UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the matter of

Docket No. C-3937

NINE WEST GROUP INC.,
a corporation

Amended*[1] *States' Comments Urging Denial of Nine West's Petition

New York and the States of Alaska, Arkansas, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia (the "States") submit these comments in response to the Commission's request for public comment on The Petition to Reopen and Modify Order dated October 25, 2007 (the "Petition"), of Nine West Footwear Corporation, successor-in-interest to Nine West Group Inc. ("Nine West"). Denominated a motion to modify, the Petition seeks relief from all of the injunctive relief provisions of the Commission's Order so that Nine West can "take actions to maintain retail prices." Petition at 1. Nine West does not want to be prevented from "fixing, controlling or maintaining the retail price of women's footwear, as well as coercing or pressuring any dealer to maintain, adopt or adhere to any resale price." Petition at 1.

The Commission should deny the Petition because granting it would not serve the public interest. The Petition is based on the false premise that Nine West's "actions to maintain retail

[1] The only difference between the comments from the states dated December 28, 2007, and these amended comments are changes made to add additional states.

prices," that is, vertical price fixing, would necessarily survive antitrust scrutiny under the Supreme Court's recent decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). To the contrary, the standards articulated by the Commission and affirmed by the Court of Appeals for the District of Columbia in *In re PolyGram Holding, Inc.*, No. 9298, 2003 WL 21770765 (F.T.C.), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005), provide the appropriate framework to analyze Nine West's Petition.[2] Under that framework, Nine West's activities are "inherently suspect" because they raise prices for consumers and violate the antitrust laws because nothing in the Petition justifies those higher prices. The Petition should be denied.

States' Interest

The States have a strong interest in preserving adequate remedies for the practice that the Commission's Order is designed to prevent — vertical price-fixing. The States vigorously prosecute vertical price-fixing. *See, e.g., New York v. Salton, Inc.*, 265 F. Supp. 2d 310 (S.D.N.Y. 2003); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184 (D. Me. 2003); *In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181 (S.D.N.Y. 2000); *Texas v. Zeneca, Inc.*, 1997-2 Trade Cas. (CCH) ¶ 71,888 (N.D. Tex. June 27, 1997); *Missouri v. Am. Cyanamid Co.*, 1997-1 Trade Cas. (CCH) ¶ 71,712 (W.D. Mo. Feb. 7, 1997); *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. 532 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996); *Pennsylvania v. Playmobil USA*, 1995-2 Trade Cas. (CCH) ¶ 71,215 (M.D. Pa. Dec. 15, 1995); *New York v. Keds Corp.*, 1994-1 Trade Cas. (CCH) ¶ 70,549 (S.D.N.Y. Mar. 21, 1994);

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[2] In addition, vertical price fixing continues to be *per se* illegal under state law, *see, e.g.*, Cal Bus & Prof Code § 16720(d), (e)(3); N.Y. Gen. Bus. Law § 369-a, and proposed federal legislation could renew the *per se* treatment under federal antitrust law, S. 2261.

Maryland v. Mitsubishi Elecs. Am., 1992-1 Trade Cas. (CCH) ¶ 69,743 (D. Md. Jan. 15, 1992); *New York v. Nintendo of Am.*, 775 F. Supp. 676 (S.D.N.Y. 1991); *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456 (D. Md. 1987).[3] The States recovered more than $115 million in cash and $75 million in product for consumers in these cases. In addition, the States submitted an amicus curiae brief and argued orally to preserve the per se rule against vertical price-fixing in *Leegin*.

The States' experience in *In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181 (S.D.N.Y. 2000) is particularly relevant to resolving the Petition. In that litigation, the States alleged that Nine West conspired with unnamed dealers to set the minimum resale price at which retailers were permitted to sell specific women's dress shoes to consumers. If retailers refused to comply, Nine West threatened to cancel orders and/or refused to take further orders for the shoes subject to the policies. Nine West used those tactics to coerce compliance and any deviation by dealers from the minimum resale price was reported to Nine West's wholesale division. Nine West's sales representatives solicited and obtained agreements from dealers to raise the selling price of Nine West products to comply with Nine West's pricing policy. The States sought injunctive relief and damages.

