

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.

(c) The term "tenant" refers to any retail occupant or potential occupant of floor area in a shopping center, whether as a lessee or owner of such space, but the term does not refer to an occupant of space within the store or other area occupied by respondent which occupant operates as 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.

(e) The term "retailer" refers to a tenant which sells merchandise or services to the consuming public.

(f) The terms "range of prices," "range of fashions" and "range of quality" refer to such descriptive words as, but not limited to, "popular priced," "medium priced," and "high priced;" "low or popular fashion," "medium fashion," and "high fashion;" "low or popular quality," "medium quality" and "high quality," which identify a tenant as a member of a class of merchants which sell their merchandise within a generally identifiable range of prices.

(g) The term "radius restriction" refers to a limitation which precludes a tenant, directly or indirectly, from engaging in, owning, or operating any business within a specified radius or distance from a shopping center.

(h) The term "developer" means any business entity which plans, constructs, or operates a shopping center and negotiates and executes lease agreements with tenants.

(i) The term "shopping center joint venturer" or "joint venturer" means any shopping center developer who enters into an agreement with Sears, Roebuck and Co. through its subsidiary Homart Development Co. to develop, construct, or operate a shopping center.

(j) The term "Agreement" refers to any Operating Agreement, Reciprocal Easement Agreement (R.E.A.), lease, or other contract of any kind, oral or written, which sets forth a relationship between the parties relating to the occupancy of floor area in a shopping center.

PAR. 2.:

A. Respondent Sears, Roebuck and Co., (hereinafter sometimes referred to as Sears), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Sears Tower, Chicago, Illinois. Sears is the largest department store chain in the Nation with stores in all fifty states and the District of Columbia. Its net sales have grown from \$4,578,000,000 in 1962 to \$12,306,000,000 in 1973. Approximately 900 retail stores generate 78 percent of its

business volume. Sears is also a major tenant in over 265 shopping centers throughout the Nation.

B. Homart Development Co., (hereinafter sometimes referred to as Homart), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located also at Sears Tower, Chicago, Illinois. Sears dominates and controls the acts and practices of its wholly-owned, unconsolidated subsidiary, Homart Development Co. Homart has developed and built more than sixteen shopping centers. It sold one in 1972, one in 1973, and now operates nine by itself, one through local Sears retail store management, and five others with shopping center joint venturers. It has several other shopping centers under construction. Sears is a major tenant in all shopping centers in which Homart is a developer. Homart had rents, sales and other revenues from its solely-owned shopping centers of \$15,438,000, as of January 31, 1972; \$18,543,000, as of January 31, 1973; \$21,986,000, as of January 31, 1974. Homart had rents, sales and other revenues from its joint venture shopping centers of \$6,174,000, as of December 31, 1971; \$20,807,000, as of December 31, 1972; \$19,788,000, as of December 31, 1973.

PAR. 3. In the course and conduct of its business, respondent Sears has engaged, and is now engaged in acts and practices in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Respondent purchases for resale a great variety of consumer products from a large number of suppliers located throughout the United States. Respondent causes these products to be transported from the place of manufacture or purchase to its business establishments located in all fifty (50) states and the District of Columbia. Such products have been and are advertised and offered for sale by respondent in newspapers circulated among and between the several States of the Nation. In its capacity as shopping center developer, respondent, through its Homart subsidiary, uses the United States mail extensively. Respondent has, and is, engaged in interstate land purchases, lease negotiations and transactions with shopping center joint venturers and tenants. Respondent, in its capacity as shopping center developer, through its subsidiary Homart, has disseminated and is disseminating advertisements and promotional materials concerning shopping centers and the tenants therein, by various communications media in commerce, for the purpose of soliciting tenants in and among the various states. Respondent's shopping centers advertise in newspapers of interstate circulation. Thus respondent's volume of business is substantial, and its acts and practices, as hereinafter set forth, are in or affecting

commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. Except to the extent that competition has been hindered, frustrated and eliminated as set forth in this complaint, respondent, in the course and conduct of its business of offering for sale, and selling, household goods, home furnishings, apparel and services and of developing and operating shopping centers, through its subsidiary Homart, has been, and is in substantial competition with other corporations, individuals and partnerships in the retail sale of the same or comparable types of merchandise and services carried and sold by respondent and also in the ownership, development and operation of shopping centers.

