it will be performed;
- b. Has explained to the prospective patient the nature of the treatment, its dangers, discomforts, limitations, and alternatives;
- c. Has conducted or has examined the results of tests appropriate to determine prospective patient's physical fitness to undergo respondents' treatment and has discussed these results with the prospective patient; and
- d. Has reviewed appropriate aspects of the prospective patient's medical history and has discussed these aspects with the prospective patient.

This certificate shall specify the date and approximate time of the

consultation, and respondent shall retain all such certificates for three (3) years.

*It is further ordered,* That no contract for respondents' process shall become binding on the patient prior to forty-eight hours after the patient has consulted with the physician who will direct and supervise the performing of the treatment and inspected and approved the treatment and recuperation facilities, and that:

1. Respondents shall clearly and conspicuously disclose, orally prior to the time of sale, and in writing on any contract, promissory note or other instrument signed by the patient, that the purchaser may rescind or cancel any obligation incurred, with return of all monies paid, by mailing or delivering a notice of cancellation to the respondents' place of business prior to the end of this period.

2. Respondents shall provide a separate and clearly understandable form which the purchaser may use as a notice of cancellation.

3. Respondents shall return to such patient, within forty-eight hours after receipt of notice of cancellation, all monies paid.

4. Respondents shall not negotiate any contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to the time the patient is treated.

*It is further ordered,* That respondents cease and desist from the following unfair practice:

1. Failing or refusing to use a licensed medical practitioner, who is familiar with such techniques of plastic surgery, who is operating within the limits of his or her profession, and who is qualified to evaluate complex physical, mental and emotional factors, to examine, diagnose, advise, select, or mentally prepare all prospective patients for chemical skin-peeling, to supervise and direct all administrations or applications of the treatment, and to provide post-operative advice or care for all such patients.

*It is further ordered,* That respondents maintain at all times in the future, for a period of not less than three (3) years, complete business records relative to the manner and form of their continuing compliance with the above terms and provisions of this order.

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

*It is further ordered,* That the individual respondent named herein promptly notify the Commission of the discontinuance of his present

business or employment, and of his affiliation with a new business or employment, in the event of such discontinuance or affiliation. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

*It is further ordered*, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

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IN THE MATTER OF  
ZENITH LABORATORIES, INC., ET AL.

*Docket 8426. Order, June 3, 1975*

Show cause order of July 24, 1973, proposing modification of the order to cease and desist vacated.

*Appearances*

For the Commission: *J. Thomas Rosch.*

For the respondents: *David R. Simon, Simon & Allen, Newark, N.J.*

ORDER VACATING ORDER PROPOSING MODIFICATION OF ORDER TO  
CEASE AND DESIST

On Apr. 13, 1973, respondent Zenith Laboratories, Inc. (Zenith), petitioned the Commission to reopen the consent order, dated Mar. 30, 1962, for the purpose of modifying said order by setting aside the order in its entirety. The 1962 consent order requires respondent to cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement:

(a) Uses the terms "quality control" or "exacting controls," or any other words or terms of similar import or meaning; or

(b) Represents, directly or indirectly:

(1) That respondents have an adequate control system, or misrepresents the nature or extent of the procedures used by them in the manufacture, preparation or distribution of drugs or food.

The Commission concluded that good cause had been shown for modifying the above provisions of the order, but not as respondent requested, and so, by order of July 24, 1973, reopened this proceeding

and ordered respondent Zenith to show cause why the order should not be modified by requiring respondent Zenith to cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement:

(a) Uses the terms "quality control" or "exacting controls," or any other words or terms of similar import or meaning; unless respondents also state in the same advertisement that such controls are required of all drug manufacturers pursuant to the standards set by the Federal Food, Drug, and Cosmetic Act, as amended; *Provided, however,* That such controls are in fact in conformance with the standards set by the Federal Food, Drug, and Cosmetic Act, as amended.

(b) Represents, directly or indirectly:

(1) That respondents have a more exacting quality control system than prescribed by the Federal Food, Drug, and Cosmetic Act, as amended, or misrepresents the nature or extent of the procedures used by them in the manufacture, preparation or distribution of drugs or food.

*Paragraph 1(a)*

Zenith, in its answer dated Aug. 24, 1973, requested that the Commission modify the consent order to permit it to use the terms "quality control" and "exacting controls" in its advertisements, without the proposed qualifying language (*i.e.*, "that such controls are required of all drug manufacturers pursuant to the standards set by the Federal Food, Drug and Cosmetic Act, as amended"). The grounds of Zenith's objections were that (1) the qualifying language could be read to imply that FDA approved of the company's quality controls, when a FDA regulation specifically prohibits a party from advertising that it has a new drug application approved by FDA; (2) it would be impractical for Zenith to include such wording; and (3) no other company is required to make the subject disclosure.

The Food and Drug Administration, by letter dated Nov. 16, 1973, similarly recommended against requiring the qualifying language, as "it appears \* \* \* that this would be inequitable unless it were enforced against all manufacturers," and, in addition, might give rise to the "possible implications that the Food and Drug Administration has approved the company's quality control standards when, in fact, that is not the situation."

Counsel supporting the complaint concur in these recommendations that the 1962 order not be modified as proposed by Paragraph 1(a). We agree.

*Paragraph 1(b)(1)*

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No objection to this modification was made by either FDA or respondents. We agree, however, with counsel supporting the complaint that the subject modification should be rejected. Representations as to "quality control" or "exacting controls" (representations which would be permissible under the modification) "should be permitted," counsel supporting the complaint point out, "[only] when respondent's controls significantly exceed the minimum requirements of the law \* \* \*." It is our opinion that many consumers tend to believe that firms in their manufacturing processes comply with the standards set by law, and, as a consequence, the use of such terms as "quality control" may well create the impression that the standards employed by the manufacturer exceeds those set by law. It follows, then, that since the subject provision is intended to prohibit representations that quality controls exceed those prescribed by FDA, representations as to "quality controls" or "exacting controls" should be proscribed. Accordingly,

*It is ordered,* That the Commission's show cause order of July 24, 1973 proposing modification of the order to cease and desist issued in this matter on Mar. 30, 1962, be, and it hereby is, vacated.

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IN THE MATTER OF  
GIFFORD-HILL & COMPANY, INC.

*Docket 8989. Order, June 3, 1975*

Denial of complaint counsel's motion requesting the Commission seek an all writs injunction.

*Appearances*

For the Commission: *Paul N. Kane, Laurence Masson, Paul Breitstein and Laurence Punter.*

For the respondent: *John H. Schafer, Covington & Burling, Wash., D.C. and Merlyn D. Sampels, Worsham, Forsythe & Sampels, Dallas, Tex.*

ORDER DENYING REQUEST TO SEEK INJUNCTION

This matter is before the Commission on the certification by the administrative law judge of complaint counsel's motion entitled "Request for Action Pursuant to the All Writs Act." In an *in camera* affidavit accompanying his "Request," counsel supporting the complaint affirms that it is his belief that one of the three ready-mix concrete concerns acquired by respondent, the acquisition of which is

challenged in the complaint in the above-captioned matter, is the subject of an agreement of sale to named individuals. Respondent's counsel oppose the certification, alleging that there is no threat that the subject ready-mix concrete firm will be "annihilated" by its acquirer, and that "instead, the enterprise involved will emerge from its prospective transaction as a healthy independent enterprise \* \* \*." Respondent concludes that, therefore, "this case bears no resemblance whatsoever to the threatened anticompetitive schemes that have prompted the Commission to seek All Writs Act injunctions in the past." By letter dated May 19, 1975, respondent's counsel sets forth, as an additional reason for denying the request, the fact that the contract of sale had been "fully consummated."

We agree that complaint counsel's request should be denied. The divestiture of the ready-mix firm makes moot the request for an injunction against Gifford-Hill. This is not to say, however, that the divestiture has mooted that part of the complaint challenging the acquisition of the divested ready-mix firm by Gifford-Hill as a violation of Section 7 of the Clayton Act. Should the acquisition be found to violate Section 7, the Commission is not precluded from requiring Gifford-Hill to recreate a viable firm comparable in competitive strength to the divested firm should the record demonstrate the need for such relief.

In addition, it should be noted that if it is shown that the divested firm will be dismantled, an All Writs injunction, or an injunction pursuant to Section 13(b) of the Federal Trade Commission Act, as amended by the 1973 Alaska Oil Pipeline Act, might be appropriate, but as against the present owners of the subject ready-mix firm, not Gifford-Hill. Such facts have not been alleged here. Accordingly,

*It is ordered,* That counsel supporting the complaint's request that the Commission seek an All Writs injunction be, and hereby is, denied. Commissioner Thompson not participating.

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IN THE MATTER OF

INTERSTATE INVESTORS CORPORATION, ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

*Docket 9008. Complaint, Jan. 28, 1975—Final Order, June 3, 1975*

Order dismissing the complaint issued against a Virginia Beach, Va., loan broker for alleged violation of the Truth in Lending Act, on the basis that the individual

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respondent is now deceased and the corporate respondent has ceased business operations and has no remaining assets.

#### *Appearances*

For the Commission: *Bernard Rowitz, Alice C. Kelleher and Thomas J. Keary.*

For the respondents: *Lewis, Sacks & DeLaura, Norfolk, Va.*

#### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Interstate Investors Corporation, a corporation, and Bernard A. Salzberg, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending 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 Interstate Investors Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at Suite 224, 287 Independence Blvd., Virginia Beach, Va.

Respondent Bernard A. Salzberg, is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged as brokers in the arranging and securing of loans for the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, respondents' customers are provided with consumer credit cost disclosure statements.

By and through the use of the aforesaid consumer credit cost disclosures respondents:

1. Fail to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Fail to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Fail to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Fail to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Fail to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Fail to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Fail to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Fail to make full consumer credit cost disclosures before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW  
JUDGE

MARCH 24, 1975

The complaint herein issued on Jan. 28, 1975, and was mailed on Mar. 3, 1975. Respondents are charged in the complaint with failing to comply with certain provisions of Regulation Z (12 C.F.R. §226) promulgated pursuant to the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), and thereby with a violation of the Federal Trade Commission Act (15 U.S.C. §41, *et seq.*).

Complaint counsel were thereafter informed, by way of a letter and a



subsequent affidavit from an attorney familiar with respondents, that individual respondent Bernard A. Salzberg was recently deceased and that the corporate respondent went out of business in October 1974 and has no assets. Complaint counsel have accordingly filed a motion to dismiss this proceeding as to all respondents since, based on the above facts, there appears to be no public interest in continuing this proceeding.

Section 3.22(e) of the Rules of Practice provides that an initial decision shall be filed when a motion to dismiss is granted. Since it appears appropriate to grant complaint counsel's motion to dismiss, the following findings of fact and conclusions are hereby made:

#### FINDINGS OF FACT

1. The complaint in this matter issued on Jan. 28, 1975 charging Interstate Investors Corporation, a corporation, and Bernard A. Salzberg, individually and as an officer of said corporation, with violations of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Failure to comply with said Regulation Z is alleged to be a violation of the Federal Trade Commission Act (Complaint, Pars. One-Five).

2. The complaint alleges that respondent Bernard A. Salzberg is an officer of the corporate respondent, and he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint. His address is the same as that of the corporate respondent (Complaint, Par. One).

3. Bernard A. Salzberg died on Jan. 23, 1975 in Virginia Beach, Va. He was the owner of all the stock of the corporate respondent, Interstate Investors Corporation (Affidavit of Albert S. Lewis, dated Mar. 13, 1975).

4. Respondent Interstate Investors Corporation went out of business during October 1974, and has been inoperative ever since. The corporate respondent has no assets (Affidavit of Albert S. Lewis, dated Mar. 13, 1975).

#### CONCLUSIONS

Since individual respondent Bernard A. Salzberg, the sole owner of corporate respondent Interstate Investors Corporation, is now deceased, and the corporate respondent has ceased business operations and has no remaining assets, it is concluded that there is no public interest in continuing this proceeding.

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Complaint

## ORDER

*It is hereby ordered,* That the complaint in this matter be, and it hereby is, dismissed as to all respondents.

## FINAL ORDER

No appeal from the initial decision of the administrative law judge having been filed and the Commission having determined that the case should not be placed on its own docket for review, pursuant to Section 3.53 of the Commission's Rules of Practice;

*It is ordered,* That the initial decision and order of the administrative law judge be, and they hereby are, adopted as the decision and final order of the Commission.

## IN THE MATTER OF

## MILTON BRADLEY COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket 8926. Complaint, April 13, 1973-Decision, June 5, 1975*

Consent order requiring a Springfield, Mass., manufacturer of toy, craft and hobby products, among other things to cease packaging its products in oversized containers creating the impression that purchasers are receiving a larger product or greater quantities; and providing others with the means to deceive the purchasing public.

*Appearances*

For the Commission: *Herbert S. Forsmith, Alan F. Rubinstein and Armando Labrada.*

For the respondent: *Charles V. Ryan and William G. White, Springfield, Mass.*

## 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 Milton Bradley Company, a corporation, hereinafter 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 Milton Bradley Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts with its principal office and place of business located at 443 Shaker Road, East Longmeadow, Mass.

PAR. 2. Respondent now, and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of toy, gift and hobby products to jobbers and retailers for resale to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, said products, when sold, to be shipped from its place of business in the State of Massachusetts to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among the products which are offered for sale and sold by the respondent are a number of toy, gift and hobby products offered under the names "Crafts by Whiting" and "Lisbeth Whiting." Through the use of certain methods of packaging, respondent has represented and has placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain of the above products, as depicted or otherwise described on the exteriors of packages, corresponded, in their lengths and widths and thicknesses, with the packages in which they were contained, and that others of such products were offered in quantities reasonably related to the size of the packages in which they were presented for sale.

PAR. 5. In truth and in fact, such products often have not corresponded with their package dimensions and are often not offered in quantities reasonably related to the size of packages in which they are presented for sale. Purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

Therefore, the methods of packaging referred to in Paragraph Four hereof were and are unfair and false, misleading and deceptive.

PAR. 6. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as the products sold by the respondent.

PAR. 7. The use by respondent of the aforesaid unfair, false, misleading and deceptive methods of packaging has had, and now has, the capacity and tendency to mislead members of the purchasing public

into the erroneous and mistaken belief that the quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with a copy of that complaint, together with a proposed form of order; and

The Commission having duly determined upon motion certified to the Commission, that, in the circumstances presented, the public interest would be served by waiver of the provisions of Section 2.34(d) of its rules which provides that the consent order procedure shall not be available after issuance of complaint; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent 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 Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Milton Bradley Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its offices and principal place of business located at 1500 Main Street, Springfield, Mass.
2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

#### ORDER

*It is ordered*, That respondent Milton Bradley Company, a corporation, and its officers, and respondent's agents, representatives, employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of hobby products, toy craft products and activity toys such as those which have been manufactured or distributed by the Crafts by Whiting division of Milton Bradley Company, and any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Packaging said products in oversized boxes or other containers so as to create the appearance or impression that the width or thickness or other dimensions or quantity of products contained in a box or container is appreciably greater than is the fact; but nothing in this order shall be construed as forbidding respondent to use oversized containers if respondent justifies the use of such containers as necessary for the efficient packaging of the products contained therein and establishes that respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers;

2. Providing wholesalers, retailers or other distributors of said products with any means or instrumentality with which to deceive the purchasing public in the manner described in Paragraph (1) above.

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

*It is further ordered*, That the respondent distribute a copy of the order to all operating divisions and subsidiaries of said corporation, and also distribute a copy of this order to all firms and individuals involved in the formulation or implementation of respondent's business policies, and all firms and individuals engaged in the advertising, marketing, or sale of respondent's products.

*It is further ordered*, That the respondent herein shall, within sixty (60) days after service upon it of this order file with the Commission a

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Complaint

report in writing setting forth in detail the manner and form in which it has complied with this order.

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IN THE MATTER OF

LIBRARY MARKETING SERVICE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-2673. Complaint, June 6, 1975-Decision, June 6, 1975.*

Consent order requiring an Orlando, Fla., seller of magazine subscriptions and other publications through the use of "mail-in" or "two-payment" purchase plans, among other things to cease using deceptive means to sell magazine subscriptions to the public and to recruit sales agents.

*Appearances*

For the Commission: *Lawrence L. Langer.*

For the respondents; *Jon D. Rosenberg & Marvin E. Newman,*  
Orlando, Fla.

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 Library Marketing Service, Inc., a corporation, and W. Michael Nace, individually and as an officer of said corporation, hereinafter referred to as respondents, have 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 Library Marketing Service, Inc., is a corporation organization existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at LMS Building, 1320 44th Street, Orlando, Fla.

Respondent W. Michael Nace is the president of the corporate respondent. As such, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are engaged in the sale of magazine subscriptions and other publications to the purchasing public by a method which

is commonly referred to as the "two-payment" or "mail-in" purchase plan.

Respondents enter into business arrangements with certain publishers or distributors of magazines and other publications whereby the publishers or distributors agree to accept and fill orders for designated magazines or other publications sold by respondents. The publishers or distributors generally require that the magazines or other publications be sold for a designated amount and that respondents forward an agreed upon amount to the publisher or distributor thereof.

Pursuant to such arrangements, the respondents solicit and sell to the purchasing public subscriptions to such magazines or other publications.

PAR. 3. In the course and conduct of their business of selling magazine subscriptions pursuant to subscription contracts, as aforesaid, respondents have entered into contractual arrangements with publishers or distributors of magazines whereby respondents are authorized to sell certain magazine subscriptions at designated selling prices and to pay designated amounts to said publishers or distributors as payment for said subscriptions. Respondents are thereby given authority to sell subscriptions to some but not all magazines and other publications.

PAR. 4. In the course and conduct of their business, as aforesaid, respondents enter, and have entered, into agreements with individuals known as "crew managers" who in turn employ or hire "sale agents," "solicitors," or other representatives to sell said magazines or other publications.

Acting through their said crew managers and solicitors, respondents place into operation and, through various direct and indirect means and devices, control, direct, supervise, recommend and otherwise implement sale methods whereby members of the general public are contacted by door-to-door solicitations, and by means of statements, representations, acts and practices as hereinafter set forth, are induced to sign subscription contracts with respondents which provide for the purchase of magazines or other publications and payment thereof usually on a subscription order with the appropriate publishers and distributors for magazines and other publications respondents are authorized to sell.

In the manner aforesaid, respondents, directly or indirectly, through said crew managers control, furnish the means, instrumentalities, services and facilities for, condone, approve and accept the pecuniary benefits flowing from the acts, practices and policies hereinafter set forth, of said crew managers and sales solicitors, hereinafter collectively referred to as respondents' representatives or solicitors.

PAR. 5. In the course and conduct of their business and in the manner

aforesaid, respondents through their representatives or solicitors, who travel from one area to another, solicit subscriptions for magazines and other publications in various States of the United States. Respondents transmit and receive in commerce various printed materials used in the solicitation and sale of magazine subscriptions and other publications. Said respondents or solicitors cause subscription contracts and money to be sent from various states to respondents' place of business in Florida by instructing members of the purchasing public to so mail in their orders. These contracts are then forwarded by respondents to various publishers or distributors, many of whom are located in states other than the State of Florida. Respondents thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in the sale of magazine subscriptions in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Respondents and respondents' crew managers in the course and conduct of their business as aforesaid, have disseminated, and now disseminate or cause to be disseminated, classified advertisements in newspapers of general and interstate circulation and in newspapers throughout the United States and have made statements and representations respecting pay and working conditions, designed and intended to induce individuals to apply as representatives or solicitors to sell magazine subscriptions on the behalf of respondents.

Among and typical of such statements and representations, but not all inclusive thereof, are the following:

1. Visit major cities and resort areas with transportation furnished and return guaranteed.
2. Above average salary plus company bonus after training \* \* \*\$520 monthly to start\* \* \*
3. \* \* \*immediate cash draw \* \* \*expenses and transportation provided\* \* \*
4. New car transportation furnished\* \* \*

In the aforesaid manner, the respondents have represented, and are now representing directly or by implication, that:

1. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents will travel on a planned itinerary exclusively to major cities and resort areas and that return free transportation is guaranteed at any time.
2. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents will earn a salary, as for example, \$520 monthly.
3. Respondents will pay the expenses of persons who answer respondents' advertisements and who become representatives or solicitors for respondents.
4. Persons who answer respondents' advertisements and who



become representatives or solicitors for respondents will be furnished a new car while traveling for or on the behalf of respondents.

