

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.

IN THE MATTER OF
GIMBEL BROTHERS, INC.

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

Docket 8885. Complaint, May 8, 1972—Decision, Jan. 30, 1974

Consent order requiring a leading department store headquartered in New York City, among other things to cease entering into or enforcing agreements, including lease agreements, enabling it to control the identity, size or location of other retailers in shopping centers.

Appearances

For the Commission: *Barbara B. Wiggs, Anthony Joseph, David Wilson, Kenneth Ross.*

For the respondent: *Solinger & Gordon, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. Section 41, *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporation named as respondent in the caption hereof, and more particularly designated and described hereinafter, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act as amended, and it appearing to the Commission that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint, stating the following:

PARAGRAPH 1. For the purpose of this complaint the following definitions shall apply:

(a) The term "regional shopping center" means a planned development of retail outlets serving the general public, in an approximately defined trading area and containing one or more major tenants.

(b) The term "major tenant" means a full-line department store,

providing primary drawing power for a regional shopping center.

(c) The term "satellite tenants" means any commercial occupant of a shopping center not a major tenant.

(d) The term "trading area" means the geographic bounds within which tenants of a regional shopping center derive the predominance of their customers.

PAR. 2. Respondent Gimbel Brothers, Inc. [hereinafter referred to as Gimbels] is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 33rd Street & Broadway, New York, N.Y. Gimbels and its wholly-owned subsidiary, Saks Fifth Avenue [hereinafter referred to as Saks], are engaged in the operation of chain retail stores, including full-line department stores and high-style women's specialty stores.

In fiscal 1970, Gimbels was one of the nation's leading department store concerns with sales in excess of \$715 million and 30 stores, approximately 13 of which are located in regional shopping centers throughout the nation. Its wholly-owned subsidiary Saks, has about 29 stores in the United States, some of which are also in regional shopping centers. Sales in suburban stores represent a growing share of the company's total sales volume, accounting for 26.7 percent of total sales in 1960, 44.8 percent in 1969 and 46.7 percent in 1970.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent purchases for resale a great variety of consumer products from a large number of suppliers located throughout the United States. Respondent causes these products, when purchased by it, to be transported from the place of manufacture or purchase to its business establishments located in N.Y., N.J., Pa., Wis. and other states. Such products have been and are advertised and offered for sale by respondent in newspapers circulated among and between the several states of the nation.

PAR. 4. The movement of population, and particularly the higher income segment of the population, from the central city to the suburbs, has precipitated the growth of shopping centers in suburban areas. In 1960, there were approximately 4,500 shopping centers in the United States; their number now exceeds 13,000 and is projected to reach 21,000 by 1980. In 1970, retail sales in shopping centers amounted to \$118 billion and accounted for 33.2 percent of all United States retail sales. Retail sales in shopping centers are projected to reach \$200 billion by 1980.

Regional shopping centers are the most economically significant type of shopping center. They reproduce to a substantial extent the retail

facilities once available only in downtown business districts, and are displacing and replacing the central, downtown business district as primary outlets for retail distribution of goods and services. Full-line department store operators, including respondent herein, have recognized the potential business opportunities presented by the expanding suburban markets and have, in recent years, taken steps to establish themselves in regional shopping centers.

PAR. 5. Except to the extent that competition has been hindered, frustrated and eliminated as set forth in this complaint, corporate respondent, in the course and conduct of its business of offering for sale and selling household goods, home furnishings, apparels and services, has been and is in substantial competition with other corporations, individuals and partnerships in the retail sale of the same or comparable brands of merchandise carried and sold by respondent.

PAR. 6. In recent years, Gimbels has entered into approximately twenty-four lease agreements for the establishment of full-line department stores and high-style specialty shops with shopping center developers. During the course of negotiating such lease agreements the developers have acceded to respondent's demands for certain types of restrictive covenants or provisions designed to protect it from certain types of competition. As of January 31, 1970, over twenty of respondent's lease agreements contain restrictive provisions. Such lease provisions, authorize Gimbels to control and determine the admission of those seeking to occupy space in the following shopping centers: North Hills Shopping Center, Ross Township, Pa.; Eastland Shopping Center, Versailles Township, Pa.; South Hills Shopping Center, Upper St. Clair, Pa.; Monroeville Shopping Center, Monroeville, Pa.; Southgate Shopping Center, Milwaukee, Wis.; Mayfair Shopping Center, Milwaukee, Wis.; Cross County Shopping Center, Yonkers, N. Y.; Moorestown Center, Moorestown, N. J.; Green Acre Shopping Center, Valley Stream, N. Y., and other shopping centers located in various parts of the United States. The restrictive provisions further control conditions affecting tenants in the aforesaid shopping centers.

