



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of  
NINE WEST GROUP INC.,  
a corporation.

Docket  
No. C-3937  
  
PUBLIC

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 requests 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 to allow Nine West to take actions to maintain resale prices, other than unilaterally terminating the retailer without prior notice. (“resale price maintenance”.) A copy of the Order is annexed to this Petition as Exhibit 1.

Parts (A)-(D) of Paragraph II of the Order prohibit Nine West from fixing, controlling or maintaining the retail price of women’s footwear, as well as from coercing or pressuring any dealer to maintain, adopt or adhere to any resale price.<sup>1</sup> At the time the Order was issued setting forth these prohibitions, Commissioners Orson Swindle and

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<sup>1</sup> The Order also contains exemptions for conduct protected under *United States v. Colgate*, 250 U.S. 300 (1919), allowing Nine West 1) to refuse unilaterally to deal with retailers who fail to comply with resale prices announced in advance; and 2) to establish and maintain cooperative advertising programs.

Thomas B. Leary criticized the “overbroad per se condemnation of minimum resale price maintenance” under *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911), and encouraged the Supreme Court to reevaluate that rule. In June 2007, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), the Court did precisely that, citing the various procompetitive justifications for minimum resale price maintenance and holding that the application of a *per se* rule was unwarranted and that the rule of reason should apply.

This holding constituted a dramatic change in antitrust law and requires that the Order in this matter now be reexamined. Because implementation of minimum resale price maintenance agreements currently prohibited by the Order would enable Nine West to develop and maintain favorable brand integrity more effectively, thereby enhancing competition at the interbrand level, the Order should be modified to prohibit those restraints no longer.

Further, considerations of fairness and the public interest likewise necessitate that Paragraph II of the Order be modified. Nine West is at an unfair competitive disadvantage because it is prohibited from entering into minimum resale price maintenance agreements of the kind now available to its competitors under the *Leegin* decision. Continuing to prohibit only Nine West from entering into minimum resale price maintenance agreements that the Supreme Court has acknowledged have procompetitive effects is decidedly not in the public interest, and therefore such prohibitions should be vacated.

Accordingly, for the reasons set forth below, Nine West respectfully requests that Paragraph II of the Order be modified to prohibit minimum resale price maintenance no longer.

### **Overview of Nine West's Business and the Women's Footwear Market**

Nine West manufactures and sells quality women's footwear under a variety of brand labels, offering its products to retail dealers throughout the United States, including many of the nation's largest retail chains. (*See* Declaration of Andrew Cohen (hereinafter "Cohen Decl.") ¶¶ 5-6 .) Nine West's footwear products range in price from about \$16 to \$395 and are marketed to consumers whose footwear needs range from casual to career to dress and special occasion. (*Id.* ¶ 7.)

In the market relevant here, Nine West brands compete with approximately 200 other women's footwear brands, making up a more than \$1.8 billion market in department store sales year-to-date July 2007. (Cohen Decl. ¶ 8.) Nine West brands account for about 12.5% of that market, for which there are not significant barriers to entry. (*Id.* ¶¶ 8-9.) The number of national women's footwear brands that compete with Nine West and that are sold in department stores increased by over 40% between 2003 and 2006. (*Id.* ¶ 9.)

Nine West markets and sells its various brands of footwear through both large department stores and specialty retailers. (Cohen Decl. ¶ 6.) Its footwear is also marketed and sold directly to consumers through specialty and outlet retail stores owned and operated by an affiliate of Nine West. (*Id.*) To increase sales, Nine West assigns employees with significant retail experience to coordinate with retailers, providing guidance on training sales staff and creating "focus areas" or "concept shops" within

stores to display the full collection of a Nine West brand in one area. (*Id.* ¶ 10.) Nine West also employs a cooperative advertising program for its products whereby it shares the costs of certain retailers' advertising and promotional expenses. (*Id.* ¶ 11.)

