

IN THE MATTER OF

NEW BALANCE ATHLETIC SHOE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3683. Complaint, Sept. 10, 1996--Decision, Sept. 10, 1996*

This consent order prohibits, among other things, the Massachusetts-based corporation from fixing, controlling, or maintaining the prices at which retailers advertise, promote or offer for sale any New Balance athletic or casual footwear. The order also prohibits the respondent from coercing or pressuring any retailer to maintain or adopt any resale price and from attempting to secure a retailer's commitment to any resale price. In addition, the order prohibits the respondent, for ten years, from notifying a retailer in advance that the retailer is subject to partial or temporary suspension or termination as a New Balance dealer if it advertises products below New Balance's designated resale price.

Appearances

For the Commission: *Michael J. Bloom and Pamela A. Gill.*

For the respondent: *Paul R. Gauron, Goodwin, Procter & Hoar,*
Boston, MA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that New Balance Athletic Shoe, Inc. (hereinafter "respondent") has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent New Balance Athletic Shoe, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal place of business located at 61 North Beacon Street, Boston, Massachusetts.

PAR. 2. Respondent is now, and for some time has been, engaged in the offering for sale, sale, and distribution of athletic footwear to retail dealers located throughout the United States, including many of the nation's largest retail chains.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts or practices alleged in the complaint, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In connection with the sale and distribution of New Balance branded products, respondent, in combination, agreement and understanding with certain of its dealers, has engaged in a course of conduct to fix, establish and maintain the resale prices at which dealers sell its products. Respondent has entered into express or tacit agreements with certain dealers, pursuant to which such dealers have agreed to raise retail prices on respondent's products, or to maintain certain prices or price levels set by respondent, or to refrain from discounting respondent's products for a certain period of time. Respondent has engaged in certain actions with the intent and effect of inducing dealers to enter into such price agreements, including, among other things, the following:

(a) Respondent has made threats to terminate or suspend shipments to discounting retailers and has engaged in other coercive acts, such as surveillance of dealers' prices, demands that dealers raise their prices, and threats that respondent would in the future respond to complaints by other dealers about a dealer's prices, with the intent and effect of inducing dealers to enter into express or tacit price agreements;

(b) Respondent, in order to induce certain dealers to enter into price agreements, has told such dealers that it would act to secure similar price agreements with other dealers or to prevent other dealers from discounting more than a certain fixed percentage below suggested retail prices; and

(c) Respondent has secured price agreements from dealers after warning discounting dealers that continued or subsequent selling of its products at prices below those set by respondent would result in discontinuation of sales to the dealer pursuant to respondent's written policy stating that respondent will give a "one-time warning" to a dealer who sells its products below designated prices, and that in the

event of continued or subsequent violation of its policy respondent will discontinue selling to that dealer.

PAR. 5. The purpose, effect, tendency, or capacity of the acts and practices described in paragraph four is and has been to restrain trade unreasonably and to hinder competition in the sale of athletic footwear in the United States, and to deprive consumers of the benefits of competition in the following ways, among others:

(a) Price competition among retail dealers with respect to the sale of New Balance products has been restricted, and

(b) Prices to consumers of New Balance products have been increased, or have been prevented from falling.

PAR. 6. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. These acts and practices are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent

has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission further issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent New Balance Athletic Shoe, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts. The mailing address and principal place of business of respondent New Balance Athletic Shoe, Inc. is 61 North Beacon Street, Boston, Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for the purpose of this order, the following definitions shall apply:

(A) The term "*New Balance*" means New Balance Athletic Shoe, Inc., its predecessors, subsidiaries, divisions, groups, and affiliates controlled by New Balance Athletic Shoe, Inc., and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

(B) The term "*respondent*" means New Balance.

(C) The term "*product*" means any athletic or casual footwear item which is manufactured, offered for sale or sold under the brand name of "New Balance" to dealers or consumers located in the United States of America.

(D) The term "*dealer*" means any person, corporation or entity not owned by New Balance, or by any entity owned or controlled by New Balance, that in the course of its business sells any product in or into the United States of America.