PAR. 7. In truth and in fact:

1. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents do not travel on a planned itinerary exclusively to major cities and/or resort areas with an unconditional guaranteed return.

2. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents do not earn a salary but are commissioned sales agents.

3. Respondents do not pay expenses of persons who answer respondents' advertisements and who become representatives or solicitors for respondents.

4. Persons who answer respondents' advertisements and who become representatives or solicitors are not furnished new cars while traveling for or on behalf of respondents.

Therefore, the statements and representations as set forth in Paragraph Six hereof, were, and are, false, misleading and deceptive.

PAR. 8. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their magazine subscriptions, respondents and respondents' representatives or solicitors have represented, and now represent, directly or by implication, that:

1. Respondents are authorized to sell subscriptions for and are able to deliver or cause the delivery of all magazines for which they sell subscriptions and accept payments.

2. Respondents' representatives or solicitors are participants in a "contest" working for prizes and awards and are not solicitors working for money compensation.

3. Respondents' representatives or solicitors are employed by or affiliated with programs designed to provide assistance to underprivileged or disadvantaged groups or persons, including but not limited to, racial and religious minorities.

4. Respondents' representatives or solicitors are competing for college scholarship awards.

5. Respondents' representatives or solicitors are college students working their way through school.

6. Respondents' representatives or solicitors are nursing school students competing for nursing school scholarships or awards.

7. Magazines purchased by subscribers will be distributed to various hospitals as gifts or contributions.

8. Respondents' representatives or solicitors are foreign exchange students or otherwise foreigners whose ability to remain in this country is related to the sale of magazine subscriptions.

9. Respondents' representatives or solicitors are veterans of the armed forces whose magazine sales will benefit other veterans or veterans organizations.

PAR. 9. In truth and in fact:

1. Respondents are not authorized to sell subscriptions for and are not able to deliver or to cause the delivery of all magazines for which their representatives or solicitors sell subscriptions and accept payments. In certain instances, respondents' representatives or solicitors sell subscriptions for magazines which respondents are not authorized by the publisher or distributor thereof to sell, and consequently, respondents are unable to deliver or to cause the delivery of these magazines for which they have accepted payments from subscribers.

2. Respondents' representatives or solicitors work for money compensation and are not primarily participants in a "contest" working for prizes and awards; such contest awards are designed to motivate sales efforts and increased earnings. The excessive use by respondents and their representatives or solicitors of credentials, oral representations and promotional materials, identifying such representatives or solicitors as participants in a contest constitutes a spurious tactic designed to enable their representatives or solicitors to utilize a personal sympathy appeal in the sale of subscriptions.

3. Respondents' representatives or solicitors are not employed by or affiliated with programs designed to provide assistance to underprivileged or disadvantaged groups or persons. The use by respondents' representatives or solicitors of such representations is likewise a spurious device to gain personal sympathy in the sale of subscriptions.

4. Respondents' representatives or solicitors are not competing for college scholarship awards but are merely commissioned sales agents.

5. In a substantial number of instances, respondents' representatives or solicitors are not college students working their way through college, but are merely commissioned sales agents.

6. Respondents' representatives or solicitors are not competing for nursing school scholarships or awards but are merely commissioned sales agents.

7. Magazines purchased by subscribers are not distributed to various hospitals as gifts or contributions.

8. In a substantial number of instances, respondents' representatives or solicitors are not foreign exchange students nor are those solicitors able to remain in this country only by continuing activities related to magazine sales.

9. Respondents' representatives or solicitors are not employed for the benefit of veterans or any veterans association but are merely

commissioned sales agents. Moreover, references to their status as veterans are, in many instances, a spurious device for appealing to a prospective purchaser's personal sympathy or patriotism.

Therefore, the aforesaid acts and practices were, and are, unfair practices and are false, misleading and deceptive.

PAR. 10. In the further course and conduct of their business as aforesaid, where respondents have received payment for subscriptions to magazines they are in fact authorized to sell and are able to deliver or cause to be delivered, they have, in many instances, failed to deliver or cause to be delivered such magazines within a reasonable period of time.

Therefore, the aforesaid acts and practices were, and are, unfair practices and are false, misleading and deceptive.

PAR. 11. In addition to the foregoing statements, representations, acts and practices, respondents have engaged in door-to-door solicitations of the aforesaid subscriptions, either without prior invitation to solicit such sales from prospective purchasers or by using one or more of the deceptive means and methods aforesaid to gain access to prospective purchasers at times and under circumstances when such prospective purchasers were not otherwise considering the purchase of magazines or other publications, and without either:

1. affirmatively stating and affording such purchasers the right to cancel any resulting subscription contracts for a period of not less than three (3) business days following such solicitations; or

2. by refusing to honor any such right purportedly given either orally or in writing, or thwarting the exercise of any right so given.

The solicitation of subscription sales without permitting cancellation within a reasonable period of time constitutes an unfair, false, misleading and deceptive practice where such sale includes two payments on the part of the subscriber and where it is made under the conditions and circumstances herein alleged.

PAR. 12. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of magazine subscriptions.

PAR. 13. By and through the use of the aforesaid acts and practices, respondents place in the hands of the crew managers, sales agents, representatives and others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 14. The use by respondents of the aforesaid false, misleading, deceptive and unfair representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the

purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of a substantial number of magazine subscriptions from respondents.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondents with violation of the Federal Trade Commission Act; and

The respondents 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 aforesaid draft of 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in § 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Library Marketing Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at LMS Building, 1320 44th Street, Orlando, Fla.

Respondent W. Michael Nace, is the president of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

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

*It is ordered,* That respondents Library Marketing Service, Inc., a corporation, its successors and assigns, and W. Michael Nace, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of magazines, magazine subscriptions or any other publication, merchandise or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, to prospective representatives or solicitors that they will travel on a planned itinerary exclusively to large cities and resort areas throughout the United States and foreign countries; or misrepresenting, in any manner, the travel opportunities available to their representatives or solicitors.

2. Representing, directly or by implication, to prospective representatives or solicitors that they will earn or receive \$520 per month or any other stated or gross amount; or representing, in any manner, the past earnings of respondents' representatives or solicitors, unless in fact the past earnings represented have actually been received by a substantial number of respondents' representatives or solicitors and accurately reflect the average earnings of such representatives or solicitors, or misrepresenting in any manner, the terms, conditions, or nature of such employment, or the manner or amount of payment for such employment.

3. Representing, directly or by implication, to prospective representatives or solicitors, that respondents will pay all, or any part of, the expenses of such solicitors except during a limited training period, or misrepresenting in any manner the terms or conditions of employment as a representative or solicitor for respondents.

4. Soliciting or accepting subscriptions for magazines or other publications which respondents have no authority to sell or which respondents cannot promptly deliver or cause to be delivered.

5. Representing, directly or by implication, that respondents' representatives or solicitors are participants in a contest working for prize awards and are not solicitors working for money compensation; or misrepresenting, in any manner, the status of their sales agents or representatives or the manner or amount of compensation they receive.

6. Representing, directly or by implication, that respondents'

representatives or solicitors are employed by or affiliated with programs designed to provide assistance or promote the welfare of underprivileged or disadvantaged groups or persons.

7. Representing, directly or by implication, that respondents' representatives or solicitors are competing for college scholarship awards.

8. Representing, directly or by implication, that respondents' representatives or solicitors are college students working their way through school, unless such is the fact.

9. Representing, directly or by implication, that respondents' sales agents or representatives are competing for nursing school or trade school awards or scholarships.

10. Representing, directly or by implication, that magazines, books or other publications purchased by subscribers will be distributed to various hospitals, veterans associations, schools and institutions as gifts or contributions.

11. Representing, directly or by implication, that respondents' representatives or solicitors are veterans; unless such is the fact; or representing, directly or by implication that the sale of magazines, books or other publications is or will be beneficial to veterans or veterans organizations.

12. Utilizing any sympathy appeal to induce the purchase of subscriptions, including but not limited to: illness, disease, handicap, race, financial need, eligibility for benefits offered by respondents, or other personal status of the solicitor, past, present or future; or representing that earnings from subscription sales will benefit certain groups of persons such as students or the underprivileged, or will help charitable or civic groups, organizations or institutions.

13. Failing clearly and conspicuously without any qualification, orally and in writing, to reveal at the initial contact or solicitation of a purchaser or prospective purchaser, whether directly or indirectly, or by written or printed communications, or person-to-person, that the purpose of such contact or solicitation is to sell products or services as the case may be, which shall be identified with particularity at the time of such contact or solicitation.

14. Failing within thirty (30) days from the date of the receipt of the final payment to enter subscriptions for each magazine, book or other publication with publishers which respondents are authorized by the publisher or distributor thereof to sell.

15. Misrepresenting the number and name(s) of publications being subscribed for, the number of issues and duration of each subscription and the total price for each and all such publications.

16. Failing to give clear and conspicuous oral and written notice to

each subscriber that upon written request said subscriber will be entitled to a refund of all monies paid if he does not have his order cleared to the publisher within 30 days of the entry of the final payment.

17. Failing to refund all monies to subscribers who have not had their orders to magazines, books or other publications, subscribed for through respondents entered within 30 days from the date of the final payment thereof or to offer the subscribers the right to substitute one or more publications or the extension of the subscription period for a publication already selected, at the option of the subscribers, upon written request by such subscribers.

18. Failing to furnish to each subscriber at the time of sale of any subscription a duplicate original of the contract, order or receipt form showing the date signed by the customer and the name of the sales representative or solicitor together with the name and mailing address of the marketing broker or crew manager together with the respondents' corporate name and address showing on the same side of the page the exact number and name(s) of the publications being subscribed for, the number of issues and duration of each subscription and the total price for each and all such publications.

19. Furnishing, or otherwise placing in the hands of others, the means or instrumentalities by or through which the public may be misled or deceived in the manner or as to the things prohibited by this order.

*It is further ordered,* That respondents do forthwith cease and desist from:

1. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the respondent, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

2. Failing to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the respondents, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in 10

point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract

**NOTICE OF CANCELLATION**

(enter date of transaction)

\_\_\_\_\_ (date)

You may cancel this transaction, without any penalty or obligation, within three (3) business days from the above date.

If you cancel, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten (10) business days following receipt by the seller of your cancellation notice, and the transaction will be canceled.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram to

\_\_\_\_\_ (name of seller)

at \_\_\_\_\_ (address of seller's place business)

not later than midnight of \_\_\_\_\_ (date)

I hereby cancel this transaction.

\_\_\_\_\_ (date)

\_\_\_\_\_ (buyer's signature)

*It is further ordered,* That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

*It is further ordered,* That respondents shall:

1. Provide each of their present and future crew managers, and other supervisory personnel engaged in the sale or supervision of persons engaged in the sale of respondents' products or services, written instructions with respect to the provisions of this order which are applicable to the functions of each such person.

2. Require each person so described in Paragraph 1 above to clearly and fully explain the applicable provisions of this order to all sales agents, representatives and other persons engaged in the sale of the respondents' products or services.

3. Provide each person so described in Paragraph 1 above with a form returnable to the respondents clearly stating his intention to be bound by and to conform his business practices to the applicable provisions of this order; retain said statement during the period said person is so engaged and make said statement available to the Commission's staff for inspection and copying upon request.

4. Inform each person described in Paragraph 1 above that respondents shall not use any third party, or the services of any third



party, if such third party will not agree to so file and does file notice with the respondents that he or she will be bound by the applicable provisions of this order.

5. If such third party will not agree to so file notice with respondents and be bound by the applicable provisions of the order, respondents shall discontinue utilizing the services of or accepting orders from such third party.

6. Inform the persons described in Paragraph 1 above that respondents are obligated by this order to discontinue dealing with those persons who continue on their own the deceptive acts or practices prohibited by this order.

7. Institute a program of continuing surveillance to reveal whether the business operations of each said person described in Paragraph 1 above conform to the applicable provisions of this order.

8. Discontinue dealing with the persons so engaged, revealed by the aforesaid program of surveillance, who continue on their own the deceptive acts or practices prohibited by the applicable provisions of this order.

9. Upon receiving information or knowledge from any source concerning two or more bona fide complaints prohibited by the applicable provisions of this order against any marketing broker, sales agents or representatives during any one-month period, forthwith be responsible for either ending said practices or securing the termination of the employment of the offending sales agents or representatives.

10. Submit to the Commission a detailed report every six (6) months for a period of three (3) years from the effective date of this order demonstrating the effectiveness of the steps or actions taken with regard to the aforesaid surveillance program.

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

*It is further ordered,* That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include a reference to respondents' new business or employment and a description of his duties and responsibilities.

*It is further ordered,* That the respondents herein shall within sixty (60) days after service upon them of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

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IN THE MATTER OF  
ASH GROVE CEMENT COMPANY

*Docket 8785. Order, June 10, 1975*

Denial of respondent's motions to stay a final decision in this matter, reopen the record for the reception of evidence, or dismiss the complaint.

*Appearances*

For the Commission: *Thomas F. Mc Nerney, Paul N. Kane and Nancy P. Rosenfeld.*

For the respondent: *David McKean and Robert Williams, McKean, Whitehead & Wilson, Wash., D.C.*

ORDER DENYING RESPONDENT'S MOTION TO STAY A FINAL DECISION IN THIS MATTER, REOPEN THE RECORD FOR THE RECEPTION OF EVIDENCE, OR DISMISS THE COMPLAINT.

By Motions filed Feb. 10, 1975 and Apr. 3, 1975, respondent in the above-captioned matter requests: (a) a stay of any final order, other than a dismissal of the complaint, pending the judicial outcome of the first of respondent's two separate attempts to obtain Commission documents under the Freedom of Information Act, 5 U.S.C. §551, *et seq.*; (b) a reopening of the adjudicative record until such time as respondent obtains, and offers into evidence, documents sought under both of its Freedom of Information Act requests; or, in the alternative (c) a final order dismissing the complaint.

The first and second request each seek essentially the same relief. Each would have the Commission hold in abeyance any final order in this matter until after the resolution of respondent's pending attempts to obtain documentation. Such documentation as might be forthcoming, it is urged, could be probative with respect to certain affirmative defenses raised in the course of this adjudication. The request for dismissal is grounded on the argument that because the Commission recently elected to close an investigation of certain acquisitions allegedly similar to those of respondent, it would be an abuse of discretion to continue the current case against respondent.

With respect to the request for dismissal, it is the Commission's view that it is well within its discretion to continue this proceeding, despite having elected to close the investigation referenced in respondent's

Order

85 F.T.C.

motion papers. See *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967). As to the requests for stay of a final order and subsequent reopening of the record, the Commission finds that the respondent had ample opportunity for discovery in this matter. The ALJ determined that the documents now requested pursuant to the Freedom of Information Act, 5 U.S.C. §551, *et seq.*, were not subject to discovery in the adjudicative proceeding. The Commission finds that arguments predicated upon the receipt and attempted introduction of these same documents into evidence are too speculative and uncertain a base upon which to stay this proceeding. Accordingly,

*It is ordered*, That respondent's motions filed Feb. 10, 1975 and Apr. 3, 1975, be, and they hereby are, denied.

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IN THE MATTER OF

TYSONS CORNER REGIONAL SHOPPING CENTER, ET  
AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket 8886. Complaint, May 8, 1972\* Decision, June 10, 1975\*\**

Consent order requiring a New York City department store chain, among other things to cease entering into or enforcing leases which exclude competitors, fix retail prices, eliminate discount selling, and otherwise restrain trade.

*Appearances*

For the Commission: *Anthony Low Joseph, David I. Wilson, and Maynard F. Thompson.*

For the respondents: *H. Max Ammerman, Wash., D.C., Weil, Gotshal & Manges, New York, N.Y., Rosenman, Colin, Kaye, Petshek, Freund & Emil, New York, N.Y., Hogan & Hartson, Wash., D.C., Surrey, Karasik & Morse, Wash., D.C.*

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\* Complaint reported in 83 F.T.C. 1598.

\*\* Reported as corrected by order of July 29, 1975.

INITIAL DECISION BY ADMINISTRATIVE LAW JUDGE MORTON  
NEEDELMAN

OCTOBER 30, 1974

## I

## STATEMENT OF THE CASE

The complaint in this proceeding was issued on May 8, 1972. It charges that the partnership which developed the Tysons Corner Regional Shopping Center (hereinafter Tysons Corner Center) and the three major department store tenants of the center (City Stores Company, The May Department Stores Company and Woodward and Lothrop, Inc.) had individually, and in combination with each other, caused the inclusion or enforcement of certain lease provisions which unfairly suppress competition in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45). Most notably, the complaint was directed at lease provisions which give the department stores the right to disapprove the other tenants to whom the developer could rent space.

What began as a three-count complaint against four respondents has been reduced by prehearing orders<sup>1</sup> and consent settlements,<sup>2</sup> to a one-count case (Count II of the complaint) against one respondent—City Stores Company, hereinafter “City Stores.”

Count II alleges that City Stores, acting alone, has “caused the inclusion or enforcement of lease provisions which suppress, restrict, hinder, lessen, prevent and foreclose competition in the resale and distribution at retail of goods and services in the Tysons Corner trading area.” Specifically, the complaint charges that the challenged provisions give City Stores the power (a) to disapprove other tenant leases, (b) to limit the floor space available to other tenants, and (c) to exercise continuing control over the conduct of other business operations.<sup>3</sup> The complaint alleges that these provisions have the tendency to restrain trade by (a) fixing prices, (b) allowing City Stores to choose their competitors and to exclude actual and potential

<sup>1</sup> Without objection of complaint counsel, City Stores' motion to dismiss Count I as to City Stores (alleging conspiracy by the three department stores and the developer to include and enforce an “approval clause”) was granted by Administrative Law Judge von Brand on Feb. 21, 1973. At the same time, City Stores' motion to dismiss Count II was denied. Later, Administrative Law Judge von Brand denied respondent's Motion for Summary Judgment on Count II and complaint counsel's cross-motion for partial summary decision (Order of Sept. 17, 1973). Count III of the complaint was directed solely to the partnership which developed Tysons Corner.

<sup>2</sup> On June 26, 1974, the Commission accepted a consent settlement from the developer (Tysons Corner Regional Shopping Center, a partnership), The May Department Stores Company, and Woodward and Lothrop, Inc. disposing of all charges against these respondents 3 CCH Trade Reg. Rep., ¶20,532 [83 F.T.C. 1598].

<sup>3</sup> By stipulation of complaint counsel, the complaint allegation respecting the power to require tenants to join an approved “merchant association” (Complaint, Para. 13(c)) was removed from the case (Tr. 368).

competitors, (c) eliminating discount advertising and discount selling, (d) denying the public the benefit of price competition, (e) boycotting potential entrants, and (f) restricting the developer in his choice of potential tenants.

City Stores filed an answer on June 14, 1972, which admits certain facts about the corporate identity and size of respondent as well as the nature of its management, purchasing, and delivery practices in the Washington, D.C. metropolitan area. City Stores also admits that its lease with Tysons Corner gave it certain rights and privileges but it denies that the existence of these rights violates Section 5 of the Federal Trade Commission Act. All other material allegations in the complaint were denied. Moreover, City Stores offered as an affirmative defense the argument that City Stores had not caused the inclusion of the questioned lease provisions, but instead that they were entered into pursuant to an order of the United States District Court for the District of Columbia, and that City Stores has neither attempted to enforce nor actually enforced any of the questioned lease provisions.<sup>4</sup>

When the undersigned was assigned to this proceeding as administrative law judge on June 3, 1974,<sup>5</sup> the parties had been working for some time on a lengthy factual stipulation. The stipulation was completed and received in evidence on July 16, 1974.<sup>6</sup> The parties submitted the case for decision on the understanding that the entire record was to consist of the stipulation, complaint, answer, previous rulings of the Commission in the case and the orders of administrative law judges who were assigned to hear the matter, as well as any evidence which might be presented between July 16, 1974, and the time the record was officially closed.<sup>7</sup> No witnesses were called by either party, no other evidence was offered, and the record was closed on Aug. 1, 1974.

