

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **William E. Kovacic, Chairman**
 Pamela Jones Harbour
 Jon Leibowitz
 J. Thomas Rosch

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In the Matter of)	
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NINE WEST GROUP INC.)	Docket No. C-3937
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_____)	

**ORDER GRANTING IN PART PETITION TO REOPEN AND MODIFY
ORDER ISSUED APRIL 11, 2000**

On October 30, 2007, Nine West Footwear Corporation, successor to Nine West Group Inc. (“Nine West”), filed a Petition to Reopen and Modify Order (“Petition”) in Docket No. C-3937, pursuant to section 5(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(b), and section 2.51 of the Federal Trade Commission’s Rules of Practice (“Rules”), 16 C.F.R. § 2.51. Nine West supplemented its Petition with a Supplemental Memorandum and Supplemental Declaration on February 8, 2008, and with additional information on December 5, 2007, February 29, 2008, and March 26, 2008. Nine West asks the Federal Trade Commission (“Commission”) to reopen and modify the consent order issued by the Commission on April 11, 2000 (“Order”), *Nine West Group Inc.*, 129 F.T.C. _____ (2000), 2000 FTC LEXIS 48 (2000).

Nine West requests that the Commission set aside Paragraph II of the Order, which prohibits Nine West from entering into agreements to fix, control, or maintain resale prices (“resale price maintenance agreements” or “RPM”). Nine West argues that the Supreme Court’s decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (“*Leegin*”),¹ changed the law governing resale price maintenance agreements so that agreements that were *per se* unlawful at the time the Order was issued must now be subject to a rule of reason analysis to determine their legality. Nine West asks that, in light of this change in the law, the Commission reopen the Order and set aside its prohibitions as no longer necessary or appropriate under the new law. Nine West also seeks reopening and modification under the public interest standard. Among other arguments, Nine West states that because of these changed conditions of law and the public interest, it should be allowed to engage in resale price maintenance agreements to maintain favorable brand equity, to counter free-riding, and to enter into agreements now available to its competitors.

Nine West’s Petition was placed on the public record for comment for thirty days pursuant to Section 2.51 of the Commission’s Rules. Two public comments were received, one from the American Antitrust Institute and one from a number of State Attorneys General. The commenters urge the Commission to deny the Petition. Pursuant to Rule 2.51, the Commission must act on the Petition no later than 120 days from the date the petition was filed. That 120 day period would have expired on February 27, 2008, but Nine West extended the period for Commission action until May 16, 2008, in part to allow the Commission to consider Nine West’s supplemental materials.

¹ ___ U.S. ___, 127 S.Ct. 2705 (2007), 2007-1 Trade Cases ¶ 75,753, overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U.S. 373 (1911).

For the reasons discussed below, the Commission has determined that Nine West has shown that changed conditions of law require reopening and modifying the Order to set aside Paragraph II of the Order. Consequently, the Commission has modified the Order in part to allow Nine West to engage in resale price maintenance agreements. However, the Commission is modifying the compliance report provision of the Order to require Nine West to file periodic reports describing its use, if any, of resale price maintenance agreements.

I.

THE COMPLAINT AND ORDER

The Complaint in this case alleged that Nine West violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging, in combination with its dealers, in a course of conduct to maintain the resale prices at which dealers sell Nine West branded products. The Complaint said the purpose and effect of this practice was to “restrain unreasonably and to hinder competition in the sale of footwear in the United States” and to deprive consumers of the benefits of competition.² The Complaint noted that “[p]rices to consumers of Nine West products [have] increased. . . . and [p]rice competition among retail dealers with respect to the sale of Nine West products has been restricted.”³

The Order, which was entered into with Nine West’s consent, prohibits Nine West, its successors and assigns, from engaging in any form of resale price maintenance. Specifically, the Order prohibits Nine West from fixing, controlling, or maintaining the resale price a dealer may

² *Nine West Group Inc.* Docket No. C-3937, 129 F.T.C. _____, 2000 FTC LEXIS 48 (2000), Complaint at ¶8 (available online at <http://www.ftc.gov/os/caselist/c3937.shtm>).