Nine West settled with the States. Nine West was enjoined for 5 years from attempting to fix, lower, raise, maintain, or stabilize the retail prices for which Nine West products were sold. Nine West also paid $34 million, $31 million of which was distributed cy pres, based on each State's population, to women's programs and approximately $3 million of which was used to pay

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[3] Information about these cases is available from the Antitrust Multistate Antitrust Database, http://naag.org/antitrust/search/.

notice costs, attorneys fees, and other expenses.

The States' settlement was based in part on the States' estimate of the impact of Nine West's activities on consumers. Moving for final approval of the settlement, the States submitted the affidavit of economist Robert J. Larner, attached as Exhibit A. Dr. Larner estimated the overcharges caused by Nine West's practices to total $45.7 million. Larner Affidavit ¶ 25.

The Petition does not discuss the States' litigation. The Petition does not rebut the States' estimate of the harm caused consumers or seek to justify overcharging consumers. Rather, Nine West seeks the opportunity to harm consumers again.

Standard for Analyzing the Petition

To reopen and modify an FTC order, the petitioner must show "that changed conditions of law or fact" or the public interest require the modification. 15 U.S.C. § 45(b). The requisite changed conditions may be shown where the order has become inequitable or harmful to competition. *In re Digital Equipment Corp.*, Doc. No. C-3818 at 2-3 (FTC Feb. 10, 2000), available at http:/www.ftc.gov/os/2000/os/digitalorder.htm. Modification is in the public interest if needed "to relieve any impediment to effective competition that may result from the order." *In re Red Apple Companies, Inc.*, FTC Docket No. 9266. On the other hand, the Commission "may properly 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, at 10 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 1102, 1111. Nine West's burden is heavy in view

of the public interest in repose and the finality of Commission Orders. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

Leegin Does Not Justify Relieving Nine West of the Order's Prohibitions

Nine West's Petition is premised on *Leegin* representing a change in law that justifies vacating the Commission's order, even without presenting evidence. But *Leegin* does not make vertical price-fixing per se legal. *Leegin* merely permits manufacturers to present evidence to justify the restraint. The Court expressly cautioned that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated."[4] To achieve that goal, the Court instructed lower courts to develop "fair and efficient" rules for analyzing vertical price-fixing:

> 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 procompetitive ones.[5]

In these comments, the States propose that the "fair and efficient" rule that should apply to Nine West's Petition is that of *PolyGram*. Like the Court in *Leegin*, the Commission's touchstone should be consumer welfare, in the sense of benefit to the natural persons in this country, and not on business welfare, in the sense of increased profitability for the businesses engaged in the restraint. Minimum vertical price-fixing is a restraint that usually raises prices for

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[4] 127 S. Ct. at 2717.

[5] 127 S. Ct. at 2720 (emphasis added).

consumers – the very opposite of consumer welfare. Because Nine West's activities did that to the tune of $45.7 million, Nine West's activities should be deemed "inherently suspect" under the *PolyGram* framework.

Further, on the record presented, the Commission should conclude without hesitation that the acts enjoined by the Order continue to violate the antitrust laws after *Leegin*. In addition to overlooking the overcharge to consumers, Nine West does not present evidence supporting a procompetitive justification or other beneficial impact on consumers from its vertical price fixing. No finding of market power or other litigation screen is warranted in these circumstances.

Misreading *Leegin*, Nine West appears to assume that price increases are immaterial to the antitrust analysis and that articulating possible procompetitive effects is enough to defeat a vertical price fixing claim. Nine West does not explain that assumption, which appears to be based on reading a single sentence out of context. In a paragraph analyzing whether the adverse price effects alone justify continuing the *per se* rule, the *Leegin* Court stated that "Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct."[6] But in allowing proof of procompetitive justifications by rejecting the per se rule, the Court did not prohibit or declare immaterial proof that consumers paid more. The Court merely provided the manufacturer, here Nine West, the opportunity to demonstrate that, despite the higher prices, the restraint generates additional beneficial services for consumers that outweigh those higher prices.

