UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of NINE WEST GROUP INC., a 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. § 45(b), and Commission Rule 2.51, 16 C.F.R. § 2.51, Nine West Footwear Corporation, successor-in-interest to Nine West Group Inc. (hereinafter "Nine West") hereby submits this Supplemental Memorandum in support of its Petition to Reopen and Modify Order (hereinafter the "Petition") previously filed with the Commission on October 29, 2007, requesting that the above-captioned proceedings be reopened and that Paragraph II of the Decision and Order of April 11, 2000 (hereinafter the "Order") be modified following the dramatic change in antitrust law brought about by the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

Overview

Nine West's Petition requests that Paragraph II of the Order be modified to allow Nine West to take actions to maintain resale prices, other than unilaterally terminating the retailer without prior notice. (Petition at 1.) The scope of Nine West's request was — and remains — extremely narrow. Nine West does not seek an

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 antitrust legal framework as its competitors, allowing it to employ forms of minimum resale price maintenance that leading economists and the Supreme Court have acknowledged are more effective at promoting interbrand competition than unilateral retailer termination.

I. THE DESIRED MODIFICATION TO THE ORDER WILL PRODUCE PROCOMPETITIVE EFFECTS.

A. Free Riding Among Retailers Selling Nine West Shoes Deters Retailers from Providing Desired Services, and Allowing Nine West to Engage in Minimum Resale Price Maintenance Will Reduce Free Riding and Benefit Consumers.

In *Leegin*, the Supreme Court acknowledged that minimum resale price maintenance promotes interbrand competition by deterring free riding and thereby encouraging retailers to "invest in tangible or intangible services or promotion efforts that aid the manufacturer's position as against rival manufacturers". 127 S. Ct. at 2715-16. As noted by the *Amici Curiae* economists in *Leegin*, the procompetitive effects of retailer investment in such services are "most significant in cases for products that are differentiated and therefore are sold on the basis of features and quality as well as price". Brief of *Amici Curiae* Economists in Support of Petitioner, *Leegin Creative Leather Prods. v. PSKS, Inc.*, at 6. For example, women's accessories "may benefit from longer

[1] *See Amended States' Comments Urging Denial of Nine West's Petition*, filed with the Commission on January 17, 2008 (hereinafter "States' Comment"), at 5.

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 brands[2] — 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.

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

> "The free rider problem is not confined to high-tech, information-intensive consumer durables. RPM occurs in markets where goods do not require detailed information, extensive product demonstration, or significant post-sale service commitments. Such products include women's fashion accessories, *shoes*, candy, and designer jeans. In the case of such products, retailers may use RPM-protected margins to invest in retail services like longer hours of operation, more attractive store furnishings, and other amenities that owe little to specialized information. Besides shopping amenities, retailers with reputations for selling high-quality merchandise provide what has been called a "quality certification" service to manufacturers. A manufacturer may use RPM to insure that reputable retailers – those who help the manufacturer build and maintain a good reputation for its brand – carry its brand by affording those retailers protection from free-riding discounters."

Kenneth G. Elzinga and David E. Mills, *The Economics of Resale Price Maintenance, in Issues in Competition Law and Policy* (Wayne D. Collins, ed., American Bar Association, forthcoming 2008) at 3 (emphasis added), *available at* http://www.virginia.edu/economics/papers/mills/RPM for ABA.pdf, *cited in* Brief of *Amici Curiae* Economists in Support of Petitioner, *Leegin Creative Leather Prods. v. PSKS, Inc.*

[3] Notably, although Nine West does provide certain benefits to retailers who designate sales personnel to devote additional time specifically to selling Nine West

¶ 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 economists[5] 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 compete with other manufacturers. (*Id.*) For example, in one instance an independent retailer with minimal floor space who provided little customer service offered Nine West styles at rock-bottom prices, taking advantage of a nearby retailer's superior customer service, displays and advertising. (*Id.* ¶ 9.) Nine West unilaterally terminated the independent retailer to prevent harm to Nine West brands and other nearby retailers, but

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products, Nine West does not automatically provide benefits for other important retailer services such as desirable location, hours, floor space, etc. (Suppl. Cohen Decl. ¶ 6.)