³ *Id.* at ¶8.

advertise, promote, offer for sale any Nine West Products,⁴ or coercing, pressuring, or otherwise securing a commitment from any dealer to maintain a resale price for Nine West Products.⁵ The Order also imposed a ten-year ban on Nine West adopting, maintaining, enforcing or threatening any policy that: (1) the dealer is subject to warning or partial or temporary suspension or termination if it sells, promotes, or advertises Nine West Products 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 any Nine West Products below any designated resale price.⁶ The Order expires by its terms, after twenty years.⁷

⁴ Order Paragraph II.A. Nine West Products is defined as all women's footwear sold under brand labels owned by Nine West. Order Paragraph I.C.

⁵ Order Paragraphs II.B and II.C.

⁶ Order Paragraph II.D. Nine West is not prohibited from unilaterally announcing its resale prices in advance and refusing to deal with those dealers who fail to comply, consistent with the Supreme Court's decision in *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Additionally, the Order does not prohibit Nine West from establishing and maintaining cooperative advertising programs as long as such programs are not a part of a resale price maintenance scheme. For a period that expired in 2005, Order Paragraph III required Nine West to include in any list advertising, book, catalogue, or promotional material where it suggested any resale price for any Nine West Products to dealers, a statement emphasizing that the retailers are free to determine their own prices for advertising and selling Nine West Products.

⁷ Order Paragraph VII.

II.

NINE WEST'S PETITION

Nine West requests that the Commission set aside Paragraph II, which contains all of the prohibitions relating to minimum resale price maintenance agreements. Nine West argues that the relief it is seeking is required by changed conditions of law and the public interest. Nine West asserts that the Supreme Court's *Leegin* decision, which held that minimum resale price maintenance should no longer be treated as *per se* unlawful but should be analyzed under the rule of reason, constitutes a "dramatic change in antitrust law" and requires the Commission to reexamine the Order in this matter.⁸

Nine West also argues that "considerations of fairness and the public interest likewise necessitate that Paragraph II of the Order be modified."⁹ Nine West further claims that it is at a competitive disadvantage because other competitors may use RPM – in light of *Leegin*. For this reason, Nine West contends it is not in the public interest to deny it the ability to form resale price maintenance agreements and take advantage of the procompetitive effects described in the Supreme Court's decision.

III.

STANDARDS FOR REOPENING AND MODIFICATION OF COMMISSION ORDERS

Section 5(b) of the FTC Act, 15 U.S.C. § 45, provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory

⁸ Petition at 2.

⁹ *Id.*

showing sufficient to require reopening 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 continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 4, 1986), at 4; *See* S.Rep. No. 96-500, 96th Cong. 2d Sess. 9 (1979)(significant changes or changes causing unfair disadvantage); *Phillips Petroleum Co.*, Docket No. C-1088, 78 F.T.C. 1573, 1575 (1971)(no modifications for changes reasonably foreseeable at time of consent negotiations); *Union Carbide Corp.*, Docket No. C-2902, 108 F.T.C. 184, 186 (1986)(must show changes in statutory or decisional law that have the effect of bringing the provisions into conflict with existing law, citing, *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961)).¹⁰

The Commission also may 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. Thus, Section 2.51 of the Commission's Rules of Practice and Procedure, as amended, invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must make a *prima facie* "satisfactory showing" of a legitimate public interest reason or other reason justifying the requested modification.

The language of section 5(b) anticipates that the petitioner bears the burden to make the requisite satisfactory showing of changed conditions to obtain reopening of the order. The

¹⁰ In *Union Carbide*, the Commission refused to reopen and modify Union Carbide's Order prohibiting exclusive dealing arrangements on the basis of a change in law because exclusive dealing arrangements always were considered under the rule of reason and "Carbide's asserted changes in law, at most, reflect a shift in focus among the several factors traditionally considered under a rule of reason analysis as applied to exclusive dealing." 108 F.T.C. at 186.

legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why changed circumstances require the Commission to modify the order.¹¹ If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 400-03 (1981)(strong public interest considerations support repose and finality).