Indeed, the discussion that follows in *Leegin* illustrates that vertical price fixing violates the antitrust laws unless the manufacturer or seller proves additional beneficial services for consumers that outweigh the higher prices caused by the restraint. In permitting business

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[6] 127 S. Ct. at 2719.

justifications for vertical price fixing to be presented, the *Leegin* majority accepted generally the assumption in the economic literature that manufacturers' and consumers' interests are "aligned with respect to retailer profit margins."[7] If that assumption is true, the "manufacturer has no incentive to overcompensate retailers with unjustified margins."[8] Implementing its caution that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated,"[9] the Court did not simply accept that assumption. First, the Court recognized that manufacturers' and consumers' interests are not always aligned, such as when "the manufacturer does not establish [vertical price fixing] to stimulate services or to promote its brand, but to give inefficient retailers higher profits."[10] Second, the Court probed whether and when that alignment might lead to consumers enjoying a net benefit from vertical price fixing:

> As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the "increase in demand resulting from enhanced service . . . will more than offset a negative impact on demand of a higher retail price."[11]

That illustrates that business justifications should be treated skeptically and that overcharges to consumers should not be ignored.

Given the Court's observations and its invitation to develop "fair and efficient" rules for vertical price fixing, *PolyGram*[12] is instructive. Applying *PolyGram* illustrates that *Leegin* is not

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[7] *Id.* at 2718.

[8] *Id.* at 2718-19.

[9] *Id.* at 2717.

[10] *Id.* at 2717; *see id.* at 2716-17.

[11] *Id.* at 2719 (citation omitted).

[12] *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005).

the "Get-Out-of-the-Order-Free card" that Nine West makes it out to be. *PolyGram* first asks whether the harm to consumers is obvious, in which case the restraint is deemed "inherently suspect." If consumers pay more because of vertical price-fixing, the restraint should be "inherently suspect."[13] In this case, Nine West's activities increased the prices consumers paid by an estimated $45.7 million.

Under *PolyGram*, Nine West then has the burden of providing a plausible and cognizable justification.[14] To meet that burden (and in effect prove the assumption in the economic literature that an alignment of consumers' and manufacturers' interests leads to net consumer benefits), Nine West should be required to prove:

> (1) its vertical price fixing caused retailers to provide actual enhanced value or services;
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> (2) the enhanced value or services increased demand for its shoes; and
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> (3) the increased demand from that value or those services was greater than the decreased demand caused by the higher price that consumers paid.

Nine West does not satisfy any of those elements in its Petition.

Even if that showing were made, the Commission would need to consider whether the enhanced value or services could be achieved in a less restrictive way than by vertical price-fixing. As phrased by the Court in *Leegin*, the Commission should consider whether "[o]ffering

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[13] The Court in *Leegin* noted that the economic literature agrees on the fundamental point that vertical price fixing means higher prices for consumers. 127 S. Ct. at 2718 (higher consumer prices "'are generally consistent with both procompetitive and anticompetitive theories.'").

[14] Once higher prices or restrictions on output are demonstrated in a non-per se case, the Court places on the defendant the burden of going forward with proof of procompetitive justifications. *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 113 (1984) (referring to this as a "heavy" burden and *citing National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-96 (1978)); *see California Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756, 775-76 (1999).

the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be ***the most efficient*** way to expand the manufacturer's market share."[15]

That accords with other Court precedent that requires the consideration of alternatives to challenged restraints. In *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 114 (1984), the Court rejected a restraint that allegedly led to a procompetitive new product when that product "could be marketed just as effectively without" the restraint.[16] By contrast, in *Broadcast Music, Inc. v. Columbia Broadcasting System*, the Court accepted the causal link between the challenged price-fixing and the procompetitive new product, a blanket license, and upheld the restraint. The *BMI* Court referred to the link as "reasonably necessary to effectuate the rights," an "obvious necessity," and a "necessary consequence of the integration."[17]

Vertical price fixing is not invariably the most efficient way to achieve procompetitive effects. The manufacturer could require its distributors to provide services as a matter of contract and even pay separately for those services. In that circumstance, the manufacturer could terminate or threaten to terminate the relationship if the retailer did not live up to those obligations. That alternative way of fostering services for consumers is more effective and efficient than threatening to terminate the relationship because the retailer is not charging consumers a higher price.

Nine West does not explain why the alternatives for achieving enhanced services are not equally or more efficient than requiring that retailers make consumers pay more.

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[15] 127 Sup. Ct. at 2716 (emphasis added).

[16] 468 U.S. 85, 114 (1984).

[17] 441 U.S. 1, 19, 20 (1979).

