

ATTORNEY GENERAL OF THE STATE OF NEW YORK
WESTCHESTER REGIONAL OFFICE

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In the Matter of the

investigation by ELIOT SPITZER,
Attorney General of the State of
New York, of

JOS. A. BANK CLOTHIERS, INC.

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**ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW
SECTION 63, SUBDIVISION 15**

Pursuant to the provisions of Article 22-A of the General Business Law (“GBL”) and §63 (12) of the Executive Law, **ELIOT SPITZER**, Attorney General of the State of New York, caused an investigation to be made into the advertisement and retail sale practices of **JOS. A. BANK CLOTHIERS, INC.** (hereinafter “Jos. A. Bank”), and based upon that investigation makes the following findings:

FINDINGS

1. Jos. A. Bank is a Delaware corporation, authorized to do business in New York, with corporate offices located at 500 Hanover Pike, Hampstead, MD 21074. The company is a designer, retailer and direct marketer of men’s tailored and casual clothing and accessories and owns and operates two hundred fourteen retail stores nationwide. Jos. A. Bank has operated stores in the State of New York since at least 1986 and currently operates 12 stores within the State. In 2003, Jos. A. Bank, a publicly held corporation, had net sales of \$299,666,000 and spent \$109,699,000 on sales and marketing. In New York State, Jos. A. Bank had in-store sales

of \$17,611,400 in 2003 and spent \$1,684,412 on retail marketing.

2. Jos. A. Bank markets its merchandise to consumers through a variety of means including direct mail, email, Internet, print, radio and television advertising, and in-store signage. In its promotional and solicitation material, Jos. A. Bank specifies merchandise that is being offered “on sale” at a discounted price, lower than the stated “regular price.”

Attorney General’s Position

3 It is the Attorney General’s position that Jos. A. Bank does not actually offer for sale or sell this merchandise at the “regular price.” Instead, Jos. A. Bank conducts “sale” after “sale.” Because the merchandise is perpetually “on sale,” the so-called “sale price” is actually the price at which Jos. A. Bank regularly offers for sale and sells the merchandise.

4. Less than 1% of all sales of Jos. A. Bank’s suits, formal wear, trousers, and blazers were made at the “regular price” during 2003. Indeed, three of the company’s best selling items - - the Signature, Executive, and Trio Suits - - have been continually on sale since January 2003, with the exception of just a few days. Out of thousands of these suits that have been sold by Jos. A. Bank since then, only a handful were sold at the “regular price.” In addition, only 10% of dress shirts were sold at regular price.

5 Furthermore, each advertised sale is described as being of limited duration, thus creating the false impression that the price will increase back to the “regular price” if a consumer does not make a purchase by the end of the sale. In fact, the price does not increase back to the regular price at the conclusion of a sale, as each “sale” is followed by another one.

6. For example, between February 25 and July 31, 2004, Jos. A. Bank promoted and

advertised that certain merchandise was “on sale” at least 22 times. As a result, with the exception of only a few days, the merchandise was continually “on sale” during that time.

7 Moreover, to increase a consumer’s sense of urgency about the expiration of a sale, many of Jos. A. Bank’s advertisements use expressions such as “Final Days”, “Final 3 Days”, “5-day Spring Sale”, etc. In fact, however, there are no “final days” to sales offered by Jos. A. Bank, as the company places merchandise back “on sale” immediately after a given sale ends. And because prices vary during these sales, a consumer who rushes to buy an item before the expiration of a sale may pay more than a consumer who purchases after the deadline when another sale is in effect that offers a lower price.

8. The following chart sets forth Jos. A. Bank’s advertised sales for various merchandise during the period from February 25 - July 31, 2004. It is apparent that the “sales” were nearly constant:

<u>Start Date of Sale</u>	<u>End Date of Sale</u>	<u>Descriptive Language</u>
February 25	February 29	“Up to 60% off-Million \$ Savings Event”
March 2	March 15	“Bonus Card Sale”
March 16	March 22	“Half Off Sale”
March 23	March 23	“Preferred Customer Day! 50% Off Reg. Price All Suits”
March 24	March 29	“Million Dollar Savings Sale! 50% OFF”
March 30	April 21	“The BIG \$199 SALE”
April 22	April 26	“5-Day Spring Sale!”
April 27	April 27	“50% off Elite Customer Event”
April 28	May 1	“ URGENT NOTICE 4 DAYS ONLY! 50% OFF ”
May 2	May 17	“PASSPORT to Savings UP TO \$300 OFF!”
May 18	May 24	“EVERY SUIT IS ON SALE! 50% OFF OR MORE”
May 25	May 25	“Preferred Customer Day!One Day Only 50% Reg.Price”
May 26	May 31	“All Suits, Sportcoats & Blazers 50% OFF!”
June 1	June 5	“Summer Values!”
June 6	June 14	“Father’s Day BONUS CARD Sale!”
June 15	June 20	“Special Event for E-mail Customers Only!50%Off Orig.Price”
June 21	June 23	“A Gift For You!”

