

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

NINE WEST GROUP INC.,

corporation

Docket
No. C-3937

PUBLIC

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
PETITION TO REOPEN AND MODIFY ORDER

Pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C.

9:45 AM - 10:00 AM - D 1051 10 SEP 2005 NEW YORK, NY

unrestricted license to engage in all types of minimum resale price maintenance, nor is Nine West requesting a declaration from the Commission that minimum resale price maintenance is *per se* legal, contrary to one comment's suggestion,¹ or even that there is a presumption of legality. Rather, Nine West wishes only to operate under the same

store hours, more convenient or prestigious store locations, better-trained and more enthusiastic employees, or favoritism in shelf placement”. *Id.*

Consumers differentiate women’s footwear brands² — as they do other fashion accessories like those at issue in *Leegin* — on the basis of criteria in addition to price. (See Supplemental Declaration of Andrew Cohen (hereinafter “Suppl. Cohen Decl.”) ¶ 5.) To aid in favorably distinguishing its brands from competitors’ brands

Nine West relies on retailers to provide adequate and appropriate floor space, advertise and promote Nine West’s branded products, actively manage product assortment flow, and employ highly trained sales staff. (Declaration of Andrew Cohen (hereinafter “10/24/07 Cohen Decl.”) ¶ 12.) Nine West similarly depends on retailers to operate in convenient, aesthetically pleasing locations during desirable hours.³ (Suppl. Cohen Decl.

² One economic study specifically identified shoe retailers as being vulnerable to free riding:

[REDACTED]

¶ 6.) Nine West also cannot rely solely on retailers owned by its parent company, Jones Apparel Group, to provide these desired services. (*Id.* ¶ 7.) Jones derived only about 17% of its Q3 2007 revenues from its retail stores selling Nine West and other brands, reflecting the importance of non-Jones-owned retailers to Nine West.⁴ (*Id.*)

As the Supreme Court's opinion in *Leegin* and economists⁵ would predict, free riding by discount retailers on the efforts of those retailers who provide these desired services has been a problem for Nine West. (Suppl. Cohen Decl. ¶ 8.) Specifically, intrabrand competition from deep-discounting dealers has in some cases deterred other

retailers from providing additional services that would enhance Nine West's ability to

would have preferred to utilize a less drastic response. (*Id.*) Similar free riding among Nine West retailers has occurred in other regions. (*Id.*) Modifying the Order to permit Nine West to engage in minimum resale price maintenance other than unilateral termination would assist in reducing such free riding.

B. Forcing Nine West to Continue to Operate Under *Per Se* Restrictions Is Anticompetitive and Harmful to Consumers.

Under the terms of the Order, Nine West is prohibited from employing vertical minimum price restraints, but it may unilaterally refuse to deal with retailers that do not follow its suggested prices, under *United States v. Colgate*, 250 U.S. 300 (1919). Employing this extreme tactic of retailer termination, the *Leegin* Court acknowledged, can lead, and has led, rational manufacturers to take wasteful measures. 127 S. Ct. at 2722-23. The Court explained:

pricing. (Suppl. Cohen Decl. ¶ 10.) In such instances, less extreme measures, such as suspension of — or at least discussion with — the deep-discounting retailer would have been preferable (*id.*), but would not have been protected under *Colgate*, or permitted by the Order.

Moreover, to comply with the Order, Nine West must ensure that none of its retailers incorrectly implies or concludes that it has entered into any “agreement” with ~~Nine West regarding pricing. This effort is made at great expense to Nine West, which~~

In addition to the expense and inefficiency of Nine West's referrals to

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[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

store and national chain store sales in that market.⁶ (Suppl. Cohen Decl. ¶ 12.) Nine

West's top competitors and their approximate market shares were as follows:

Brown Shoe Co. — 6.2%

Vince Camuto Group — 4.4%

demonstrate their programs' validity with a showing of their procompetitive effects. Leaving Nine West at this disadvantage is anticompetitive and harmful to consumers, creating inefficiencies and higher costs and causing the market to operate less efficiently for all participants. (*See also* Petition at 11-12.)

~~It is important to note, however, that Nine West seeks only to be placed~~

on a level playing field with its competitors — not given a *carte blanche* minimum resale price maintenance pass.

III. NINE WEST WILL REMAIN SUBJECT TO STATE AND FEDERAL ANTITRUST LAWS IF THE COMMISSION GRANTS THE PETITION.

Even if the Commission modifies the Order as requested, Nine West will remain subject to state and federal antitrust laws if its use of minimum resale price maintenance should produce anticompetitive effects. Indeed, as the States themselves

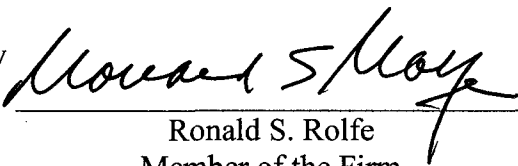
Gen. Bus. Law § 369-a.⁹ Nine West would no doubt remain under careful scrutiny by both the Commission and the states if the Order is modified as requested.

Conclusion

For all of the reasons stated above, as well as in the original Petition, Nine West respectfully requests that parts (A)-(D) of Paragraph II of the April 11, 2000 Decision and Order be deleted so as to prohibit minimum resale price maintenance no longer.

February 8, 2008

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⁹ In the majority of states, but certainly not all, federal antitrust precedent is used by courts in interpreting state antitrust statutes. (See Supplemental Exhibit 1, annexed to this Supplemental Memorandum, for a summary of current state law regarding resale price maintenance.)

Supplemental Memorandum in Support of Petition to Reopen and Modify Order
Supplemental Exhibit 1

In the following states, state law regarding resale price maintenance is unsettled, but would likely follow federal law: Alabama; Alaska; Arizona; Colorado; Connecticut; Delaware, Florida; Georgia; Hawaii; Illinois; Indiana; Iowa; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Missouri; Nebraska; New Jersey; New Mexico; North Dakota; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; Washington; West Virginia; Wisconsin

In the following states, state law regarding resale price maintenance and the role of federal precedent in interpreting state antitrust statutes are both unclear or

unsettled: Idaho; Kansas; Mississippi; Montana; Nevada; New Hampshire; North

Carolina; Vermont; Wyoming

Other:

Arkansas: State law unclear. Statute declares it illegal "to regulate or fix, either in this state or elsewhere, the price of any article of manufacture", but a 1910 state supreme court decision says that state law does not prohibit resale price maintenance.