Conclusion

The Commission should deny the Petition under the *PolyGram* framework. Nine West's activities, which are enjoined by the Order, caused consumers to pay an additional $45.7 million. Nine West does not dispute that estimate, provide any alternative estimate, or indeed discuss with any specificity the higher prices that are paid by consumers because of vertical price fixing. Those higher prices should lead the Commission to conclude that Nine West's activities are "inherently suspect." The Petition includes wholly conclusory assertions that procompetitive effects can occur. But Nine West has not introduced evidence or otherwise documented any of those asserted procompetitive effects. The States are not aware of *any* estimate of any procompetitive effects of the activities engaged in by Nine West, let alone an estimate that would outweigh the $45.7 million consumer overcharge.

The Petition should be denied in all respects.

Dated: January 17, 2008
New York, New York

Respectfully submitted,

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF FLORIDA, ex rel. Attorney General ROBERT A. BUTTERWORTH, Plaintiffs, v. NINE WEST GROUP, INC. and JOHN DOES 1-500 Defendants.	§	CIVIL ACTION NO. 00 CIV 1707 (BDP) AFFIDAVIT OF ROBERT J. LARNER

COMMONWEALTH OF MASSACHUSETTS)
: ss.:
COUNTY OF SUFFOLK)

ROBERT J. LARNER, being duly sworn, deposes and says:

Introduction and Qualifications

1. I am an economist and a Vice President of Charles River Associates Incorporated ("CRA"), a research and consulting firm headquartered in Boston, Massachusetts. Both my undergraduate concentration and my graduate training were in economics, and I hold a Ph.D. in economics from the University of Wisconsin–Madison.

2. For more than thirty years, I have specialized within economics in the fields of industrial organization and the economics of antitrust and government regulation. Industrial organization is the branch of economics that studies markets and evaluates the extent to which they are

functioning in a competitive manner. My professional experience includes two years at the Federal Trade Commission. During most of my time at the FTC, I served as Chief of the Division of Industry Analysis in the Bureau of Economics. In that position, I was responsible for the development and supervision of industry studies and for analyses of various trade practices and their effects on competition. I also taught for six years as an Assistant Professor of Economics at Brandeis University, and I spent the spring semester of 1991 at Boston College as an Adjunct Associate Professor of Economics.

3. Since joining CRA in 1976, I have analyzed competitive issues in a wide variety of industries as an expert economist in more than one hundred antitrust cases and regulatory proceedings. Vertical restraints, both price and nonprice, have been a significant part of my work and research, and I have published three papers on the subject. In addition, I have submitted affidavits in the matter of Minolta Camera Products Antitrust Litigation and in the matter of Panasonic Consumer Electronics Products Antitrust Litigation.[1] The affidavits evaluated the fairness, reasonableness, and adequacy of the proposed settlements between the participating states and the respective defendants in protecting the interests of the consumers on whose behalf the states were acting. My resume, which lists my publications and testimony, is attached as Exhibit 1.

4. In March 1998, I was retained by the State of Florida, Office of the Attorney General ("Florida") to provide economic analysis relating to its investigation of Easy Spirit pricing policies and enforcement actions. Subsequently, I was retained by Florida to provide assistance in assessing the impact of the pricing policies and enforcement actions of Nine West Group, Inc.

[1] *In re Minolta Camera Products Antitrust Litigation*, 688 F. Supp 456 (D. Md. 1987), and *In re Panasonic Consumer Electronics Products Antitrust Litigation*, 1989 Trade Cas. ¶68,613 (1989).

("Nine West") on the retail prices of certain brands and styles of that company's shoes. More recently, I have been asked by the plaintiffs in this action to evaluate the fairness, reasonableness, and adequacy of the Settlement Agreement ("settlement") between the 57 states, territories and possessions of the United States ("the States") and Nine West in protecting the interests of the consumers and citizens on whose behalf the States were acting. This affidavit contains my evaluation and conclusions.