Thereafter, proposed findings and briefs were submitted by both parties. These papers were considered by the undersigned, and all proposed findings which are not herein adopted either in the form or substance proposed are rejected as not supported by the evidence or as involving immaterial matters.

<sup>4</sup> Another affirmative defense was directed at alleged procedural irregularities when the complaint issued; namely, improper participation and possible conflict of interest by the former director of the Bureau of Competition in violation of Section 0.735-10 of the Commission's Rules. This defense was pressed in ancillary litigation which was decided eventually against respondent's favor.

<sup>5</sup> Judge von Brand resigned from the Office of Administrative Law Judges on Nov. 10, 1973, and he was replaced by Administrative Law Judge Donald R. Moore who was relieved of the assignment on June 2, 1974.

<sup>6</sup> The stipulation is designated as JX (*i.e.*, Joint Exhibit) 1A through 1 Z-17. The attachments to the stipulation are JX 1 Z-18 (site plan for Tysons Corner Center); JX 1 Z-19 *in camera* (sales of Tysons Corner Center) and JX 1 Z-20 to 1 Z-207 (City Stores - Tysons Corner lease).

<sup>7</sup> The record was left open for two weeks in order for the parties to consider alternative methods of producing evidence on certain issues and to weigh the undersigned's admonition that it might be desirable to have documentary or live testimony on the issue of business justification for the subject practices (Tr. 468-488, 530-532).

After having reviewed the record of this proceeding as stipulated by the parties, as well as proposed findings and supporting briefs filed by the parties, I find that this proceeding is in the public interest, and, based on the entire record I make the following findings of fact.

## II

### FINDINGS OF FACT

#### CITY STORES AND ITS LANSBURGH'S DIVISION

1. Respondent City Stores Company ("City Stores") is a Delaware corporation, with its principal office and place of business at 500 Fifth Ave., New York, N.Y. Through its various divisions and subsidiaries, City Stores owns and operates 38 department stores (more than 10 of which are in regional shopping centers), 68 specialty stores, and 43 home furnishing stores. These 149 retail outlets are located in 18 States and the District of Columbia. In fiscal 1974, ending Jan. 31, 1974, sales by City Stores exceeded \$373 million (Stip. ¶1; JX 1-B).

2. From its headquarters in New York City, respondent controls the overall activities, including the shopping center activities of its various divisions and subsidiaries (Stip. ¶1; JX 1-B).

3. Until June 19, 1973, one of the divisions owned and operated by City Stores was the Lansburgh's department store chain in the Wash., D.C. metropolitan area.<sup>8</sup> By February 1972, Lansburgh's, whose principal place of business was at 204 Seventh St., N.W., Wash., D.C., operated five department stores in Metropolitan Washington - one in downtown Washington, two in Maryland, and two in Virginia. One of the Virginia department stores was located in Tysons Corner Center (Stip. ¶¶2, 3; JX 1-B to 1-C).

4. While the total sales of the Lansburgh's chain were in excess of \$28 million in 1973, this represented only 1.4 percent of sales of general merchandise, apparel and furniture in the Wash., D.C. area. Moreover, the rate of growth of Lansburgh's sales between 1964 and 1973 was substantially below the rate at which department store sales generally increased in the Wash., D.C. area (Stip. ¶4; JX 1-C to 1-D).

5. In January 1973, City Stores decided to terminate the operations of its Lansburgh's stores in the Wash., D.C. area and liquidate the Lansburgh's division. As a result, since June 1973, the Lansburgh's stores in the Wash., D.C. area, including the store in Tysons Corner Center, have been closed; the Lansburgh's division has been liquidated; and City Stores operates no department stores in Metropolitan

<sup>8</sup> The Wash., D.C. metropolitan area consists of Wash., D.C., Montgomery and Prince Georges Counties, Maryland, and Alexandria, Fairfax, and Falls Church cities, and Arlington, Fairfax, Loudoun and Prince William Counties, Va. (Stip. ¶5; JX 1-D).

Washington under Lansburgh's or any other name (Stip. ¶26; JX 1-W to 1-X).

6. Lansburgh's was, prior to and during the term of its tenancy at Tysons Corner Center, in competition with the Hecht division of The May Company, and Woodward and Lothrop, as well as other retail establishments engaged in the sale of merchandise lines similar to merchandise sold by Lansburgh's (Stip. ¶26; JX 1-W).

7. In the course and conduct of its business at Tysons Corner Center during the period 1969 to 1973, Lansburgh's engaged in the purchase, delivery and mailing of goods across State lines. It also advertised its goods and offered them for sale in newspapers circulated across state lines in Metropolitan Washington. While most of Lansburgh's customers at Tysons Corner Center were residents of the Commonwealth of Virginia, and most goods sold by Lansburgh's at Tysons Corner Center were sold to residents of Virginia, customers from the District of Columbia and Maryland shopped at Tysons Corner Center and either carried the merchandise they purchased across State lines or had the goods delivered across state lines (Answer ¶6; Stip. ¶25; JX 1-V to 1-W).

#### The Development and Importance of Tysons Corner Center

8. Tysons Corner Center, in which Lansburgh's operated a department store between 1969 and 1973, was developed and is managed by a partnership whose principals include Theodore N. Lerner and H. Max Ammerman. The main office of the partnership is located in Wheaton, Md. (Stip. ¶9; JX 1-G).

9. Financed by the Connecticut General Life Insurance Company of Bloomfield, Conn., Tysons Corner Center was constructed during the period 1966 to 1968. It is located in Fairfax, Va., approximately nine miles northwest of downtown Wash., D.C. on a triangular shaped 90-acre parcel of land adjoining the D.C. beltway. It opened for business on July 25, 1968 (Stip. ¶¶10, 12; JX 1-G, 1-H to 1-I). The general layout of the center, which had been formulated and completed by December 1965 without the participation or prior approval of City Stores, anticipated a gross leasable area of over a million square feet which included the planned construction of three department stores occupying 150,000 square feet each (Stip. ¶11; JX 1-H).

10. With over 1.2 million square feet of leasable floor space, Tysons Corner Center is one of the nation's largest regional shopping centers (Stip. ¶11; JX 1-H). In size, it ranks among the top 196 shopping centers

out of a total of over 15,000 shopping centers of various sizes in the United States (Stip. ¶8; JX 1-F to 1-G).<sup>9</sup>

11. As a regional shopping center, Tysons Corner Center provides a variety and depth of goods and services comparable to an urban central business district (Stip. ¶7; JX 1-E). At one time or another, there have been as many as three major department stores and 111 "satellite" outlets located in the center. And like an urban business district, Tysons Corner Center includes more than just retail outlets—it has several 30-story office towers, theatres, motels (Appendix 1-A to Stipulation; JX 1-Z-18), banks, art galleries, health clubs and restaurants (Stip. ¶30; JX 1-Z-3 to 1-Z-6). Sales of the center are very substantial (JX 1-Z-19, *in camera*).

12. Regional shopping centers, such as Tysons Corner Center, represent a significant segment of retailing in the United States, accounting for between 13 percent and 20 percent of all retail sales (Stip. ¶¶7, 8; JX 1-D to 1-G).

13. The Tysons Corner Center presently has two major tenants, a Woodward and Lothrop department store and a Hecht's department store, each of approximately 150,000 square feet. As indicated in Finding 5, Lansburgh's no longer operates a store in the center.

14. City Stores is seeking to assign its lease to Arlen Realty and Development Company, which intends to operate a Korvette store in the former Lansburgh's space. The Tysons Corner Center management opposes the assignment and the issue is being litigated in the Virginia State courts. The former Lansburgh's space covering 156,277 square feet is now vacant (Stip. ¶27; JX 1-X).

15. In addition to securing major tenants (*i.e.*, City Stores, The May Company and Woodward and Lothrop) the Tysons Corner Center developers have negotiated with and entered into a number of satellite tenant leases for retail selling space at the Center. The signing of satellite tenants began in mid-1967, and continued after City Stores entered the Center. A satellite tenant of a shopping center is a tenant other than a major or "anchor" tenant - *i.e.*, in the case of Tysons

<sup>9</sup> As used in this proceeding, a "shopping center" is defined as a planned development of retail outlets managed as a unit in relation to a trade area which the development is intended to serve, and providing on-site parking in some definite relationship to the types and sizes of stores in the development (Stip. ¶6; JX 1-D). There are various kinds of shopping centers, to wit:

A "regional shopping center" which has at least one major tenant. Typically, this major tenant has 100,000 square feet or more of selling space. This major tenant serves as an "anchor" and provides the regional shopping center with its primary drawing power. A "satellite tenant" in a regional shopping center is any tenant of a shopping center which is not an anchor or major tenant. The minimum gross lease space (GLA) of a regional shopping center ranges between 200,000 (generally for older centers) and 400,000 square feet. The median GLA space of a regional shopping center is 519,000 square feet with a middle range from 361,000 to 776,000 square feet. In addition to regional shopping centers, there are smaller shopping centers called "community shopping centers" (with a median GLA of 160,000 square feet, a middle range GLA from 122,000 to 204,000 square feet, and a junior department store or variety store as principal tenant), and neighborhood shopping centers (with a median GLA of 49,000 square feet, a middle range GLA from 36,000 to 70,000 square feet and a supermarket as the principal tenant) (Stip. ¶7; JX 1-D to 1-F).



Corner Center other than the three department stores (Stip. ¶7; JX 1-E).

16. The Tysons Corner Center developers met with prospective satellite tenants and negotiated with them in Maryland, Virginia, the District of Columbia and, in a few instances, in other States. Some of the satellite tenants are organized and have their principal place of business outside of the Commonwealth of Virginia. The Tysons Corner Center developers make use of the United States mails in the negotiation and execution of satellite tenant leases (Stip. ¶30; JX 1-Z-3).

17. Retail merchandise sold at the Tysons Corner Center by major and satellite tenants is often manufactured, stored, and shipped in or from States other than Virginia. In some cases, retail tenants of Tysons Corner Center will deliver or mail goods purchased at the center to customers outside of the Commonwealth of Virginia. While some customers of Tysons Corner Center are residents of Maryland and the District of Columbia, most of the goods sold at the Tysons Corner Center are bought by residents of Virginia (Stip. ¶31; JX 1-Z-7).

#### The Approval Clause

18. As indicated in Finding 7, City Stores, through its Lansburgh's division, began doing business in Tysons Corner Center in 1969. By the terms of its entry into Tysons Corner Center, City Stores obtained a lease substantially identical to the leases of The May Company and Woodward and Lothrop, the other major department stores in Tysons Corner Center. (Findings 41 to 50).

19. The City Stores-Tysons Corner Center lease contained a provision giving respondent the right to disapprove the entry of new satellite tenants. This power to control effectively the entry of new competitors is contained in Section 31.3 of the lease. Section 31.3, as obtained by City Stores, and as previously contained in The May Company and the Woodward and Lothrop leases, provides:

*Section 31.3* With respect to all Center Leases, (including any modifications of, supplements to or renewals of (other than renewals made in accordance with renewal provisions in effect as of the date hereof in Center Leases in effect as of the date hereof) entered into by Landlord for the occupancy of Floor Area on the Shopping Center Site (exclusive of the Tenant Store), the following provisions shall apply:

(A) No Center lease shall be entered into with any person(s) in respect of the Mall Stores (or any part or parts thereof or any storeroom or storerooms therein) located within one hundred twenty-five (125) feet of the Enclosed Mall facades of the Tenant Principal Building, unless Tenant shall have previously approved the identity and location of the Person(s) as proposed Occupant(s), which approval, as respects identity, shall be granted or withheld in the sole and absolute judgment of Tenant and which approval, as respects location, shall not be unreasonably withheld (provided, however, that by the

execution of this Lease, Tenant approves the identity of the Person(s) enumerated in Part I of Exhibit M hereof).

(B) As respects any building, buildings and/or improvements or any part or parts thereof or any storeroom or storerooms therein located more than one hundred twenty-five (125) feet from the Enclosed Mall facades(s) of the Tenant Principal Building, all Center Leases entered into for the occupancy of thirty thousand (30,000) square feet or less of Floor Area shall be subject to the previous approval of Tenant of the identity of the Person(s), which approval shall not be unreasonably withheld, provided, however, that by the execution of this Lease Tenant approves the identity of the Person(s) enumerated in Part I of Exhibit M hereof.

(C) Landlord agrees that in respect of the selection and location of Occupants on the Shopping Center Site, the following objectives, *inter alia*, shall be considered (provided, however, nothing contained in this sentence shall be deemed to derogate from the rights, privileges, powers and immunities of Tenant under this Article XXXI); (a) having financially sound Person(s) of good reputation as Occupant(s) of the Shopping Center Site, (b) maintaining a balanced and diversified grouping of retail stores, (c) establishing and maintaining a proper mixture of retail stores and a diversified selection of merchandise, and (d) avoiding excessive and persistent traffic congestion in the Common Area.

(D) No Center Lease shall be entered with any Person(s) providing for the occupancy of more than thirty thousand (30,000) square feet of Floor Area without the prior consent of Tenant, which consent may be granted or withheld in the sole and absolute discretion of Tenant. Notwithstanding the provisions of the preceding sentence, Landlord may enter into a Center Lease (i) for the operation of a retail facility (1) in the Woodward store at the location shown on Exhibit B hereof, \* \* \* subject, however, to the prior approval of Tenant of the identity of the proposed Occupant thereunder (which approval shall be granted or withheld in the sole and absolute judgment of Tenant), provided, however, by execution of this Lease Tenant approves the identity of the Person(s) (as proposed Occupants) as enumerated in Part II of Exhibit M hereof, and (2) in the May Store location shown on Exhibit B hereof, \* \* \* subject, however, to the prior approval of Tenant of the identity of the proposed Occupant thereunder (which approval shall be granted or withheld in the sole and absolute judgment of Tenant), provided, however, by execution of this Lease Tenant approves the identity of the Person(s) (as proposed Occupants), as enumerated in Part II of Exhibit M hereof. (ii) (subject to the provisions of Sec. 31.3(A)), with the respective proposed Occupants listed in Part I of Exhibit M for occupancy of Floor Area (in excess of 30,000 sq. ft.) in the respective sizes set forth in Part I of Exhibit M; and

(E) Except with respect to the Woodward Store and the May Store, the Center Lease(s), including any modifications of, supplements to or renewals thereof, shall contain provisions: (1) prohibiting any Person(s) (including, but not by way of limitation, assignees, transferees, subleasees, licensees or mortgagees of or through any Occupant (whether by voluntary or involuntary act or by operation of law) or any holder of a corporate Occupant's possessory interest by dissolution, merger, consolidation or by transfer of more than fifty percent (50%) of the issued and outstanding voting stock of such corporate Occupant), unless the occupancy of such Person(s) is previously approved in accordance with the provisions of this Sec. 31.3, from occupying Floor Area on the Shopping Center Site, (2) subject to the provisions of Sec. 35.3(E) hereof, requiring the Occupant to join the merchants' association referred to in Article XXXV hereof and to comply with the rules and regulations thereof and to contribute at least pro rata to the annual budget thereof on the basis of the ratio of its respective Floor Area to the aggregate Floor Area on the Shopping Center Site, (3) requiring the Occupant with respect to its facilities, to comply with the standards of maintenance management,

operation and control set forth in Exhibit L hereof, (4) requiring the Occupant to comply with the provisions of Article XXXVI hereof, and (5) providing that the provisions of this subsection (E) shall be enforceable by the parties hereto, jointly or severally.

(F) The foregoing provisions of this 31.3 as respects the approval of the identity of Person(s) set forth in Part I of Exhibit M hereof and as respects the approval of the amount of Floor Area that may be occupied by respective Person(s) set forth in Part I of Exhibit M hereof are subject to the conditions, qualifications, limitations and restrictions provided with respect thereto in Part I of Exhibit M hereof.

The references to "Tenant" in the above-quoted lease provisions refer to City Stores (Stip. ¶28; JX 1-X to 1-Z-2).

20. Exhibit M, which is referred to in Section 31.3 of the lease, are lists of Tysons Corner Tenants whose admission the Center was deemed approved by City Stores (Stip. ¶29; JX 1-Z-2). While Exhibit M contains a varied and extensive list of merchants, it does not include the recognized discounters in the Wash., D.C. area - *i.e.*, Dalmo, Sun Radio and George's. City Stores did not participate in any negotiations concerning the merchants included in, or excluded from Exhibit M (Stip. ¶29; JX 1-Z-2 to 1-Z-3). Of the 111 tenants now located at Tysons Corner Center, about one-half were not pre-approved by inclusion in Exhibit M (Compare JX 1-Z-4 with JX 1-Z-192 to 1-Z-200).

21. As part of the approval process contemplated by Section 31.3 of the lease, the Tysons Corner Center developers sent a letter dated Feb. 21, 1969, which requested City Stores' approval of a lease for Dalmo Sales Company ("Dalmo"). At that time, Dalmo, which is a well-known Washington area discounter, had five retail outlets in the Washington Metropolitan Area, including stores in Maryland, Virginia and the District of Columbia. The letter stated:

In accordance with the provisions of your Lease, we hereby request your approval of the Lease executed by us with Tyco Appliances and TV, Inc. for location D-7, as shown and outlined in red on the enclosed Leasing Plan. Tyco will sell appliances and is owned and operated by Dalmo. The lease contains provisions which prohibit both Tyco and Dalmo from advertising discount or bargain sales at all of their present stores. In fact, Dalmo is now in the process of removing their "discount slogan" from all advertising, signing, etc. (Stip. ¶42; JX 1-Z-14)

22. City Stores did not reply to the Tysons Corner Partnership letter of Feb. 21, 1969. Approval of Dalmo was given pursuant to Section 31.5(B) of City Stores lease, which provides:

The failure of Tenant to disapprove the location and/or identity or Person(s) as proposed Occupant(s) under Center Lease(s) within seven (7) days after request for respective approval thereof by Landlord shall be deemed to constitute the approval thereof. (Stip. ¶43; JX 1-Z-15)

23. Although City Stores approved Dalmo's lease (Stip. ¶43; JX 1-Z-15), Dalmo never became a tenant in Tysons Corner Center because The May Company and Woodward and Lothrop, which also had the right to disapprove a prospective entrant, vetoed the Dalmo entry (Stip. ¶44; JX 1-Z-15).

24. Also pursuant to Section 31.3 of the lease, on Apr. 29, 1969, City Stores was asked to and did give its approval to the lease of Sun Radio Stores, another well-known Washington decorator. At that time, Sun Radio had nine retail outlets in the Washington Metropolitan Area, including stores in Maryland and Virginia. An addendum to the Sun Radio lease provides:

Tenant covenants and agrees that with reference to all of the Sun Radio Stores in the Washington-Metropolitan area, it shall not include in any of its advertising or other material in its stores, any advertising or reference to the effect that it continually sells or offers merchandise for sale at bargain prices. Tenant further agrees that it shall not use the word "discount" or make any reference to a discount operation in any such advertising or on any signs at Tysons Corner Center or other material. Tenant may, however, advertise sales from time to time, as are incidental to any ordinary retail business. Tenant will remove the word "discount" from any of its signs at any other location when present sign is replaced with a new sign. (Stip. ¶45; JX 1-Z-15 to 1-Z-16)

25. Apart from the facts cited in Findings 18 to 24, 32, 34 and 41 to 51 relating to the acquisition and enforcement of approval rights in the City Stores-Tysons Corner Center lease, there is no evidence showing any direct action by City Stores to eliminate price competition from new entrants. Thus, respondent had not requested nor had it discussed or suggested the Dalmo "no-discounter" provision with either the developer, Dalmo (Stip. ¶42; JX 1-Z-14), or the other major tenants. (Stip. ¶43; JX 1-Z-15) Respondent was not present during the negotiation and drafting of the addendum to the Sun lease, nor did it state to the developer or to anyone else that its approval of the Sun lease would be conditioned on the inclusion of the no-discounter provision (Stip. ¶45; JX 1-Z-16).