PAR. 5. Respondent Sears, in its capacity as a major tenant or through its subsidiary Homart, has entered into negotiations with various prospective major tenants, shopping center joint venturers, and developers for the purpose of either developing and operating shopping centers, or for the purpose of establishing a retail store in either a Homart or non-Homart shopping center. During the course of such negotiations, the parties thereto have contracted, combined and conspired to include certain provisions in Agreements. These resultant provisions, more fully described hereinafter, authorized Sears, major tenants, shopping center joint venturers, or developers to control and determine the admission of tenants into shopping centers and control conditions affecting tenants. These provisions suppress, restrict, hinder, lessen, prevent and foreclose competition in the retail distribution of goods and services.

PAR. 6. In the course and conduct of its business respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers, and developers to exclude from shopping centers, certain tenants and categories of tenants, such as discount stores, variety stores, junior department stores and other department stores. Further, it has entered into Agreements or has included provisions therein which confer on respondent, in its capacity as a major tenant, certain rights or afford respondent certain means by which it achieves the exclusion of other tenants. The latter Agreements enable respondent to:

(a) approve or disapprove the entry of tenants or categories of tenants; and

(b) establish and circulate lists of approved tenants and categories of tenants, from which future tenants will be chosen.

Respondent has used the rights or means provided by these Agreements to exclude other tenants.

PAR. 7. The aforesaid Agreements and the actions of respondent pursuant thereto, have had and continue to have the tendency to restrain trade and commerce in shopping centers. Included among the effects of such restraints are the following:

- (a) boycotting potential tenants from shopping centers;
- (b) allowing respondent to choose its competitors and to exclude actual and potential competitors; and
- (c) restricting, hindering and coercing joint venturers or developers in their choice of tenants.

PAR. 8. In the course and conduct of its business, respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers, and developers to maintain, control, fix and establish the range of prices, the range of fashions, the range of quality and the retail selling prices of goods and services offered for sale by tenants in shopping centers. Acting pursuant to these Agreements, shopping center joint venturers, developers or respondent includes certain price, fashion, or quality requirements in leases entered into with other tenants. Such Agreements have had, and continue to have, the tendency to restrain trade and commerce in shopping centers in that they eliminate, hinder, and discourage discount selling; fix, control, and maintain retail prices; and deny the public the benefit of price competition.

PAR. 9. In the course and conduct of its business, respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers or developers, which Agreements enable respondent Sears to do the following or which themselves:

- (a) limit the amount of floor space available to tenants or for specific use by various tenants;
- (b) limit the types of products or services to be sold by tenants;
- (c) control, restrict, or prohibit other tenants in the conduct of sales, use of advertising, or other methods of promotion;
- (d) determine or approve the location of various tenants in shopping centers;
- (e) require other tenants to continue operating their stores in shopping centers in a manner similar to that which the tenants operate at other locations so as to determine or control the price ranges, fashion or quality ranges, or particular brands or types of

goods and services which other tenants may sell in shopping centers;
or

(f) determine or approve the minimum hours of operation of other tenants in shopping centers.

These Agreements are implemented by respondent through its subsidiary Homart or through shopping center joint venturers or developers.

