

IN THE MATTER OF
FEDERATED DEPARTMENT STORES, INC.

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

Docket C-2958. Complaint, April 2, 1979 — Decision, April 2, 1979

This consent order, among other things, requires a Cincinnati, Ohio operator of retail department stores to cease entering into or enforcing agreements which grant the firm the right to exclude certain tenants from shopping centers; control tenants' advertising, goods and prices; or otherwise restrict competition.

Appearances

For the Commission: *David I. Keniry.*

For the respondent: *G. Duane Vieth, Arnold & Porter, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, (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 Federated and its operating divisions, officers, agents, representatives, employees, successors, and assigns.
- b. The term "shopping center" refers to a planned development of retail outlets in the United States of America, developed and managed as a unit in relation to a trade area which the development is intended to serve and containing (1) a total floor area designed for retail occupancy of 250,000 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 any occupant or potential occupant of space within respondent's store or other areas operated by respondent, which occupant is to operate a department for respondent pursuant to a lease or license from respondent.

d. The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant occupying 50,000 square feet or more shall be presumed to provide primary drawing power.

e. The term "trading area" means the geographical bounds within which tenants of a shopping center derive the predominance of their customers.

f. The term "Boston market" means the Boston Massachusetts Standard Metropolitan Statistical Area as is defined in the Bureau of the Budget Publication, "Standard Metropolitan Statistical Areas, 1972."

PAR. 2. Respondent Federated Department Stores, Inc. (hereinafter referred to as "Federated") 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 at 222 West Seventh St., Cincinnati, Ohio. Respondent Federated operates and controls its 19 divisions from its principal office and place of business.

In fiscal 1975, Federated's total sales volume was approximately 3.7 billion dollars. Department stores sales accounted for approximately 2.7 billion dollars or 74% of Federated's total sales volume.

Federated and fourteen of its nineteen divisions are engaged in the operation of retail department stores (Abraham & Straus, Bloomingdale's, Bullock's South, Bullock's North, Burdine's, Filene's, Foley's, Goldsmith's, Lazarus, Levy's, Milwaukee Boston Store, Rike's Sanger-Harris, and Shillito's). In addition, Federated's I. Magin & Company division operates twenty-two specialty stores.

In 1975, Federated's 15 department or specialty store divisions operated approximately 141 department or specialty stores with cumulative floor space of approximately 30 million square feet.

In the Boston, Massachusetts metropolitan area, one of the thirteen metropolitan areas in which Federated operates depart-

ment stores, Federated owns, operates, directs and controls the Filene's department store chain, a division with its principal office and place of business at 426 Washington St., Boston, Massachusetts. Filene's is one of the leading department stores in New England. Federated operates six Filene's department stores in the Boston market encompassing approximately 1.3 million square feet of floor square.

Five of Filene's six department stores in the Boston market are located in the following shopping centers:

- a. North Shore Shopping Center
Peabody, Massachusetts
- b. South Shore Plaza
Braintree, Massachusetts
- c. Burlington Mall
Burlington, Massachusetts
- d. Natick Mall
Natick, Massachusetts
- e. Chestnut Hill Mall
Chestnut Hill, Massachusetts

Federated also operates a Filene's department store in Boston's central business district and two limited-line Filene's stores in suburban Belmont and Wellesley. Federated operates three Filene's department stores in shopping centers outside of the Boston market, at the following locations:

- a. Cape Cod Mall
Hyannis, Massachusetts
- b. Worcester Center
Worcester, Massachusetts
- c. Warwick Mall
Warwick, Rhode Island

PAR. 3. In the course and conduct of its business, Federated 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 variety of consumer products from numerous suppliers located throughout the United States. Respondent causes these products, when purchased by it, to be transported from the place of manufacture or purchase to its warehouses and retail department stores located in Massachusetts, Texas, Florida, California and other states. Such products have been and are advertised for sale by respondent in newspapers and

direct mailings circulated among and between the several states of the nation and by the interstate transmission of promotional sales messages by means of the various broadcast media.