[4] At the end of 2000, Jones Apparel Group had 773 stores selling primarily women's footwear (432 specialty stores and 341 outlet stores). (Suppl. Cohen Decl. ¶ 7.) At the end of 2006, Jones had 796 stores selling primarily women's footwear (398 specialty stores and 398 outlet stores). (*Id.*) Outlet stores provide a broad selection of Jones brands at value prices, offering a distribution channel for residual inventories of current and proven prior season's styles, with the remainder of the merchandise consisting of discontinued styles. (*Id.*)

[5] *See* Brief of *Amici Curiae* Economists in Support of Petitioner, *Leegin Creative Leather Prods. v. PSKS, Inc.*, at 5-10; *see also* T. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 122-23 (1983) (reviewing a study of a Commission case against Florsheim shoes that concluded that it was "analytically plausible, and supported by the evidence available from an industry study" that Florsheim used resale price maintenance to create a "strong signal of product quality" and combat free riding), *cited in Leegin*, 127 S. Ct. at 2715, 2717, 2718.

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:

> "A manufacturer might refuse to discuss its pricing policy with its distributors except through counsel knowledgeable of the subtle intricacies of the law. Or it might terminate longstanding distributors for minor violations without seeking an explanation. The increased costs these burdensome measures generate flow to consumers in the form of higher prices."

Id. (citations omitted); *see also* Brief of PING, Inc. as *Amicus Curiae* in Support of Petitioner, *Leegin Creative Leather Prods. v. PSKS, Inc.*, at 9-18 (describing the costly and inefficient programs PING has implemented solely to preserve its ability to terminate excessively discounting retailers, as provided for in *Colgate*).

Under the Order, which implements *Colgate* and *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), Nine West has been burdened by just such inefficiencies. On numerous occasions, Nine West executives have been forced to decide between unilaterally terminating deep-discounting retailers that were harming brand integrity and other service-providing retailers, or abiding the discounters' harmful

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 must provide training and allocate resources that could otherwise be used to improve the quality of Nine West products, the efficiency of its production systems, the development of new products to increase consumer choice, or the provision of additional consumer services. Instead, these resources are dedicated only to helping Nine West avoid an antitrust lawsuit. For instance, Nine West has retained outside counsel to train its sales staff and executives about how to run the gauntlet between *Colgate* on the one hand and *Dr. Miles* and the Order on the other. (Suppl. Cohen Decl. ¶ 11.) Nine West attorneys have drafted scripts to guide divisional management and sales employees through retailer-initiated conversations relating to pricing. (*Id.*) New Nine West employees holding management or sales positions in the wholesale divisions receive (and are required to certify receipt of) an antitrust compliance handbook and watch a videotaped training program on Nine West pricing policies and antitrust compliance under the Order. (*Id.*) Additional training sessions are scheduled regularly approximately once per year to keep wholesale sales employees apprised of Nine West's pricing policies. (*Id.*) Further, employees are instructed that they must direct questions regarding retailer pricing to one of two specially designated company executives. (*Id.*)

In addition to the expense and inefficiency of Nine West's safeguards to prevent the appearance of an "agreement" regarding prices, the act of unilateral termination itself can be costly and produce serious anticompetitive effects. Unilateral termination harms consumers by reducing the number of retailers selling a given brand and reducing the supply of the product in question, thereby limiting consumer choice and preventing goods from being as readily accessible. *See* Brief of PING, Inc. as *Amicus Curiae* in Support of Petitioner, *Leegin Creative Leather Prods. v. PSKS, Inc.*, at 4 (describing how unilateral termination of more than 1,000 retailers as permitted under *Colgate* limits consumer choice and ultimately reduces output). The net result of such terminations is that the manufacturer's goods are less accessible to consumers, translating into reduced interbrand competition. Also, such terminations often come at an added cost of retailer good will. Retailers who might otherwise be effective dealers may choose not to sell a manufacturer's products because of the danger of unilateral termination without warning.

Such negative effects are particularly onerous for Nine West following *Leegin*. Under the Order, Nine West must maintain its costly and inefficient antitrust safeguards, but its competitors now may use less extreme measures to control resale prices. As discussed further *infra* in Part II, leaving Nine West to operate at this competitive disadvantage is unfair and causes the market to operate less efficiently for all participants, translating ultimately into higher costs for consumers.

C. The Highly Competitive Nature of the Women's Footwear Market Makes It Unlikely that Minimum Resale Price Restraints Would Be Used to Facilitate Collusion.

