

IV

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

IN THE MATTER OF

MEN'S MARKET SERVICE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC.
5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(C) OF THE
CLAYTON ACT

Docket C-2634. Complaint, Feb. 11, 1975 - Decision, Feb. 11, 1975

Consent order requiring a New York City manufacturer and seller of men's clothing and its affiliated merchandising service, among other things to cease inducing discriminatory price reductions or advertising allowances from suppliers.

Appearances

For the Commission: *Paul N. Kane.*

For the respondents: *Charles L. Stewart* for *Hart, Schaffner & Marx*, Chicago, Ill. and *Lee N. Abrams, Mayer, Brown & Platt*, Chicago, Ill.

COMPLAINT

The Federal Trade Commission having reason to believe that Men's Market Service, Inc. and Hart Schaffner & Marx, each of which is named in the caption hereof and is hereinafter more particularly described and referred to as a respondent, having violated the provisions of Section 2 of the Clayton Act, as amended (15 U.S.C. §13) and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45), as hereinafter more particularly designated and described, 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 respect thereto as follows:

PARAGRAPH 1. Respondent Men's Market Service, Inc., hereinafter MMS, 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 place of business located at Suite 1304, 1290 Avenue of the Americas, N. Y., N. Y. MMS is a wholly-owned subsidiary of Wallach's, Inc., a New York corporation which is a wholly-owned subsidiary of respondent Hart

Schaffner & Marx, hereinafter HSM. The HSM menswear stores purchase a wide variety of merchandise. MMS selects a small portion of the total and recommends it to executives of HSM menswear stores for purchase by their stores. MMS represents HSM menswear stores in negotiations with suppliers of such merchandise, concerning patterns, styles, specifications, delivery dates, delivery places, prices and other terms and conditions of purchase by HSM menswear stores of the items of merchandise recommended by MMS.

PAR. 2. Respondent Hart Schaffner & Marx is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its main office and principal place of business located at 36 S. Franklin St., Chicago, Ill. HSM also maintains an office and showroom in Suite 2014, 1290 Avenue of the Americas, New York, N.Y.

HSM through various subsidiaries is engaged in the manufacture of apparel products (including, *inter alia*, men's tailored clothing, men's raincoats, women's and children's jeans and men's jackets and active sportswear), the sale of such products to chain and independent retail apparel and department stores throughout the United States, and the operation, through wholly-owned subsidiaries, of 234 retail mens' specialty stores, herein sometimes referred to as HSM menswear stores, in 67 metropolitan areas throughout most of the United States.

Brands under which respondent HSM and its subsidiaries and divisions market one or more of the above kinds of products include Hart Schaffner & Marx, Hickey-Freeman, Society Brand, Johnny Carson, Austin Reed of Regent Street, Jaymar, Gleneagles, and California Sportswear. The HSM retail stores include such groups of HSM menswear stores as Wallach's, Inc., F. R. Tripler & Co., and Field Bros. in the New York metropolitan area, Baskin and Capper & Capper in the Chicago metropolitan area, F. B. Silverwood in the Los Angeles metropolitan area, Jack Henry Clothing Co. in the Kansas City metropolitan area, Hastings in the San Francisco and Sacramento metropolitan areas, and Klopfenstein's Inc. and Littler's, Inc. in the Seattle metropolitan area, as well as similar menswear store groups in other metropolitan areas.

Sales of said 234 HSM menswear stores during the fiscal year ended Jan. 31, 1974 were in excess of \$235,000,000.

PAR. 3. The HSM menswear stores are among the menswear specialty stores which emphasize quality and fashion and in which a substantial percentage of the items sold has a relatively high value. The HSM menswear stores sell men's tailored clothing (suits, sport coats, slacks, formal wear and outerwear) as well as men's furnishings (men's shirts, sweaters, neckties, scarves, mufflers, robes, pajamas, under-

wear, socks, handkerchiefs, belts, wallets, toiletries, gift items and various other items of merchandise). The men's tailored clothing and the men's furnishings so sold are procured in part from the manufacturing divisions of respondent HSM and in part from other vendors selected upon a basis of quality materials, styles and patterns.