PAR. 10. Such Agreements, as identified in Paragraph Nine, have had and continue to have the tendency to restrain trade and commerce in shopping centers in that they:

(a) limit the extent to which tenants can compete within shopping centers;

(b) limit a tenant's right to determine the types of products and services to be sold;

(c) eliminate, hinder, and discourage discount advertising, discount pricing, and discount selling;

(d) allow respondent to control the location of tenants in shopping centers so as to induce the public to shop in areas where respondent's stores are located;

(e) restrict other tenants to specified methods of operation so as to limit the price ranges, fashion or quality ranges, or brands of goods and services tenants may sell to the consuming public in shopping centers;

(f) deny other tenants the right to choose the minimum hours of business during which they may compete; and

(g) deny the public the benefit of price competition.

PAR. 11. In the course and conduct of its business, respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers or developers to impose "radius restrictions" upon tenants in shopping centers in order to preclude them from placing other stores similar to their own within a specified distance from said shopping centers. Such Agreements are implemented by respondent through its subsidiary Homart or by shopping center joint venturers or developers. Such Agreements tend to restrain trade and commerce in that they limit the number and location of retail stores operated by tenants outside of the shopping center, thereby limiting competition and limiting the number and location of other retail stores that might otherwise be accessible to the public.

PAR. 12. In the course and conduct of its business, respondent Sears, in its capacity as a shopping center developer, is, and has been, engaged in unfair methods of competition in or affecting commerce,

in that it has entered into Agreements with major tenants and shopping center joint venturers to maintain, control, fix and establish the range of prices, the range of fashions, the range of quality and the retail selling prices of goods and services offered for sale by tenants in shopping centers. Acting pursuant to these Agreements, shopping center joint venturers or respondent, includes certain price, fashion or quality requirements in the leases entered into with tenants. Such Agreements have had, and continue to have, the tendency to restrain trade and commerce in shopping centers in that they eliminate, hinder, and discourage discount selling; fix, control, and maintain retail prices; and deny the public the benefit of price competition.

PAR. 13. In the course and conduct of its business, respondent Sears, in its capacity as a shopping center developer, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into and implemented Agreements which impose "radius restrictions" upon tenants in Homart shopping centers. Such Agreements tend to restrain trade and commerce in that they limit the number and location of retail stores operated by tenants outside of Homart shopping centers, thereby limiting competition among shopping centers, and limiting the number and location of other retail stores that might otherwise be accessible to the public.

PAR. 14. In the course and conduct of its business, respondent Sears, in its capacity as a shopping center developer, is, and has been, engaged in unfair methods of competition and unfair acts and practices in or affecting commerce by conditioning approval of certain tenants for entry into its shopping centers upon such tenants' agreement to occupy space in another Homart shopping center. That condition of approval for entry has had, and continues to have, the tendency to restrain trade and commerce among shopping centers. Included among the effects of such restraints are the following:

(a) denying tenants the freedom to occupy space in the shopping centers of their choice; and

(b) denying developers, competing with respondent, the freedom to negotiate with such tenants for the occupancy of space in the developers' shopping centers.

PAR. 15. The aforesaid acts, practices, and methods of competition of the respondent, as herein alleged, and the adverse competitive effects resulting therefrom, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair acts and practices and unfair methods of

competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Sears Towers, Chicago, Illinois. 60684

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and the respondent, and the proceeding is in the public interest.

ORDER

I

For the purpose of this order 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.

(c) The term "tenant" refers to any retail occupant or potential occupant of floor area in a shopping center, whether as a lessee or owner of such space, but the term does not refer to an occupant of space within the store or other area occupied by respondent, which occupant operates as 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.

(e) The term "retailer" refers to a tenant which sells merchandise or services to the consuming public.

(f) The terms "range of prices," "range of fashions" and "range of quality" refer to such descriptive words as, but not limited to, "popular priced," "medium priced," and "high priced;" "low or popular fashion," "medium fashion," and "high fashion;" "low or popular quality," "medium quality" and "high quality," which identify a tenant as a member of a class of merchants which sell their merchandise within a generally identifiable range of prices.

(g) The term "radius restriction" refers to a limitation which precludes a tenant, directly or indirectly, from engaging in, owning, or operating any business within a specified radius or distance from a shopping center.