June 25	July 5	“4 th of July Sale! Up to 70% OFF!”
July 8	July 12	“URGENT NOTICE FOUR DAYS ONLY”
July 14	July 19	“Midsummer Clearance Sale!”
July 22	July 23	“Preferred Customer Event-2 Days Only!”
July 27	July 31	“Express Letter Sale- Up to an Additional 50% off Clearance”

9. The Attorney General believes that the promotional material and advertising campaign utilized by Jos. A. Bank is misleading and deceptive and has the capacity to mislead consumers to believe that they are being offered a discount from the company’s regular prices when, in fact, they are not. By reason of the foregoing, Jos. A. Bank has engaged in conduct that violates (i) GBL §349, which prohibits deceptive business practices, (ii) GBL §350, which prohibits false advertising, and (iii) Part 233 of Title 16 of the Code of Federal Regulations, the FTC’s “Guides Against Deceptive Pricing,” which prohibits the practice of falsely describing a price as a regular price.

10. By reason of the foregoing, Jos. A. Bank has also engaged in repeated fraudulent and illegal acts, and demonstrated persistent fraud and illegality in the carrying on, conducting or transaction of business, in violation of Executive Law §63(12).

Jos. A. Bank’s Position

1 Jos. A. Bank does not believe that it has engaged in any illegal, deceptive, fraudulent or inappropriate business practices.

12. IT NOW APPEARS that Jos. A. Bank is willing to enter into this Assurance without admitting to the Attorney General’s finding or to any violation of law, and that the Attorney General is willing to accept this Assurance pursuant to Executive Law §63(15) in lieu of commencing a statutory proceeding.

PARTIES SUBJECT TO ASSURANCE

IT IS HEREBY AGREED that this Assurance shall extend to Jos. A. Bank, its officers, directors, agents, employees and assignees, and any individual or entity through which Jos. A. Bank may now or hereafter act.

DECEPTIVE ACTS AND PRACTICES PROHIBITED

IT IS FURTHER AGREED that Jos. A. Bank shall not engage in any deceptive acts and practices or false advertising in violation of GBL §§ 349 and 350.

IT IS FURTHER AGREED that Jos. A. Bank shall not advertise, or offer to sell, any item at a “sale” or discount from a purported “regular” or comparably-termed price unless that price is the actual, bona fide price at which the item was openly, actively and regularly offered for sale by Jos. A. Bank, for a reasonably substantial period of time, in the recent, regular course of its business, and not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based. Compliance with the requirements of 16 C.F.R. 233.1 shall be deemed compliance with the requirements of this section.

IT IS FURTHER AGREED by Jos. A. Bank that it shall comply with all provisions of 16 C.F.R. 233

MISCELLANEOUS

IT IS FURTHER AGREED that the acceptance of this Assurance by the Attorney General shall not be deemed or construed as an approval by the Attorney General of any of the activities of Jos. A. Bank, and Jos. A. Bank shall not make any representations to the contrary.

PENALTIES AND COSTS

IT IS FURTHER AGREED that Jos. A. Bank shall pay the State of New York at the time of the execution of this Assurance the sum of four hundred and twenty-five thousand dollars (\$425,000.00) as civil penalties, and the sum of fifty thousand dollars (\$50,000.00) as costs, by certified check for the aggregate sum of four hundred and seventy-five thousand dollars (\$475,000.00), delivered to Eliot Spitzer, Attorney General of the State of New York, c/o Yasmin R. Kutty, Assistant Attorney General, 101 East Post Road, White Plains, NY 10601-5008.

COMPLIANCE REPORT TO THE ATTORNEY GENERAL

IT IS FURTHER AGREED that Jos. A. Bank shall file with the Attorney General, no later than thirty days after executing this Assurance, an affidavit, sworn to by a knowledgeable employee of Jos. A. Bank, demonstrating that it has devised policies and procedures to effect compliance with the terms of this Assurance.

IT IS FURTHER AGREED that Jos. A. Bank shall also file with the Attorney General, no later than one hundred and twenty days after executing this Assurance, an affidavit, sworn to by a knowledgeable employee of Jos. A. Bank, demonstrating that it is operating in full compliance with the terms of this Assurance.

ENFORCEMENT

IT IS FURTHER AGREED that evidence of a violation of this Assurance shall constitute *prima facie* proof of violation of Executive Law §63(12) in any civil action or proceeding thereafter commenced by the Attorney General.

PRIVATE RIGHTS

IT IS FURTHER AGREED that nothing contained herein shall be construed to deprive any person, corporation, association or other entity of any private right under the law.

Dated: White Plains, New York
September _____, 2004

JOS. A. BANK CLOTHIERS, INC.

By: _____
R. Neal Black
Executive Vice President
Jos. A. Bank Clothiers, Inc.

ELIOT SPITZER

Attorney General of the State of New York

By: _____
Yasmin R. Kutty
Assistant Attorney General
Westchester Regional Office

CORPORATE ACKNOWLEDGMENT

STATE OF MARYLAND
COUNTY OF CARROLL)ss.

R. Neal Black, being duly sworn, deposes and says:

I am the Executive Vice President of Jos. A. Bank Clothiers, Inc., the respondent described herein, and which executed the foregoing Assurance of Discontinuance. I have executed the foregoing instrument with the consent and authority of Jos. A. Bank Clothiers, Inc. and those responsible for the acts of said entity duly acknowledge the same.

R. Neal Black
Executive Vice President
Jos. A. Bank Clothiers, Inc.

Sworn to before me this ____ day
of September, 2004.

Notary Public