26. While City Stores officials claim that they would have approved both the Dalmo and Sun entry without the no-discounter clauses (stip. ¶¶43, 45; JX 1-Z-15, 1-Z-16), in fact, when approval was actually given, there was no indication of such willingness since (1) approval to the Dalmo entry was accomplished by not responding at all to the approval solicitation which included the no-discounter provision (Stip. ¶43; JX 1-Z-15), and (2) approval of the Sun entry was apparently given to the very lease which included the no-discounter clause (Stip. ¶45; JX 1-Z-15 to 1-Z-16).

#### Satellite Lease Provisions

27. Once approval is given by the major tenants, including City Stores, satellite tenants are allowed to enter Tysons Corner Center and operate under a standard form lease. The standard satellite lease was formulated and completed prior to the execution of the City Stores lease (Stip. ¶32; JX 1-Z-7), and City Stores did not participate in the drafting or negotiation of the standard form lease (Stip. ¶38; JX 1-Z-

12), nor did it discuss with or suggest to Tysons Corner Center, The May Company, or Woodward and Lothrop the inclusion or exclusion of any provision in the standard form lease (Stip. ¶39; JX 1-Z-12).

28. While the standard satellite lease may be modified and tailored to the requirements of each leasing transaction, most satellite tenants operate under a standard lease containing a ban against operating a discount store similar to a "Korvette" which sell merchandise at discount or bargain prices. Thus, Article 16.I of the Tysons Corner Center printed satellite tenant lease form, which respondent knew about at least since 1969 (Stip. ¶41; JX 1-Z-13) provides as follows:

Tenant shall not operate or conduct in the demised premises a type of business currently known in the commercial trade as a "discount store" or a "bargain store" similar to a "Korvette" or other type of discount store, nor shall Tenant operate or conduct a business continuously selling, or offering or purporting or holding itself out to sell, merchandise or services at "discount" or "bargain" prices. Tenant shall not, unless otherwise expressly permitted so to do hereunder, use or permit the use of trading stamps\* \* \*. Notwithstanding any other provision hereof, any substantial addition to or change in the type, or price lines, or quality of merchandise or services, or any substantial other change in the type of business permitted to be carried on by Tenant hereunder, without the express prior written consent of Landlord (which consent may be granted or withheld in Landlord's sole and absolute discretion, and with or without statement of or necessity for reason therefor, and which, if granted, may be conditioned, among other things, upon Tenant's agreement to comply with new and additional requirements not set forth or contained in this lease which may be applicable to all or any part of the demised premises without regard to the prior or prospective use thereof, and including but not limited to requirement of payment of an increased or additional rent over the rent prescribed herein) may be deemed to be a breach and violation of this lease at Landlord's sole and absolute discretion. (Stip. ¶36; JX 1-Z-8 to 1-Z-9)

29. There are satellite tenant leases which contain changes in the printed form of Article 16.I. For example, the Giant lease permits the use of trading stamps. Article 16.I is modified from the printed form in the following leases as indicated:

(1) *Bailey, Banks & Biddle*: The last sentence is amended to provide that the Landlord's consent may not be unreasonably withheld.

(2) *Fabric Tree*: The last sentence is deleted.

(3) *Giant*: The last sentence is deleted.

(4) *Joseph R. Harris*: The last sentence is amended to prohibit the stated additions or changes "unless such addition or change is in accordance with the policy in effect in a majority of the stores being operated by Tenant in the Metropolitan Washington Area."

(5) *Olan Mills*: Addendum (12) to the lease provides:

The offering of a "loss leader" or a similar discount or bargain price shall not be deemed to be a violation of the provisions of Article Sixteen, Paragraph I, providing Tenant does not persistently use the specific words "discount" and/or "bargain" in its advertising and telephone solicitations.

(6) *Peoples Drug*: Addendum (37) contains a new clause in lieu of and based upon Article 16.I which provides that Peoples shall not conduct a

discount operation unless a majority of Tenant's stores in the Wash., D.C., Metropolitan Area do so. In addition, a proviso is added to the end of Article 16.I as follows:

provided, however, that nothing herein contained shall be deemed to limit or prohibit Tenant from adding to or changing the brands or specific lines of merchandise, or changing the brands or specific identifications or types or price lines or quality of merchandise dealt in or dispensed on the premises, so long as the general pattern and type of operation as a drug store, as permitted and described on page 1 of this Lease, shall continue to be maintained.

(7) *Singer*: The last sentence of Article 16.I is deleted.

(8) *Spencer Gifts*: Article 16.I is deleted in its entirety.

(9) *Thom McAns*: The beginning of the last sentence of Article 16.I is changed to read:

Notwithstanding any other provision hereof, any substantial change in the price lines, or any change in the type of business permitted to be carried on \* \* \*

(10) *Top Value*: This tenant's lease is not the printed form, and it contains no provision identical or similar to Article 16.I.

(11) *United Virginia Bank*: Article 16.I is deleted in its entirety.

(12) *Woolworth's*: The Woolworth lease is a typewritten document drafted by the Tenant and contains no provision identical or similar to Article 16.I (Stip. ¶37; JX 1-Z-9 to 1-Z-12).

30. The standard form satellite lease also contains a "use clause" or "permitted use clause" which provides as follows:

Such occupancy shall be for the purpose of \_\_\_\_\_.

The blank is completed in the course of the negotiation of the lease. All such use clauses provide that sales on the leased premises shall be of a specified type merchandise, such as "children's shoes," and shall be "for no other purpose whatsoever." (Stip. ¶33; JX 1-Z-7 to 1-Z-8; Stip. ¶35; JX 1-Z-8)

31. There are 28 instances (out of 111 satellites) in which the "use clauses" described in Finding 30 defines the use that a tenant may make of the premises in terms of the price of specified merchandise. This type of "use clause" typically reads as follows:

Ups N Downs [Satellite Tenant's Name]: the retail sale of medium priced womens sportswear, swimwear and related accessories and incidental thereto the sale at retail of boots and sandals. The majority of the sales at the demised premises shall be sportswear and swimwear. (Stip. ¶34; JX 1-Z-8)

32. In seeking City Stores approval for a satellite tenant (pursuant to Section 31.3 of City Stores' lease), Tysons Corner developer has referred to "use clause" limitations on pricing and merchandise. Thus, a letter requesting such approval for G&G Shops of Virginia, Inc. indicated that the proposed tenant would be selling only "popular-priced" women's clothing. (Stip. ¶40; JX 1-Z-12)

33. All requests for approval of entry were granted by City Stores

including requests which mentioned, and those which did not mention, that the proposed tenant would be selling merchandise within a certain price range. (Stip. ¶41; JX 1-Z-13)

34. The no-discounter and use restrictions contained in satellite leases are continuing ones which cannot be changed without the approval of City Stores and the other major tenants. This continuing control exists because the preamble to Section 31.3, when read together with Sections 31.3(A), (B), (D) and (E) of the City Stores lease provides that modification, supplements, and renewals can only be made in the leases of any tenants in the Center unless the developer obtains City Stores' approval of the satellite's continued occupancy. (See lease provisions quoted in Finding 19.) Moreover, approval, once given, may be revoked if the satellite tenant engages in "business operations or merchandising practices" which respondent determines are detrimental to the shopping center (Lease Section 31.5(A)(2); JX 1-Z-155).

35. The interstate mails were used as the mechanism for approval by City Stores of satellite tenants. Pursuant to Section 31.3 of the City Stores' lease, requests for approval were sent from Tysons Corner Partnership headquarters in Maryland to City Stores' New York office and to the Lansburgh's division office in the District of Columbia. City Stores' officers in New York sent the request for approval letters from New York to Lansburgh's office in Washington. Lansburgh's letters approving tenants were sent from the District of Columbia to the Tysons Corner partnership at its Maryland address (Stip. ¶46; JX 1-Z-16 to 1-Z-17).

#### Space Limitations

36. In accordance with similar lease provisions in The May Company lease and the Woodward lease relating to the other department stores, the City Stores lease contains a provision limiting the floor area of The May Company store and the Woodward and Lothrop store. This limitation on the floor space of respondent's competitors is contained in Section 31.3(D) of the City Stores lease and reads in pertinent part as follows:

\* \* \* at no time prior to Termination Date shall the Occupant of the Woodward Store occupy, control or possess or operate more than two hundred forty five thousand (245,000) square feet of Floor area on the Shopping center Site \* \* \* at no time prior to Termination Date shall the Occupant of the May Store occupy, control or possess or operate more than two hundred forty-five thousand (245,000) square feet of Floor Area on the Shopping Center Site\* \* \*. (Stip. ¶21; JX 1-Q to 1-R)

37. While there is no proof that the space limitation contained in Section 31.3(D) caused actual competitive harm, the comparative floor area of department stores is a factor affecting competition between stores. As department store area decreases, a point is reached where a store must eliminate departments, lines, or depth of merchandise. That

point is reached for a store depending upon the general practice of the store and trading area regarding size, lines carried and merchandising techniques. At some point, which will depend upon the merchandising policy of the store, a department store's smaller store area vis-a-vis a competing department store's larger store areas may place the smaller store at a competitive disadvantage (Stip. ¶21; JX 1-S to 1-T).

38. City Stores did not want competing department stores in the same shopping center to have the right to expand beyond their original sizes unless City Stores also had expansion rights (Stip. ¶21; JX 1-S).

39. A recent expansion to The May Company store at Tysons Corner Center was made in accordance with the limitation contained in the City Stores lease. Although there is no evidence that The May Company or Woodward and Lothrop operate department stores in regional shopping centers which are larger than the 245,000 square feet limitation contained in Section 31.3(D), some department stores have expanded beyond the 245,000 square feet limitation (Stip. ¶21; JX 1-T).

40. In addition to the limitations on department store expansion, Part I of Exhibit M of the lease which provisions are incorporated by reference into Section 31.3 of the City Stores lease, impose space limitations on many of the prospective satellite tenants. Approval for their admission is conditioned on their observance of strict space restrictions. For example, the floor area that Raleigh's and Philipsborn could occupy was limited to 40,000 square feet. Similarly, Jelleff's is limited to 60,000 square feet, Richman Brothers and Ups 'n' Downs to 7500 square feet each, House of Fabrics, Fabric Tree, Petrie and Marianne to 10,000 square feet each, and Giant Foods to 35,000 square feet, no more than 15 percent of which can be used for nonfood merchandise (JX 1-Z-192 to 1-Z-193, 1-Z-197).

#### The Circumstances Surrounding The City Stores' Lease

41. The lease provisions which are described in detail in Findings 19, 20, 22, 34, 36 and 40 came about under the following circumstances. On or about May 29, 1962, Isadore Gudelsky and Theodore N. Lerner, the original developers of Tysons Corner Center, wrote a letter to Charles Jagels, who was then the president of City Stores' Lansburgh's division, granting City Stores an option to lease space for a Lansburgh's department store in the Tysons Corner Center "with rental and terms at least equal to that of any other major department store in the center." (Stip. ¶14; JX 1-J.)

42. City Stores' officials viewed the word "terms" in this letter as relating principally to such matters as rent, size, location and parking spaces. So-called rights of approval discussed earlier (Findings 18 to 26) were not among the terms that officials of City Stores considered essential to the agreement (Stip. ¶14; JX 1-J).



43. Officials of City Stores knew, however, on the basis of their general experience in the department store business, their familiarity with other shopping center operations of Theodore N. Lerner, and information they received about The May Company and Woodward and Lothrop leases that if their lease were substantially equal to those given these other major department stores (as they insisted it should be) the lease would indeed contain a provision giving all major tenants - *i.e.*, all the department stores including City Stores - the right of approval over the entry of all other prospective tenants (Stip. ¶¶ 14, 15, 19; JX 1-J to 1-K, 1-L to 1-M).

44. The Gudelsky-Lerner option of May 29, 1962, was conditioned upon City Stores rendering assistance to secure certain zoning approvals which were necessary for the development of Tysons Corner Center. Notwithstanding the fact that the necessary zoning approvals were secured, the developers refused to offer City Stores a lease in the Tysons Corner Center. Rather, in order to obtain entry to Tysons Corner Center, City Stores filed suit against the developers of Tysons Corner Center in 1966 (*sub nom City Stores Co. v. Ammerman*, Civ. Action No. 98-66, D.D.C.) for specific performance of its rights under the May 29, 1962 option (Stip. ¶16; JX 1-K).

45. Prior to the filing of the complaint in 1966, the developers of Tysons Corner Center had negotiated a lease on December 6, 1965, with The May Company for the operation of a Hecht Department Store at Tysons Corner Center. On Nov. 1, 1965, a lease was signed with Woodward and Lothrop for the operation of a department store at the Center. The Woodward and Lothrop lease was substantially identical to the one signed by The May Company (Stip. ¶13; JX 1-I).

46. With the exception of the provision in the letter of May 29, 1962, relating to terms equal to those enjoyed by "any other major department store," and the knowledge that this would include approval rights (Findings 41 to 43), on no occasion prior to the filing of the lawsuit against the developers of the Tysons Corner Center was there any discussion or negotiation between the developers and City Stores with respect to the specific provisions to be contained in any lease which might be offered to City Stores. Specifically, the developer had no actual knowledge that City Stores wanted an approval clause as a way of eliminating potential price competition (Stip. ¶¶ 17, 18; JX 1-K to 1-L).

47. Throughout the trial in City Stores' action against the developers, in order to rebut the developers' contention that the May 29, 1962, letter was too vague to permit specific performance, counsel for City Stores indicated that City Stores would accept whatever lease terms the developers had in the interim granted to The May Company

and Woodward and Lothrop. City Stores did not know the specific terms of those leases until well after the lawsuit had been instituted. City Stores had been advised shortly before it filed its complaint against the developers that The May Company and Woodward and Lothrop had reserved the right to approve any other tenants in the Tysons Corner Center, but City Stores did not know the exact terms of such approval rights (Stip. ¶19; JX 1-L to 1-M).

48. On Apr. 5, 1967, the court ordered that City Stores be admitted to Tysons Corner Center and be given a lease with the terms equal to The May Company lease, subject to the court's approval. Prior to such approval, changes were made in The May Company lease in order to reflect differences relating to names, dates, construction schedule, architectural design and locations. Other portions of the lease which were clearly inapplicable to City Stores were waived, omitted, or modified (Stip. ¶21; JX 1-P to 1-Q).

49. At no time after it entered Tysons Corner Center did City Stores take any action to waive the "approval right." (See, Stip. ¶21; JX 1-P to 1-Q which specifies what *was* waived.)

50. Upon affirmance by the Court of Appeals of the District Court's order approving the format of the City Stores' lease, the lease was executed in Maryland on May 23, 1968. Neither court considered the lawfulness under the antitrust laws of the approval clause (Stip. ¶22; JX 1-T).

51. At no time after the filing of the lawsuit against the developer and prior to the execution of the City Stores' lease, did any discussion or negotiation between representatives of City Stores and representatives of the Tysons Corner developers concern the provisions and practices which are challenged in this proceeding. Except for insisting on a lease identical to that granted the other major tenants, City Stores did not negotiate or discuss with the developers any terms relating to the right to disapprove other tenant leases or rights relating to a limitation on floor space (Stip. ¶23; JX 1-T to 1-V).

52. In the spring of 1967, City Stores would not have been able to obtain from the Tysons Corner developers a lease for a Lansburgh's store at the Tysons Corner Center containing "approval" provisions had such provisions not been previously included in The May Company and Woodward and Lothrop leases (Stip. ¶23; JX 1-U to 1-V).

53. Had City Stores been in a position to negotiate independently a lease at the Tysons Corner Center, it would have accepted such lease even if it contained no provision dealing with the approval right (Stip. ¶23; JX 1-V).

54. City Stores' willingness to accept almost any terms for the Tysons Corner location resulted, in part, from City Stores' previous

failure to locate in other regional shopping centers in the Washington Metropolitan Area. In 1962, City Stores' officials considered it a competitive necessity for Lansburgh's to expand through entry into regional shopping centers in the Washington, D.C. suburbs and believed that the Tysons Corner Center presented one such opportunity (Stip. ¶23; JX 1-V).

#### The Fourth Department Store Issue

55. In a portion of its complaint filed in 1966 against the developers, City Stores alleged that:

Plaintiff is informed and believes that Defendants have entered into binding, definitive lease agreements with the Hecht Company and Woodward & Lothrop for two major department stores in the Tyson's Corner Shopping center. Plaintiff is further informed and believes that Defendants are about to enter into a binding and definitive lease agreement for a third major department store in the center. Plaintiff is further informed and believes that the terms of the lease agreements entered into with Woodward & Lothrop and The Hecht Company contain clauses limiting the total number of major department stores in the center to three. Unless Defendants are immediately restrained and permanently enjoined from entering into a lease agreement with any other major department store tenant until Plaintiff has an opportunity to exercise its option, Plaintiff's right to accept a lease to become a major department store tenant at such rentals and terms as may be offered to any other major department store tenant will be irrevocably lost unless the then tenants waive the limitation to three. Furthermore, since Plaintiff's Option for a Lease entitles it to obtain a lease agreement with terms at least equal to the Woodward & Lothrop and The Hecht Company agreements, Plaintiff has a right to obtain a lease, including it as a major department store in the center, with a clause limiting the total number of major department stores in the center to three. Defendants should not be permitted to enter into a lease agreement for a third major department store in the center, since this would make it impossible for them to give Plaintiff the form of lease agreement to which it is entitled. Finally, if Defendants should consummate a lease agreement for a third department store and then, despite the three-store limitation, offer Plaintiff a lease, that lease would be of greatly reduced value to the Plaintiff in view of the increased competition at the center. This complaint therefore is being filed against the Defendants at this critical time so as to restrain threatened action which would frustrate and largely nullify the value of Plaintiff's Option for a Lease and violate Plaintiff's rights thereunder.

In addition to the general prayer for relief stated in Paragraph 14 of the Complaint which reads:

That this Court adjudge and declare that Defendants are subject to a binding obligation, at the option of Plaintiff, to enter into a lease agreement with Plaintiff for a major department store at the Tyson's Corner shopping center at a rental and upon terms at least equal to the rental and terms of any lease agreement for a major department store with any other tenant at the center

City Stores' prayer for relief in the complaint in connection with this allegation reads:

15. That Defendants be enjoined and restrained, preliminarily and permanently, from entering into lease agreements for a third major department store at the Tyson's Corner shopping center until and unless -

(1) Defendants shall execute a lease agreement with Plaintiff for a major department store at the center, or

(2) Plaintiff has refused, or failed within a reasonable time after specification in accordance with the procedure set forth in Paragraph 19 below, to accept the rental and terms of each of the existing lease agreements for a major department store at the center. (Stip. ¶20; JX 1-M to 1-O).

56. These statements in the complaint (Finding 55) were intended to protect City Stores' right to the third major tenant location in the Tysons Corner Center shown on the site plan. City Stores had learned through newspaper reports and industry sources that the developers intended to lease to another department store the third department store site planned for the center which Lansburgh's had a right to obtain under the May 29, 1962, option (Stip. ¶20; JX 1-O).

57. Further, because of the less desirable nature of a fourth undesignated location in the Center which the developers might have offered if City Stores ultimately prevailed in its litigation at a time when the third department store site was no longer available, it was important for City Stores to seek to enjoin the developers from leasing its designated site to another department store during the pendency of the lawsuit. The quoted statements were made in the complaint (Finding 55) to support the motion that was made, and thereafter granted, for such a preliminary injunction (Stip. ¶20; JX 1-P).

58. During the course of the litigation with the developers, City Stores offered to settle the case by allowing the developers to offer a fourth site to any other department store so long as the site given to Lansburgh's was acceptable to City Stores. This proposal was rejected by the developers or by one of the other major tenants. (Stip. ¶20; JX 1-P)

59. Article VIII of the City Stores-Tysons Corner lease (JX 1-Z-61) provides for "Landlord Construction" in accordance with the site plan which shows three department stores (Appendix A to Stipulation, JX 1-Z-18; references in the lease to Exhibit B may be read as referring to JX 1-Z-18).