(h) The term "developer" means any business entity which plans, constructs, or operates a shopping center and negotiates and executes lease agreements with tenants.

(i) The term "shopping center joint venturer" or "joint venturer" means any shopping center developer who enters into an agreement with Sears, Roebuck and Co. through its subsidiary Homart Development Co. to develop, construct, or operate a shopping center.

(j) The term "Agreement" refers to any Operating Agreement, Reciprocal Easement Agreement (R.E.A.), lease, or other contract of any kind, oral or written, which sets forth a relationship between the parties relating to the occupancy of floor area in a shopping center.

II

A. *It is ordered*, That respondent Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in its capacity as a tenant in a shopping center, cease and desist from making, carrying out or enforcing, directly or indirectly, an Agreement or provision of an Agreement, which:

1. 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) variety stores;
2. grants respondent the right to approve or disapprove the entry into a shopping center of any other tenant;
3. provides for the formulation or circulation of lists of approved tenants;
4. grants respondent the right to approve or disapprove the amount of floor space that any other tenant may occupy or use in a shopping center;
5. specifies that any tenant in a shopping center shall or shall not sell its merchandise or services at any particular price, or within any range of prices, or within any range of fashions, or within any range of quality, when such descriptions identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices;
6. limits discount advertising, discount pricing, or discount selling;
7. grants respondent the right to approve or disapprove the amount of floor space that any other tenant may choose to allocate for specific use in a shopping center;
8. limits the types of merchandise or services which any named tenant other than respondent in a shopping center may offer for sale;
9. limits other tenants in a shopping center from conducting bona fide sales;
10. prescribes the minimum hours of business operation of other tenants in a shopping center;
11. grants respondent the right to approve or disapprove the location in a shopping center of any other tenant;
12. provides for radius restrictions upon any tenant in a shopping center; or

13. authorizes a major tenant to limit the types of merchandise or services which respondent may offer for sale in a shopping center.

B. *It is further ordered*, That respondent, in its capacity as a tenant in a shopping center, shall not enter into or carry out any conspiracy, combination, or arrangement with any other tenant or developer to exclude any tenant from a shopping center or to achieve the results which respondent is prohibited from undertaking by Paragraph IIA of this order.

III

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

1. specifies that any tenant in any shopping center shall or shall not sell merchandise or services at any price, or within any range of prices, or within any range of fashions, or within any range of quality, when such descriptions identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices;

2. specifies that any tenant in any shopping center shall not be a discounter or sell merchandise or services at discount prices;

3. specifies that any tenant in any shopping center shall be subject to a radius restriction; or

4. specifically conditions the approval of tenant entry into one of its shopping centers upon the tenant's agreement to occupy space in another of its shopping centers.

B. *It is further ordered*, That respondent, in its capacity as a shopping center developer, cease and desist from entering into any Agreement or provision of an Agreement with any tenant that said tenant may:

1. specify or control or may require respondent to specify or control prices, price ranges, fashion ranges, quality ranges, which identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices; or

2. control or may require respondent to control discounting by any other retailer; or

3. exclude any retailer from any of respondent's shopping centers by reason of such retailer's discount selling or discount advertising.

C. *It is further ordered*, That respondent cease and desist from using the same officers or other employees in respondent's separate capacities as a tenant in or as a developer of shopping centers.

D. *It is further ordered*, That this order shall not prohibit

respondent, in its capacity as a tenant in a shopping center, from including a provision in an Agreement which identifies in designated buildings respondent and those other major tenants which enter into such an Agreement.