IV.

NINE WEST HAS DEMONSTRATED CHANGED CONDITIONS OF LAW THAT REQUIRE REOPENING AND MODIFYING THE ORDER

Based on the information provided by Nine West and other available information, the Commission has determined that Nine West has made a satisfactory showing that changes in law require reopening the proceeding and modifying Paragraph II of the Order.

A. Analytical Framework

The Commission previously reopened and modified an order based on a change of law when the Supreme Court replaced a *per se* analysis with a rule of reason analysis for non-price vertical restraints. In 1989, the Commission set aside the order in *Sharp Electronics*

¹¹ The Commission properly may decline to reopen an order if a request is “merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.” S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). *See also* Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

Corporation, which prohibited Sharp Electronics from engaging in non-price vertical restraints, such as territorial restrictions.¹² At the time the order was entered, all vertical restrictions – price and non-price – were *per se* unlawful under *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). The Commission vacated the *Sharp Electronics* order based upon the change of law enunciated in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (“*GTE Sylvania*”) and its progeny, which changed the test for non-price vertical restraints from *per se* condemnation to the rule of reason.

In 2000, when the Commission issued this Order, the rule of *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911), forbade all minimum resale price maintenance agreements as unlawful *per se*.¹³ In *Leegin*, the Supreme Court overruled *Dr. Miles* in holding that minimum resale price maintenance agreements should be analyzed under the rule of reason.¹⁴ Citing cases such as *GTE Sylvania Inc., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), and *State Oil Co. v. Khan*, 522 U.S. 3 (1997),¹⁵ the Court noted that the reasoning of its more recent jurisprudence rejected the rationales on which *Dr. Miles* was based.

¹² *Sharp Electronics Corporation*, Docket No. C-2574, 84 F.T.C. 743 (1974), reopened and modified, 112 F.T.C. 303 (1989) (“*Sharp Electronics*”). The complaint in *Sharp Electronics* did not allege that the non-price vertical restraints had been used as part of an unlawful minimum resale price maintenance agreement.

¹³ On a number of occasions from the mid-1970s until *Leegin*, the Supreme Court had said that the *per se* rule of *Dr. Miles* remained good law. See, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 68-69 (1977); *Monsanto Co. v. Spray-Rite Service Corp.* 465 U.S. 752, 761, 769 (J. Brennan, concurring); and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988).

¹⁴ See, generally, *Leegin*, 127 S.Ct. 2705.

¹⁵ *Leegin*, 127 S.Ct. at 2712-25.

As it abandoned the *per se* prohibition of *Dr. Miles*, the Court cautioned that it was not declaring RPM to be *per se* legal. *Leegin* summarized some of the possible procompetitive and anticompetitive consequences of resale price maintenance.¹⁶ The Court explained that RPM might stimulate interbrand competition and have a procompetitive effect on competition, so that RPM does not meet the *per se* illegality standard of a practice that “always or almost always tends to restrict competition and decrease output.”¹⁷ At the same time, after reviewing the potential anticompetitive effects of RPM, the Court said: “[a]s should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.”¹⁸ In light of these potential adverse effects, the Court further observed that “[i]f the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market.”¹⁹

The Court’s comments about the possible competitive harms of RPM, and its caution to lower courts “to be diligent in eliminating their anticompetitive uses from the market,” can usefully be understood in the context of the debate between the *Leegin* majority and the dissent about the wisdom of abandoning the *per se* ban of *Dr. Miles*. The dissent argued that the majority had slighted the potential anticompetitive consequences of RPM.²⁰ The majority’s recitation of examples of some of the possible competitive harms and its call for “diligent”

¹⁶ *See, id., generally.*

¹⁷ *Id.* at 2717 (citing to *Business Electronics Corp.*, 485 U.S. at 723).

¹⁸ *Id.*

¹⁹ *Id.* at 2719.