### III

#### DISCUSSION

##### "Commerce"

The threshold question in this case is whether the acts and practices alleged in the complaint—securing and enforcing the "right of approval" and certain other provisions in a regional shopping center lease—took place "in commerce" and are, therefore, subject to the jurisdiction of the Federal Trade Commission.

In arguing against the Commission's subject matter jurisdiction, respondent says that the determinative factor is that there is no evidence that the illegal use of the contested lease provisions occurred

"in commerce" within the meaning of Section 5. I believe respondent is wrong on this specific point; besides, respondent's narrow statement of the "commerce" issue overlooks (1) the interstate nature of the *entire* transaction which is being questioned; (2) the essentially interstate pattern of City Stores' business and the direct connection between the questioned practices and respondent's overall business; and (3) the fact that the questioned practices tend to regulate the flow of commerce.

This case is about securing and enforcing certain provisions in a City Stores-Tysons Corner Center lease which was negotiated between a developer based in Maryland and City Stores officials located in New York City. The lease was executed in Maryland.<sup>10</sup> The subject of the cross-state negotiation was not simply a parcel of land located on an interstate beltway encircling Metropolitan Washington: the lease was for the operation of a department store which was to buy, sell, and advertise across state lines according to policies determined by a multi-state corporation.<sup>11</sup> The lease included an approval clause and space limitations which when enforced governed the entry of other retailer-tenants into Tysons Corner Center including those from outside the Commonwealth of Virginia, who, in turn, were to buy, sell, and advertise across State lines.<sup>12</sup>

The implementation of the crucial approval clause took place across State lines since when City Stores was called upon to exercise its right of approval (or, if you will, its right of disapproval), this was done by the interstate mailing of either a request for approval or the lease itself from the developer in Maryland to City Stores in New York City or to Lansburgh's main office in the District of Columbia, and then on to City Stores in New York. In most instances, City Stores replied (either directly or through Lansburgh's) across State lines by use of the United States mail.<sup>13</sup> When approval was given, it meant that satellite stores could enter (at least to the extent that respondent controlled entry), but they were then subjected to lease provisions limiting their freedom to sell as discounters, including sales across State lines.<sup>14</sup>

While respondent's use of the United States mail to implement its approval power is an adequate basis for Commission jurisdiction (*Bernstein v. FTC*, 200 F.2d 404 (9th Cir. 1952); *Rothschild v. FTC*, 200 F.2d 39 (7th Cir. 1953, *cert. denied*, 345 U.S. 941 (1963)), it is unnecessary to rest jurisdiction on such limited grounds. Instead, I have also taken into account the fact that the approval right contemplates and is intimately linked with the process of satellite lease

<sup>10</sup> Findings 1, 8, 50.

<sup>11</sup> Findings 1, 2, 3, 7.

<sup>12</sup> Findings 16, 17, 19.

<sup>13</sup> Finding 35.

<sup>14</sup> Findings 27, 28.

negotiation (see discussion, *infra*, especially text at notes 26 to 40). This entire chain of events - from securing the City Stores lease to the imposition of no-discounting provisos on satellites-took place "in commerce"<sup>15</sup> although the underlying agreements pertain to leases of realty interests which are traditionally considered local in nature. See, e.g., *United States v. South-Eastern Underwriters Assn*, 322 U.S. 533, 547 (1944). Moreover, the events relating to Tysons Corner Center are part and parcel of a multi-state department store business directed by City Stores from its New York headquarters.<sup>16</sup> See, e.g., *Holland Furnace Co. v. FTC*, 269 F.2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 932 (1965). And finally, the lease provisions establish a control mechanism for regulating the "flow of commerce" in the sense that it enables respondent to determine who enters Tysons Corner Center and how these entrants are able to do business across State lines.<sup>17</sup> See, e.g., *Ford Motor Co. v. FTC*, 120 F.2d 175 (6th Cir. 1941), *cert. denied*, 314 U.S. 668 (1941). All of these factors add up to a more than adequate basis for Commission jurisdiction.<sup>18</sup>

Despite all these indicia of interstate commerce, respondent argues that one of the key incidents involved in this case - the attempted entry of the discounter Dalmo and the imposition of certain no-discounter conditions, including restrictions on Dalmo pricing in Virginia, Maryland and the District of Columbia - did not occur "in commerce" since no letter of approval or disapproval was mailed by City Stores. As I will indicate later, I believe the "Dalmo incident" is significant as illustrative of the inherent anticompetitive nature of the approval clause. I do not accept, however, respondent's version of where this incident took place.

By the terms of the lease, City Stores in New York City may allow Dalmo's entry (subject to the no-discounter provision) by taking a positive step (sending an approval letter) or by doing nothing at all.<sup>19</sup> Should City Stores send such an approval letter from New York, the act of approval would unquestionably be "in commerce." According to respondent, however, if its New York headquarters happens to indicate approval by *not* sending a letter, there is no interstate act, even though

<sup>15</sup> Findings 15, 16, 19, 21, 22, 24, 27, 28, 30, 31, 32, 33, 35, 40, 41, 50.

<sup>16</sup> Findings 1, 2, 3, 35.

<sup>17</sup> Findings 17, 19, 24, 28, 30, 31, 32, 34, 36, 40.

<sup>18</sup> Clearly this case does not involve the purely local practices challenged in such cases as *FTC v. Bunte Bros.*, 312 U.S. 349 (1941) (where goods were manufactured and sold in one state), or *Plum Tree, Inc. v. N.K. Winston Corp.*, 351 F.Supp. 80 (S.D.N.Y. 1972), and *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc.*, 219 F.Supp. 400 (W.D.Pa. 1963) (where for purposes of the Robinson-Patman Act, a lease was held not to be a "commodity" sold in commerce), or *St. Anthony-Minneapolis, Inc. v. Red Owl Stores*, 316 F.Supp. 1045 (D. Minn. 1970), and *Saron Gas Stations No. Six, Inc. v. Shell Oil Co.*, 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963) (where there were no sales across State lines or use of the mails by an interstate seller to control the flow of commerce).

<sup>19</sup> Finding 22.

this negative "response" means the same as affirmatively sending a letter of approval.

I fail to see why the Commission's jurisdiction should be circumscribed by the form in which City Stores in New York chooses to convey across a state line its approval of an entrant. Whether the letter is sent or not, the substantive result is the same - respondent has agreed to the entry of a Wash., D.C. discounter into a Virginia shopping center subject to the anticompetitive terms indicated in a letter from the developer who is based in Maryland. With respect to the "commerce" question, substance rather than form controls, see, *e.g.*, *FTC v. Pacific States Paper Trade Association*, 273 U.S. 52 (1927), therefore, I have concluded that the exercise of a "negative option" from New York as determinative of the conditions of entry into Virginia is as much a communication "in commerce" as the positive sending of a letter of approval.

"The Right of Approval"

Turning to the main issue in the case, the approval clause, I believe the key point is whether the record shows that this provision in the City Stores-Tyson's Corner lease - *i.e.*, the right of City Stores to veto new entrants into Tyson's Corner Center - has actual or potential anticompetitive effects. If the record supports such a conclusion, then the circumstances surrounding respondent's acquisition of the approval right are largely, but not entirely, irrelevant.

To start with, the stipulation compels a conclusion of *almost* complete indifference on the part of City Stores in acquiring approval rights. I say "almost" because respondent knew that it would get approval rights by merely insisting on the same treatment as that extended to The May Company and Woodward and Lothrop.<sup>20</sup> In fact, it was given the same treatment, and it ended up with the right of approval.<sup>21</sup> Moreover, once it got approval rights and entered Tyson's Corner Center, it did nothing to rid itself of the controversial clause, although other clauses *were* waived.<sup>22</sup> I do accept, however, most of respondent's contentions with respect to this acquisition: given its less than robust market position, it could not have coerced the approval rights as a condition of entry;<sup>23</sup> it would have entered Tyson's Corner without the approval right;<sup>24</sup> and the developer had no actual knowledge that City

<sup>20</sup> Findings 43, 45, 46, 47, 51.

<sup>21</sup> Findings 18, 19.

<sup>22</sup> Findings 48, 49.

<sup>23</sup> Findings 4, 5, 52.

<sup>24</sup> Findings 53, 54.

Stores would exercise approval rights in an anticompetitive way, and, especially, to bar discounters.<sup>25</sup> As I indicated at the outset, these facts are not entirely irrelevant - for if the approval right *is* demanded by a major department store as a condition of entry, it tends to show an initial inclination to use it in an anticompetitive way and one can safely assume that anticompetitive effects will naturally follow. Obviously, if the record *did* show coercion or zeal on the part of City Stores in obtaining approval rights, complaint counsel would have made much ado about this, and they would have argued that anticompetitive effects must surely follow. Where there is no such evidence, assumptions about the inevitability of adverse effects cannot be made. But, on the other hand, the chaste circumstances surrounding the acquisition does not prove the *absence* of anticompetitive effects, and the question remains whether there is other evidence that trade may be restrained by the approval right.

The short answer to this question is that I believe the record will support the conclusion that the approval clause in the City Stores' lease has a substantial tendency, capacity, and potential to suppress price competition.

What the record shows is that the developer and a potential entrant recognized that the approval clause clearly gave City Stores the right to bar entry to a discounter if respondent chose to do so. This is the plain meaning of the "Dalmo Incident" where, *pursuant to the approval clause*, the developer asked City Stores to approve the entry of this well-known Washington area discounter on the condition that it would refrain from "advertising discount or bargain sales at *all* of their present stores" - that is, not only in Tysons Corner Center but in *all* the Dalmo stores in Virginia, Maryland, and the District of Columbia.<sup>26</sup>

Also pursuant to the approval procedure, City Stores was asked to approve (and it did) the entry of Sun Radio another important Washington area discounter, who pledged in its lease not to call itself a discounter in *any* of its stores or "include in any of its advertising or other material in its stores, any advertising or reference to the effect that it continuously sells or offers merchandise for sale at bargain prices."<sup>27</sup>

It is of no moment that the no-discounter terms of the Dalmo letter and the Sun lease were neither requested nor suggested by City Stores, or that City Stores did not discuss the no-discounter language with the developers or the other department stores.<sup>28</sup> On the contrary, these facts show that the mere presence of an approval clause in the

<sup>25</sup> Finding 46.

<sup>26</sup> Finding 21.

<sup>27</sup> Finding 24.

<sup>28</sup> Finding 25.



lease of a traditional department store is a signal to both the developer and a discounter, that approval may be withheld unless the discounter image is changed, and, therefore, entry should be sought on the basis that price competition will be held in check.

The conclusions which I draw from the Dalmo and Sun incidents are in no way changed by respondent's assertion that it would have approved Dalmo's or Sun's entry with or without the no-discounter provisos.<sup>29</sup> In fact, when it gave approval (by not indicating disapproval), it did not tell the developer that as far as it was concerned, the no-discounter conditions should be eliminated.<sup>30</sup> But more importantly, I know of no principle of antitrust law which would allow the quality of competition in a significant retail area like Tysons Corner Center to be determined by how lenient City Stores may or may not be, or how much price cutting it may or may not tolerate in a particular moment of its history.<sup>31</sup>

Since the clear meaning of the Dalmo and Sun incidents is that an approval clause means to both the developer and a prospective entrant that an "anchor" tenant, like City Stores, may determine if it wants or does not want price competition (and the developer and the price-cutter entrant should act accordingly), the potentially adverse effect of the clause is manifest. There was no need that complaint demonstrate actual adverse effect: the Commission may stop a practice in its incipiency before all price competition is eliminated.<sup>32</sup> As it happens, there is circumstantial evidence which serves to show that the no-discounting implications of the approval clause registered with practically all the satellite tenants. Many entered Tysons Corner Center subject to City Stores' approval, and most signed a lease which said that they could not operate a "discount store or a bargain store similar to Korvette nor continuously sell at discount or bargain prices."<sup>33</sup> In addition, there is evidence that the right of approval may have prompted other variations of price-related conditions on entry.

<sup>29</sup> Findings 26, 33.

<sup>30</sup> Finding 26.

<sup>31</sup> In *Northern Pacific Railway Co., et al. v. United States*, 356 U.S. 1 (1958), the Supreme Court specifically rejected this kind of "leniency" argument:

The defendant contends that the "preferential routing" clauses are subject to so many exceptions and have been administered so leniently that they do not significantly restrain competition. It points out that these clauses permit the vendee or lessee to ship by competing carrier if its rates are lower (or in some instances if its service is better) than the defendant's.

Of course if these restrictive provisions are merely harmless sieves with no tendency to restrain competition, as the defendant's argument seems to imply, it is hard to understand why it has expended so much effort in obtaining them in vast numbers and upholding their validity, or how they are of any benefit to anyone, even the defendant. But however that may be, the essential fact remains that these agreements are binding obligations held over the heads of vendees which deny defendant's competitors access to the fenced-off market on the same terms as the defendant. 356 U.S. at 11-12, accord, *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 458 (1922).

<sup>32</sup> *Fashion Originators Guild of America v. FTC*, 312 U.S. 457, 466 (1941); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-395 (1953); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966).

<sup>33</sup> Findings 20, 27, 28.

Thus, the record shows that City Stores, *again, in the context of the developer securing respondent's approval*, was informed that a new entrant, G&G Stores, would only offer "a middle-priced line of shoes."<sup>34</sup> Entry of other satellites, which was similarly conditioned on City Stores' approval, was limited to the sale of merchandise of a specified price and excluded the sale of lower-priced goods.<sup>35</sup> These are continuing restrictions on the satellites which cannot be removed without respondent's approval.<sup>36</sup>

In the commercial world, anticompetitive commitments like these are neither inadvertently imposed nor lightly accepted, and from what we know of the Dalmo incident, alone, it is reasonable to surmise that it was the approval clause which actually inspired, or at least tended or had the capacity to inspire these price-restrictive provisions.

It does not help respondent's cause to say that it always approved the entry of all satellite stores:<sup>37</sup> the record shows that while the satellites may indeed have had respondent's approval, they entered with their hands tied behind their backs. Nor do I think it decisive that there is no direct evidence showing that City Stores negotiated the anticompetitive satellite clauses or requested that conditions be imposed on Dalmo, Sun, and others,<sup>38</sup> or intended that these conditions be imposed.<sup>39</sup> As I indicated above, respondent had to do very little once it obtained, in the form of an approval clause, the right to say "yes" or "no" to price competition.

In defense of the clause, respondent has also vigorously pressed the argument of "unused power." A common thread running throughout its brief is that where power (*i.e.*, power to disapprove) is unexercised, then no violation can be found (respondent's Main Brief, at pp. 54, *et seq.*). The trouble with respondent's position is that it requires me to accept the notion that where a major tenant in a shopping center obtains the approval right, the right is only "exercised" when City Stores takes affirmative action to exclude a discounter or otherwise control the terms of entry of potential competitors. But the evils inherent in the approval right can work without positive action by respondent. The approval right is "exercised" quite effectively simply by standing as a reminder to both the developer and potential entrant that if they do not toe the line, the right to disapprove may be invoked.

<sup>34</sup> Finding 32.

<sup>35</sup> Findings 30, 31.

<sup>36</sup> Finding 34.

<sup>37</sup> Finding 33.

<sup>38</sup> Finding 51.

<sup>39</sup> Proof of specific intent is unnecessary except in attempt to monopolize cases. Thus, in *United States v. Masonite Corp.*, 316 U.S. 265 (1942), the Supreme Court said:

[a]s respects statements of various appellees that they did not intend to join a combination to fix prices, we need only say that they must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say to the contrary. 316 U.S. at 275.

That City Stores never found it necessary actually to use the power by exercising its right to disapprove does not change the highly anticompetitive implications of its mere existence.<sup>40</sup>

Its mere existence, however, does not amount, as complaint counsel would have it, to a horizontal conspiracy to fix prices, and therefore *per se* illegal. Complaint counsel argue that because City Stores has the right of approval, respondent becomes "enmeshed \* \* \* in combinations with the developer and the satellite tenants to fix or control prices, eliminate discount selling, and eliminate discount advertising" (complaint counsel's Main Brief, at p. 15). "Enmeshed" or not, there is no agreement between City Stores and the satellites fixing or tampering with their respective prices and without such an agreement, tacit or otherwise, there can be no conspiracy.<sup>41</sup> In rejecting this *per se* theory of complaint counsel, I am distinguishing between an anticompetitive practice which has pricing effects and "price-fixing." While the pricing effects may properly be taken into account in deciding whether practices are unreasonable or unfair, this is not the same as saying that receipt or enforcement of the approval clause is a price-fixing combination or conspiracy and therefore *per se* illegal, irrespective of the effect.<sup>42</sup>

With theories of *per se* combination or conspiracy out of the way, I am deciding this case essentially on the basis of the more pragmatic and less conceptualistic branch of Section 5—*i.e.*, an approach which

<sup>40</sup> The courts have recognized the anticompetitive implications of restrictive power obtained but not actually invoked. In *F.C. Russell Company v. Consumers Insulation Company*, 226 F.2d 373, 376 (3rd Cir. 1955), the court said: "The inchoate threat which these circumstances engender hangs in the air and we may doubt that that threat is without its effect in a highly competitive market."

See, also *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922); *Northern Pacific Railway Co., et al. v. United States*, 356 U.S. 1 (1958).

<sup>41</sup> The only conspiracy theory that I can envision is that, arguably, the approval clause has the effect of placing City Stores in the center of a "hub and spokes" combination (see, *e.g.*, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939)), whereby the satellites (*i.e.*, the "spokes") agree not to sell at discount prices because respondent (the "hub") will not give entry approval. Complaint counsel, however, are a long way from meeting the test of *Interstate Circuit* since there was no showing that the response of any satellite to the existence of the approval right was dependent upon a similar response by other satellites. Even under the most expansive reading of conspiracy law, identical but not interdependent responses to the same economic fact is not an "agreement" by any stretch of the imagination. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962).

<sup>42</sup> Nor do I accept complaint counsel's alternative *per se* theories grounded on *Associated Press v. United States*, 326 U.S. 1 (1945), and *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912). It is doubtful that these are *per se* cases, and, in any event, they could be viewed as concerted refusals to deal (*i.e.*, boycotts as in *Fashion Originators Guild of America v. FTC*, 312 U.S. 457 (1941), and *Klor's Inc., v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)), in which competitors combined to deny an essential service (membership in a newspaper agency and access to a St. Louis terminal which every railroad had to pass through). With the dismissal of Count I, there is no charge left in this case that City Stores combined with the other department stores to boycott or do anything else. As for *Gamco, Inc. v. Providence Fruit [ Produce Building, Inc.]*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952), this "bottleneck" case does not apply a *per se* approach—the case turned on (1) the desirability of space in the Produce Building, (2) the competitive implications of the failure to renew the lease, (3) the business justification for a denial by a monopolist of access to a substantial economic advantage. This is hardly a *per se* approach and I have looked to similar factors in the unfairness analysis to be discussed above.

emphasizes that "unfairness" turns on considerations of context, effect, justification and consistency with antitrust policy.<sup>43</sup> Under this approach it is significant that even if one cannot find that the approval clause "amounts" to price-fixing, there is evidence showing that the approval right may have highly anticompetitive effects on competition, and especially price competition.<sup>44</sup>

Starting with this effect, I next look to the setting. It was not necessary that complaint counsel show that Tysons Corner Center was a "relevant market" as that term is used in merger cases.<sup>45</sup> It is enough that the record shows, as it does, that Tysons Corner Center is a significant center of business where if competition is restrained, a substantial number of consumers will have to pay the price.<sup>46</sup>

While I believe that the crucial considerations are probable anticompetitive effects, the economic setting, and lack of justification for the practice, I have also concluded that the acquisition of the approval right violates the policy of the antitrust laws which disfavors the use of vertical leverage to accomplish restraints on pricing. By this I mean, not only would it have been patently illegal for City Stores to have entered into a horizontal agreement with new tenants about any aspect of pricing, but the same illegal result could not have been legally accomplished through an agreement between respondent and Tysons Corner Center by which the developer agreed to allow entry depending

<sup>43</sup> On the record of this case, it is not necessary to test the outer limits of Section 5 where the Commission may predicate a finding of unfairness "independent of possible or actual effects on competition." *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, at 248 (1972). In *S I H*, the Court pointed to certain factual considerations as an alternative test for unfairness. The Court said that the Commission may proscribe practices as unfair "in their effect upon consumers" (*id.*, at 239), clearly a factual consideration. And again, the Court cited favorably as a factor in determining unfairness "whether it causes substantial injury to consumers (or competitors or other businessmen)" (*id.* at 245, note 5). The legislative history of Section 5 shows a similar overriding interest in giving the Commission the power to determine unfairness by referring to the facts of a particular case rather than abstract standards or rigid formulae. See, Baker and Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 Vill. L. Rev. 517, 560 (1962). Thus, the floor debates on Section 5 indicate a congressional purpose that the law of unfairness be fashioned on the facts of each case by a "rule of reason" balancing of the business reasons for the conduct against the practice's adverse effects upon the public interest. 51 Cong. Rec. 12915, 12916 (1914) (remarks of Senator Cummins). While there may be cases where the destructive effect of the practice is so apparent as to preclude even the proffer of justification evidence, see, e.g., *Atlantic Refining Company v. FTC*, 381 U.S. 357 (1965), we do not reach that question here since respondent was encouraged to present a business justification but did not do so.