E. *It is further ordered*, That this order shall not prohibit respondent, in its capacity as a tenant in a shopping center, from negotiating to include, including, carrying out or enforcing an Agreement or provision in any Agreement which:

1. requires that in regard to the selection of other tenants in the shopping center by the joint venturer or developer the following objective shall be considered --- maintaining a balanced and diversified grouping of financially sound retail stores, merchandise and services;

2. prohibits occupancy of space in a shopping center by clearly objectionable types of tenants, including, for purposes of illustration, establishments selling or exhibiting pornographic materials, massage parlors, and body and fender shops;

3. permits respondent to establish reasonable categories of retailers from which the developer or the landlord may select tenants to be located in the area immediately proximate to respondent's store; *provided*, that such categories shall not include specification of (a) price reasonably accessible to respondent's store determined by the application of such parking ratio to the number of square feet of floor area of respondent's store, (iii) the entrances and exits to and from respondent's store and any malls, and (iv) those parking area mall entrances and exits which substantially serve respondent's store; or

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

F. *It is further ordered*, That respondent, in its capacity as a shopping center developer, will within thirty (30) days after service of this order mail a copy of this order and a copy of Letter "A", attached hereto, by registered or certified mail, to all tenants in its Homart shopping centers.

G. *It is further ordered*, That respondent, in its capacity as a

shopping center developer, advise the Commission in writing within sixty (60) days after respondent has knowledge of any occasion that:

1. a tenant disapproves the admission into any of respondent's shopping centers of any other retailer;

2. a tenant refuses to approve the renewal of another retailer's lease in any of respondent's shopping centers;

3. a tenant approves the admission of another retailer into any of respondent's shopping centers subject to conditions imposed by the tenant relating to the pricing, price ranges, fashion ranges, quality ranges, (b) price lines, (c) trade names, (d) store names, (e) trademarks, brands or lines of merchandise of retailers, or (f) identity of particular retailers, including the listing of particular retailers as examples of a category; and *further, provided*, that such area shall not exceed 150 lineal feet on each level of the center;

4. requires that reasonable standards of appearance, signs, maintenance and housekeeping be maintained in a shopping center;

5. establishes a layout of a shopping center which layout may designate: (a) respondent's store and stores of other major tenants, (b) the location, size and height of all structures (including any structure that is to be occupied by only one tenant) but not the amount of floor area that any other tenant may occupy in the shopping center, (c) the use of all structures of a nonmerchandising nature, (d) the usage by square footage of leasable floor area in the shopping center (excluding floor area occupied by major tenants) of each type of merchandise or service to be handled or offered for sale, for which the developer will use his best efforts to obtain tenants, and (e) parking areas, roadways, utilities, entrances, exits, walkways, malls, landscaped areas and other common areas, and (f) expansion areas and may within such areas establish a layout incorporating items (a) through (e) of this subsection 5; or

6. requires that any expansion of the shopping center not provided for in the initial layout:

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

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

- (c) shall not result in a change of (i) the shopping center's parking ratio, (ii) the location of a number of parking spaces ranges, trade names, store names, trademarks, brands or lines of merchandise or the discounting practices or methods of such other retailer; or

4. a tenant enters into an Agreement or provision of an Agreement with respondent to become a tenant in any of respondent's shopping centers on condition that respondent refuse to renew the lease of another retailer.

IV

A. *It is further ordered*, That respondent shall within thirty (30) days after service of this order upon respondent distribute a copy of this order to each of its operating divisions.

B. *It is further ordered*, That respondent, in its capacity as a tenant, shall within thirty (30) days after service of this order upon respondent, distribute a copy thereof by registered or certified mail to each major tenant, shopping center joint venturer and developer in every shopping center in which respondent is a major tenant.

C. *It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent or in its subsidiary Homart 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 corporations which may affect compliance obligations arising out of the order.

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

Commissioner Dole abstained, not having participated in the decision to provisionally accept this agreement. Commissioner Clanton dissented.