### **The Order and the Relief Nine West is Seeking**

In its Complaint, the Commission alleged that Nine West had engaged in contracts with certain of its dealers, the substantial terms of which were "to fix, raise, maintain or stabilize the retail prices at which Nine West products were advertised and sold to the consuming public". (Complaint ¶ 6.) Nine West and the Commission entered into an agreement whereby the Commission issued a Decision and Order that, in pertinent part, prohibits Nine West from:

- (A) fixing, controlling or maintaining the resale price at which any dealer may advertise, promote, offer for sale or sell Nine West Products<sup>2</sup>;
- (B) requiring, coercing or otherwise pressuring any dealer to maintain, adopt or adhere to any resale price;
- (C) securing or attempting to secure any commitment or assurance from any dealer concerning the resale price at which the dealer may advertise, promote, offer for sale or sell Nine West Products;
- (D) for a period of ten years from the date on which the Order became final, adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan pursuant to which Nine West notifies a dealer in advance that (1) the dealer is subject to warning or partial or temporary suspension or termination if it sells, offers for sale, promotes or advertises any Nine West product below any resale price designated by Nine West; and (2) the dealer will be subject to a greater sanction if it continues or renews selling, offering for sale, promoting or advertising Nine West Products below any such designated resale price. (Order ¶ II.)

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<sup>2</sup> As defined in the Order, the phrase "Nine West Products" encompasses "all women's footwear sold under brand labels owned by Nine West, including, but not limited to, the following: Amalfi, Bandolino, Calico, Capezio, cK/Calvin Klein, Easy Spirit, Enzo Angiolini, Evan-Picone, Joyce, Nine West, Pappagallo, Selby, Westies, and 9 & Co., that are offered for sale to consumers located in the United States of America and U.S. territories and possessions, or to dealers, by Nine West". (Order ¶ I.)

The Order also contains exemptions for conduct permissible under *Colgate*, stating that it does not prohibit Nine West from “announcing resale prices in advance and unilaterally refusing to deal with those who fail to comply” or “establishing and maintaining cooperative advertising programs that include conditions as to the prices at which dealers offer Nine West Products, so long as such advertising programs are not a part of a resale price maintenance scheme”. (Order ¶ II.)

Section 5(b) of the Federal Trade Commission Act provides that the Commission may reopen an order to consider whether that order should be modified if an applicant “makes a satisfactory showing that changed conditions of law or fact” require such modification. 15 U.S.C. § 45(b); *see also* 16 C.F.R. § 2.51(b). A satisfactory showing sufficient to require reopening and modification is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make its continued application inequitable or harmful. *See Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4; S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (reopening appropriate in instances involving significant changes or changes causing unfair disadvantage); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (modification warranted by “clear showing” of changes that eliminate reasons for order or that order causes unanticipated hardship). The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. 16 C.F.R. § 2.51(b)(1)(ii).

As demonstrated *infra* Part I, the Commission should delete parts (A)-(D) of Paragraph II, modifying the Order to eliminate its minimum resale price maintenance

prohibition because the *Leegin* decision constituted a “changed condition[] of law” — the very change in the law called for by Commissioners Swindle and Leary. This restraint on Nine West is inconsistent with the state of antitrust law post-*Leegin*, as well as out of step with current economic scholarship regarding efficient distribution of products in a competitive market. Because the *Leegin* decision acknowledged procompetitive justifications for minimum resale price maintenance and held that such price restraints must be evaluated on a case-by-case basis under the rule of reason, the Commission should now reconsider Nine West’s conduct under that new standard.

