

Complaint

IN THE MATTER OF

NINE WEST GROUP INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3937; File No. 9810386
Complaint, April 11, 2000--Decision, April 11, 2000*

This consent order prohibits Respondent Nine West Group Inc. from fixing controlling or maintaining the retail price of women's footwear. It also prohibits Respondent from pressuring, or coercing any dealer to adhere, adopt, or maintain any set retail price. Respondent is also prohibited from securing any commitments or assurances regarding the resale price. For a period of ten years, Respondent is also prohibited from notifying a dealer in advance that they are subject to a temporary or partial suspension of supply if the dealer sells Nine West shoes below a designated price. Respondent must also, for a period of five years, display conspicuously on any list, book, catalogue, advertising, or promotional material where it has suggested a retail price to a dealer a required statement explaining that while it may suggest a price, dealers remain free to determine at which price to advertise and sell Nine West products. Respondent must also send a letter to dealers with a similar explanation.

Participants

For the Commission: *Alan B. Loughnan, Theodore Zang, Ann Weintraub, Barbara Anthony, Daniel P. Ducore, Kenneth Kelly, and Gregory Vistnes.*

For the Respondents: *Ron Rolfe, Cravath, Swaine & Moore, and Kevin Arquit, Rogers & Wells.*

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 Nine West Group Inc. (hereinafter "Respondent" or "Nine West"), has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing

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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:

RESPONDENT

1. Respondent Nine West Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Nine West Plaza, 1129 Westchester Avenue, White Plains, New York 10604-3529, and includes its parent, Jones Apparel Group, Inc., and their affiliates, subsidiaries, divisions and organizational units of any kind, their successors and assigns and their present officers, directors, employees, agents, representatives and other persons acting on their behalf.

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

JURISDICTION

3. Respondent is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

4. 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 within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

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**RESPONDENT'S ACTS IN COMBINATION WITH
CERTAIN OF ITS DEALERS**

5. In connection with the sale and distribution of Nine West branded products, Respondent, in combination, agreement and understanding with certain of its dealers, beginning in January 1988 and continuing thereafter until at least July 31, 1999, engaged in unlawful contracts, combinations, or agreements, in unreasonable restraint of interstate trade and commerce.

6. The combinations and contracts consisted of continuing agreements, understandings or concert of action among Respondent and certain of its dealers, the substantial terms of which were to fix, raise, maintain or stabilize the retail prices at which Nine West products were advertised and sold to the consuming public.

7. For the purpose of forming, effectuating and furthering the unlawful contracts, combinations or agreements, the Respondent and certain of its dealers did, among other things, the following:

a. Various Nine West divisions adopted pricing policies governing the retail sale of Nine West products and distributed "off limits" or "non-promote" lists of shoes, including shoes that could not be promoted outside of defined periods of time, called "clearance windows" or "breakdates." In doing so, Nine West did seek acquiescence in and threatened and initiated enforcement actions to enforce those policies. Retailers communicated to Nine West their agreement to adhere to these pricing policies.

b. Nine West shared revisions of its pricing policies, such as updated "off limits" or "non-promote" lists, with certain of its dealers prior to implementation of such revised policies for the purpose of soliciting input as to shoes that should, or should not, be included on the revised lists.

c. Nine West added or removed shoes from the coverage of its pricing policies at the request of its dealers.

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d. Nine West added/extended or removed/limited “clearance windows” or “breakdates” for shoes covered by its pricing policies at the request of its dealers.

e. Nine West negotiated individualized exemptions from the coverage of its pricing policies for certain of its dealers. Nine West often conditioned its agreement in these cases on the condition that the dealer would not advertise the newly-negotiated retail price.

f. Nine West received complaints from dealers regarding other dealers’ violation of Nine West’s pricing policies. Nine West responded to violations of its pricing policies by some of its dealers in a number of different ways. For example, Nine West suspended shipments to violating dealers for a limited period, with the tacit understanding that shipments would resume if Nine West discovered no further violation of the policy in the interim, or if the dealer promised not to violate the policy again in the future. Dealers communicated to Nine West their acquiescence to Nine West’s pricing policies.

EFFECTS

8. The purpose, effect, tendency, or capacity of the acts and practices described in Paragraphs 5, 6, and 7 has been to restrain trade unreasonably and to hinder competition in the sale of women’s footwear in the United States, and to deprive consumers of the benefits of competition in the following ways, among others:

- a. Prices to consumers of Nine West products have been increased, or have been prevented from falling; and

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- b. Price competition among retail dealers with respect to the sale of Nine West products has been restricted.