<sup>44</sup> See discussion earlier, especially text at notes 26 through 39.

<sup>45</sup> Where the practice involves the exclusion of competition or effects on prices, the courts and the Commission take as market just that market which the concern itself takes for its field of activity. It is assumed that the "field" sufficiently describes a market, for otherwise what would be the point of the effort to exclude or control. *Washington Crab Assn.*, 66 F.T.C. 45, 119 (1964).

<sup>46</sup> Findings 9, 10, 11, 12. See, also, *City Stores v. Ammerman*, 266 F.Supp. 766, 770 (D.C.D.C. 1967), where the court says that Lansburgh's had reached the conclusion "that the Tysons Corner site was preferable to any other in the area." The district court opinion was affirmed in *Ammerman v. City Stores*, 394 F.2d 950 (D.C. Cir. 1968), where the court set out the following text from a 1962 letter from Lansburgh's president (Jagels) to the Tysons Corner Center Developer (Lerner):

We are convinced that the Gudelsky-Lerner tract, to which you refer as the Tyson's Triangle, is superior to any other. Being located on the Beltway, it has an unexcelled advertising value. Its location on both Route 7 and Route 123 gives it access to all local traffic.

Since the Tyson's Triangle site will be developed almost exclusively to commercial uses, it also assures a live center with no dead spots. It is also readily available to automobile traffic without other competing uses within the Triangle. 394 F.2d at 952, note 4.

on whether a potential satellite gave assurances that prices would be maintained at a satisfactorily high level.<sup>47</sup> For all practical purposes the approval clause accomplishes the same end. It is a small step from (a) City Stores agreeing with the developer on how Tysons Corner Center will use its discretionary control over space, that is, entry to (b) City Stores, itself, assuming this same control and with it the right to veto the entry of price competition. In short, the acquisition of approval power is practically indistinguishable from what respondent could not have legally obtained by virtue of an express agreement preventing the developer from leasing to price cutters. Accordingly, it follows under Section 5 (where the form in which respondent has cast the transaction does *not* govern<sup>48</sup>), that because the clause operates in much the same way as an agreement which is clearly unlawful under the antitrust laws, this, too, weighs in favor of finding it unfair. It must be emphasized (as I indicated earlier with respect to complaint counsel's *per se* theories) that I am not saying that an approval clause is *per se* illegal because it amounts to a price-fixing agreement. What I am saying is that where a practice violates the underlying public policy of the price-fixing cases this is a factor, along with effects and lack of business justification, which should be taken into account in the balancing process which is at the heart of the unfairness analysis.<sup>49</sup>

Given these factors - probable anticompetitive effects, in a significant setting, and a practice which violates the policy of the antitrust laws - I believe that complaint counsel have made out a *prima facie* case. This means that in the absence of a clear showing of a valid business justification compatible with the aims of our national antitrust policy the clause must be stricken.

It is well established that the question of business justification is a

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<sup>47</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-223 (1940). Nor could the same result have been brought about by an agreement, direct or implied, between developer and new tenant to lease space on the condition that prices are maintained at a set level. See, e.g., *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

<sup>48</sup> *FTC v. Curtis Publishing Co.*, 260 U.S. 568, 581-582 (1923); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 397 (1953); *Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962).

<sup>49</sup> Public policy considerations are one of the three alternative sources of unfairness standards identified in the Statement of Basis and Purpose supporting the Cigarette Rule and favorably cited by the Supreme Court in *SIH*. This "public policy" test turns on whether S&H's conduct falls within the "penumbra" of some established concept of illegality. *FTC v. Sperry and Hutchinson*, 405 U.S. 233, 245, N. 5 (1972). Earlier, in *Atlantic Refining*, the Supreme Court said:

As our cases hold, all that is necessary in § 5 proceedings to find a violation is to discover conduct that "runs counter to the public policy declared in the Act" . . . But this is of necessity, and was intended to be, a standard to which the Commission would give substance. In doing so, its use as a guideline of recognized violations of antitrust laws was, we believe, entirely appropriate. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations . . . When conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance. *Atlantic Refining Co. v. FTC*, 381 U.S. at 369-70 (1965) (citations omitted).

burden which respondent must assume since it controls the facts and presumably knows what it reasonably requires.<sup>50</sup> I can only conclude that since City Stores has not come forward with any business justification, it has none. Moreover, at every turn in this proceeding, respondent has insisted that it never really wanted or needed the right of approval, or considered it important. As I indicated earlier, while this may indeed show a lack of anticompetitive intent, it also tends to show that approval rights are not justifiable. As it happens, it is difficult even to conjure up a legitimate (*i.e.*, non-anticompetitive) function of the approval right since the lease contains elsewhere adequate protection for any concern over the “image” of the shopping center as a whole: Section 31.3(C) requires the developer to select financially sound tenants of good reputation.<sup>51</sup>

While respondent has no factual justification for the approval provision, it argues that “approval” is similar to the exclusive dealing rights allowed in such cases as *Packard* and *Schwing*.<sup>52</sup> (Respondent’s Main Brief, at p. 50, *et seq.*)

In my view, the “exclusive dealing cases” are inapposite and respondent should not be heard to argue that since it could have been designated as the “exclusive” retail outlet in Tysons Corner Center, it may be the party to a less restrictive provision which gives it the right to exclude others. Exclusive arrangements, contrary to respondent’s argument, are *not per se* legal. If City Stores had been given exclusive retailing rights in Tysons Corner Center, the legality of that grant would have been carefully examined to determine the circumstances and significance of the exclusivity including possible justification in eliminating all competition. As a subject of conjecture, I cannot conceive of the circumstances under which the elimination of *all*

<sup>50</sup> As early as *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *modified and affd*, 175 U.S. 211 (1899), the rule was enunciated that a proponent of a contract of restraint may attempt affirmatively to justify it by a showing that it is ancillary to and necessary to the achievement of the lawful main purpose of the contract, that the duration and scope of the restraint is not substantially greater than is necessary to achieve that purpose, and that the restraint is otherwise reasonable in the circumstances. See, *White Motor Co. v. United States*, 372 U.S. 253, 270 (Brennan, J., concurring). While I have looked to *Addyston* for a standard on the justification question, this is not to suggest that I accept the notion that significant anticompetitive practices should be excused because the covenantees subjectively viewed the restraint as “ancillary” to their basic deal. If that were the test, every restraint would be lawful.

<sup>51</sup> Finding 19 (Para. 31.3(C)). The lease also contains provisions requiring that the architectural design concept, quality of construction and materials, the decor, and color of the stores harmonize and be compatible with respondent’s store. (JX 1-Z-63; JX 1-Z-171).

<sup>52</sup> *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Schwing Motor Co., Inc. v. Hudson Sales Corp.*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 822 (1957). As far as I know, there are no decided federal cases, either in the courts or before the Commission, which have treated directly with the merits of the “right of approval” under the “exclusivity” doctrine or any recognized doctrine of the antitrust laws. In *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, 308 F.Supp. 988 (D.D.C.), *affd*, 429 F.2d 206 (D.C. Cir. 1970), the court - considering the very same lease provisions challenged herein - denied a temporary injunction. While indicating its doubts that a *per se* violation could be established (as a basis for a temporary injunction), the court said a rule of reason analysis might be applicable.

competition by operation of an exclusive grant to a tenant could be justified in the context of a giant regional shopping center.<sup>53</sup> But obviously respondent cannot avail itself of a hypothetical justification as an explanation for what actually happened in this case. Here there was no justification presented; City Stores obtained the right to determine the conditions of entry; and that right, as the record shows may lead to severe effects on price competition which in no way is condoned by the exclusive dealing cases.

To sum up, on the basis of the record in this case, I have concluded that blanket approval clauses may lead to the elimination of price competition. To allow such clauses to exist in such economically significant places as Tysons Corner would be an open invitation to this respondent and other major department store retailers to divide up the country into protected enclaves where they would be free to set the metes and bounds of meaningful competition. As far as I know, City Stores never enjoyed such control over their actual or potential competitors in our older downtown business centers, and I fail to see why regional shopping centers - the "downtowns" of the future - should be turned over to this form of private regulation.

The Fourth Department Store Issue and the Limitation on Department Store Space

Complaint counsel maintain that the record shows an agreement between Tysons Corner Center and respondent to boycott a fourth department store. All that the record shows on this point is that in 1966 when it became apparent to City Stores that it would have to litigate to get into Tysons Corner Center, it told the District Court that if the developer was not immediately enjoined, one of the three planned department store sites would be given to another and the most that City Stores could hope for would be a less desirable and apparently unplanned fourth site.<sup>54</sup>

The record also shows that the outcome of the litigation was that City Stores got the third site and signed a lease for the third department store site. But complaint counsel argue that because the lease incorporated by reference the original plan of the shopping center,<sup>55</sup> this shows an agreement to limit the number of department stores to three since the plan only shows three department store sites.

On its face, I find nothing sinister in the fact that a developer's plan is incorporated into a lease. How else would a tenant know what he is

<sup>53</sup> The rationale of *Schwing and Packard* (that a weak manufacturer may grant exclusivity to a seller who was losing money in order to save or build a faltering distributorship for effective interbrand competition) was recognized to be of "necessarily limited scope" in Justice Brennan's concurring opinion in *White Motors Co. v. United States*, 372 U.S. 253, at 269, note 8 (1963).

<sup>54</sup> Finding 55, 56, 57, 58.

<sup>55</sup> Finding 59.

getting into? Nor, as far as I know, is there anything illegal in the developer conceiving of a shopping center as having a triangular configuration with three major department stores anchoring each corner. If this triangular configuration with its apparently natural limitation to three department stores had some roots in a conspiracy to boycott which involved respondent, then complaint counsel should have put in some evidence on the point.<sup>56</sup>

#### Expansion and Space Limitations

The limitation on department store expansion is another matter, however. This was brought about by agreements between the developer and each department store, including respondent, which provided that the other two may not expand beyond 245,000 feet.<sup>57</sup> It would have been illegal for the department stores to enter into such an agreement among themselves restraining competition and the same result cannot be legitimized by saying that this is merely an innocent bilateral arrangement between developer and tenant.

I have reached the same conclusion with respect to the provision in City Stores-Tyson's Corner lease which, in effect, sets the size of many of the satellite tenants.<sup>58</sup>

City Stores has no business entering into an agreement with a developer and indirectly with its competitors which determines how big its competitors (or City Stores, for that matter) will get. Size, whether it be that of department stores or satellites, is such a significant aspect of retail competition<sup>59</sup> that a restrictive agreement on this subject would be condemned under the Sherman Act even though it is competition rather than price itself. See, e.g., *Mandeville Island Farms, Inc., et al. v. American Crystal Sugar Corp.*, 334 U.S. 219, 235-236 (1948); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-224 (1940); *National Macaroni Manufacturers Ass'n v. FTC*, 345 F.2d 421 (1965).

## IV

### CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondent, and the acts and practices charged in the complaint took place in commerce, as "commerce" is defined in the Federal Trade Commission Act.

<sup>56</sup> As far as I can determine the three department store configuration grew out of an early agreement between the developer, Hecht (i.e., The May Company) and Woodward and Lothrop. City Stores "was not responsible for these actions\* \* \*." *City Stores Company v. Ammerman*, 266 F.Supp. 766, 779 (D.C.D.C. 1967).

<sup>57</sup> Finding 36.

<sup>58</sup> Finding 40.

<sup>59</sup> Findings 6, 37, 38, 39.



2. Respondent has caused the inclusion or enforcement of lease provisions in its Tysons Corner Regional Shopping Center lease which has the tendency to restrain trade and is an unfair method of competition. Specifically, a provision giving respondent the right to disapprove other tenants has the undue tendency, capacity, or effect of:

- a. Controlling and maintaining retail prices.
- b. Allowing respondent to choose its competitors and to exclude actual and potential competitors who might compete in price.
- c. Eliminating discount advertising and discount selling.
- d. Denying the public the benefit of price competition.
- e. Giving respondent continuing control over its competitors especially the pricing decision of its competitors.

3. Respondent has caused the inclusion or enforcement of lease provisions in its Tysons Corner Regional Shopping Center lease relating to size of competing department stores and satellite stores which has the tendency and effect of eliminating or restraining competition between respondent and other stores.

4. Respondent has offered no business justification for the provisions described above.

5. Said lease provisions, as hereinabove described, are all to the prejudice and injury of the consuming public and respondent's competitors, and constitute a restraint of trade and an unfair method of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

## V

### THE ORDER

There are several aspects of the remedy problem which I believe require some amplification.

First, complaint counsel insist that respondents be subjected to an order forbidding it from conspiring with other department stores about the approval right although there is no such conspiracy charge left in the case, and, in fact, the charge (Count I of the complaint) was removed with the full acquiescence of complaint counsel. This odd recommendation is justified by an arcane reference to the fact that the *other* Tysons Corner department stores ("The May Company" and "Woodward and Lothrop") have consented to a conspiracy provision in *their* orders and under the rubric of "fencing in," City Stores should get the same treatment.

As I understand complaint counsel's theory, it works as follows: when a respondent does not consent to a conspiracy order and chooses to litigate that issue, but complaint counsel later backs down and the

issue is removed from the case, complaint counsel, nevertheless, is entitled to a conspiracy order because in other cases which were *not* litigated, and where complaint counsel did *not* back away from the conspiracy charge, the respondents consented to such an order. To include a conspiracy order under this rationale would have the effect of turning logic on its head, and adding a "Catch 22" to the antitrust laws. I will have no part of it.

Next, I turn to respondent's request for a proviso allowing a measure of control over satellite entry in the form of a clause permitting a veto over "objectionable types of tenants." Respondent argues that The May Company and Woodward and Lothrop consent orders contain such an exception to the absolute prohibition against any form of approval clause. While the Commission may have some discretionary power in this respect, I am limited to the record. And on the basis of the record before me, I cannot allow respondent such open-ended control over entry which can work in much the same way as an approval clause. I have concluded that an approval clause, no matter what form it may take, is nothing more than a device for working anticompetitive mischief and it should be banned outright.

As I indicated earlier, whatever interest respondent may have in protecting the "image" of the center as a whole, this is adequately met by a lease provision requiring the developer to select financially sound tenants who have good housekeeping habits. The order will have a proviso expressly allowing such selection criteria.<sup>60</sup> Any other limitations on entry into shopping centers should be left to a less self-interested arbiter of what is in the best interests of the entire center - *i.e.*, to the discretion of the developer who is concerned with the center as a totality, or to local government which is the conventional instrumentality for determining what is or is not a socially acceptable business. I would not allow major department stores to regulate competition in these economically important retail centers by giving them the right of deciding which of their competitors are "objectionable." Besides, in this case City Stores has insisted in the most vehement terms possible that it has no real interest in the rights of approval, and it introduced no evidence whatsoever to show that approval rights in *any* form are justified.

Finally, respondent argues in favor of limiting the scope of the order to the Washington, D.C. area. This is understandable since the record

<sup>60</sup> I believe that, minimally, there is a built-in ambiguity in a proviso which would permit respondent to question the selection of a tenant on the grounds that the tenant may upset the "balance" or "diversification" of the center. An aggressive discounter may indeed upset the "balance" (whatever that means), and in the name of "diversification" respondent could lodge an objection to the entry of a direct competitor who instead of offering more variety, offers consumers a choice in terms of lower prices for the same merchandise as that sold by respondent.

The order will, however, contain provisos allowing lease provisions which identify the major tenants and establish a layout for the center. Neither provision, as I concluded earlier, has been shown to be anticompetitive.

shows that it no longer operates in Washington, but it does have at least ten shopping center operations elsewhere, and in the future it may enter still others. The approval right in the form of a grant to a major tenant like City Stores has a tendency and capacity to restrain price competition. It should be banned wherever it exists or may exist. There is no basis whatever for a geographical limitation on the order.<sup>61</sup>

Accordingly, the following order will be issued:

#### ORDER

##### I

For purposes of this Order, the following definitions shall apply:

A. The term "respondent" refers to City Stores Company, its operating divisions, its subsidiaries, and their respective officers, agents, representatives, employees, successors or assignees.

B. The term "shopping center" refers to a group of retail outlets in the United States of America planned, developed and managed as a unit and containing (1) a total floor area designed for retail occupancy of 200,000 square feet or more, of which at least 50,000 square feet is for occupancy by tenants other than respondent, (2) at least two tenants other than respondent, (3) at least one major tenant, and (4) on-site parking.

C. The term "tenant" refers to any occupant or potential occupant of retail space in a shopping center which occupancy is for the sale of merchandise or services to the public, whether said occupant leases or owns said space, but the term does not refer to an occupant of space within the store occupied by respondent, which occupant operates a department for respondent pursuant to a license from respondent.

D. The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant which occupies at least 50,000 square feet of floor area will be deemed to provide primary drawing power.

##### II

*It is ordered,* That respondent, in its capacity as a tenant in a shopping center, cease and desist from obtaining, making, carrying out or enforcing, directly or indirectly, an agreement or provision of any agreement, whether applicable to the shopping center or to any expansion thereof, which:

<sup>61</sup> Nor should the order be limited, as respondent requests, to a prohibition against only those leases which by their terms exclude price competition. Such an order would be less than useless since respondent would be free to negotiate for the very blanket approval clause which can cause the competitive harm described in this initial decision. The result would be the exact opposite of "fencing in," *FTC v. National Lead Co.*, 352 U.S. 419 (1953); it would leave the barn door wide open.

1. grants respondent the right to approve or disapprove the entry into a shopping center of any other tenant;
2. prohibits the admission into a shopping center of any particular tenant or class of tenants, including for purposes of illustration:
  - (a) other department stores,
  - (b) junior department stores,
  - (c) discount stores, or
  - (d) catalogue stores;
3. limits the types or brands of merchandise or services which any other tenant in a shopping center may offer for sale;
4. specifies that any other tenant in a shopping center shall or shall not sell its merchandise or services at any particular price or within any range of prices;
5. grants respondent the right to approve or disapprove the location in a shopping center of any other tenant;
6. specifies or prohibits any type of advertising by any other tenant or grants respondent the right to approve or disapprove any advertising by any other tenant;
7. grants respondent the right to approve or disapprove the amount of floor space that any other tenant may occupy in a shopping center.

### III

A. *It is further ordered,* That this order shall not prohibit respondent from including a provision in a reciprocal easement agreement or lease with respect to a shopping center which provision identifies in designated buildings respondent and those other major tenants which contemporaneously enter into such reciprocal easement agreement or lease with respect to such shopping center.