PAR. 7. In the course and conduct of its business, Gimbels is and has been engaged in unfair methods of competition and unfair acts or practices in commerce, in that it has caused the inclusion and enforcement of lease provisions which suppress, restrict, restrain, hinder, lessen, prevent and foreclose competition in the retail distribution of goods and services in, among others, the following metropolitan trading areas: Pittsburgh, Pa.; Philadelphia, Pa.; Milwaukee, Wis.; and Long Island, N. Y. Said lease provisions include the following:

- (a) The right to disapprove other tenant leases;
- (b) The right to limit the floor space available to other tenants;

(c) The power to exercise continuing control over the conduct of the satellite tenants' business operations.

PAR. 8. The aforesaid lease provisions, the rights, powers and privileges thereby conferred on respondent as a major tenant of the aforesaid shopping centers, and its exercise and enforcement thereof, have had and continue to have the tendency to restrain trade and commerce in the retail trading areas served by those shopping centers, and represent a course of dealing by respondent designed to eliminate, discourage and hinder discount sales, discount pricing and the establishment of discount outlets in shopping centers. Included among such restraints are the following effects:

(a) Fixing, controlling and maintaining retail prices;

(b) Allowing the respondent to select its competitors and to exclude actual and potential competitors;

(c) Hindering and discouraging discount advertising, discount pricing, and discount selling;

(d) Restricting, hindering and coercing shopping center developers in their choice of potential tenants in shopping centers.

Said leases and lease provisions, respondent's acts, practices and methods of competition in connection therewith, and the adverse competitive effects resulting therefrom are to the injury of consumers and respondent's competitors, and constitute an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint which charges respondent Gimbel Brothers, Inc. with violating the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid complaint, 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 thereafter accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and after 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 makes the following jurisdictional findings and enters the following order:

1. Respondent Gimbel Brothers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 33rd Street and Broadway, N. Y., N. Y.

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

I

For purposes of this order, the following definitions shall apply:

A. The term "respondent" refers to Gimbel Brothers, Inc., its operating divisions, its subsidiaries, and their respective officers, agents, representatives, employees, successors or assignees.

B. The term "shopping center" refers to a planned development of retail outlets which has a total floor area designed for retail occupancy of at least 200,000 sq. ft. excluding, however, such a development consisting of one major tenant and less than 50,000 sq. ft. designed for retail occupancy by tenants other than the major tenant.

C. The term "tenant" refers to any occupant or potential occupant of retail space in a shopping center, whether as lessee or owner of such space, but not as a developer of a shopping center.

D. The term "retailer" refers to a tenant which sells merchandise or services to the public.

E. The term "major tenant" refers to a tenant providing primary drawing power in a shopping center.

F. The term "respondent's pro rata share of lineal feet" refers to the number of lineal feet in a shopping center determined by dividing 50 percent of the total lineal feet of nonmajor tenant mall store frontage by the number of major tenants in the shopping center.

II

A. *It is ordered*, That respondent, in its capacity as a tenant in a shopping center, cease and desist from making, carrying out, or enforcing, directly or indirectly, an agreement or provision of any agreement which:

1. grants respondent the right to approve or disapprove the entry into a shopping center of any other retailer;

2. grants respondent the right to approve or disapprove the amount of floor space that any other retailer may lease or purchase in a shopping center;

3. prohibits the admission into a shopping center of any particular retailer or class of retailers, including, for purposes of illustration:

- (a) other department stores,
- (b) junior department stores,
- (c) discount stores, or
- (d) catalogue stores;

4. Limits the types of merchandise or brands of merchandise or service which any other retailer in a shopping center may offer for sale;

5. specifies that any other retailer in a shopping center shall or shall not sell its merchandise or services at any particular price or within any range of prices;

6. grants respondent the right to approve or disapprove the location in a shopping center of any other retailer;

7. specifies or prohibits any type of advertising by other retailers, other than advertising within a shopping center;

8. prohibits price advertising within a shopping center by retailers or controls advertising within a center by retailers in such a way as to make it difficult for customers to discern advertised prices from the common area of such shopping center; or

9. prevents expansion of a shopping center.