5. In the course of my study leading to the preparation of this affidavit, I had a number of discussions with staff members of the Office of the Attorney General in Florida, Texas, and other states, and I and CRA staff working under my direction reviewed a large amount of material provided by them. This material included Nine West documents relating to the pricing of shoe styles it sells under the Nine West, Enzo Angiolini, and Easy Spirit brands; deposition testimony of executives of the Easy Spirit division of Nine West, and deposition testimony of employees of department stores and other buyers of Nine West shoes. I also reviewed and analyzed NPD data[2] relating to department store shoe sales of the three brands for the 18 months from February 1998 to July 1999. In addition, I reviewed the complaint filed by the States against Nine West ("the complaint") and the Settlement Agreement between Nine West and the States. I also reviewed material from the business and trade press pertaining to women's shoes generally as well as to Nine West products. The sources and types of information I gathered and relied upon are among the kinds of material commonly used by economists in analyzing trade practices and forming opinions and conclusions about their effects.

[2] The NPD data and my analysis of them are discussed in paragraphs 20 to 25 below.

6. Based upon the material I have reviewed and my analysis of the available evidence, I have arrived at three conclusions regarding the settlement. First, the evidence is consistent with the States' claim that Nine West's pricing policies and enforcement actions had the effect of increasing the retail prices of its protected or off-limits shoes. Second, despite the indication of overcharges attributable to the pricing policies and related behavior, the available data and other evidence are not sufficient to support a conclusion that the aggregate overcharges were substantially in excess of $34 million for the period January 1, 1988 to July 31, 1999 ("relevant period"). Finally, including in my evaluation not only the costs and risks of litigation, but also the value of the injunctive relief provided by the settlement and the deterrent effect it is likely to have, I believe that the terms of the Settlement Agreement are fair, reasonable and adequate in protecting the interest of the consumers and citizens on whose behalf the States have acted.

Terms of the Settlement

7. As I understand the Settlement Agreement, there are two provisions pertinent to my analysis and evaluation. One relates to monetary payments and the other to injunctive relief. First, Nine West has agreed to pay $34 million into a settlement account. A portion of the payments, not to exceed $3.5 million, will be used to pay the administrative costs and expenses of the States.[3]

8. Because of the relatively small dollar amount of the injury per capita, as well as the difficulty and cost of identifying consumers who purchased Nine West products during the relevant period, the Settlement Agreement, in lieu of restitution, provides for the distribution of not less than $30.5 million to not-for-profit corporations and charitable organizations with the

condition that the money be used to fund women's health, educational, vocational and safety programs.[4]

9. The Settlement Agreement also provides injunctive relief. For a period of five years, Nine West is prohibited from agreeing with any dealer with respect to the retail prices at which Nine West women's footwear is advertised, promoted, offered for sale, or sold to consumers.[5] Nine West is also prohibited from requiring or pressuring dealers to adopt, maintain, or adhere to any resale price and from seeking or securing from dealers any commitment or assurance relating to retail prices.[6] In addition, Nine West will notify dealers of their rights to determine independently the prices at which they advertise and sell Nine West products. Notification will take the form of letters to all existing dealers within 30 days of the final judgement, letters affixed to each price list for five years, and letters to each new dealer within 90 days of affiliation with Nine West.[7]

10. The injunctive provisions of the Settlement Agreement also benefit the consumers represented by the States, because of the effects they can be expected to have on the future retail prices of Nine West and other brands of women's shoes. The prohibitions have a deterrent value, as do the dealer-notification obligations of the injunctive relief, because Nine West can expect

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[3] Settlement Agreement, Sections VI, A.
[4] Settlement Agreement, Section VI, B, 2.
[5] Settlement Agreement, Section III, A.
[6] Settlement Agreement, Section III, B.
[7] Settlement Agreement, Section III, C-G. The Settlement Agreement does not limit Nine West's right to suggest retail prices for Nine West products to retailers, dealers, and distributors, or to engage in other behavior permitted by federal and state antitrust laws.

both closer monitoring of its pricing policies and practices and also swifter enforcement and more severe penalties (including contempt penalties) should any violations occur.[8]

11. In return for these provisions regarding monetary payments and injunctive relief, the States have agreed that, upon final approval by the Court, the Settlement Agreement will release Nine West from claims relating to the challenged pricing policies and enforcement actions for the period January 1, 1988 through July 31, 1999.[9]

Nine West's Pricing Policies

12. At the beginning of 1992, Easy Spirit, then a division of the United Shoe Company[10], announced a new pricing policy that became effective March 15, 1992. Under its terms, Easy Spirit would "...discontinue doing business with any retailer who does not substantially adhere to our suggested retail price ranges and sale date practices." [11] In addition, the pricing policy set specific time periods in which sales events could occur.