PAR. 4. The movement of population, and particularly the higher income segment of the population, from the central city to the suburbs, has precipitated the growth of shopping centers in suburban areas. In 1960, there were approximately 4,500 shopping centers in the United States; their number now exceeds 14,000 and is projected to reach 20,000 by 1980. In 1970, retail sales in shopping centers amounted to \$118 billion and accounted for 32.2% of all United States retail sales. Retail sales in shopping centers are projected to reach \$200 billion by 1980.

Shopping centers reproduce to a substantial extent the retail facilities once available only in downtown business districts, and are displacing and replacing the central downtown business district as primary outlets for retail distribution of goods and services. Department store operators, including respondent herein, have recognized the potential business opportunities presented by the expanding suburban markets and have, in recent years, established themselves in shopping centers.

PAR. 5. 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 diverse other consumer goods, has been and is in substantial competition with other corporations, individuals and partnerships in the retail sale of the same or comparable brands of merchandise carried and sold by respondent.

PAR. 6. Federated, in its capacity as a tenant, has entered into agreements with developers and other major tenants at various shopping centers throughout the country, which agreements contain various kinds of restrictive covenants and provisions hereinafter more fully described.

PAR. 7. In the course and conduct of its business, Federated is and has been engaged in unfair methods of competition and unfair acts and practices in or affecting commerce, in that it has included, caused the inclusion of, or enforced or caused the enforcement of, restrictive agreements, provisions and covenants which lessen, prevent and foreclose competition in the resale and distribution at retail of goods and services.

PAR. 8. The inclusion or enforcement of the aforesaid covenants and provisions, and the rights, powers and privileges conferred thereby, have had and continue to have the tendency to restrain

- a. Allowing Federated to choose its competitors and to exclude actual and potential competitors;
- b. Hindering or discouraging certain types of retail operations, including discount stores;
- c. Excluding tenants from shopping centers; and
- d. Restricting and hindering developers in their choice of tenants in shopping centers.

PAR. 9. The inclusion or enforcement of the provisions and covenants referred to above constitute an unfair method of competition and unfair acts and practices in or affecting commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

Commissioner Pitofsky did not participate.

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

1. Respondent Federated Department Stores, Inc. is a corporation organized, existing and doing business under and by virtue of

the laws of the State of Delaware, with its principal office and place of business located at 222 West Seventh St., Cincinnati, Ohio.

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

ORDER

I.

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

(a) The term "respondent" refers to Federated and its operating divisions, officers, agents, representatives, employees, successors, and assigns.

(b) The term "shopping center" refers to a planned development of retail outlets in the United States of America, developed and managed as a unit in relation to a trade area which the development is intended to serve and containing (1) a total floor area designed for retail occupancy of 250,000 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 any occupant or potential occupant of space within respondent's store or other areas operated by respondent, which occupant is to operate a department for respondent pursuant to a lease or license from respondent.

(d) The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant occupying 50,000 square feet or more shall be presumed 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 an agreement 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 particu-

lar tenant or class of tenants, including, without limitation, 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 the content of any advertising by any other tenant or grants respondent the right to approve or disapprove the content of 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; or

8. Prohibits the owner or occupant of real property adjoining, abutting or adjacent to a shopping center in which respondent is a tenant from using such property for the sale of merchandise or services similar or identical to the merchandise or services sold in the shopping center; *provided, however*, that nothing in this paragraph shall apply to an agreement or provision thereof which affirmatively prescribes particular land uses or zoning for any real property.

III.

A. *It is further ordered*, That this order shall not prohibit respondent from negotiating to include, including, carrying out or enforcing any agreement or provision in any agreement relating to respondent's occupancy, or proposed occupancy, of space in a shopping center, which (1) identify in designated buildings respondent and those major tenants which have entered, or which are to contemporaneously enter or which the developer or landlord represents in writing have stated an intention to enter, into agreements for occupying space in the shopping center, (2) recite that respondent and such major tenants have contracted or shall contract with the developer or landlord to maintain and operate their stores for a specified term, not to exceed 25 years, in such designated buildings, and (3) provide for respondent's right to cancel, terminate or modify its agreement for occupancy if such major tenants do not occupy

such designated buildings or do not maintain and operate their stores for the specified term.

