

IN THE MATTER OF

CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Apr. 20, 1977

Denial of complaint counsel's motion to amend complaint by adding a new theory; and remand of remainder of motion to ALJ as being within his authority on which to act.

ORDER

Complaint counsel move to amend paragraphs 14a and 15a of the complaint. These paragraphs now provide in part as follows:

14. In print advertising and elsewhere, respondents, directly or by implication, make and have made numerous representations to prospective purchasers with respect to the facilities and services associated with the purchase of respondents' condominium units, including but not limited to representations that:

a. The water of Morgan Bay was safe and healthy for swimming at the time such representations were made.

15. In truth and in fact:

a. Respondents knew or had reason to know that Morgan Bay was not safe and healthy for swimming.

Complaint counsel request that the following language be substituted:

14. * * *

a.(1) Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

(2) At the time of the first dissemination of the representations challenged herein and thereafter, the respondents had and relied upon a reasonable basis for the claim that Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

15. * * *

a. (1) Morgan Bay was not, is not, and will not be safe, healthy, and suitable for swimming and bathing.

(2) At the time of the first dissemination of representations challenged herein and thereafter, Respondents did not have and did not rely upon a reasonable basis for the claim that Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

According to complaint counsel, the proposed amendments would simply make it clear that the complaint, as it originally issued, alleged that (1) respondents had represented to consumers not only that the water of Morgan Bay was "safe and healthy" for swimming as of the time the representations were made, but also that the bay

would continue to be suitable for swimming; and (2) respondents' representations were unfair and deceptive because respondents lacked a "reasonable basis" for this claim. The administrative law judge concluded that he lacked authority to grant the motion and certified it to the Commission with "the strongest possible recommendation that it be denied."

The law judges have authority to allow an appropriate amendment to pleadings "only if the amendment is reasonably within the scope of the original complaint * * *. Motions for other amendments * * * shall be certified to the Commission." Rules of Practice, Section 3.15(a). The ALJ lacks authority to permit modifications where the effect is an alteration of the underlying theory behind the complaint. He may, however, permit service of an amended pleading that merely clarifies allegations of the complaint or adds examples or practices already alleged to be unlawful. *See, e.g., Cavanagh Communities Corp.*, 87 F.T.C. 143, 144 n. 2, 3 (1976).

We agree with the ALJ that the theory underlying the "lack of reasonable basis" allegation is sufficiently different from the charge already alleged to require certification of this portion of the motion. We also agree that insufficient justification has been offered for adding a new theory at this time.¹ The request is, therefore, denied.

We disagree, however, with the ALJ's decision to certify the portion of complaint counsel's motion to amend the complaint to make it clear that evidence of the recent suitability of Morgan Bay for swimming may be introduced. This proposed amendment is reasonably within the scope of the complaint, *see Cavanagh, supra*, and is, therefore, within the ALJ's authority to order. This portion of the motion is remanded to the ALJ.²

It is so ordered.

¹ According to the ALJ, addition of the new theory might delay the presentation of respondents' case for several months.

² The ALJ, of course, indicates in his certification order that he would be inclined to deny this amendment.

Complaint

89 F.T.C.

IN THE MATTER OF
SEARS, ROEBUCK AND CO.

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

Docket C-2885. Complaint, Apr. 20, 1977 --- Decision, Apr. 20, 1977

This consent order, among other things, requires a Chicago, Ill., department store chain, in its capacity of shopping center developer and/or major tenant, to cease entering into and enforcing agreements which exclude particular classes of occupants; control tenants' advertising, goods and prices; or otherwise restrict competitive trade. Additionally, to ensure compliance with the terms of the order, respondent is prohibited from using the same officers and employees in its separate capacities as tenant or shopping center developer.

Appearances

For the Commission: *James D. Tangires, Jerry W. Boykin, Eugene R. Webb, and Michael Dershowitz.*

For the respondent: *Lloyd S. McClelland, Chicago, Ill.*

COMPLAINT

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

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

(a) The term "respondent" refers to Sears, Roebuck and Co., its operating divisions, its subsidiaries including but not limited to Homart Development Co., and their respective officers, agents, representatives, or employees.

(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 are for occupancy by tenants other than respondent, (2) at least two tenants other than respondent, (3) at least one major tenant other than respondent, and (4) on-site parking.