U.S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICES ADMINISTRATION
Administrator of Pension and Welfare Benefit Programs
Washington, D.C. 20216

OPINION 75-147

NOV 4 1975 3(14)

Metropolitan Life Insurance Company
One Madison Avenue
New York, New York 10010

Attention: Gerard J. Talbot, Esq.
Vice President, Tax Counsel

Gentlemen :

By letter dated June 10, 1975, and as supplemented by a letter dated June 26, 1975, submitted by Mr. John M. Vine, the authorized representative of the May Department Stores, you requested a ruling from the Department of Labor as to your status under section 3(14) of the Employee Retirement Income Security Act of 1974 and section 4975(e)(2) of the Internal Revenue Code with respect to the May Department Stores Company Employees Retirement Plan. By letter dated August 11, 1975, supplemented by letter dated October 16, 1975, the Internal Revenue Service was also asked to rule with respect to the same issues raised before the Department of Labor.

You and Mr. Vine have represented in your letters and in the documents enclosed therein that the facts set forth below are pertinent to our consideration of the proposed transaction. The May Department Stores Company (May) maintains the May Department Stores Company Employee Retirement Plan (the Plan) for its employees and the employees of certain subsidiaries of May. The Plan, covering some 55,000 participants, is a trusteed plan qualified under section 401(a) of the Internal Revenue Code. Participants in the Plan include employees of the May Stores Shopping Centers, Inc. (Shopping Centers), a wholly owned subsidiary of May.

The May retirement plan currently has all of its plan assets, amounting to approximately $100,000,000, held and invested directly in trust. Under the terms of the Plan and trust, May may exercise substantial control over the investments made by the trust. May proposes to have substantially all of the plan assets transferred to Metropolitan Life Insurance Company (Metropolitan) under two group companion contracts issued to the trustee of the Plan. Under one contract, Metropolitan will agree to pay to the trustee the principal amount paid to Metropolitan in 20 annual installments together with interest thereon at a rate of approximately 9.3%. Under the second contract the trustee will have the right to purchase annuities on individual retirees at any time. A third separate account group contract providing for liquidation of plan assets transferred to Metropolitan in kind will also be used if the transfer from the trust is made partly or entirely in kind rather than completely in cash. Funds derived from liquidation of such assets will then be trans ferred to the general account contracts.

On June 1, 1973, Metropolitan and Shopping Centers entered into a partnership for the purpose of acquiring, developing, operating and managing certain residential and commercial real property in Los Angeles, California, under the partnership name Parklabrea Associates. Part of the property involved, consisting of apartment buildings and related commercial facilities, was owned by Metropolitan and the adjoining property, consisting of the May Company department store and related commercial facilities, was owned by May. Each partner contributed $3,500,000 in cash to the partnership. The partnership then purchased the property owned by Metropolitan for $60,000,000 ($6,000,000 in cash and $54,000,000 in an installment promissory note secured by a purchase money deed of trust to Metropolitan), and the property owned by May for $10,000,000 ($1,000,000 in cash and $9,000,000 in an installment promissory note secured by a purchase money deed of trust to May).

The partnership agreement provides for allocation of profits and losses between Metropolitan and Shopping Centers on a 73%-27% basis until such time as the partnership has made cash distributions to the partners totalling $20,500,000, at which time profits and losses thereafter will be allocated between the partners on a 50%-50% basis. At this time cash distibutions of $1,250,000 to the partners have occurred. In the event of termination and dissolution of

the partnership, proceeds of liquidation or sale shall be distributed in the same percentages as cash distribution. Thus, proceeds of liquidation would be distributed on a 73%-27% basis until $20,500,000 has been distributed, at which time distributions in excess of that amount will be distributed on a 50%-50% basis. The parties expect that cash distributions totalling $20,500,000 will not occur for a number of years in the future, and would modify the agreement prior thereto to avoid having Shopping Centers acquire a 50% capital or profits interest if such interest would cause a prohibited transaction to occur, or take other steps to avoid the prohibited transaction.

The partnership agreement also provides that the partners may agree to make additional improvements to the partnership property, in which event the capital contributions for, profit and loss ratio with respect to, and cash distributions with respect to such additional improvements will be on a 50%-50% basis, and at the option of either partner a new partnership will be formed for such purpose. The parties have not agreed to make any additional improvements and would modify the agreement to avoid having Shopping Centers acquire a 50% capital or profits interest if such interest would result in a prohibited transaction, or take other steps to avoid the prohibited transaction.

The partnership (Parklabrea Associates) has no employees and thus has no employees covered under the Plan. The partnership properties are managed by Parklabrea Management, Inc. (a subsidiary of Shopping Centers) pursuant to a management agreement with the partnership. There are approximately 50 employees working for Parklabrea Management, Inc., who are Plan participants, and an additional 50 employees of Shopping Centers who are Plan participants, out of approximately 55,000 employees covered by the May retirement plan.

Based upon the foregoing facts you have requested the following rulings from the Department of Labor:

1. That Parklabrea Associates is not a party in interest with respect to the Plan within the meaning of section 3(14)(G) of the Act solely by reason of the fact that Shopping Centers will at some later date acquire a 50% interest in Parklabrea Associates; and

2. That Metropolitan is not a party in interest with respect to the Plan within the meaning of section 3(14)(I) of the Act solely because of its ownership of in excess of 10% of the capital or profits of Parklabrea Associates.

Section 3(14) of the Act provides that the term party in interest means, as to an employee benefit plan –

(A) a fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of –

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of --

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D) or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account.

It should be noted that under subparagraph (C) both May and Shopping Centers are parties in interest, since they are employers with employees covered under the May retirement plan.

As to ruling request (1), we conclude that Parklabrea Associates is not a party in interest with respect to the Plan within the meaning of section 3(14)(G) of the Act solely by reason of the fact that Shopping Centers will at some later date acquire a 50% interest in the Parklabrea Associates. We note that this ruling is limited solely to section 3(14)(G) of the Act and it is based on the assumption that Shopping Centers is not in fact a 50% partner.

With respect to ruling request (2), we conclude that Metropolitan is not a party in interest with respect to the Plan within the meaning of section 3(14)(I) of the Act solely because it owns in excess of 10% of the capital or profits of Parklabrea Associates, if Parklabrea Associates is presently not a person described in section 3(14)(C), (D), (E), or (G) of the Act.

For purposes of this ruling we are assuming but not ruling that Parklabrea Associates does not exercise or retain the right to exercise the direction and control over those individuals who perform services for Parklabrea Associates pursuant to its contract with Parklabrea Management, Inc., which would be necessary to establish the relationship of employer and employee.

Finally, we emphasize that our consideration of the transaction proposed in your letter does not relate to any provisions of the Act not discussed herein. Thus, for example, we are not hereby rendering any opinion with respect to the prudence of the proposed transaction under section 404(a) of the Act, or with respect to whether Metropolitan or Parklabrea Associates is a party in interest with respect to the Plan for any reason not discussed in this letter.

Sincerely,

JAMES D. HUTCHINSON
Administrator