Applying the rule of reason, the Order’s prohibitions cannot be any longer justified. Nine West seeks to use minimum resale price maintenance to bolster its efforts to persuade consumers that its products are more fashionable and of higher quality than those of its competitors. Retailers play a crucial role in this process by providing adequate and appropriate floor space, advertising and promoting Nine West’s branded products, actively managing product assortment and flow, and employing highly trained sales personnel. (*See* Cohen Decl. ¶ 12.) However, the Order’s prohibition of minimum resale price maintenance currently inhibits Nine West’s ability to guarantee its retailers sufficient profit margins to justify spending time and money providing these enhanced services to consumers. (*Id.* ¶¶ 13, 15, 16.) Full-service dealers are especially reluctant to commit resources for such services when they know they are in danger of losing sales to low-end retailers who are able sell Nine West products at lower prices by “free riding” off their efforts. (*Id.*) As the *Leegin* Court noted, minimum resale price maintenance is a formidable tool for preventing such free riding. Used for that purpose — the purpose for which Nine West seeks to employ it — minimum resale price maintenance is

procompetitive and legal under the rule of reason, and thus Paragraph II's prohibition of minimum resale price maintenance should be set aside.

Moreover, as demonstrated *infra* Part II, the Commission should remove the restraints on Nine West to promote considerations of fairness and the public interest. At present, Nine West is being unfairly hindered as a result of these prohibitions that apply to Nine West but not to any of its competitors. The women's footwear market is highly competitive with low barriers to entry. (Cohen Decl. ¶ 9.) Because Nine West's competitors may employ minimum resale price maintenance to bolster their brands' images but Nine West may not, the Order is causing competitive injury to Nine West. (*Id.* ¶¶ 15, 16.) Eliminating the Order's restrictions in parts (A)-(D) of Paragraph II will permit Nine West likewise to use that form of vertical restraint, allowing it to compete more effectively, to the benefit of consumers.

**I. THE SUPREME COURT'S DECISION IN *LEEGIN* CONSTITUTED A SIGNIFICANT CHANGE IN THE LAW JUSTIFYING REOPENING AND MODIFYING THE ORDER CURRENTLY RESTRAINING NINE WEST.**

In June, the Supreme Court issued its decision in *Leegin* expressly overruling the rule of *per se* illegality for minimum resale price maintenance agreements. The Court held that such agreements should be evaluated under the rule of reason. This holding radically altered the landscape of antitrust law, in the process undermining the Commission's legal basis for its Order restraining Nine West. Indeed, under a rule of reason analysis there is no basis for continuing the Order's prohibitions set forth in parts (A)-(D) of Paragraph II.

In its decision, the *Leegin* Court acknowledged three procompetitive justifications for a manufacturer's use of resale price maintenance. First, the Court noted that a manufacturer's use of vertical price restraints tends to eliminate intrabrand price

competition, which in turn encourages retailers to “invest in tangible or intangible services or promotional efforts that aid the manufacturer’s position as against rival manufacturers”, thereby promoting interbrand competition. *See Leegin*, 127 S. Ct. at 2715. Without such vertical price restraints, the Court explained, “discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate”. *Id.* Minimum resale price maintenance prevents the discounter from undercutting the service provider. “With price competition decreased, the manufacturer’s retailers compete among themselves over services.” *Id.* at 2716.

Second, the Court noted that resale price maintenance can increase interbrand competition by facilitating market entry for new firms and brands. *Id.* “[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer.” *Id.* (quoting *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)).

Third, the Court explained that resale price maintenance can increase interbrand competition “by encouraging retailer services that would not be provided even absent free riding”. *Id.* Offering a guaranteed margin for retailers while threatening termination if retailers do not perform adequately is an efficient way of providing an incentive for retailers to more aggressively and effectively sell a product. *Id.* For example, resale price maintenance may be effective for motivating retailers to stock adequate inventories of a manufacturer’s goods, even in the face of uncertain consumer demand. *Id.*