B. *It is further ordered*, That respondent, in its capacity as a tenant in a shopping center, shall not enter into or carry out any conspiracy, combination or arrangement with any other tenant to exclude any tenants from a shopping center or to grant respondent or another tenant any control over the admission of other tenants to the shopping center.

III

A. *It is further ordered*, That when respondent is the first major tenant to agree with a developer or landlord of a shopping center to become a tenant in such center, this order shall not prohibit respondent from terminating its agreement to become a tenant in such center if such developer or landlord does not obtain the agreement of one major tenant acceptable to respondent to operate a store in the center.

B. *It is further ordered*, That this order shall not prohibit respondent from negotiating to include, including, carrying out, or enforcing provisions in any agreement (a) with a developer or a landlord of a shopping center, or (b) if respondent shall be the owner of the building in which its store is located within a shopping center or land in a shopping center on which it intends to erect such a building, then with the owners of other buildings and land in such shopping center, which:

1. permit respondent to establish reasonable categories of retailers from which the developer or the landlord may select tenants to be located in the area immediately proximate to respondent's store; provided that such categories shall not include specification of (a)

price ranges, (b) price lines, (c) trade names, (d) store names, (e) trademarks, brands or lines of merchandise of retailers, or (f) identity of particular retailers, including the listing of particular retailers as examples of a category; and *Further, provided*, That such area shall not exceed 150 lineal feet of mall store frontage with respect to respondent's department stores and 200 lineal feet of mall store frontage with respect to respondent's Saks Fifth Avenue stores, immediately proximate to the mall frontage of respondent's store, on each level, *Provided*, That such area does not exceed respondent's pro rata share of lineal feet;

2. require the developer or the landlord to maintain reasonable standards of appearance, signs, maintenance and housekeeping of and in the shopping center;

3. prohibit occupancy of space in the shopping center by clearly objectionable types of tenants, including, for purposes of illustration, shops selling pornographic materials;

4. approve or grant to respondent the right to approve an initial layout of the shopping center, which layout may (a) designate respondent's store, (b) set forth the location, size and height of all buildings, (c) locate parking areas, roadways, utilities, entrances, exits, walkways, malls, landscaped areas and other common areas, and (d) establish a proposed layout for future expansion of the shopping center; and

5. require that any expansion of the shopping center not provide for in the initial layout:

(a) Shall not interfere with efficient automobile and pedestrian traffic flow into and out of the shopping center and between respondent's store and perimeter and access roads, parking areas, malls and other common areas of the shopping center;

(b) Shall not interfere with the efficient operation of respondent's store, including its utilities or its visibility from within the shopping center or from public highways adjacent thereto;

(c) Shall not result in a change of (i) the shopping center's parking ratio; (ii) the location of a number of parking spaces reasonably accessible to respondent's store determined by the application of such parking ratio to the number of square feet of floor area of respondent's store; (iii) the entrances and exits to and from respondent's store and any malls; and (iv) those parking area mall entrances and exits which substantially serve respondent's store;

(d) Shall be accomplished only after any and all covenants,

obligations and standards (for example, construction, architecture, operation, maintenance, repair, alteration, restoration, parking ratio, and easements) of the shopping center, exclusive of the expansion area (i) shall be made applicable to the expansion area and (ii) shall be made prior in right to any and all mortgages, deeds of trust, liens, encumbrances, and restrictions applicable to the expansion area, and (iii) shall be made prior in right to any and all other covenants, obligations and standards applicable to the expansion area.

IV

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent shall:

(1) within thirty (30) days after service of this order upon respondent, notify each developer of shopping centers in which respondent occupies floor space, of this order by providing each such developer with a copy thereof by registered certified mail, and

(2) within sixty (60) days after the date of issuance of this order, 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.

V

It is further ordered, That respondent shall 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.

IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., ET AL.

Docket 8888. Interlocutory Order, Feb. 4, 1974

Order remanding to administrative law judge for disposition complaint counsel's request for *in camera* treatment of the testimony of certain witnesses, the Commission expressing the opinion that under the circumstances described in Section 3.45(b) of Rules of Practice authorizes the administrative law judge to order a closed hearing. Administrative law judge ordered to provide the Commission with a copy of the order disposing of aforesaid request.