

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

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.*

* 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 orders¹ and consent settlements,² 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.³ 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

¹ 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.

² 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].

³ 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.⁴

When the undersigned was assigned to this proceeding as administrative law judge on June 3, 1974,⁵ the parties had been working for some time on a lengthy factual stipulation. The stipulation was completed and received in evidence on July 16, 1974.⁶ 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.⁷ 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.

⁴ 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.

⁵ 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.

⁶ 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).

⁷ 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.⁸ 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

⁸ 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).⁹

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

⁹ 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.¹⁰ 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.¹¹ 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.¹²

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.¹³ 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.¹⁴

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

¹⁰ Findings 1, 8, 50.

¹¹ Findings 1, 2, 3, 7.

¹² Findings 16, 17, 19.

¹³ Finding 35.

¹⁴ 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"¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ 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

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

¹⁶ Findings 1, 2, 3, 35.

¹⁷ Findings 17, 19, 24, 28, 30, 31, 32, 34, 36, 40.

¹⁸ 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 *Savon Gas Stations No. Sir, 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).

¹⁹ 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. discounteer 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-Tysons Corner lease - i.e., the right of City Stores to veto new entrants into Tysons 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.²⁰ In fact, it was given the same treatment, and it ended up with the right of approval.²¹ Moreover, once it got approval rights and entered Tysons Corner Center, it did nothing to rid itself of the controversial clause, although other clauses *were* waived.²² 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;²³ it would have entered Tysons Corner without the approval right;²⁴ and the developer had no actual knowledge that City

²⁰ Findings 43, 45, 46, 47, 51.

²¹ Findings 18, 19.

²² Findings 48, 49.

²³ Findings 4, 5, 52.

²⁴ Findings 53, 54.

Stores would exercise approval rights in an anticompetitive way, and, especially, to bar discounters.²⁵ 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.²⁶

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."²⁷

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.²⁸ On the contrary, these facts show that the mere presence of an approval clause in the

²⁵ Finding 46.

²⁶ Finding 21.

²⁷ Finding 24.

²⁸ 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.²⁹ 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.³⁰ 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.³¹

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 incipency before all price competition is eliminated.³² 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."³³ In addition, there is evidence that the right of approval may have prompted other variations of price-related conditions on entry.

²⁹ Findings 26, 33.

³⁰ Finding 26.

³¹ 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).

³² *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).

³³ 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."³⁴ 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.³⁵ These are continuing restrictions on the satellites which cannot be removed without respondent's approval.³⁶

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:³⁷ 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,³⁸ or intended that these conditions be imposed.³⁹ 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.

³⁴ Finding 32.

³⁵ Findings 30, 31.

³⁶ Finding 34.

³⁷ Finding 33.

³⁸ Finding 51.

³⁹ 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.⁴⁰

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.⁴¹ 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.⁴²

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

⁴⁰ 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).

⁴¹ 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).

⁴² 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.⁴³ 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.⁴⁴

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.⁴⁵ 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.⁴⁶

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

⁴³ 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.

⁴⁴ See discussion earlier, especially text at notes 26 through 39.

⁴⁵ 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).

⁴⁶ 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.⁴⁷ 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* govern⁴⁸), 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.⁴⁹

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

⁴⁷ *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).

⁴⁸ *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).

⁴⁹ 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.⁵⁰ 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.⁵¹

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*.⁵² (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*

⁵⁰ As early as *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *modified and aff'd*, 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.

⁵¹ 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).

⁵² *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.), *aff'd*, 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.⁵³ 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.⁵⁴

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,⁵⁵ 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

⁵³ 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).

⁵⁴ Finding 55, 56, 57, 58.

⁵⁵ 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.⁵⁶

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.⁵⁷ 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.⁵⁸

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 competition⁵⁹ 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.

⁵⁶ 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).

⁵⁷ Finding 36.

⁵⁸ Finding 40.

⁵⁹ 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.⁶⁰ 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

⁶⁰ 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.

Initial Decision

85 F.T.C.

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.⁶¹

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:

⁶¹ 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.¹

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])² 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"³ 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

¹ 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.

² 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

³ 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.⁴ Broad approval rights may also be used to condition the entry of a competitor upon adoption of suitable pricing policies.⁵ And, because supplements, modifications, and renewals of satellite tenant leases required the re-approval of City Stores (I.D. 34), the approval clauses

⁴ 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.

⁵ 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.⁶ 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).⁷

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,

⁶ 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).

⁷ 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.⁸ 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."⁹ 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.¹⁰ 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

⁸ 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.

⁹ 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)

¹⁰ 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.¹¹ 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

¹¹ 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 entrants¹², 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.¹³

City Stores protests that it is being cited for the mere possession of unexercised market power.¹⁴ 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,

¹² 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."

¹³ 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).

¹⁴ 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.¹⁵

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.¹⁶

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

¹⁵ 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.

¹⁶ 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."¹⁷

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

¹⁷ 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.¹⁸

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.¹⁹ 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

¹⁸ 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.

¹⁹ 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.

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*

* 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.

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.

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*

* 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.