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 in selecting other tenants in a shopping center the developer shall select businesses which are financially sound and which will in the aggregate provide a balanced and diversified grouping of retail stores, merchandise and services in the shopping center;

2. Requires that specified standards of appearance, signs, maintenance, heating, air conditioning, lighting and housekeeping be maintained in a shopping center;

3. Establishes a layout of a shopping center which layout may designate: (a) respondent's store and stores which are to be occupied by 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 space that any other tenant may occupy in the shopping center; (c) the minimum floor space to be occupied by respondent and by major tenants; (d) uses of all structures to be used for purposes other than the retail sale of merchandise or services to the public; (e) parking ratios, parking areas (including stall sizes and arrangement), 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 3;

4. Requires that any change or expansion of a 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, and shall not interfere with the visibility of its signs from within the shopping center or from public highways adjacent thereto;

(c) shall not result in a change of (i) the shopping center's parking ratio, (ii) the location of a number of parking spaces reasonably accessible to respondent's store, (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, 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 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;

5. Prohibits occupancy of space in a shopping center by types of tenants that create undue noise, litter or odor;

6. Permits respondent to establish reasonable categories of tenants from which the developer or landlord of a shopping center 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) trade names, (b) store names, (c) trademarks, brands or particular lines of merchandise, or (d) identity of particular retailers, including the listing of particular retailers as examples of a category; *provided*, that such area shall not exceed the greater of (i) 150 lineal feet from respondent's store on each level of the center, or (ii) 20% of the total lineal mall front footage, exclusive of respondent's store, on each level of the center;

7. 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;

8. Requires that any space designated for occupancy by a major tenant in the initial layout of the shopping center not be leased for occupancy by other than a major tenant, that any sub-division of such space for occupancy by more than one tenant not result in any tenant occupying less than 50,000 square feet of such space or that each successive occupancy of such space be for the sale of merchandise or services to the public;

9. Prohibits or establishes limitations on the location in the shopping center of commercial office buildings, hotels, motor inns, new and used automobile dealers or funeral parlors; or

10. Establishes reasonable limitations on the location in the shopping center of fast food outlets, grocery supermarkets or movie theaters.

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 directors, officers, and to each of its operating divisions;

B. Within thirty (30) days after service of this order upon respondent, notify each landlord of a shopping center in which respondent is a tenant, of this order by providing each landlord with a copy thereof by certified mail;

C. Within ninety (90) 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 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 would affect compliance obligations arising out of the order.

Commissioner Pitofsky did not participate.

CRANE CO., ET AL.

459

Complaint

IN THE MATTER OF
CRANE CO., ET AL.

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

Docket C-2959. Complaint, April 5, 1979 — Decision, April 5, 1979

This consent order, among other things, requires a New York City manufacturer and seller of various products to cause the Medusa Corporation to divest itself completely of its Dixon, Ill. cement plant, together with whatever assets associated with the plant that may be necessary to maintain the facility as an effective competitor in the production and sale of portland cement. The order further prohibits respondents from acquiring the whole or part of the assets of any firm engaged in the production or sale of portland cement without prior Commission approval.

Appearances

For the Commission: *James S. Teborek and Bert L. Slonim.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Thomas Mellon Evans ("T.M. Evans") presently influences the management of Crane Co. ("Crane"), H.K. Porter, Inc. ("Porter") and its subsidiary, Missouri Portland Cement Company ("MPC"), that Crane presently owns approximately forty-four (44%) percent of the shares of Medusa Corporation ("Medusa"), that Crane intends to tender for any and all of the outstanding shares of Medusa stock, that Crane's present ownership of Medusa capital stock, its acquisition of additional capital stock of Medusa, or the merger of Medusa with Crane violates or would violate individually or collectively, Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, 5(b), of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. Definitions

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

a. "Portland cement" includes Types I through V of portland