Under the rule of reason, the procompetitive rationales for minimum resale price maintenance identified by the Court are plainly applicable to Nine West. For such companies in the highly competitive women's footwear market, resale price maintenance agreements are especially useful for assuring that retailers adhere to marketing policies by which positive brand images may be cultivated and maintained. To promote brand recognition and loyalty, Nine West relies upon its retailers to provide adequate and appropriate floor space, advertise and promote Nine West's branded products, actively manage product assortment and flow, and employ highly trained sales personnel, thereby bolstering consumer perception of Nine West brands. (*See* Cohen Decl. ¶ 12.) These are expensive tasks, and retailers generally make such financial investments only if there is assurance of reasonable profit margins. (*Id.* ¶ 13.) Likewise, retailers are reluctant to conduct costly promotional programs if other dealers will inevitably free ride on those efforts while selling the product at much lower prices. (*Id.*) Minimum resale price maintenance gives retailers the assurance of adequate margins and prevents such free riding, making retailers more willing to engage in the desired promotional programs and thereby enhancing interbrand competition.

Further, the sale of Nine West products by certain retailers at near-wholesale prices itself damages brand integrity by eroding the consumer perception that Nine West products are well-made, fashionable and in high demand. Consumers inherently associate higher-end women's footwear with a particular price range. (Cohen Decl. ¶ 14.) When certain retailers constantly offer Nine West products at extremely low, near-wholesale prices, consumers may incorrectly conclude that Nine West products are

lower quality or less desirable, which can result in harm to brand integrity and Nine West's competitive position generally. (*Id.*)

In addition, highly competitive conditions in the women's footwear market today make it unlikely that minimum resale price restraints could be used to facilitate collusion. There are also not significant impediments to entry into the market, as reflected by the steadily growing number of brands. (*See* Cohen Decl. ¶ 9.) Considering the procompetitive rationales for minimum resale price maintenance both generally and specific to Nine West's case, the Order's prohibition of those restraints does not survive analysis under the rule of reason.

The Commission has previously vacated an order dependent on a *per se* rule that was later abandoned for a rule of reason analysis. In *In the Matter of Sharp Electronics Corp.*, 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. 112 F.T.C. 303 (1989). Observing that subsequent Supreme Court decisions required that the rule of reason be applied to evaluate such vertical restraints, the Commission determined that the law had changed since it issued the order to an extent necessitating the proceedings be reopened. *Id.* Analyzing the vertical restraints Sharp sought to employ under a rule of reason analysis, the Commission determined Sharp's conduct was procompetitive and set aside the order. *Id.*

The Court's decision in *Leegin* is a similarly dramatic change in the law warranting the Commission's reconsideration of Nine West's conduct under the rule of reason. Because of the nature of the relevant market and the procompetitive justifications

for minimum resale price maintenance agreements identified by the *Leegin* Court and applicable to Nine West, Paragraph II of the Order should be modified to permit Nine West to enter into such agreements to the extent it believes necessary to make it a more effective competitor in the interbrand market.

**II. PARAGRAPH II OF THE ORDER SHOULD BE MODIFIED TO PROMOTE CONSIDERATIONS OF FAIRNESS AND THE PUBLIC INTEREST.**

Under the Order, Nine West is at an unfair competitive disadvantage because it is prohibited from entering into minimum resale price maintenance agreements of the kind now available to its competitors under the *Leegin* decision. (*See* Cohen Decl. ¶¶ 15, 16.) It is contrary to consumers' interests to apply a rigid *per se* prohibition of such agreements to Nine West but not to its competitors. Such a prohibition causes competitive injury — compromising Nine West's ability to compete with peer companies while creating inefficiencies and higher costs and causing the market to operate less efficiently for all participants. To continue prohibiting only Nine West from entering into minimum resale price maintenance agreements that the Supreme Court has acknowledged have procompetitive effects is decidedly not in the public interest, and thus such prohibition should be vacated.