B. *It is further ordered,* That this order shall not prohibit respondent from negotiating to include, including, carrying out or enforcing an agreement or provision in any agreement which:

1. requires that with respect to the selection of other tenants in the shopping center, the developer shall select businesses which are financially sound and of good reputation.
2. requires that reasonable standards of appearance, signs, maintenance and housekeeping be maintained in a shopping center; or
3. establishes a layout of a shopping center which layout may (a) designate respondent's store, (b) set forth the location, size and height of all buildings, but not the amount of floor space that any other tenant may occupy in the shopping center, and (c) locate parking areas, roadways, utilities, entrances, exits, walkways, malls, landscaped areas and other areas.

## IV

*It is further ordered, That respondent shall:*

A. within thirty (30) days after service of this order upon respondent, distribute a copy of this order to each of its operating divisions;

B. within thirty (30) days after service of this order upon respondent, notify each developer of shopping centers in which respondent is a tenant, of this Order by providing each such developer with a copy thereof by registered certified mail;

C. within sixty (60) days after service of this order upon respondent, file with the Commission a report showing the manner and form in which it has complied and is complying with each and every specific provision of this order; and

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

## OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

Complaint in this matter issued on May 8, 1972. Respondents were the partnership which developed the Tysons Corner Regional Shopping Center ("Tysons Corner Center"), and the three major department store tenants of the center, City Stores Company ("City Stores"), The May Department Stores Company ("May Company"), and Woodward and Lothrop, Inc. ("Woodward"). The complaint charged that respondents had individually and in concert caused the inclusion or enforcement of certain provisions in leases of space at Tysons Corner Center which had the tendency to restrain trade, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45). These lease provisions included clauses granting the department stores broad rights to approve (or reject) prospective tenants to whom the developer might wish to rent space in the center, and clauses limiting the floor space which competitors of the lessees could occupy.

Respondents all filed answers conceding the existence of the challenged lease provisions but denying any illegality and raising various affirmative defenses. Following pretrial proceedings the matter was withdrawn from adjudication, and on June 26, 1974, the Commission accepted consent agreements entered by the Tysons Corner partnership, May Company, and Woodward. The matter was

returned to adjudication with respect to City Stores, and was subsequently tried before an administrative law judge on a stipulated record.<sup>1</sup>

In an initial decision dated Oct. 30, 1974, Administrative Law Judge Needelman concluded that the acts and practices challenged in the complaint were "in commerce" as defined in the Federal Trade Commission Act, and that respondent had violated Section 5 by including and enforcing provisions in its lease which had the tendency and effect of eliminating price competition in a very significant retail center in the Wash., D.C. metropolitan area. The law judge also found that respondent had caused the inclusion or enforcement of lease provisions at the Tysons Corner Center "relating to size of competing department stores and satellite stores which has the tendency and effect of eliminating or restraining competition between respondent and other stores." (I.D. p. 48 [p. 999, herein])<sup>2</sup> The judge entered an order based on his finding of violations.

Respondent has appealed, contending that the challenged acts and practices were not "in commerce"<sup>3</sup> and that even if "in commerce" its challenged activities were not in any event violative of Section 5. Complaint counsel, while not appealing from the determination of the administrative law judge (being, presumably, satisfied with the order he proposed) have nonetheless, in defense of the result reached by the judge, suggested further alternative grounds, rejected by him, which they contend would sustain the finding of illegality.

The facts of this matter are set forth adequately in the initial decision, and need only be summarized here. City Stores, through its Lansburgh's division, began doing business via operation of a department store at Tysons Corner Center in 1969 (I.D. 7). To obtain its lease at the center, City Stores was forced to sue the developer for specific performance, alleging that a one-page letter it had received during the early stages of the center's planning constituted an enforceable option (I.D. 41, 44). In order to demonstrate to the court that the one-page letter was indeed an agreement capable of specific performance, City Stores chose to ask that it be granted a lease essentially identical to those previously obtained by May Company and Woodward, also major department store tenants of the center (I.D. 47). The May Company and Woodward leases contained the challenged

<sup>1</sup> Of three counts in the original complaint, only Count II was adjudicated. This count challenged City Stores' inclusion or enforcement of the disputed contract provisions. Count I, alleging conspiracy among the parties to include and enforce an approval clause, was dropped as to City Stores by order of the administrative law judge on Feb. 21, 1973, without objection from complaint counsel. Count III dealt only with the actions of the Tysons Corner partnership.

<sup>2</sup> The following abbreviations are used herein: I.D. - Initial Decision (Finding No.) I.D. p. - Initial Decision (Page No.) RB - Respondent's Appeal Brief to the Commission (Page No.) Stip. - Joint Stipulation of the Parties

<sup>3</sup> The scope of Section 5 has since been extended to cover acts "in and affecting commerce." The earlier version, however, must govern the disposition of this case.

approval provisions. The District Court granted City Stores' prayer for specific performance (I.D. 48). Thereupon, City Stores entered into limited negotiations with the developer, wherein the parties made certain minor modifications in the lease (I.D. 48). The Court of Appeals subsequently affirmed the order of the District Court, approving the format of the City Stores' lease and ordering its implementation (I.D. 50). Thereupon, on May 23, 1968, the lease was executed in Maryland. Neither the District Court nor the Court of Appeals ever considered the antitrust implications of the lease (I.D. 50).

The "approval rights" challenged by the complaint were contained in Section 31.3 of City Stores' lease. This section provided, in relevant part, that with respect to all leases entered into by the developer for floor space in the shopping center:

(A) No Center lease shall be entered into with any person(s) in respect of the Mall Stores \* \* \* located within one hundred twenty-five (125) feet of the Enclosed Mall facades of the Tenant Principal Building, unless Tenant shall have previously approved the identity and location of the Person(s) as proposed Occupant(s), which approval, as respects identity, shall be granted or withheld in the sole and absolute judgment of Tenant and which approval, as respects location, shall not be unreasonably withheld\* \* \*.

(B) As respects any building, buildings and/or improvements or any part or parts thereof or any storeroom or storerooms therein located more than one hundred twenty-five (125) feet from the Enclosed Mall facade(s) of the Tenant Principal Building, all Center Leases entered into for the occupancy of thirty thousand (30,000) square feet or less of Floor Area shall be subject to the previous approval of Tenant of the identity of the Person(s), which approval shall not be unreasonably withheld\* \* \*.

(D) No Center Lease shall be entered with any Person(s) providing for the occupancy of more than thirty thousand (30,000) square feet of Floor Area without the prior consent of Tenant, which consent may be granted or withheld in the sole and absolute discretion of Tenant\* \* \*.

The anticompetitive possibilities created by approval rights of the breadth obtained by City Stores are substantial. The quoted clauses confer upon it the power to exclude would-be entrants for any reason whatsoever, including the fact that such entrants may compete with respondent in some line of commerce on the basis of price or other factors.<sup>4</sup> Broad approval rights may also be used to condition the entry of a competitor upon adoption of suitable pricing policies.<sup>5</sup> And, because supplements, modifications, and renewals of satellite tenant leases required the re-approval of City Stores (I.D. 34), the approval clauses

<sup>4</sup> By terms, the right to exclude competitors occupying over 30,000 square feet, or occupying space within 125 feet of respondent's principal mall facade is absolute. Approval of parties occupying under 30,000 square feet more than 125 feet from the mall facade may not be "unreasonably withheld." The meaning of "unreasonably" in the context of the lease is unclear, but there has been no suggestion made that it would prevent exclusion because of the competition offered by an entrant.

<sup>5</sup> There is abundant evidence in the record of this case to suggest that competitors were willing to alter their pricing policies in order to obtain entry into the Tysons Corner Center. (I.D. 21, 24, 28).

conferred upon it power to govern at least certain activities of existing competitors who had already been once approved.<sup>6</sup> In this regard it is worthwhile to note that most satellite tenant leases in the Tysons Corner Center contained clauses prohibiting conduct of discount operations by the tenant (I.D. 28).

Respondent appears to recognize that had it actually vetoed a competitor simply to avoid competition, or had it insisted that a competitor temper its pricing policies as a condition of entry, there would be no question of illegality. It contends, however, that having never actually disapproved of a prospective tenant, it should not be held in violation for mere acquisition and possession of the right to do so.

The administrative law judge found, however, that the approval clauses exerted an anticompetitive effect in that they acted as a "signal to both the developer and would-be discounter entrants that approval may be withheld unless the discounter image is changed, and therefore, entry should be sought on the basis that price competition will be held in check." (I.D. p. 34.[pp. 990-991 herein]). The judge based this conclusion principally on the so-called "Dalmo" incident. A well-known Washington discount chain ("Dalmo Sales Co.") sought entry into Tysons Corner Center. By letter dated February 21, 1969, the developer sought approval of City Stores, pursuant to Section 31.3 of its lease, for the entry of Dalmo (under the name "Tyco Appliances"). The request letter pointed out that the lease to be signed by Dalmo would contain provisions prohibiting Tyco and Dalmo from advertising discount or bargain sales at all of their existing stores, and further noted that Dalmo stores were in the process of "removing their 'discount slogan' from all advertising, signing, etc." (I.D. 21). City Stores did not reply to the request for approval, and pursuant to the lease was thereby deemed to have approved the application (I.D. 22). Dalmo did not enter, however, because May Company and Woodward vetoed it (I.D. 23).<sup>7</sup>

Dalmo subsequently sued to obtain entry into the Tysons Corner Center. Its suit for a preliminary injunction was denied, but the findings of the District Court are instructive with respect to the possible effects of approval rights on the behavior of the developer. The court found that:

Dalmo commenced negotiations with Tysons Corner in May, 1968. In December, 1968,

<sup>6</sup> Section 31.5(a)(2) of the lease provided that approval, once given, may be revoked if the satellite tenant engages in "business operations or merchandising practices" which respondent determined are detrimental to the shopping center (I.D. 34).

<sup>7</sup> A short time later City Stores was asked to approve the entry of Sun Radio, another well-known Washington area discounter. City Stores granted its approval by letter. The Sun Radio lease contained an addendum in which Sun agreed to use no discount advertising at Tysons Corner, and to eliminate other discount signs throughout the Washington area as the time came for replacement of such signs (I.D. 24).



Tysons Corner submitted a form lease with an addendum to Dalmo. Subsequent negotiations between Tysons Corner and Dalmo concerned the removal of the word "discount" from all Dalmo advertising. Representatives of Tysons Corner viewed Dalmo as somewhat below the quality of other stores at Tysons Corner and stated that changes in Dalmo's advertising policy might render it acceptable to the three department stores. Tysons Corner submitted to Dalmo an addendum containing such changes\* \* \*. [*Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, 308 F.Supp. 988, 991 (D.D.C. 1970); *aff'd* 429 F.2d 206 (D.C. Cir. 1970).]

The "changes" to which the District Court referred related primarily to the use of discount advertising by Dalmo. The point, as the administrative law judge recognized, is not that City Stores (or the other major tenants) actively intervened in these negotiations in an effort to influence Dalmo's pricing policies. There is no evidence of record to this effect, and the District Court expressly found that it was not unlikely that defendants in the injunctive action would be able to prove that they had vetoed Dalmo for reasons unrelated to its pricing policies. The relevant point is that the developer apparently felt constrained to evaluate the pricing policies of a potential entrant into the Tysons Corner Center with reference to whether or not they would please the entrant's major tenant competitors, who retained the unfettered contractual right to veto the entrant if such pricing policies did not please them.

Under these circumstances we believe the administrative law judge was fully warranted in concluding that the approval rights obtained by City Stores may have highly adverse effects on competition, and especially price competition, and were exercised in such a way as to threaten if not achieve this effect. The administrative law judge went further to consider the economic setting: Tysons Corner Center is a significant center of business, in which a restraint of trade would affect a significant number of consumers (I.D. pp. 40-41 [p. 994, herein]). Reviewing the underlying policy of the antitrust laws, the judge reasoned that the approval clauses come close to accomplishing indirectly what all agree could not be done directly: contractual control by a party over the pricing policies of its competitors (I.D. pp. 41-42 [pp. 994-995, herein]). The administrative law judge thus concluded that complaint counsel had made out a *prima facie* case under Section 5 demonstrating that the approval clauses constituted an unreasonable restraint of trade. Because City Stores did not come forth with evidence to demonstrate a business justification for the approval rights contained in its lease, the law judge concluded that it had violated Section 5.

On appeal, City Stores asserts by way of "justification" only its felt necessity to request from the District Court a lease identical to those negotiated by May Company and Woodward. We believe these "chaste

circumstances" of its lease acquisition, outlined hereinabove and in I.D. 41-54, are of no relevance to the question of liability under Section 5. City Stores knew, prior to requesting it, that the lease it sought from the District Court included the provisions in question. It had the opportunity to request a lease without such provisions.<sup>8</sup> Indeed, in ironing out lease terms prior to the District Court's final decree, City Stores waived inclusion of at least one lease right it did not need in order to avoid a reciprocal liability. (I.D. 48; Stip. 21) It could similarly have waived inclusion of the approval rights. Its acquisition of the challenged lease provisions was in no sense, therefore, "involuntary."<sup>9</sup> The fact that May Company and Woodward had previously included the disputed provisions in their leases could not possibly justify City Stores' inclusion of the same provisions, if those provisions were otherwise illegal.<sup>10</sup> Nor do we see how approval of the trial and appellate courts, which gave no consideration of any sort to the antitrust implications of the City Stores' lease, can possibly immunize that agreement from Commission scrutiny.

We thus do not quarrel with the administrative law judge's rationale for finding respondent's approval rights to be illegal, and adopt it as a suitable basis for our own resolution of this controversy. We believe, in addition, however, that the spirit of the antitrust laws and our mandate under Section 5 of the Federal Trade Commission Act to prevent restraints of trade in their incipiency [*Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-395 (1953)] compel the further conclusion that agreements which create approval rights as broad and unfettered as those involved in this case are illegal *per se*.

The existence of approval rights of the sort involved here creates the imminent danger of impermissible, traditionally proscribed and *per se* illegal anticompetitive harm. The approval rights obtained by City Stores were essentially without limitation. They allowed it to exclude competitors for whatever reason it wished, including the fact that it feared competition and the prices competitors might charge. The use of these approval clauses to foreclose price competition, either via the concerted exclusion of a discounting competitor, or by conditioning entry of a competitor upon adoption of certain pricing policies, would

<sup>8</sup> I.D. 47-48. The law judge found that City Stores was advised shortly before filing its action for specific performance that the May Company and Woodward leases contained broad approval rights. It became aware of the precise details of these leases well after the initiation of litigation, but before the details of relief were finally determined.

<sup>9</sup> And even the involuntary acquisition of illegal contractual rights cannot excuse subsequent voluntary retention of them. At no time did City Stores ever waive its rights of approval. (I.D. 49)

<sup>10</sup> The Commission, of course, did challenge the legality of the clauses negotiated by May and Woodward, which City Stores copied. As to those parties the matter was settled by consent, without an admission of wrongdoing.

amount to an agreement to fix prices, long held to be illegal *per se* under the antitrust laws, without regard to whatever justification might be raised on behalf of the necessity to maintain certain price levels at a shopping center. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-23 (1940); *Dr. Miles Medical Co. v. John D. Park [ Sons Co.]*, 220 U.S. 373 (1911); *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963).

And even should the lessee refrain from overt enforcement of the approval clause in an anticompetitive fashion, there is always the further danger, suggested by the record in this case, and by common sense as well, that the developer will feel compelled to act with an eye out for the tenant's undisputed, contractual authority to veto an unwanted competitor, excluding altogether or limiting the pricing flexibility of a would-be entrant.

It seems to us, moreover, that random exclusion of potential entrants by lessor and lessee, pursuant to exercise of a blanket right of approval, offends the policy of the antitrust laws which render group boycotts illegal *per se*. *Klor's Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959). Counsel for respondent and the administrative law judge attempt to distinguish the *Klor's* case on grounds that it involved an agreement between ten suppliers and a competitor of *Klor's*. Exclusion pursuant to an approval clause would amount to a concerted refusal to deal only on the part of one competitor (the tenant) and one supplier (the lessor). Complaint counsel argue that this difference is not determinative, and that the spirit of the boycott laws abhors the concerted exclusionary activity by competitor and supplier that would result from the veto of a tenant pursuant to an approval clause.

Cases enunciating the rule that joint refusals to deal are illegal *per se* have in fact generally involved two or more parties at the same distributional level [e.g., *Klor's Inc.*, *supra*; *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); *United States v. General Motors Corp.*, 384 U.S. 127 (1966)]. It is by no means clear, however, that such cases have turned on the presence of more than one party at the same distributional level. As the Supreme Court summarized in *General Motors, supra*:

The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. [Citations omitted] \* \* \* Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins\* \* \* (at p. 146)

Exclusion of an entrant from a shopping center pursuant to exercise of blanket veto authority amounts to no more or less than joint activity

(on the part of tenant and lessor) to deprive the potential entrant of a source of supply. This combination was an important focus of the Court's concern in *Klor's*, and we question whether the case would have been decided differently had the allegation been that Broadway Hale signed separate, unrelated agreements with each of Klor's suppliers, or, for that matter, had Klor's been dependent on only one major supplier which agreed with Broadway Hale to cut it off. Cf. *Girardi v. Gates Rubber Co. Sales Division, Inc.*, *supra*, at page 200, (citing Klor's in a situation involving concerted action by one supplier and one competitor, although the case turns on an allegation of price fixing).

City Stores suggests that agreements between a supplier and a distributor cannot constitute boycotts because that is tantamount to holding that exclusive dealing arrangements are *per se* illegal, which they are not. Courts have routinely scrutinized exclusive dealing agreements, unlike boycotts, for their economic effect.

While the line between the two is far from clear, it is apparent that by its terms an approval clause is not an exclusive dealing agreement, but merely a grant to the tenant to exclude at random those competitors it may choose.<sup>11</sup> The fact that City Stores *might* under appropriate circumstances, and with a showing of suitable economic purpose and insubstantial competitive harm be able to obtain rights of exclusive occupancy from a lessor obviously does not give it all "lesser included" privileges. The merchant with an exclusive distributorship cannot lawfully agree to admit a second distributor on condition that the new entrant charge the same prices, arguing that the right to exclude everyone must include the right to admit some on condition. The same is true, we believe, with respect to blanket approval powers.

There are, to be sure, concerns of existing tenants regarding the continuing operation of a shopping center which we can imagine a developer would quite properly take into account in evaluating potential new entrants into the retailing community. Moreover, we recognize, as did the administrative law judge, that it may be appropriate for a tenant, contemplating a long term rental commitment, to insist that its concerns be accommodated by including a continuing obligation upon the landlord to consider them in the tenant's lease. But the pricing policies and ability to offer competition of prospective

<sup>11</sup> The District of Columbia Court of Appeals was faced with this dilemma in *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). In that case an automobile manufacturer's major distributor requested an exclusive dealing agreement, the granting of which had the effect of eliminating Webster as a distributor. Apparently in response to the contention that the joint exclusion of a competitor constituted a boycott the court noted simply, "The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement." (At p. 421). The form of the agreement clearly makes a substantial difference. The court recognized that an agreement to create an exclusive dealership, though it unavoidably results in an exclusionary result, may nonetheless have redeeming competitive virtues. The same recognition has not been accorded to agreements which have as their main purpose and effect the random exclusion of particular competitors, pursuant to no articulated standards.

entrants are clearly not concerns to which the antitrust laws allow concerted attention of tenant and developer to be paid. And similarly, the law frowns upon the concerted exclusion of prospective entrants pursuant to no standards save the unarticulated wishes of a competitor. Thus, while the administrative law judge sought "justification" evidence from respondent (but did not receive it), it seems to us that insofar as the approval clauses involved here do confer blanket power to exclude competitors, and exercise control over their pricing, there is no justification which could, under long established precedent, be properly advanced for them.

Moreover, we believe, and no reason has been presented to the contrary, that leases can readily be written in such fashion as to spell out the specific and legitimate considerations which a tenant may insist that developers consider in admitting new entrants<sup>12</sup>, without creating the massive potential for price-fixing and anticompetitive exclusionary activity inherent in agreements conferring blanket approval rights.