²⁰ *Id.* at 2725-2737 (J. Breyer, dissenting).

efforts by the lower courts to be attentive to these harms can be seen as an attempt to provide assurances that the Court foresaw a useful role for continued antitrust scrutiny of RPM.²¹

These passages provide important guidance for the Commission’s review of the Nine West Petition. They correctly can be taken as an admonition, not only to the lower courts, but also to enforcement agencies, to take careful account of possible anticompetitive harms in the treatment of RPM matters under a rule of reason framework. To inform the future analysis of RPM and, perhaps, to respond to the dissent’s argument that a rule of reason inquiry would prove in practice to be unmanageable, the *Leegin* Court described some factors that might be used to identify conditions in which RPM posed greater anticompetitive potential.

One factor is the source of the resale price maintenance program: if retailers were the impetus for the adoption of RPM, that could indicate the existence of a retailer cartel or support for a dominant, inefficient retailer.²² A second factor is whether RPM programs were ubiquitous in an industry.²³ In that regard, the Court said “[re]sale price maintenance should be subject to more careful scrutiny, . . . if many competing manufacturers adopt the practice.”²⁴ A third factor is whether the practice is likely to increase prices because a manufacturer or retailer is a

²¹ After reviewing the potential anticompetitive effects of RPM, the *Leegin* majority said: “As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.” *Id.* at 2717.

²² *Id.* at 2719.

²³ *Id.*

²⁴ *Id.*

dominant player in the market in which it competes. The Court explained that these were relevant factors to an inquiry into the anticompetitive effect of RPM.²⁵

These considerations lead us to conclude that the change in the rule for RPM from *per se* condemnation to a rule of reason analysis does not by itself dictate that we vacate the minimum RPM prohibitions in the *Nine West* order. In the *Sharp Electronics* order modification, the Commission addressed the question of whether Sharp Electronics showed that the changes in the law eliminated the need for the order or made continued application of the order inequitable or harmful to competition. We said:

However, this showing [of change from *per se* to rule of reason analysis] alone, without further showing that the order's prohibitions cannot be justified under current law, would be insufficient to require reopening. This is because the challenged vertical restrictions, although not *per se* unlawful, may nonetheless be unreasonable. If so, the order's prohibitions would be consistent with existing law.²⁶

Our obligation is to ask whether a modification is appropriate in light of *Leegin's* cautions about the circumstances in which the establishment of an RPM program could be anticompetitive and subject to prohibition under the rule of reason.

Leegin did not spell out which variation of the rule of reason should be applied to RPM going forward. The analytical options would include the elaborate, comprehensive inquiry suggested in decisions such as *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918), or a truncated rule of reason analysis, such as the type applied by the Supreme Court²⁷ and the

²⁵ *Id.*

²⁶ *Sharp Electronics*, 112 F.T.C. at 306.

²⁷ See, generally, *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S.

U.S. Court of Appeals for the District of Columbia Circuit in *Polygram Holdings, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29 (D.C. Cir. 2005), or some other truncated inquiry into the likely effects of the practice.²⁸ The *Leegin* decision may be read to suggest a truncated analysis, such as the one applied in *Polygram Holdings*, might be suitable for analyzing minimum resale price maintenance agreements, at least under some circumstances. The *Leegin* Court observed:

As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote competitive ones.²⁹

In this and related passages, the Court has invited efforts by the lower courts, and this Commission, after *Leegin* to devise rules “for offering proof, or even presumptions where justified,” to assess the reasonableness of RPM. The elaboration of such evidentiary rules and substantive presumptions resembles the analytical approach that the D.C. Circuit endorsed in *Polygram Holdings*. Under *Polygram Holdings*, if a practice is “inherently suspect” a defendant using it must then “either identify some reason the restraint is unlikely to harm consumers, or

85 (1984); and, *National Soc’y of Prof’l Engineers v. U.S.*, 435 U.S. 679 (1978).

²⁸ The D.C. Circuit in *Polygram Holdings* explained its reasoning for adopting a truncated analysis:

Since *Professional Engineers* the Supreme Court has steadily moved away from the dichotomous approach – under which every restraint of trade is either unlawful per se, and hence not susceptible to a procompetitive justification, or subject to a full-blown rule-of-reason analysis – toward one in which the extent of the inquiry is tailored to the suspect conduct in each particular case.