The market for women's footwear is highly competitive and there are not significant impediments to entry. (10/24/07 Cohen Decl. ¶ 9.) In 2007, Nine West

brands accounted for about 10.4% of that market, based upon available total department 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%
Coach, Inc. — 3.7%
Nike, Inc. — 2.9%
C&J Clarks International Ltd. — 2.7%
Steve Madden Ltd. — 2.5%
Kenneth Cole Productions, Inc. — 2.0%
Wolverine World Wide, Inc. — 1.5%
Marc Fisher LLC — 1.3%
Nina Footwear Corporation — 1.1%
Liz Claiborne — 1.0%

(*Id.*)

Given this diverse and competitive marketplace, there is little danger that Nine West — or any other manufacturer — could abuse minimum resale price maintenance to an anticompetitive end. *See Leegin*, 127 S. Ct. at 2720 (noting that "[i]f a retailer lacks market power, manufacturers likely can sell their goods through rival retailers" and "there is less likelihood it can use the practice to keep competitors away from distribution outlets").

II. APPLYING THE SAME ANTITRUST LEGAL FRAMEWORK TO NINE WEST AS TO ITS COMPETITORS PROMOTES CONSIDERATIONS OF FAIRNESS AND THE PUBLIC INTEREST.

Although, as described *supra* and in the Petition, all the procompetitive rationales for minimum resale price maintenance discussed in *Leegin* apply to Nine West and the women's footwear market more broadly, it is difficult for Nine West to set forth

[6] As submitted previously, Nine West women's footwear brands accounted for 12.5% of sales year-to-date July 2007 in department stores. (10/24/07 Cohen Decl. ¶ 8.)

specific, empirical examples of such procompetitive effects because Nine West at present is prohibited from engaging in any kind of minimum resale price maintenance besides unilateral termination. If, as the comments suggest,[7] a demonstration of actual procompetitive effects is a prerequisite to modification of the Order, then Nine West's Petition is hopeless and it is trapped in a state of perpetual competitive disadvantage. Nine West cannot demonstrate procompetitive effects of minimum resale price maintenance programs that it is preemptively prohibited from implementing. Likewise, under *In the Matter of Sharp Electronics Corp.*, 112 F.T.C. 303 (1989), Nine West should not be required now to make a showing of procompetitive effects of any minimum resale price maintenance program in place at the time of the Order. In *Sharp*, where because of an intervening Supreme Court decision the Commission set aside a consent order prohibiting Sharp from imposing territorial restrictions on its dealers or defining the class of customers to whom dealers were permitted to sell Sharp calculators, the Commission analyzed the potential procompetitive and anticompetitive effects of such prohibitions *in the present* — not at the time of the consent order for a *nunc pro tunc* determination. *See Sharp*, 112 F.T.C. 303 (1989) (observing "the market *today* appears to be competitive" and noting that "[t]here also appear to be no significant impediments to entry into the market") (emphasis added). Meanwhile, under *Leegin* Nine West's competitors may engage in minimum resale price maintenance[8] and — if those programs are challenged —

[7] The States argue that Nine West must be required to prove: "(1) its vertical price fixing caused retailers to provide actual enhanced value or services; (2) the enhanced value or services increased demand for its shoes; and (3) the increased demand from that value or those services was greater than the decreased demand caused by the higher price that consumers paid." States' Comment at 8.

[8] Nine West executives believe that numerous competitors currently employ some form of resale price maintenance, although the practice is far from ubiquitous. Nine West

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, moreover, 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 assert, many states "vigorously prosecute vertical price-fixing". States' Comment at 2. For instance, minimum resale price maintenance is unlawful under California law, and any contract setting forth a minimum resale price maintenance agreement is unenforceable under New York law. *See* Cal. Bus. & Prof. Code § 16720(d), (e)(3); N.Y.

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executives understand that Coach, Inc., Deckers Outdoor Corporation, C&J Clark International Limited, Born Footwear, Ecco and Brown Shoe Company all use some type of minimum resale price maintenance. (Suppl. Cohen Decl. ¶ 13.) Also, Coach, Merrell, Born, Ecco, Sofft, Clarks, Kate Spade, UGG and BCBG/BCBG Max Azria are all competitor brands that have been excluded from department store point-of-sale coupons, based on a review of fine-print exclusions in Macy's, Bloomingdale's and Lord & Taylor's point-of-sale coupons appearing in publications such as *The New York Times*, the Stamford *Advocate* and direct mail promotions. (*Id.*) What Nine West does not know — without the types of discussions that would be problematic — is to what extent its competitors have embraced the *Leegin* world and rejected the *Dr. Miles/Colgate* straightjacket.

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.)

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.

California: Minimum resale price maintenance has been held to be *per se* illegal under state law, though the exception under *United States v. Colgate*, 250 U.S. 300 (1919), applies.

New York: State statute declares unenforceable "[a]ny contract provision" setting forth a minimum resale price maintenance agreement.

Ohio: State law unsettled, but early state court decisions have held resale price maintenance to be *per se* illegal.