DISSENTING STATEMENT OF COMMISSIONER CLANTON

I continue to adhere to my belief that the order, in its present form, should be rejected. Paragraph III E.5.(d) permits Sears to enter into agreements with shopping center developers that, *inter alia*, designate the layout of a shopping center, including "the usage by square footage of leasable floor area * * * of each type of merchandise or service to be handled or offered for sale for which the developer will use his best efforts to obtain tenants* * *." This exemption from the proscriptions of the order comes perilously close to conferring the kind of prior approval rights which the Commission struck down by its decision *In the Matter of Tysons Corner Regional Shopping Center, et al.*, 85 F.T.C. 970 (1975). While not authorizing the exclusion of identified prospective tenants, paragraph III E.5.(d) may achieve a

similar effect by enabling Sears to exercise veto power over various types of retail product lines and services (and thereby, perhaps, excluding certain classes of retailers) through the designation of allowable floor space.

As the Commission noted in *Tyson's Corner*:

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 (citation omitted). 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. (Id. at 1013).

The interests of a tenant in the viability of a shopping center can be met, as the Commission pointed out in *Tyson's Corner*, by spelling out in lease agreements "specific and legitimate considerations which a tenant may insist that developers consider in admitting new entrants, without creating the massive potential for price-fixing and anticompetitive exclusionary activity inherent in agreements conferring blanket approval rights* * *." Id. at 1012. (Footnote omitted). The Commission there distinguished between lease provisions giving a tenant broad rights of prior approval over other prospective entrants and those provisions setting forth well-defined entry criteria that are unlikely to constitute a cover for price-fixing and other price-controlling activities. In the latter situation, the burden would be on the tenant to demonstrate that the developer failed to give proper consideration to the relevant standards in the lease, a showing the Commission observed as "unlikely to be made or ever attempted if pricing policy is the main reason for the objection to the new competitor." Id. at 1018. By contrast, the *Sears* order permits major tenant participation in the design and layout of shopping centers in a way that renders effective enforcement of the order difficult if not impossible.

To the extent that appropriate consideration may be given to the economic viability of a proposed shopping center, the pending order contains several provisions outlining permissible lease arrangements similar to those incorporated in the *Tyson's Corner* order; in fact, the order here would go further by permitting Sears to spell out in its lease agreement with a developer "reasonable categories of retailers" from which the developer would select tenants for location within the immediate proximity (150 feet) of Sears' store. (Paragraph III E.3.). To go beyond that, as provided in paragraph III E.5.(d), creates an unnecessary risk of anti-competitive exclusionary conduct.

For the above reasons, the order should not be approved.

IN THE MATTER OF
LAS ANIMAS RANCH, INC., ET AL.

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

Docket C-2877. Complaint, Apr. 22, 1977 -- Decision, Apr. 22, 1977

Consent order requiring seven Colorado Springs, Colo., sellers of undeveloped land, among other things, to cease misrepresenting the risks involved in land purchase; the location and quality of the land offered for sale; the costs and availability of utilities; and the advisability of consulting with a professional real estate expert prior to purchase. Further, the order requires respondents to cease failing to furnish the information required by Regulation Z of the Truth in Lending Act; provide a cooling-off period; advise buyers of their rights to cancellation and refund; and to institute a surveillance program designed to ensure compliance with the terms of the order.

Appearances

For the Commission: *Gerald H. Jagers.*

For the respondents: *Ron J. Robinson, Walton, Robinson & Shields,*
Colorado Springs, Colorado.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Las Animas Ranch, Inc., Mount Blanca Estates, Inc., Mount Blanca Valley Ranches, Inc., Chubasco, Inc., Pine Cone Properties, Inc., corporations; O'Keefe-Baldwin & Associates, Ltd., Trinchera Creek Estates, Ltd., general partnerships; and Charles R. Baldwin, individually and as an officer, stockholder and managing partner of said corporations and partnerships; hereinafter sometimes referred to as respondents, have violated provisions of said Acts and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect in the enumerated paragraphs below.

Allegations in the enumerated paragraphs of respondents' present acts and practices include respondents' past acts and practices. Allegations in said paragraphs of respondents' representations or statements include such representations and statements in sales