13. I have been informed by the States that, at approximately the same time, the Nine West and Enzo Angiolini divisions of the Nine West Group had similar pricing policies in place. The common element in the pricing policies of all three divisions was that certain styles of shoes were designated as "protected" or "off-limits", and each division considered it a violation of its pricing policy for retailers to sell these shoes below the suggested retail prices set by the division.

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[8] At the same time, it is possible that the provisions of the injunctive relief will, by increasing the prospective costs, deter Nine West from adopting distribution policies and practices that are efficiency-enhancing and would be found lawful if challenged. This possibility, however, is too speculative to be more than simply noted in evaluating the proposed settlement.

[9] Settlement Agreement, Section VIII, E.

14. According to the complaint, the pricing policies of several divisions of the Nine West Group specified penalties for non-compliance that included canceling orders and refusing to take future orders for products subject to the pricing policy,[12] and employees of the Nine West Group's retail and wholesale operations monitored the prices at which products subject to the pricing policy were advertised and sold by dealers.[13] Nine West responded to violations of its pricing policies in several ways. In some cases, Nine West suspended shipments to the offending dealer violating the policy for a limited period, with the understanding that shipments would resume if no further violations were discovered or if the dealer promised not to violate the policy in the future.[14] Nine West also used suspended shipments, or the threat to suspend shipments, to obtain agreements from dealers to raise their selling prices.[15] In other instances, according to the complaint, Nine West threatened to withhold "mark down money," "gross margin assistance," and discounts and cooperative advertising funds if the dealer did not comply with the pricing policies.[16] As a result of its enforcement actions, Nine West's pricing policies amounted to a scheme of resale price maintenance.[17]

A Framework for Evaluating the Settlement Agreement

15. My analysis of the adequacy of the settlement between the States and Nine West starts from the standard economic premise that parties to litigation are better off settling if the benefits they obtain in the settlement exceed the expected value of their net benefits from litigating the

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[10] The Nine West Group purchased Easy Spirit from the United Shoe Company in March 1995.
[11] ES019473.
[12] Civil Action No. [XXX], Complaint, Section VIII, 24, c.
[13] Complaint, Section VIII, 24, e.
[14] Complaint, Section VIII, 24,l,i.
[15] Complaint, Section VIII, 24,l,ii.
[16] Complaint, Section VIII, 24,l,iii.
[17] For the purpose of my analysis, I assumed liability as a result of the enforcement actions cited in the Complaint.

case through trial and possible appeal.[18] The expected value of the plaintiffs' net benefits from litigating equals the benefits (e.g., compensation, injunctive relief, award of attorney's fees) they are likely to receive if they win at trial multiplied by their estimate of the probability that they will prevail. [19] Net benefits are obtained by subtracting the expected costs of the litigation from the expected value of the benefits.

16. A comprehensive analysis of the settlement entails estimating the benefits the plaintiffs are likely to receive if they prevail at trial, the probability of their prevailing, and their costs of litigation.[20] The expected value of these net benefits is then compared to the value of the monetary payments, injunctive relief, and other benefits provided by the proposed settlement.

17. The Settlement Agreement provides for a payment of $34 million to compensate for injury to purchasers of Nine West products during the relevant period. An evaluation of the settlement, therefore, can start by examining whether there is evidence that the challenged pricing policies had the effect of increasing aggregate retail prices for protected Nine West shoes by more than the $34 million. The absence of such evidence would indicate that the States have obtained a fair and adequate settlement for the consumers whose interest they represent.[21]

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[18] Economic analyses of the decision to settle or litigate can be found in Cooter and Ulen, *Law and Economics*, 2nd ed., Addison-Wesley, 1997, 349-362; Lucian A. Bebchuk, "Litigation and Settlement under Imperfect Information," 15 *The Rand Journal of Economics* (Autumn 1984), 404-415; and Frank H. Easterbrook, William M. Landes, and Richard A. Posner, "Contribution among Antitrust Defendants: A Legal and Economic Analysis," 23 *The Journal of Law and Economics* (October 1980), 331-370.

[19] Prevailing at trial means winning on both liability and damages.