(E) The term "*resale price*" means any price, price floor, minimum price, maximum discount, price range, or any mark-up formula or margin of profit used by any dealer for pricing any

product. "Resale price" includes, but is not limited to, any suggested, established, or customary resale price.

II.

It is further ordered, That New Balance, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacturing, offering for sale, sale or distribution of any product in or into the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, do forthwith cease and desist from:

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

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

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

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

Provided that nothing in this order shall prohibit New Balance from establishing and maintaining cooperative advertising programs

that include conditions as to the prices at which dealers offer products, so long as such advertising programs are not a part of a resale price maintenance scheme and do not otherwise violate this order.

III.

It is further ordered, That, for a period of five (5) years from the date on which this order becomes final, New Balance shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any product to any dealer:

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

IV.

It is further ordered, That, within thirty (30) days after the date on which this order becomes final, New Balance shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to all of its directors and officers, and to dealers, distributors, agents, or sales representatives engaged in the sale of any product in or into the United States of America.

V.

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

VI.

It is further ordered, That New Balance shall notify the Commission at least thirty (30) days prior to any proposed changes in New Balance such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, within sixty (60) days after the date this order becomes final, and at such other times as the Commission or its staff shall request, New Balance shall file with the Commission a verified written report setting forth in detail the manner and form in which New Balance has complied and is complying with this order.

VIII.

It is further ordered, That this order shall terminate on September 10, 2016.

Commissioner Starek dissenting.

EXHIBIT A

[NEW BALANCE LETTERHEAD]

Dear Retailer:

The Federal Trade Commission has conducted an investigation into New Balance's sales policies, and in particular New Balance's "Statement of Policy," which was announced in July 1991 and, with modifications, has remained in effect since then. To expeditiously resolve the investigation and to avoid disruption to the conduct of its business, New Balance has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission prohibiting certain practices relating to resale prices. A copy of the order is enclosed. This letter and the accompanying order are being sent to all of our dealers, sales personnel and representatives.

The order spells out our obligations in greater detail, but we want you to know and understand that you can sell and advertise our products at any

price you choose. While we may send materials to you which contain suggested retail prices, you remain free to sell and advertise those products at any price you choose.

We look forward to continuing to do business with you in the future.

Sincerely yours,

President
New Balance Athletic Shoe, Inc.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

There is some evidence that New Balance went beyond permissible communications with its dealers and entered the realm of unlawful resale price maintenance. An order is, therefore, appropriate. I write separately to make clear my understanding that the complaint does not challenge the announcement or implementation by a supplier of a structured termination policy. Although I view paragraph 4(c) of the complaint as ambiguous, the essence of the charge is that New Balance secured price agreements from dealers that discounted in return for assurances that New Balance would not impose sanctions on them. New Balance did not implement its structured termination policy, and the complaint and order do not address the lawfulness of that policy.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

As I did in Reebok International, Ltd., Docket No. C-3592, I find reason to believe that the target of the present investigation -- New Balance Athletic Shoe, Inc. ("New Balance") -- has entered into agreements with retailers to restrain retail prices and has thereby violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. However, I dissent from the Commission's decision to issue the final order in this matter because certain provisions of the order are not required to prevent unlawful conduct and may instead unnecessarily restrain procompetitive conduct by New Balance.

As in Reebok International, the fencing-in restrictions in the order relating to resale price advertising (specifically, the minimum advertised price provisions¹) and to New Balance's "structured

¹ The unnecessary provisions relating to price advertising appear in paragraphs II(A), II(B), and III and in Exhibit A to the proposed order.

termination policy"² are unjustifiably broad and likely to deter efficient conduct. Indeed, the order even goes beyond the provisions I found overinclusive, and therefore unacceptable, in the Reebok order: the current order omits language that appeared in paragraph II of the Reebok order that expressly recognized the respondent's Colgate rights.³

In the interests of fairness and efficiency, injunctive relief ordered to address resale price maintenance should be strictly tailored to the *per se* unlawful conduct alleged. Because the order in this case mandates excessive restrictions upon the conduct of New Balance, I respectfully dissent.

² See paragraph IV(C) of the proposed complaint and paragraph II(D) of the proposed order.

³ See *United States v. Colgate & Co.*, 250 U.S. 300 (1919).