

IN THE MATTER OF
MOTHERHOOD MATERNITY SHOPS, INC.

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

Docket C-2974. Complaint, June 21, 1979 — Decision, June 21, 1979

This consent order, among other things, requires a Santa Monica, Calif. manufacturer and seller of maternity wearing apparel and related products and its corporate owner to cease establishing, maintaining and enforcing resale prices and sale periods for their products; soliciting, exchanging or disseminating price information; and compelling adherence to such prices and sale periods through persuasion or coercion. Respondents are additionally prohibited from withholding advertising allowances, or otherwise taking adverse action against recalcitrant retailers.

Appearances

For the Commission: *Sandra L. Bird and Elliot Feinberg.*

For the respondents: *George Zachary, Rosenfeld, Meyer & Susman, Beverly Hills, Calif.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Motherhood Maternity Shops, Inc., a corporation, has violated the provisions of said Act, 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 as follows:

PARAGRAPH 1. Respondent Motherhood Maternity Shops, Inc. (hereinafter sometimes referred to as Maternity Shops) is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business at 1330 Colorado Ave., Santa Monica, California.

PAR. 2. Respondent MMS of Delaware, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1330 Colorado Ave., Santa Monica, California.

MMS of Delaware, Inc. acquired all of the stock of Motherhood Maternity Shops, Inc. in July 1977, through the merger of Motherhood Maternity Shops, Inc. and MMS of California, Inc., a wholly-owned subsidiary of MMS of Delaware, Inc.

PAR. 3. Respondent Maternity Shops is now, and has been, engaged

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(2) advertising a product at a price other than that which respondent Maternity Shops has established or suggested.

PAR. 9. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondent, as hereinabove alleged, are unfair methods of competition and unfair acts or practices because they have the tendency to, or the actual effect of:

- (a) fixing, maintaining or stabilizing the prices at which respondent Maternity Shops' products were resold;
- (b) suppressing or eliminating price competition between or among resellers selling respondent Maternity Shops' products and between such resellers and respondent Maternity Shops; and
- (c) depriving consumers of the benefits of competition.

PAR. 10. The aforesaid acts, practices and methods of competition, constitute unfair methods of competition and unfair acts and practices 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 respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of the complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 the respondents have 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, 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 Motherhood Maternity Shops, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 1330 Colorado Ave., Santa Monica, California.

Respondent MMS of Delaware, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1330 Colorado Ave., Santa Monica, California. Respondent Motherhood Maternity Shops, Inc. has been merged with MMS of California, Inc., a wholly-owned subsidiary of MMS of Delaware, Inc. The surviving corporation, Motherhood Maternity Shops, Inc., is a wholly-owned subsidiary of MMS of Delaware, Inc.

2. 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

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

"Product" is defined as any item of wearing apparel and any related accessory and any other merchandise, service or thing which is manufactured, offered for sale, or sold by respondents or any of their subsidiaries.

"Reseller" is defined as any corporation, firm or person which sells or which requests to sell any product sold or distributed by respondents or any corporation or firm owned or operated by respondents, but excluding persons, partnerships or corporations operating retail outlets owned or operated by respondents or any of their subsidiaries.

"Resale price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula, or margin of profit used by any reseller for pricing respondents' products. Such term includes but is not limited to any suggested, established or customary resale price as well as the retail price in effect for retail outlets or departments owned or operated by respondents or any of their subsidiaries.

"Sale period" is defined as any time period during which retail outlets or departments owned or operated by respondents or any of their subsidiaries offer any product for sale at resale prices lower than those in effect during the usual and ordinary course of business; or any suggested, authorized or customary time for selling or

advertising apparel at prices lower than suggested, established or customary resale prices.

"Company-owned store" is defined as any retail outlet owned or operated by respondents or any of their subsidiaries.

I

It is ordered, That respondents Motherhood Maternity Shops, Inc., a corporation, and MMS of Delaware, Inc., a corporation, their successors and assigns, and respondents' officers, their agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, offering for sale, sale, distributing or advertising of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Fixing, establishing, controlling, stabilizing, maintaining or enforcing, directly or indirectly, the price at which any reseller may advertise, promote, offer for sale or sell any product.
2. Establishing, exacting assurances to comply with, continuing or enforcing any contract, agreement, understanding or arrangement with any reseller to fix, establish, control, stabilize, maintain or enforce, directly or indirectly, the price at which any product is to be resold or advertised.
3. Establishing, exacting assurances to comply with, continuing or enforcing any contract, agreement, understanding or arrangement with any reseller to tie any resale price of any reseller to any resale price in effect at any company-owned store.
4. Suggesting, communicating, publishing, disseminating, circulating or providing by any means any information concerning resale prices or sale periods to any reseller. The advertising to consumers of actual resale prices by any company-owned store shall not be deemed as violation of this paragraph.
5. Soliciting, gathering or exchanging, directly or indirectly, information concerning any resale price or sale period of any reseller.
6. Establishing, exacting assurances to comply with, continuing or enforcing any contract, agreement, understanding or arrangement with any reseller to fix, establish or control the form, content or timing of the advertising of any product by any reseller.
7. Suggesting, recommending, advising, persuading, inducing or coercing any reseller to establish, maintain, issue, adopt or adhere to

any resale price, or to establish, maintain, issue, adopt or adhere to any sale period.