Polygram Holdings, 416 F.3d at 34.

²⁹ *Leegin*, 127 S.Ct. at 2720.

identify some competitive benefit that plausibly offsets the apparent or anticipated harm.”³⁰

What renders a practice “inherently suspect” is “not necessarily from anything ‘inherent’ in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare.”³¹

The question is whether, post-*Leegin*, RPM can be considered in some circumstances as “inherently suspect,” and thus a worthy object for the scrutiny under the presumptions and phased inquiries that the D.C. Circuit approved in *Polygram Holdings* for certain horizontal restraints. On the one hand, manufacturers use RPM to ensure that retailers sell their products at prices fixed by the manufacturer. In this case, for example, Nine West states that the purpose of its Petition is to enable it to “maintain resale prices.” One might say that there is a “close family resemblance” between Nine West's use of resale price maintenance and “another practice that already stands convicted in the court of consumer welfare” – horizontal price fixing. At the same time, in deciding to overrule the *per se* ban of *Dr. Miles*, the *Leegin* Court relied heavily upon commentary that said RPM can serve benign or competitive purposes.³² The Court also explicitly noted that evidence of price effects would only be the beginning point for further analysis of competitive harm. This seems to indicate the Court’s view that the price setting associated with an RPM agreement ordinarily is less intrinsically dangerous than agreements among direct rivals to set prices or other terms of trade.

³⁰ *Polygram Holdings*, 416 F. 3d at 36.

³¹ *Id.* at 37.

³² *Leegin*, 127 S.Ct. at 2714-16.

RPM agreements ordinarily might be seen by the Court as less intrinsically dangerous than horizontal price-setting arrangements, but not invariably so. The Court’s elaboration of these relevant factors provides an approach for identifying when RPM might be subjected to closer analytical scrutiny, such as that anticipated by *Polygram Holdings* or other truncated rule of reason analyses. For example, the *Leegin* Court said with respect to RPM that “unlawful price fixing, designed solely to obtain monopoly profits, is an ever present temptation” and explained that “a manufacturer with market power . . . might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants” or “could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers.”³³

At this early stage of the application of the teaching of *Leegin* by the lower courts and the Commission, the *Leegin* factors can serve as helpful guides to begin an assessment of when RPM deserves closer scrutiny. Through the Commission’s own enforcement work, research, and external consultations such as workshops, we anticipate further refinements to this analysis, including the further specification of scenarios in which RPM poses potential hazards and those in which it does not.

B. Application to Nine West’s Petition

It is within this framework that we consider Nine West’s arguments that, post-*Leegin*, its practices will not harm competition and that procompetitive justifications warrant approval of its order modification request.³⁴ Consistent with the framework outlined above, two ways that Nine

³³ *Id.* at 2716-17.

³⁴ *Polygram Holdings*, 416 F.3d at 36.

West can demonstrate that its use of RPM will not harm competition is to show that it lacks market power, and that the impetus for the resale price maintenance is from Nine West itself and not retailers (*i.e.*, the result of a retailer cartel or pressure from a dominant, inefficient retailer). If market power does not exist, the forces of interbrand competition will discipline any supra-competitive pricing.³⁵ But, if market power does exist and those forces therefore will not discipline Nine West's resale prices, then it could be profitable for Nine West to impose higher resale prices than would otherwise prevail over a substantial period of time. That is harmful to both competition and consumers. That is the fundamental teaching of Sections 0.1 and 1.0 of the Merger Guidelines.³⁶

On the record before us, it appears that Nine West has only a modest market share in any putative relevant product market in which it competes. This suggests *prima facie* that it lacks market power, and there is no reason to believe that there is collective market power in any putative market. There is also no evidence of a dominant, inefficient retailer in this market, and Nine West states that Nine West itself is responsible for its desire to engage in resale price maintenance; it is based on its wish to increase the services offered by retailers that sell Nine West products. We therefore grant Nine West's Petition on the basis that Nine West's use of resale price maintenance is not likely to harm consumers.