Indeed, a decision to modify Paragraph II of the Order to permit Nine West to employ minimum resale price maintenance would be consistent with Commission precedent. The Commission has determined in previous instances that public interest considerations warranted reopening and modifying orders that prohibited particular companies from using vertical restraints that were no longer viewed as *per se* antitrust law violations and thus were permissible when implemented by competing

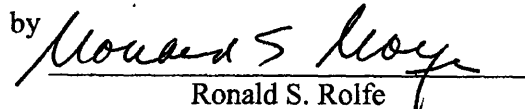
companies. See *In the Matter of Clinique Labs, Inc.*, 116 F.T.C. 126, 132-34 (1993) (vacating prohibition on certain cooperative advertising and promotional programs, noting that such programs had come to be evaluated using a rule of reason analysis and observing that the Commission's order prohibiting Clinique from itself employing such programs was adversely affecting the company's ability to compete and thus was contrary to the public interest); *In the Matter of U.S. Pioneer Elecs. Corp.*, Docket No. C-2755, 1992 WL 696670 (F.T.C. Apr. 8, 1992) (vacating prohibition on cooperative advertising restrictions as contrary to the public interest, noting that "Pioneer has demonstrated that many of its competitors currently use such programs with respect to consumer electronic product lines that are directly competitive with the Pioneer lines"); *In the Matter of the Magnavox Co.*, 113 F.T.C. 255 (1990) (modifying an order that prohibited certain non-price vertical restraints, noting that Magnavox had "shown that it is being injured in competing with other firms who are free to and do engage in such things"); see also *In the Matter of Onkyo U.S.A. Corp.*, 122 F.T.C. 325, 326-27 (1996) (modifying order to permit Onkyo to implement lawful price restrictive cooperative advertising programs and to announce resale prices in advance and terminate dealers who fail to adhere to such resale prices to thereby "put Onkyo on an equal basis with its competitors").

**Conclusion**

For all of the reasons stated above and in the accompanying Affidavit of Andrew Cohen, 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.

October 25, 2007

CRAVATH, SWAINE & MOORE LLP,

by   
Ronald S. Rolfe  
Member of the Firm

Worldwide Plaza  
825 Eighth Avenue  
New York, NY 10019-7475  
(212) 474-1000

*Attorneys for Applicant Nine West  
Footwear Corporation*

# Exhibit 1



1. Respondent Nine West Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. The mailing address and principal place of business of Respondent Nine West Group is Nine West Plaza, 1129 Westchester Avenue, White Plains, New York 10604-3529.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

## ORDER

### I.

IT IS ORDERED that for the purpose of this order, the following definitions shall apply:

(A) "*Nine West*" means Nine West Group Inc., its parent, Jones Apparel Group, Inc., and their affiliates, subsidiaries, divisions and other organizational units of any kind, that sold or sell Nine West Products as defined herein, their successors and assigns and their present officers, directors, employees, agents, representatives and other persons acting on their behalf. As used herein, "Nine West" shall not be construed to bring within the terms of this order any product that bears or is marketed in packaging that bears a trademark owned by Jones Apparel Group, Inc. or any of its predecessors, subsidiaries, units, divisions or affiliates other than Nine West Group Inc.

(B) "*Respondent*" means Nine West.

(C) "*Nine West Products*" means all women's footwear sold under brand labels owned by Nine West, including, but not limited to, the following: Amalfi, Bandolino, Calico, Capezio, cK/Calvin Klein, Easy Spirit, Enzo Angiolini, Evan-Picone, Joyce, Nine West, Pappagallo, Selby, Westies, and 9 & Co., that are offered for sale to consumers located in the United States of America and U.S. territories and possessions, or to dealers, by Nine West.

(D) "*Dealer*" means any person, corporation or entity not owned by Nine West, or by any entity owned or controlled by Nine West, that in the course of its business sells any Nine West Products in or into the United States of America.

(E) "*Resale price*" means any price, price floor, minimum price, maximum discount, price range, or any mark-up formula or margin of profit used by any dealer for pricing any product. "Resale price" includes, but is not limited to, any suggested, established, or customary resale price.



II.

IT IS FURTHER ORDERED that Nine West, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacturing, offering for sale, sale or distribution of any Nine West Products in or into the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, forthwith cease and desist from:

(A) Fixing, controlling, or maintaining the resale price at which any dealer may advertise, promote, offer for sale or sell any Nine West Products.