VIOLATION ALLEGED

9. 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.

IN WITNESS THEREOF, the Federal Trade Commission on this eleventh day of April, 2000, issues its complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Nine West Group Inc., hereinafter sometimes referred to as Respondent, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Northeast Regional Office presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, 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 thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

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

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ORDER

I.

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

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

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

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

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

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

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

II.

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

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

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

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

(D) For a period of ten (10) years from the date on which this order becomes final, adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan pursuant to which Respondent notifies a dealer in advance that: (1) the dealer is subject to warning or partial or temporary suspension or termination if it sells, offers for sale, promotes or advertises any Nine West Products below any resale price designated by Respondent; and (2) the dealer will be subject to a greater sanction if it continues or renews selling, offering for sale, promoting or advertising any Nine West Products below any such

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designated resale price. As used herein, the phrase "partial or temporary suspension or termination" includes but is not limited to any disruption, limitation, or restriction of supply: (1) of some, but not all, Nine West Products; or (2) to some, but not all, dealer locations or businesses; or (3) for any delimited duration. As used herein, the phrase "greater sanction" includes but is not limited to a partial or temporary suspension or termination of greater scope or duration than the one previously implemented by Respondent, or a complete suspension or termination.

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

III.

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

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

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IV.

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

V.

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

VI.

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

VII.

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

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

VIII.

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

By the Commission.

EXHIBIT A

[NINE WEST LETTERHEAD]

Dear Retailer:

The Attorneys General of [x number] of States, and the Federal Trade Commission have conducted investigations into Nine West Group Inc.'s sales policies. To expeditiously resolve the investigations and to avoid disruption to the conduct of its business, Nine West Group Inc. has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission and a Final Judgment and Consent Decree by the States prohibiting certain practices relating to resale prices. Copies of the Consent Order and the Final Judgment and Consent Decree are enclosed. This letter and the accompanying Orders are being sent to all of our dealers, sales personnel and representatives.

The Orders spell out our obligations in greater detail, but we want you to know and understand the following. Under both orders you can advertise and sell our products at any price you choose. While we may send materials to you which may contain

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our 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 of Sales and Marketing
Nine West Group Inc.

**STATEMENT OF COMMISSIONERS ORSON SWINDLE
AND THOMAS B. LEARY**

We have voted to accept the consent agreement for public comment because we have reason to believe that the conduct engaged in by Nine West falls outside the limited zone of protection afforded by the *Colgate* doctrine,¹ and thus is per se illegal under current law. We do not mean to indicate agreement, however, with the artificial analysis mandated by the *Colgate* doctrine or with the overbroad per se condemnation of minimum resale price maintenance (“RPM”), which the *Colgate* doctrine mitigates to some degree.

We do not know what conclusion we might have reached had Nine West’s behavior been analyzed under the rule of reason, because that question did not arise. Nevertheless, one can easily posit instances of minimum RPM that involve a mixture of

¹ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

Analysis to Aid Public Comment

procompetitive and anticompetitive effects, like any other vertical restraint, and undercut the continuing validity of the per se rule against the practice. Several years ago, the Supreme Court took the beneficial step of reexamining and overruling the doctrine that condemned maximum RPM as per se illegal.² When an appropriate case arises, we believe that the Court should continue this healthy trend by reassessing the even hoarier per se treatment of minimum RPM.³

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission (“the Commission”) has accepted, subject to final approval, an agreement from Nine West Group Inc. (“Nine West”) to a proposed consent order. The agreement settles charges by the Commission that Nine West violated Section 5 of the Federal Trade Commission Act by entering into vertical agreements that restricted retail price competition in the sale of women’s shoes. Nine West is a major manufacturer and seller of women’s shoes and sells shoes under the “Easy Spirit,” “Enzo Angiolini,” “Bandolino,” “cK/Calvin Klein,” “Pappagallo,” “Selby,” “Amalfi,” “Calico,” “Evan-Picone,” “Westies” “Capezio,” “Joyce,” and “9 & Co.” labels. Jones Apparel Group, Inc., purchased Nine West in July of 1999, and is a signatory to the consent agreement, but none of the conduct alleged in the complaint occurred after the purchase.