PAR. 4. MMS employs experienced buyers of men's furnishings to shop markets in the United States and abroad for dependable sources of supply, sometimes hereinafter referred to as suppliers, for men's furnishings suitable in quality and fashion for resale by HSM menswear stores. These MMS buyers also receive advice and recommendations from experienced buyers employed by some of the larger groups of HSM menswear stores. When the MMS shoppers find a suitable item from a dependable supplier, the supplier is permitted to display samples of the products, chosen by said shoppers, in the MMS office or the HSM office and showroom at 1290 Avenue of the Americas in New York City. MMS recommends to the HSM menswear stores that they purchase such selected products and MMS designates each such supplier a "preferred resource." Periodically MMS furnishes the HSM menswear stores a list of such "preferred resources." Purchases are made for the HSM menswear stores by their respective buyers or other officers who periodically visit the aforesaid MMS office and HSM office and showroom, examine the samples on display, and write purchase orders for their respective store or group of stores. Purchase orders are sent to the supplier involved either directly or indirectly through MMS. Whether an order is submitted directly or indirectly, a copy is furnished to MMS for accounting purposes. Thereafter the supplier bills and ships the merchandise directly to the ordering store or group of stores.

After selecting an item to recommend for purchase by HSM menswear stores, MMS has sought to ascertain from the supplier thereof the nature and amount of cost savings which such supplier expected to derive as a result of the advance ordering, large cumulative total quantities and manner of purchasing of that item by HSM menswear stores. Based upon such information MMS has solicited, from vendors who expected to derive such cost savings percentage rebates representing all or a portion of such cost savings, such rebates to be paid to MMS at the end of a season or at the end of a year, for distribution by MMS among the HSM menswear stores in proportion to the purchases by the respective store or group of stores of the specific items purchased by said store or group of stores during a season or a year. The majority of the "preferred resources" do not grant or pay such rebates. Prior to 1970, MMS solicited and received from some of such "preferred resources" percentage rebates based in part on cost

savings derived by said suppliers from their elimination of, or reduction in, their salesmen's commissions.

The rebates received by MMS, for distribution to HSM menswear stores totaled \$205,120.00 in the fiscal year ended Jan. 31, 1969. In the fiscal year ended Jan. 31, 1974, the volume of these rebates was \$102,936.46. The number of suppliers paying such rebates declined in the same period from 25 to 9.

PAR. 5. In the course and conduct of their business, MMS and HSM are now and at all times herein mentioned have been engaged in "commerce" as that term is defined in the Clayton and Federal Trade Commission Acts, as amended, in that men's furnishings and other products of suppliers manufacturing them in different states or countries are purchased by and delivered to HSM menswear stores in states other than states or countries of production or origin of shipment, by means of transactions herein alleged.

COUNT I

PAR. 6. Paragraphs One through Five are hereby adopted and made a part of this Count as fully as if herein set out verbatim.

PAR. 7. In the course and conduct of their business in commerce, as aforesaid, and in connection with MMS's inducement and receipt, or receipt, of rebates on purchases from acceding suppliers, respondent MMS during 1969 and prior years received and accepted amounts which in whole or in part acceding suppliers normally paid as commissions to their salesmen.

Typically, such suppliers reduced their salesmen's commissions by amounts which represented at least one-half the amount of the rebate granted to respondent MMS.

PAR. 8. The acts and practices of respondents in receiving and accepting amounts of money, which reflected in whole or in part amounts normally paid as commissions to suppliers' salesmen, constituted violations of the provisions of subsection (c) of Section 2 of the Clayton Act, as amended.

COUNT II

PAR. 9. Paragraphs One through Five are hereby adopted and made a part of this Count as fully as if herein set out verbatim.

PAR. 10. In the course of its business in commerce, as aforesaid, respondent HSM through its menswear stores, is now and has been in active competition with other corporations, firms and individuals also engaged in the purchase for resale, sale and distribution within the United States, of various products, including men's furnishings.

PAR. 11. In the further course and conduct of its business in commerce, respondent MMS and the HSM menswear stores have induced the receipt of advertising allowances from suppliers to help defray the cost of advertising their products in seasonal catalogs distributed by the HSM menswear stores to their customers. Respondent HSM prepares and distributes to the HSM menswear stores an annual seasonal catalog which advertises men's furnishings among other products. Respondents MMS and HSM negotiate with suppliers of items which will be advertised therein to contribute to the cost of the catalog. Contributions so induced to this program by participating suppliers in 1972 totalled \$72,000. The advertising allowances granted by such suppliers prior to 1973 were dependent upon the cumulative total of items advertised in the catalog which were purchased by all HSM menswear stores combined. Prior to 1973, respondents did not make arrangements to assure that every such contributing supplier had made a cooperative advertising plan available whereby all of the contributing suppliers' customers competing with HSM menswear stores could receive proportionally equal advertising allowances. Respondents knew or should have known that some of said suppliers were selling goods to customers who were competing with some of the HSM menswear stores and that they were inducing and receiving, or were receiving, from suppliers, payments or allowances for advertising in the seasonal catalogs which some of said suppliers were not offering or otherwise making available on proportionally equal terms to other customers who were competing with HSM menswear stores in the sale and distribution of said suppliers' products.