[20] A plaintiff's costs of litigation are commonly measured as the sum of legal fees and out-of-pocket expenses. Where the plaintiffs, as here, are states, however, the costs of litigation may be more appropriately viewed as opportunity costs. That is, to the extent that the states were to devote additional resources to litigating the case against Nine West, they would have fewer resources available to allocate to other antitrust or consumer protection

Evaluation of the Settlement

18. Although the Settlement Agreement provides for a payment by Nine West of $34 million in full and final settlement of the States' claims covering the entire relevant period, the scope of my evaluation is limited to the third-party sales of protected shoes by three divisions, Nine West, Enzo Angiolini and Easy Spirit for the time period February 1, 1996 through July 31, 1999. I understand that the staffs of the Attorney General's offices of Texas and Florida in the course of their investigation searched within each division of Nine West for evidence of pricing policies and associated enforcement behavior that might be construed as resale price maintenance. I am informed that they found insufficient evidence to conclude either that the other divisions had pricing policies and enforcement behavior that could be characterized as resale price maintenance, or that their policies and related behavior had any discernible effects on retail prices. From my own study, I am not aware of any testimony, documents, or price data indicating that Nine West's pricing policies and enforcement actions affected the retail prices of the shoes of other Nine West divisions.

19. A key element in assessing the effects of the Nine West pricing policies is determining what the prices and the extent of discounting of the protected styles of the three divisions would have been absent their pricing policies and associated enforcement behavior. Any analysis of their effects is constrained by both imperfect benchmarks and limited data. Systematic data on retail prices of protected and unprotected shoes are available only for the 18-month period between February 1, 1998 and July 31, 1999. The limited data prevent a comparison of prices

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matters. Settling the suit against Nine West releases resources for other investigations and litigation for the benefit of consumers.

[21] If Nine West's pricing program had no effect on retail prices of protected shoes, or if the aggregate effects were smaller than $34 million, the settlement would be more than fair to consumers.

paid by consumers for certain styles of shoes before and after the pricing policies went into effect. In addition, women's shoes are a highly differentiated product, and I could identify no shoes offered by competitors that were clearly comparable to the Nine West brands.[22] In addition, no systematic data on retail prices of styles offered by other shoe companies were available, and I also lacked information about the pricing policies and related behavior of other shoe companies.

20. Despite these limitations, I believe that the available data relating to the discounting of Nine West's protected and unprotected shoe styles provide a sufficient basis for an evaluation of the reasonableness of the settlement. Unprotected shoes were the Nine West styles not subject to the challenged pricing policies. My analysis relies on retail price data of Nine West shoes compiled by the NPD Group, Inc. and provided to CRA by the States. The NPD database contains U.S retail sales of women's shoes for eleven department stores from January 1, 1998 through July 31, 1999. For each department store, the database provides by month the average selling price and volume of each style sold. I determined the weighted average monthly selling price of a style by aggregating prices across department stores, with the prices weighted by volume. Suggested retail prices (SRPs) and wholesale costs for each style/month, based on Nine West documents, were provided by the States in the form of seasonal Nine West linesheets and off-limits lists[23] prepared by the States.

21. I began my estimates of the damages or overcharges attributable to Nine West's pricing policies by assuming that in the but-for world (that is, a world absent the challenged pricing

[22] One factor is prominence of the Nine West brands, which in 1997 were reported to account for more than 40 percent of the women's footwear sold in department stores. Donaldson, Lufkin & Jenrette, Research Bulletin, October 31, 1997; Nine West Group (NIN).

[23] The off-limits lists indicate which styles were protected and the seasons they were on the protected list.

policies and enforcement actions) each of the three divisions would have discounted its protected styles to the same extent that it had actually discounted its unprotected styles as reflected in the available data. I believe that this assumption results in an estimate of damages that is an upper bound on damages since the Nine West shoes subject to the pricing policies were its more popular styles and it is likely that the more popular styles, precisely because the demand for them was stronger, would have been less subject to discounting in the but-for world. I attempted to moderate the upward bias resulting from this assumption by excluding from the calculations style/month observations in which the average selling price was less than or within 5 percent of the style's wholesale cost. I believe that sales at unusually low or distress prices are more likely to occur for unprotected styles than protected styles, and that discounting to such a deep level, is a different kind of phenomenon than the discounting that policies of resale price maintenance are intended to curb.