² *State Oil Co. v. Khan*, 522 U.S. 3 (1997), overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

³ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

Analysis to Aid Public Comment

The proposed consent order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to invite public comment on the proposed order. This analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Nine West that the law has been violated as alleged in the complaint.

The Complaint

Nine West Group is a Delaware corporation with its principal place of business in White Plains, New York. Nine West sells women's footwear to retail outlets throughout the United States, including many of the nation's largest department stores.

The complaint alleges that beginning in January 1988 and continuing until at least July 31, 1999, Nine West entered into agreements with certain retailers that fixed, raised, and stabilized retail prices to consumers. Nine West adopted pricing policies that determined which shoes the retailer could not discount or promote outside of specified times. Nine West did not merely announce these policies and terminate a retailer that did not adhere to them, which would have been lawful, but instead Nine West sought agreement from these dealers on future pricing. For example, Nine West suspended shipments and said it would resume them only if the dealer promised not to violate the policy again. Nine West also coerced compliance by threatening to

withhold discounts or advertising funds if the dealer refused to comply with a pricing policy. Retailers communicated to Nine West that they would adhere to the pricing policies.

The Proposed Consent Order

The proposed consent order is designed to prevent Nine West from agreeing with its dealers to set prices. Paragraph II of the order prohibits Nine West from fixing, controlling, or maintaining the retail price of women's footwear. It also prohibits Nine West from coercing or pressuring any dealer to maintain, adopt, or adhere to any resale price. Nine West also may not secure or attempt to secure commitments or assurances from any dealer concerning resale prices. Finally, Paragraph II prohibits Nine West, for a period of ten years, from notifying a dealer in advance that the dealer is subject to a temporary suspension of supply (e.g., no shoes shipped for six months) or a partial suspension (e.g., no orders of Easy Spirit loafers) if the dealer sells Nine West shoes below a designated price.

Paragraph III of the order requires that for a period of five years from the date on which the order becomes final, Nine West shall clearly and conspicuously include a statement on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any Nine West product to any dealer. The required statement explains that while Nine West may suggest resale prices for its products, dealers remain free to determine on their own the prices at which they will sell and advertise Nine West's products.

Paragraph IV of the order requires Nine West to mail a letter (see attachment A) to its retailers with a copy of the Commission's order. The letter states that while Nine West may send materials to them with suggested retail prices, they are free to sell and advertise at a price they chose. Paragraph V requires that the same letter with a copy of the Commission's order be sent to new employees of Nine West.

Analysis to Aid Public Comment

Paragraph VI of the order requires Nine West to notify the Commission at least thirty days prior to any proposed changes in the corporation, such as dissolution or sale. Paragraph VII consists of standard Commission reporting and compliance procedures. Finally, Paragraph VIII contains a standard “sunset provision,” under which the terms of the order terminate twenty years after the date of issuance.

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IN THE MATTER OF

**MICHAEL T. BERKLEY, D.C., AND MARK A.
CASSELLIUS, D.C.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3936; File No. 9910278
Complaint, April 11, 2000--Decision, April 11, 2000

This consent order addresses practices used by Respondents Michael T. Berkley, D.S. and Mark A. Cassellius, two chiropractors with a principle practice in La Crosse, Wisconsin. The order prohibits Respondents from fixing prices for any chiropractic services. The order also prohibits Respondents from: (1) engaging in collective negotiations on behalf of any chiropractors; (2) orchestrating concerted refusals to deal; or (3) fixing prices, or any other terms, on which chiropractors deal. In addition, they are prohibited from encouraging, advising, or pressuring any person to engage in any action that would be prohibited if the person were subject to the order. Respondents may engage in conduct that is reasonably necessary to operate (a) any "qualified risk-sharing joint arrangement," or, (b) any "qualified clinically integrated joint arrangement

Participants

For the Commission: *Nicholas J. Franczyk, David A. O'Toole, Evan Siegel, Daniel P. Ducore, Elizabeth Schneirov, J. Elizabeth Callison, and Gregory S. Vistnes.*

For the Respondents: *Beth J. Kushner, von Briesen Purtell & Roper, S.C., Jon Axelrod, DeWitt, Ross & Stevens, and Joseph J. Connell, Parke O'Flaherty.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 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 the individuals named above, hereinafter "Respondents," have violated and are violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect