UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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

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

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 [illegible] changed the law governing resale price maintenance agreements so that agreements that were 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.

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[1] __ U.S. __, 127 S.Ct. 2705 (2007), 2007-1 Trade Cases ¶ 75,753, overruling *D. [illegible] C. [illegible] D. [illegible] & [illegible] C.* 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

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[2] . 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] . at ¶8.

advertise, promote, offer for sale any Nine West Products,[4] or coercing, pressuring, or otherwise

[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 [illegible] *C* [illegible] *& C* ., 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 decision, which held that minimum resale price maintenance should no longer be treated as 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 . 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

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[8] Petition at 2.

[9] .

[10] In , the Commission refused to reopen and modify Union Carbide's Order prohibiting exclusive dealing arrangements on the basis of a change in law because

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. *F* *D* , 452 U.S. 394, 400-03 (1981)(strong public interest considerations support repose and finality).

IV.

[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). Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

C , 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 unlawful under . . . *A* & *C* ., 388 U.S. 365 (1967). The Commission vacated the order based upon the change of law enunciated in *C* ., . . . *E* ., 433 U.S. 36 (1977)(" *E* ") and its progeny, which changed the test for non-price vertical restraints from condemnation to the rule of reason.

In 2000, when the Commission issued this Order, the rule of *D* . *C* . . *D.* & , *C* ., 220 U.S. 373 (1911), forbade all minimum resale price maintenance agreements as unlawful .[13] In , the Supreme Court overruled *D* . in holding that minimum resale price maintenance agreements should be analyzed under the rule of reason.[14] Citing cases such as *E* ., *B* *E* *C* . . *E* *C* ., 485 U.S. 717 (1988), and *O* *C* . . , 522 U.S. 3 (1997),[15] the Court noted that the reasoning of its more recent jurisprudence rejected the rationales on which *D* . was based.

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[12] *E* *C* , Docket No. C-2574, 84 F.T.C. 743 (1974), reopened and modified, 112 F.T.C. 303 (1989)(" *E* "). 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 , the Supreme Court had said that the rule of *D* . remained good law. , . ., *C* ., . . . *E* ., 433 U.S. 36, 68-69 (1977); *C* . . - *C* . 465 U.S. 752, 761, 769 (J. Brennan, concurring); and *B* *E* *C* . . *E* *C* ., 485 U.S. 717, 724 (1988).

[14] , , 127 S.Ct. 2705.

[15] , 127 S.Ct. at 2712-25.

As it abandoned the prohibition of *D* , the Court cautioned that it was not declaring RPM to be legal. 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 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

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[16] , ., .

[17] . at 2717 (*B* *E* *C* ., 485 U.S. at 723).

[18] .

[19] . at 2719.

[20] . at 2725-2737 (J. Breyer, dissenting).

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 condemnation to a rule of reason analysis does not by itself dictate that we vacate the minimum RPM prohibitions in the order. In the *E* 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 to rule of reason analysis] alone,

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[25] .

[26] *E* , 112 F.T.C. at 306.

[27] , , *F* *C* . *F* *D* , 476 U.S. 447 (1986); *C* *A* . *B* , 468 U.S.

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

> As courts gain experience considering the effects of these restren6.1dp (c)8.1.1()-.9(4-ip)-.9(p)9.1(l)-.9(y of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restrant and to provide more guidance to businesses. Courts can, for example, devise rules over time for offern proof, or even presumptions where justified, to make the rule of reason a fair and efficient

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85 (1984); and, [illegible], 435 U.S. 679 (1978).

[28] The D.C. Circuit in [illegible] explained its reasoning for adopting a truncated analysis:

> Since [illegible] 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.

[illegible], 416 F.3d at 34.

[29] [illegible], 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."

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[30] , 416 F. 3d at 36.

[31] . at 37.

[32] , 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 [illegible]

[33] [illegible]. at 2716-17.

[34] [illegible], 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 (. ., 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 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 factors and raises competitive concern, Nine West could also meet its burden by demonstrating that its use of resale

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[35] , 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 *C* .[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.

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[37] Supplemental Petition at 9.

[38] . 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 , 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 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.
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> By the Commission.

Donald S. Clark
Secretary

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ISSUED: May 6, 2008