22. For each of the three Nine West divisions, I calculated capture ratios over the 18-month period as a measure of the extent of price discounting. The capture ratio for a division is obtained by dividing the actual retail revenue for all styles by the revenue retailers would have received if they had been able to sell all pairs of those styles at their respective suggested retail prices. The extent to which this measure is less than 100 percent is a measure of the extent to which retailers have discounted the styles to make the sales they made. Capture ratios were calculated separately for the protected and unprotected styles of each division and compared.

23. In only one division, Enzo Angiolini, were protected shoes subject to less discounting than unprotected styles. For that division, the capture ratio for protected styles was 89 percent, compared to a capture ratio of 81.1 percent for unprotected styles, a difference of 7.9 percentage

points. For the Easy Spirit and Nine West divisions, on the other hand, protected styles were actually discounted more than unprotected styles. Thus, a methodology with a key assumption that is likely to result in overestimates of overcharges attributable to Nine West pricing policies shows overcharges for protected shoes for only one of the three divisions.[24]

24. Using the difference in the capture ratios for protected and unprotected styles for the 18-month period from February 1, 1998 to July 31, 1999, I estimated the dollar amount of overcharges for a period of three and half years, from February 1, 1996 to July 31, 1999. I extrapolated overcharge estimates from the final 18-month period for which there were sales data to the earlier period. In doing this, I assumed that the difference in capture ratios for the protected and unprotected shoes of each division for 1996 and 1997 was similar to that of 1998 and 1999, and that the relative importance of protected shoes to all shoes for each division was stable during the time period.[25] The database used to estimate capture ratios and potential protected revenues contains sales of 11 departments stores and represents approximately 35 percent of sales of Nine West shoes made by all third-party stores. In my analysis, I assumed that the 11 stores are representative of all Nine West sales by third-party stores in terms of volume, discounting and wholesale cost figures, and that the relative importance of sales of the 11 department stores to all third-party stores is constant.

25. The estimated overcharges for the time period February 1996 through July 1999 sum to $45.7 million, with all of the overcharges occurring in the styles of the Enzo Angiolini division. Because the NPD data for the Easy Spirit and Nine West divisions show greater discounting of

[24] If style/months with unusually low average selling prices are included, however, protected styles were subject to less discounting than unprotected styles in each of the three divisions.
[25] However, estimates of percentage overcharges by divisions varied significantly over time if the 18-month period was broken into 6-month segments.

protected shoes than unprotected shoes, there are no overcharges associated with sales of the protected styles of these divisions.[26]

Conclusion

26. Any analysis of the overall impacts of Nine West's pricing policies is constrained by limited data and imperfect benchmarks for the but-for world. Nonetheless, the available data on retail prices actually paid for Nine West shoes in relation to the suggested retail prices indicate that the pricing policies and associated enforcement efforts raised prices of the Enzo Angiolini protected styles above what they would otherwise have been, although the methodology employed results in estimated overcharges with some upward bias. In addition, some buyers of Nine West shoes have testified that they would have had more sales and lowered the prices on some shoes in the absence of the pricing policy,[27] and some retailers that deviated from the pricing policies testified that they were induced by Nine West's enforcement efforts to change their behavior in order to comply with the policy.[28]

27. It is my opinion that the available evidence relating to the impact of the challenged pricing policies supports the States' claim that Nine West's pricing policies and enforcement actions increased the retail prices of at least some protected shoes. Given the limitations of the data, I believe it would be very difficult to prove at trial that the price effects amounted to significantly more than $34 million. In addition, the Settlement Agreement also provides

[26] Additionally, the potential protected revenue for 1999 for all third-party stores that the Nine West capture ratio is multiplied against is zero; there were no protected shoe observations in the NPD data set for 1999 that satisfied the cost exclusion criteria, i.e., either valid wholesale cost data were not available or the weighted average monthly prices were less than or within 5 percent of cost.

[27] Florida CID Statement # 97-043, May 15, 1997, 55, 60

[28] Florida CID Statement # 97-043, May 15, 1997, 24.

injunctive relief and is likely to have a deterrent effect in the future. In view of these additional benefits, as well as the cost of continued litigation and the uncertainty surrounding the outcome of a trial, it is my opinion that the States have obtained a fair, reasonable, and adequate settlement for the consumers and citizens they represent.

Robert J. Larner

Robert J. Larner

Sworn to before me this 22 day of November 2000.

Notary Public
County of Suffolk
My Commission expires: 12/16/2005