If we were to conclude that Nine West runs afoul of the *Leegin* factors and raises competitive concern, Nine West could also meet its burden by demonstrating that its use of resale

³⁵ *GTE Sylvania*, 433 U.S. at 52, n.19 (1976).

³⁶ United States Department of Justice and Federal Trade Commission, 1992 HORIZONTAL MERGER GUIDELINES (rev. April 8, 1997) (available at <http://www.ftc.gov/bc/docs/horizmer.shtm>).

price maintenance is procompetitive. For example, firms engaging in minimum resale price maintenance may be able to show a justification for the practice by presenting evidence that while the practice might increase resale prices for its products over what they would otherwise be, it enhances output. That might suggest that consumers place a higher value on non-price factors (such as service) than they do on price, so that the practice may be viewed as efficiency-enhancing.

Nine West asserts that implementation of minimum resale price maintenance agreements will increase consumer demand for its products and thereby enhance competition. However, Nine West has not provided evidence of procompetitive effects that would result from its use of resale price maintenance agreements beyond its conclusory assertion. Nine West asserts that it cannot provide any specific, empirical examples of procompetitive effects because it is prohibited from engaging in resale price maintenance agreements, except for unilateral termination under *Colgate*.³⁷ Nine West also asserts that it is at a disadvantage compared to its competitors that are engaging in resale price maintenance agreements because if those competitors' programs are challenged, those competitors have the ability to "demonstrate their programs' validity with a showing of their procompetitive effects."³⁸ The former protestation has merit. The latter assertion does not.

³⁷ Supplemental Petition at 9.

³⁸ *Id.* at 9-10.

V.

THE COMMISSION GRANTS IN PART NINE WEST'S REQUEST FOR MODIFICATION

Although at this time we have determined that Nine West's potential use of resale price maintenance is not likely to harm consumers at this time, and we are setting aside that portion of the Commission's Order, the circumstances in the market could change. We have therefore concluded there is a basis to monitor the effects of Nine West's use of resale price maintenance. Depending on the circumstances, it may become necessary to determine if Nine West's use of resale price maintenance is procompetitive, as it claims in its Petition (but has not proved). Part of Nine West's rationale, if not its only rationale, for its desire to engage in resale price maintenance is unproven procompetitive efficiencies. Therefore, to aid the Commission in monitoring Nine West's use of resale price maintenance, we require Nine West to file a report with the Commission one, three, and five years after the Order has been modified that provides information describing Nine West's use of RPM and its effect on its prices and output.

We find that Nine West has met its burden under the analysis suggested in *Leegin* with respect to scenarios in which RPM may endanger competition. Nine West's potential use of RPM is currently not captured by the factors that *Leegin* identified as possible criteria for condemning RPM. In particular, Nine West has demonstrated that it lacks market power and that the Nine West itself is the source of the resale price maintenance. We grant Nine West's Petition on that basis. However, the Commission will continue to monitor the effects of Nine West's use of resale price maintenance should it choose to adopt a resale price maintenance program. The reporting obligations we impose on Nine West will aid in that process. The Commission may

challenge its use of such a program should it appear to be illegal. Accordingly,

IT IS ORDERED that this matter be reopened and that the Commission's order in Docket No. C-3937, issued on April 11, 2000, be, and it hereby is, modified to set aside Paragraph II of the Order and to add the following proviso to Paragraph VII of the Order, as of the date of service of this order:

IT IS FURTHER ORDERED that on the first, third, and fifth anniversary of the date this Order Modifying 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 stating whether Nine West has engaged in resale price maintenance agreements (other than announcing resale prices in advance and unilaterally refusing to deal with those who fail to comply), and if so, setting forth in detail the manner and form in which Nine West has engaged in such resale price maintenance agreements including, but not limited to a discussion of, with supporting documents and communications, the planning, implementation, reasons for, terms, and results of any resale price maintenance agreements, who prompted or initiated the use of the resale price maintenance agreements, the brands and markets where the resale price maintenance agreements were implemented, Nine West's market or segment shares, and the projected or actual benefits to consumers and Nine West from the resale price maintenance agreements.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: May 6, 2008