(B) Requiring, coercing, or otherwise pressuring any dealer to maintain, adopt, or adhere to any resale price.

(C) Securing or attempting to secure any commitment or assurance from any dealer concerning the resale price at which the dealer may advertise, promote, offer for sale or sell any Nine West Products.

(D) For a period of ten (10) years from the date on which this order becomes final, adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan pursuant to which Respondent notifies a dealer in advance that: (1) the dealer is subject to warning or partial or temporary suspension or termination if it sells, offers for sale, promotes or advertises any Nine West Products below any resale price designated by Respondent; and (2) the dealer will be subject to a greater sanction if it continues or renews selling, offering for sale, promoting or advertising any Nine West Products below any such designated resale price. As used herein, the phrase "partial or temporary suspension or termination" includes but is not limited to any disruption, limitation, or restriction of supply: (1) of some, but not all, Nine West Products; or (2) to some, but not all, dealer locations or businesses; or (3) for any delimited duration. As used herein, the phrase "greater sanction" includes but is not limited to a partial or temporary suspension or termination of greater scope or duration than the one previously implemented by Respondent, or a complete suspension or termination.

PROVIDED that nothing in this order shall prohibit Nine West from announcing resale prices in advance and unilaterally refusing to deal with those who fail to comply. PROVIDED FURTHER that nothing in this order shall prohibit Nine West from establishing and maintaining cooperative advertising programs that include conditions as to the prices at which dealers offer Nine West Products, so long as such advertising programs are not a part of a resale price maintenance scheme and do not otherwise violate this order.

III.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date on which this order becomes final, Nine West shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any Nine West Products to any dealer:

ALTHOUGH NINE WEST MAY SUGGEST RESALE PRICES FOR PRODUCTS, RETAILERS ARE FREE TO DETERMINE ON THEIR OWN THE PRICES AT WHICH THEY WILL ADVERTISE AND SELL NINE WEST PRODUCTS.

IV.

IT IS FURTHER ORDERED that, within thirty (30) days after the date on which this order becomes final, Nine West shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to each director, officer, dealer, distributor, agent, and sales representative engaged in the sale of any Nine West Products in or into the United States of America.

V.

IT IS FURTHER ORDERED that, for a period of two (2) years after the date on which this order becomes final, Nine West shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to each new director, officer, dealer, distributor, agent, and sales representative engaged in the sale of any Nine West Products in or into the United States of America, within ninety (90) days of the commencement of such person's employment or affiliation with Nine West.

VI.

IT IS FURTHER ORDERED that Nine West shall notify the Commission at least thirty (30) days prior to any proposed changes in Nine West such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VII.

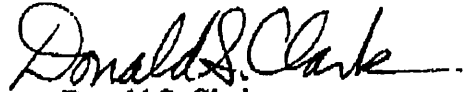
IT IS FURTHER ORDERED that, within sixty (60) days after the date this order becomes final, and at such other times as the Commission or its staff shall request, Nine West shall file

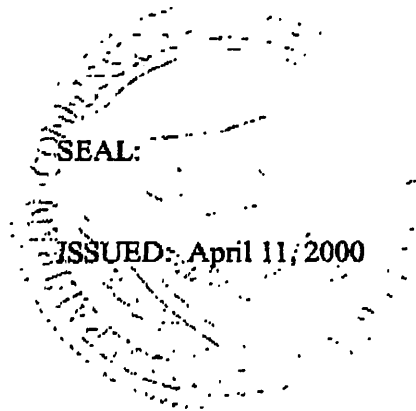
with the Commission a verified written report setting forth in detail the manner and form in which Nine West has complied and is complying with this order.

VIII.

IT IS FURTHER ORDERED that this order shall terminate on April 11, 2020.

By the Commission.

  
Donald S. Clark  
Secretary



UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

NINE WEST GROUP INC.,  
a corporation.