8. Communicating with any reseller concerning any deviation or alleged deviation from any resale price or sale period.

9. Suggesting, recommending, advising, persuading, inducing or coercing any reseller to refrain from or to discontinue advertising any product at a certain resale price.

10. Representing directly or by implication that any action may or will be taken against any reseller who deviates from any resale price or sale period.

11. Securing or attempting to secure any promise or assurance from any reseller regarding the price at which such reseller will or may advertise or sell any product; or requesting or requiring any reseller to obtain approval from respondents for any price at which such reseller may or will advertise or sell any product.

12. Threatening to withhold or withholding advertising allowances or any other assistance, payment, service or consideration from any reseller, or limiting or restricting eligibility of any reseller to receive such benefits because said reseller advertises or sells any product at certain resale prices.

13. Taking any action to hinder or preclude the lawful use by any reseller of any trademark of any respondent in conjunction with the sale or advertising of any product.

14. Terminating, suspending, delaying shipments to, or taking or threatening any action against any reseller because the reseller has, or was alleged to have sold or advertised any product at a certain resale price, or because the reseller may engage in any such activity in the future.

II

It is further ordered, That respondents shall:

1. Within thirty (30) days after the date of service of this order, mail under separate cover a copy of this order to every past reseller. An affidavit of mailing shall be sworn to by an official of respondents verifying that said mailing of this order was completed.

2. Mail a copy of this order to any reseller that purchases any products from respondents within five (5) years after the date of service of this order. The mailing required by this provision shall occur within thirty (30) days after the first purchase by said reseller.

3. Within thirty (30) days after the date of service of this order distribute a copy of this order to each of their operating divisions and subsidiaries and to all officers, supervisory sales personnel, sales

agents and representatives selling to resellers, and to advertising agencies retained by respondents and secure from each entity or person a statement acknowledging receipt of said order.

III

It is further ordered, That respondents:

1. Notify the Commission at least thirty (30) days prior to any proposed change in the respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporations which may affect compliance obligations arising out of this order.

2. Maintain complete business records which fully disclose the manner and form of respondents' compliance with the Order, including but not limited to any records referring or relating, in whole or in part, to:

- (a) any communication between any respondent and any reseller relating to any price at which any reseller, person or firm is selling, proposes to sell, is advertising or proposes to advertise any product;
- (b) the termination of any reseller for any reason; or
- (c) the refusal to deal with any reseller for any reason.

Respondents shall maintain the records required by this paragraph for at least three (3) years from the date such records were created or received by respondents. The records required by this paragraph shall be made available to Commission staff upon reasonable notice.

3. Within sixty (60) days after service upon them of this order, file with the Commission a report, in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

CROWN TUFT, INC., ET AL.

Docket C-1192. Interlocutory Order, June 26, 1979

ORDER DENYING MOTION TO MODIFY OR VACATE CONSENT
ORDER

By letter dated May 9, 1979 individual respondent Arthur B. E. Lauman petitioned the Federal Trade Commission to reopen the proceeding in the above-docketed matter to vacate the order as it pertains to him as an individual and as it pertains to the named corporation, dissolved sometime after 1971.

Mr. Lauman states that he had "no personal knowledge" of and he did not "condone in any fashion, any of the charges contained within the consent order agreement;" he sold Crown Tuft, Inc. to Johns-Manville Corporation in 1968; he was employed by Crown Tuft until 1971; he is "no longer engaged by or associated with either the existing company or the company to which Crown Tuft, Inc. was sold;" to the best of his knowledge, Crown Tuft, Inc. was dissolved and Johns-Manville Corporation "disposed of the carpet division some years ago."

The order issued against the respondents on April 11, 1967 (see 71 F.T.C. 646) forbids them from misbranding textile fiber products and requires them to disclose the names and amount of constituent fibers contained in carpets, on labels, tags, invoices, and advertisements, pursuant to the provisions of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder.

It is axiomatic that corporations can only act through individuals, and it is well settled that the Commission may properly name officers, directors, and sole stockholders of corporate respondents in their official as well as their individual capacities in order to prevent the evasion of its order. *F.T.C. v. Standard Education Society*, 86 F.2d 692 (2d Cir. 1936), *rev'd. on other grounds*, 302 U.S. 112, 120 (1937); *Abel Allan Goodman v. F.T.C.*, 211 F.2d 7, 14-15 (2d Cir. 1954). The purpose of doing so is to make the order fully effective in preventing recurrence of the practices found to be unlawful, for the Commission has recognized that a corporate respondent is not the only vehicle through which individuals, who have been personally involved in unlawful practices, may in the future continue to engage in such practices. *Tractor Training Service v. F.T.C.*, 227 F.2d 420, 425 (9th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); *Consumer Sales Corp., v. F.T.C.*, 198 F.2d 404, 407-408 (2d Cir. 1952), *cert. denied*, 344 U.S. 912