For these reasons, because the agreement itself creates the imminent danger of impermissible, traditionally proscribed and *per se* illegal anticompetitive harm, and because arguably legitimate business objectives which may be served by the agreement can be achieved by means of substantially less restrictive contractual arrangements, we believe the agreement must be condemned, and the contract reformed.<sup>13</sup>

City Stores protests that it is being cited for the mere possession of unexercised market power.<sup>14</sup> There is a significant difference, however, between the contract at issue in this case and the unexercised power to restrain trade inuring to a firm which has gained a large market through internal expansion. In the latter case (absent anticompetitive motive or other unusual circumstance) the firm grows large in response to business imperatives, in particular, demand for its product. Corporate growth as the result of vigorous, lawful competition is the essence of our free enterprise system, and merely because such growth may incidentally confer power to injure competition cannot be a reason to discourage or undo it, absent abuse or evidence of injury. This case,

<sup>12</sup> Indeed, paragraph 31(C) of the City Stores' lease includes an enumeration of specific factors:

"(C) Landlord agrees that in respect of the selection and location of Occupants on the Shopping Center Site, the following objectives, *inter alia*, shall be considered \* \* \* (a) having financially sound Person(s) of good reputation as Occupant(s) of the Shopping Center Site, (b) maintaining a balanced and diversified grouping of retail stores, (c) establishing and maintaining a proper mixture of retail stores and a diversified selection of merchandise, and (d) avoiding excessive and persistent traffic congestion in the Common Area."

<sup>13</sup> Both the Commission and courts have on many occasions in the past recognized the necessity to amend contracts and agreements, though unenforced, with the potential or actual effect of restraining trade. *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 458 (1922); *United States v. International Salt Co.*, 6 F.R.D. 302, 309 (S.D.N.Y. 1946); *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1, 11-12 (1958).

<sup>14</sup> The administrative law judge, as noted before, did not find that City Stores' approval rights were wholly unexercised, nor do we, but for the purposes of our alternative holding we do assume, *arguendo*, that they were.

to the contrary, does not involve a unilateral corporate response to market forces, redounding to the benefit of consumers. Respondent can show no justification for its actions in contracting for and retaining rights as broad as those it acquired. Whatever legitimate purposes might have been served by the approval clauses (and City Stores has suggested none, insisting throughout these proceedings that it had essentially no interest in them) could as readily have been accomplished by less drastic means.

We think a better analogy than the corporation grown large is that of the man who acquires a machine gun, arguing that he intends to use it only in self defense. While heavy armaments can doubtless be used for this purpose, so can many less dangerous weapons, and laws properly forbid the acquisition and possession of machine guns without waiting for a calamity. We believe that Section 5 is no less capable of dealing with the competitive machine gun of limitless approval rights, and that the threat they pose to traditional antitrust values warrants respondent's confinement to a more modest arsenal.

#### Floor Space Limitations

Language in City Stores' lease prescribed that May Company and Woodward could not occupy more than 245,000 square feet of floor space in the Tysons Corner Center. The Woodward and May Company leases each contained similar clauses, limiting the size of the non-party major tenants to 245,000 square feet (I.D. 36). The administrative law judge further found that City Stores' lease imposed space limitations on many prospective satellite tenants, by conditioning approval for their admission on their observance of strict space restrictions (I.D. 40). Identical limitations were also imposed by the May Company and Woodward leases.

We agree with the conclusion of the administrative law judge that these agreements to limit the size of competitors violate Section 5 (I.D. p. 47 [p. 998, herein]). It is almost self-evident, and the administrative law judge so found, that floor space is a crucial element in the ability of a store to compete (I.D. 6, 37-39). The inability to expand beyond a certain size can effectively preclude a retailer from offering a particular product line or services that would render it a more viable competitor for consumers' patronage. In demonstrating an agreement with the developer to limit the size of competitors, we thus believe that complaint counsel made out a *prima facie* case of an unreasonable restraint of trade, activity with a clear tendency and capacity to limit competition.

Respondent has suggested no justification for these limitations save the statement that "There are physical limitations to a shopping center,

and there must be a size beyond which the major tenants should be prohibited from expanding." (RB 52) While the overall size of a shopping center, in relation to available land and facilities, may be a legitimate concern of a major shopping center tenant, cognizable in its lease, we are hard put to see how limitations placed on particular competitors are the least restrictive or even a reasonably related way to achieve that result.

City Stores indicated that it required a limitation on the floor space of May Company and Woodward because those companies had obtained lease provisions limiting its available space. As was observed with respect to approval clauses, restraints imposed by competitors cannot justify the adoption of the same restraints by those who may be victimized thereby. The Commission did challenge the restrictions on City Stores' size imposed by May Company and Woodward, and by consent those companies agreed to eliminate them.

Respondent also suggests that by virtue of leases executed prior to its own, the May Company and Woodward had already limited each others' maximum size, as well as that of other shopping center tenants and, therefore, City Stores' lease agreement could have no further tendency to restrain trade. It seems to us, however, that from the moment City Stores first executed its lease, the restrictive provisions therein had as great a capacity to restrain trade as those contained in the leases of the other department stores. The existence of *both* the City Stores' lease and the Woodward lease stood as equally effective barriers to the expansion of May Company (and vice versa) and the existence of all three major department store leases independently and to identical effect limited the sizes of certain satellite tenants.

Finally, in its reply brief, at pages 18-19, City Stores argues that order paragraph III(B)(3) proposed by the administrative law judge undermines his rationale for finding liability, in that it permits respondent to incorporate in a lease a shopping center layout which may designate the location, size, and height of all buildings (but not the amount of floor space that any tenant may occupy). We see no inconsistency in the law judge's conclusions and his order. Paragraph III(B)(3) of the order merely makes clear that a shopping center layout will not constitute a limitation on floor space, which is prohibited by Section II of the order. It is readily conceivable that, as a major tenant, City Stores would have a substantial interest in knowing the general layout of a center into which it is contemplating entry in order to ensure itself, for instance, that the center contains a minimum viable mix of stores, and that access to its own store, visibility from the road, and the like, will not be impeded. The order of the administrative law judge merely seeks to assure that a less restrictive means of satisfying

potentially important business interests will not be deemed to run afoul of the general prohibition on those restraints for which no justification appears.<sup>15</sup>

#### Commerce

Respondent contends that the practices challenged by the complaint were not "in commerce." The administrative law judge found that they were. We agree. That the challenged covenants in this case were embodied in a lease of realty interest, often considered to be local in character, does not end the analysis. A two-hundred page agreement, signed by a multi-State corporation, governing all facets of the operation of a major retail center designed to sell to the citizens of three jurisdictions merchandise received from all parts of the country is not exempted in its entirety from interstate commerce, or immunized from antitrust scrutiny merely because it takes the form of a lease of real property.<sup>16</sup>

The administrative law judge based his conclusions that the challenged practices were in interstate commerce on the variety of interstate aspects of City Stores' acquisition and exercise of its approval rights (I.D. pp. 28-31 [pp. 985-988, herein]). We have no quarrel with the law judge's analysis, which dealt both with the agreement whereby City Stores obtained its approval rights, and with the subsequent means by which those rights were implemented, which included communications by mail across State lines. We would simply add that in our view a consideration of both the circumstances in which the challenged agreement was executed, and a consideration of its subject matter, lead to the conclusion that the agreement alone, or the acquisition by City Stores of the challenged approval rights, occurred in commerce.

The parties to the agreement were a corporation headquartered in New York with operations throughout the country, (I.D. 1,2) and a developer headquartered in Maryland (I.D. 8). City Stores signed the lease on behalf of its Lansburgh's division, headquartered in Wash., D.C. (I.D. 3). The agreement was executed in Maryland (I.D. 50), and applied to the conduct of business at a shopping center located in Virginia (I.D. 17). If these facts are not sufficient to establish that City

<sup>15</sup> Presumably the administrative law judge included the layout provision because an identical provision was included in the consent orders signed by Woodward and the May Company in this matter. While the order may be surplusage, in that what it permits is not forbidden by the prohibition on floor area restraints, City Stores has not argued that, as a means of resolving the conflict, the provision be dropped.

<sup>16</sup> To cite a clear example, the leases of many satellite tenants at Tysons Corner Center contained provisions which prevented them from using discount advertising or adopting a discount pricing approach in their business. We know of no principle of law which holds that because a price-fixing agreement is inserted in a lease of real property it therefore cannot be of interstate character. In this regard the covenants of a lease must be analyzed in the same manner as any agreement. The fact that certain undertakings contained in leases of real property may be in commerce, or may affect commerce, for the purposes of antitrust jurisdiction, need not alter the applicability of state and local law to those portions of the lease which do not restrain trade in commerce.



Stores' acquisition of the challenged approval rights occurred in interstate commerce, we are hard put to discern in which particular state the transaction did occur; in New York, the corporate headquarters and center of control where the decision was presumably made to seek the contract known to contain the challenged provisions; in Maryland, where the lease was signed; or in Virginia, the site of the shopping center to which the lease applied?

Moreover, the agreement on its face applied to the conduct of business at Tysons Corner Center, conferring upon City Stores authority to determine who could or could not sell there (and limiting the size of City Stores' competitors). There is no question that the sale of certain merchandise at Tysons Corner Center occurs in interstate commerce. The center is located in Virginia, on an interstate beltway, nine miles from the center of the District of Columbia (I.D. 9). Advertising occurs in media of interstate circulation and consumers cross state boundaries from the District of Columbia and Maryland to make purchases at the center. Merchandise is also shipped for home delivery from the center to consumers in various states. Commission jurisdiction over sales practices at the center would clearly attach (I.D. 7, 17). See *Safeway Stores, Inc. v. FTC*, 366 F.2d 795-8 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967); *Dahnke Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). It would be anomalous to hold that the making of an agreement which is intended to govern commercial activities clearly in commerce is not itself in commerce simply because it occurs in a lease of realty. Both the interstate aspects of the contracting process whereby approval rights were obtained, and the intended applicability of such rights to activities clearly in interstate commerce, compel a conclusion that the agreement was "in commerce."<sup>17</sup>

#### Order

As prescribed by §3.52(b)(5) of the Commission's Rules of Practice, respondent has submitted alternative order language to that proposed by the administrative law judge, assuming, *arguendo*, that the Commission finds (as it has) a violation. We agree generally with the approach followed by the administrative law judge in fashioning his order. The judge's order essentially prohibits respondent's acquisition

<sup>17</sup> Adoption of respondent's theory would render it virtually impossible for the Commission to halt a conspiracy to fix prices, no matter how grandiose its designs. The conspirators need merely take care to consummate their agreement within the boundaries of one state, rather than via phone or mail. Although admitting that an agreement to fix prices is illegal *per se*, without regard to actual effect, respondent would presumably contend that no matter from whence the parties to the agreement had come, and no matter how many states their agreement might encompass, the "agreement" itself was not in commerce. While the term "in commerce" did have certain limitations, recognized by Congress when it recently enlarged the scope of Section 5, we cannot believe that it ever contained such a large loophole, nor have courts thought so, in upholding Commission orders directed at prevention of agreements to restrain commerce. See, e.g., *Salt Producers Ass'n, et al. v. Federal Trade Commission*, 134 F.2d 354, 359-60 (7th Cir. 1943).

of broad approval rights, as well as its use of certain other types of restrictive contractual provisions which could be used to accomplish the same anticompetitive ends as the approval clauses (*i.e.*, no-discounter clauses; merchandise limitations, advertising restrictions, restrictions on categories of stores). We believe the provision of Part II of the law judge's order are suitably tailored to the violation, and are necessary to prevent its recurrence in the same or a different guise.<sup>18</sup>

At the same time, while insuring that restrictive leasing provisions may not be used to control prices and stifle competition, the administrative law judge recognized that there well may be (though respondent has not suggested what they are) various legally cognizable interests of a shopping center tenant in the character of other center tenants, interests which are quite permissibly embodied in a lease. These interests cannot, of course, be accommodated by the blunderbuss mechanism of the approval clause. They must be formulated precisely and explicitly, so that exclusion of prospective tenants by the developer occurs pursuant to well-defined standards that are unlikely to constitute a cover for price fixing and other price controlling activities. In Section III of his order, the administrative law judge, therefore, indicated that respondent was not precluded from negotiating for a lease with the developer that required the lessor to select businesses which are financially sound and of good reputation, nor from negotiating a lease requiring that reasonable standards of appearance, signs, maintenance, and housekeeping be maintained in the shopping center.

Respondent also implies that if the Commission will not adopt its alternative prohibitory language in paragraph II of the order, the Commission should include in paragraph III a provision also contained in the consent orders negotiated with May Company and Woodward, allowing lease clauses which require the developer of a shopping center to consider the objective of maintaining a balanced and diversified grouping of retail stores, merchandise, and services. We think that inclusion of this clause in Section III of the order is appropriate.<sup>19</sup> The administrative law judge expressed concern in his decision that the term "balance" could be used as a subterfuge for eliminating discounters who might well be deemed to upset the balance of a shopping center. We do not think that this is a likely possibility. Part II

<sup>18</sup> We believe, moreover, despite respondent's objections, that it is necessary that the order apply to exclusionary policies affecting all tenants, satellite or major. While the evidence relied upon by the administrative law judge concerned satellite tenants, this was clearly incidental to the violation in this case; City Stores' approval clause gave it the authority to exclude and control the policies of large as well as small entrants into Tysons Corner Center.

<sup>19</sup> It should be noted, however, that Section III of the order is intended to clarify, rather than create exceptions to, the prohibitions contained in Section II. It is not, that is, intended to constitute an exhaustive listing of the factors which City Stores may insist be considered by a shopping center landlord in the management of the center, as a condition of City Stores' signing a shopping center lease. This proceeding has not been concerned with these matters.

of the order makes clear that pricing orientation of a particular center entrant is not a valid criterion of selection under any circumstances. Moreover, the tenant who seeks to exclude an entrant pursuant to a "balance" clause is in an entirely different posture from one with an absolute right of approval. In the latter case the tenant may disapprove and the entrant must sue to prove that exclusion was unlawful, if indeed the case ever reaches that point (the developer may simply exclude the entrant in anticipation of a veto). Where criteria for entry are explicitly set forth in the lease, the final decision is solely in the hands of the landlord; should the entrant be admitted the burden is upon the tenant to demonstrate that the landlord did not consider the requisite balance and diversification, a showing unlikely to be made or even attempted if pricing policy is the main reason for objection to the new competitor.

Respondent also suggests that the Commission should include a proviso in its order similar to those in the May Company and Woodward consent orders, specifying that it may negotiate a lease clause which prevents the developer from leasing nearby mall space to a tenant whose presence would create undue noise, litter, or odor. For the same reasons indicated in the preceding paragraph we believe inclusion of this provision is proper.

As modified, we believe that the order herein entered adequately addresses the violation in this case. It prohibits the use of overbroad anticompetitive lease clauses, while making clear that respondent remains free to bargain with its lessor for lease language which accommodates legitimate interests it may have in the continuing operation of a shopping center.

An appropriate order is appended.

#### FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent's counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion, having denied the appeal:

*It is ordered,* That the initial decision of the administrative law judge, pages 1-51, [pp. 970-1001], herein, be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, with the exclusion of page 38 [p. 993, herein] and all of footnote 42, [p. 993, herein], and except insofar as certain comments on pages 49-50 [pp. 999-1000 herein] are inconsistent with the conclusions on pages 19-20 [pp. 1016-1017, herein] of the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

*It is further ordered*, That the following order be entered:

ORDER

I

For purposes of this order the following definitions shall apply:

A. The term "respondent" refers to City Stores Company, its operating divisions, its subsidiaries, and their respective officers, agents, representatives, employees, successors or assignees.

B. The term "shopping center" refers to a group of retail outlets in the United States of America planned, developed and managed as a unit and containing (1) a total floor area designed for retail occupancy of 200,000 square feet or more, of which at least 50,000 square feet is for occupancy by tenants other than respondent; (2) at least two tenants other than respondent; (3) at least one major tenant; and (4) on-site parking.

C. The term "tenant" refers to any occupant or potential occupant of retail space in a shopping center which occupancy is for sale of merchandise or services to the public, whether said occupant leases or owns said space, but the term does not refer to an occupant of space within the store occupied by respondent, which occupant operates a department for respondent pursuant to a license from respondent.

D. The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant which occupies at least 50,000 square feet of floor area will be deemed to provide primary drawing power.

II

*It is ordered*, That respondent, in its capacity as a tenant in a shopping center, cease and desist from obtaining, making, carrying out or enforcing, directly or indirectly, any agreement or provision of any agreement, whether applicable to the shopping center or to any expansion thereof, which:

1. grants respondent the right to approve or disapprove the entry into a shopping center of any other tenant;
2. prohibits the admission into a shopping center of any particular tenant or class of tenants, including, for purposes of illustration:
  - (a) other department stores,
  - (b) junior department stores,
  - (c) discount stores, or
  - (d) catalogue stores;

3. limits the types or brands of merchandise or services which any other tenant in a shopping center may offer for sale;
4. specifies that any other tenant in a shopping center shall or shall not sell its merchandise or services at any particular price or within any range of prices;
5. grants respondent the right to approve or disapprove the location in a shopping center of any other tenant;
6. specifies or prohibits any type of advertising by any other tenant or grants respondent the right to approve or disapprove any advertising by any other tenant;
7. grants respondent the right to approve or disapprove the amount of floor space that any other tenant may occupy in a shopping center.

## III

A. *It is further ordered,* That this order shall not prohibit respondent from including a provision in a reciprocal easement agreement or lease with respect to a shopping center which provision identifies in designated buildings respondent and those other major tenants which contemporaneously enter into such reciprocal easement agreement or lease with respect to such shopping center.

B. *It is further ordered,* That this order shall not prohibit respondent from negotiating to include, including, carrying out or enforcing an agreement or provision in any agreement which:

1. requires that with respect to the selection of other tenants in the shopping center, the developer shall select businesses which are financially sound and of good reputation.
2. requires that reasonable standards of appearance, signs, maintenance, and housekeeping be maintained in a shopping center;
3. establishes a layout of a shopping center which layout may (a) designate respondent's store, (b) set forth the location, size and height of all buildings, but not the amount of floor space that any other tenant may occupy in the shopping center, and (c) locate parking areas, roadways, utilities, entrances, exits, walkways, malls, landscaped areas and other areas;
4. prohibits occupancy of space in a shopping center immediately proximate to respondent by types of tenants that create undue noise, litter or odor; or
5. requires that in respect of the selection of other tenants in the shopping center by the developer the objective of maintaining a balanced and diversified grouping of retail stores, merchandise, and services shall be considered.

1021

Order

IV

*It is further ordered*, That respondent shall:

\* A. within thirty (30) days after this order becomes final, distribute a copy of this order to each of its operating divisions;

\* B. within thirty (30) days after this order becomes final, notify each developer of shopping centers, in which respondent is a tenant, of this order by providing each such developer with a copy thereof by registered certified mail;

\* C. within sixty (60) days after this order becomes final, file with the Commission a report showing the manner and form in which it has complied and is complying with each and every specific provision of this order; and

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

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IN THE MATTER OF

HORIZON CORPORATION

*Docket 9017. Order, June 10, 1975*

General counsel ordered to take action to notify the Arizona District Court in accordance with Commission's determination contained in its order.

*Appearances*

For the Commission: *Eugene Kaplan, Alan N. Schlaifer and Morgan D. Hodgson.*

For the respondent: *Basil Mezines, Stein, Mitchell & Mezines, Wash., D.C. and Samuel Pruitt, Jr. and J. Michael Brennan, Gibson, Dunn & Crutcher, Los Angeles, Calif.*

ORDER DIRECTING GENERAL COUNSEL TO TAKE  
APPROPRIATE ACTION IN JUDICIAL PROCEEDING

By motion filed May 12, 1975, complaint counsel requested that the General Counsel of the Commission be directed to appear as *amicus*

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\* Commission order of July 29, 1975, corrected the statement of compliance deadlines in the final order by substituting the words "this Order becomes final," for the words "service of this Order upon respondents" in each of subparagraphs IV A., B., and C.