PAR. 12. In the further course of their business in commerce, rebates and advertising allowances were received from preferred resources, even though such rebates and allowances granted by such suppliers were dependent upon the cumulative total of purchases made by all HSM menswear stores although separate delivery must be made to separate groups of stores.

PAR. 13. The capacity, tendency and effect of respondents' acts and practices has been, and if allowed to continue may be, to:

(a) Obtain cooperative advertising allowances from suppliers to help defray the costs of advertising such suppliers' products in a seasonal catalog distributed by HSM menswear stores regardless of whether proportionally equal advertising allowances are available from such suppliers to all customers competing with one or more HSM menswear stores.

(b) Gain preferential treatment from suppliers, solely on the basis of the anticipated substantiality of the aggregate purchases of HSM menswear stores, and

(c) Injure competition with the HSM menswear stores in the resale of products so purchased and so advertised.

PAR. 14. The aforesaid acts and practices of respondents constitute unfair methods of competition and unfair acts or practices in commerce within the intent and meaning, and 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 respondents named in the caption hereof, and respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 2 of the Clayton Act, as amended and Section 5 of the Federal Trade Commission Act, as amended.

Respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 respondents 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 has reason to believe that respondents have violated the said acts, 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, now in further conformity with the procedure prescribed in Sec. 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Men's Market Service, Inc. 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 Suite 1304, 1290 Avenue of the Americas, N. Y., N.Y.
2. Respondent Hart Schaffner & Marx 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 36 S. Franklin St., Chicago, Ill.
3. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

I

It is ordered, That the respondent corporations, Men's Market Service, Inc. and Hart Schaffner & Marx, their respective successors, assigns, officers, agents, representatives, and employees, in connection with the centralized selection, recommendation and negotiation of net prices for the purchase for resale by Hart Schaffner & Marx menswear stores of any product in commerce, as "commerce" is defined in the Clayton Act, shall not receive or accept, or arrange directly or indirectly for any subsidiary operating HSM menswear stores to receive or accept, from any supplier or from anyone acting for or in behalf of or who is subject to the direct or indirect control of such supplier, any rebate or discount in lieu of brokerage, by purchasing products from such supplier at net prices reflecting a reduction from the net prices at which sales of such products of like grade and quality are being effected by such supplier to competing purchasers, where such reduction in net price exceeds the cost savings derived by said supplier in manufacture, sale or delivery to HSM menswear stores; provided that said cost savings derived by any such supplier shall not include savings derived from a reduction in the regular rate of commission, brokerage or other compensation currently being paid by said supplier for sales services.

II

It is further ordered, That respondents Men's Market Service, Inc. and Hart Schaffner & Marx, their respective successors, assigns, officers, agents, representatives, employees, and subsidiaries operating HSM menswear stores, in connection with the purchase for resale by said HSM menswear stores in competition with other purchasers from the same suppliers of goods of like grade and quality, of any product in commerce, as "commerce" is defined in the Clayton Act, shall not:

(a) Induce suppliers to grant discriminatory discounts, rebates or other reductions in net prices to or for the benefit of HSM menswear stores, except to meet the lawful net prices offered by a competitor, where such reduction in net price exceeds the cost savings derived by said supplier in manufacture, sale or delivery to HSM menswear stores.

(b) Induce suppliers to grant catalog advertising allowances or other advertising allowances directly or indirectly to HSM menswear stores, unless such allowances are available on proportionally equal terms to all

Decision and Order

85 F.T.C.

competitors of such HSM menswear stores purchasing from said suppliers' products of like grade and quality.

For the purpose of determining "net price" under the terms of Paragraphs I and II of this order, there shall be taken into account all discounts and rebates or other terms and conditions of sale by which net prices are affected.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in either 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 its compliance obligations arising out of this order.

It is further ordered, That respondents furnish a copy of this order to all suppliers of merchandise purchased for resale by HSM menswear stores who, currently and during the five years preceding the date of this order, are and were designated "preferred resources" and to all future such suppliers of such merchandise for a ten year period following the date of this order, and respondent HSM shall also furnish a copy of this order to each of its subsidiaries operating menswear stores.

It is further ordered, That respondents shall, within 60 days after service upon them of this order, file with the Commission reports in writing setting forth in detail the manner and form in which they have complied and will comply with this order.