Docket  
No. C-3937

PUBLIC

DECLARATION IN SUPPORT OF PETITION TO REOPEN AND MODIFY ORDER

ANDREW COHEN, Chief Executive Officer and President of Nine West Footwear Corporation, successor-in-interest to Nine West Group Inc. (hereinafter "Nine West")

hereby states as follows:

1. My name is Andrew Cohen, and I am Chief Executive Officer and President of Nine West. I am familiar with Nine West's operations and the competitive environment in which it operates.

2. I have read and am familiar with the Commission's Decision and Order, issued April 11, 2000 in the above-captioned matter (hereinafter the "Order") and Nine West's Petition to Reopen and Modify filed with the Commission today (hereinafter the "Petition").

3. The information in this Declaration is based on my personal knowledge and on information conveyed to me by other senior executives at Nine West.

4. I affirm that to the best of my knowledge and belief, all of the facts and statements contained in the Petition are true.

5. Nine West manufactures and sells quality women's footwear under a variety of brand labels, including Anne Klein, Bandolino, Easy Spirit, Enzo Angiolini, Joan & David, Nine West and Sam & Libby.

6. Nine West markets and sells its various brands of footwear both through large department stores and specialty retailers. Its footwear is also marketed and sold directly to consumers through specialty and outlet retail stores owned and operated by an affiliate of Nine West.

7. Nine West's footwear products range in price from about \$16 to \$395 and are marketed to consumers whose footwear needs range from casual to career to dress and special occasion.

8. Nine West brands relevant to this application compete with approximately 200 other women's footwear brands, making up a more than \$1.8 billion market in department store sales year-to-date July 2007. Nine West brands account for about 12.5% of that market.

9. The women's footwear market is highly competitive, and there are not significant barriers to entry. The number of national women's footwear brands that compete with Nine West and that are sold in department stores increased by over 40% between 2003 and 2006.

10. To increase sales, Nine West assigns employees with significant retail experience to coordinate with retailers, providing guidance on training sales staff and creating "focus areas" or "concept shops" within stores to display the full collection of a Nine West brand in one area.

11. Nine West also employs a cooperative advertising program for its products whereby it shares the costs of certain retailers' advertising and promotional expenses.

12. To promote brand recognition and loyalty, Nine West relies upon its retailers to provide adequate and appropriate floor space, advertise and promote Nine West's branded products, actively manage product assortment and flow, and employ highly trained sales personnel, thereby bolstering consumer perception of Nine West brands.

13. Assembling a highly qualified sales and merchandizing staff and promoting and dedicating floor space to particular brands require financial investments, which generally retailers make only if there is assurance of reasonable profit margins. Retailers are also reluctant to make such investments if other retailers will inevitably free ride on those efforts while selling the product at much lower prices.

14. Consumers inherently associate higher-end women's footwear with a particular price range. When certain retailers constantly offer Nine West products at extremely low, near-wholesale prices, consumers may incorrectly conclude that Nine West products are lower quality or less desirable, which can result in harm to brand integrity and Nine West's competitive position generally.

15. We believe that many of Nine West's competitors use some type of resale price maintenance program — either “off limits” (no discounting) lists, “break date” lists (discounting permitted only during specified sales events or other specified periods) or refusal to accept returns if suggested retail prices or break dates are not followed. In addition, many competitive brands are excluded from department store point-of-sale coupons. In some cases the exclusion is required by the vendor, but in other cases, the exclusion is retailer-driven. In the latter case, the retailer may want to avoid a sales event markdown rate on a particular brand that vastly exceeds the level at which the vendor is

known to provide margin support, or the retailer may have offered up exclusion from point-of-sale events as an incentive for a salon or designer vendor to sell to that retailer.

16. Under the Order, Nine West is at an unfair competitive disadvantage because it is prohibited from entering into minimum resale price maintenance agreements of the kind now available to its competitors under the *Leegin* decision.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2007



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Andrew Cohen