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Dear Assistant Attorney General Varney and Chairman Leibowitz:

We are writing to request that you urge the Solicitor General to support the pending petition for certiorari seeking review of the Fifth Circuit’s decision in PSKS, Inc. v. Leegin Creative Leather Products, Inc., 615 F.3d 412 (5th Cir. 2010), insofar as the petition presents the question of whether a strict definition of the relevant market and proof of a manufacturer’s market power is required in order for a plaintiff to establish a prima facie violation of the rule of reason in a resale price maintenance (RPM) case.

The Fifth Circuit’s troubling holding that a “market-power screen” is appropriate for RPM cases – even at the pleading stage – along with similar holdings in other cases,¹ is bad antitrust policy because it short circuits and distorts a proper analysis of the anticompetitive effects of RPM, and threatens to turn the rule of reason into a rule of per se legality. It is also inconsistent with Supreme Court’s Leegin decision, the “direct evidence” rule of Indiana Dentists, and the agencies’ own policies rejecting a market-power screen for vertical nonprice restraints and RPM agreements.

¹ The recent decision of the Eleventh Circuit in Jacobs v. Tempur-Pedic Int’l, Inc., 2010 WL 4880864 (Dec. 2, 2010), is equally troubling. In that case, as in PSKS, the court upheld the dismissal of an RPM complaint under Rule 12(b)(6) for failure to sufficiently allege a plausible relevant product market. The court held that the alleged product market “must be supported by demonstrable empirical evidence,” such as “factual allegations of the cross-elasticity of demand or other indications of price sensitivity . . . .” Id. at *5; see also Spahr v. Leegin Creative Leather Products, Inc., 2008 WL 3914461 (E.D. Tenn. 2008) (dismissing RPM complaint because the alleged relevant market was not plausible). We agree with petitioner in PSKS that the complaint’s allegations were sufficient to allege a plausible relevant product market, and believe the Fifth and Eleventh Circuits have applied too stringent a standard for pleading a relevant product market. However, the extent to which a detailed market definition and high market shares are required to establish that an RPM agreement is prima facie illegal is important regardless of the procedural stage of the litigation.
If the PSKS case is not considered to be a good vehicle for addressing the requirements of a prima facie RPM violation, we urge the agencies and the Solicitor General to make clear in any event that a market-power screen is inappropriate for RPM cases.

**Background**

In its 2007 *Leegin* opinion, the Supreme Court overturned the per se rule governing resale price maintenance agreements because “it cannot be stated with any degree of confidence that resale price maintenance ‘always or almost always tend[s] to restrict competition and decrease output.” *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 894 (2007) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)) (alteration in original). However, while acknowledging that “vertical agreements setting minimum resale prices can have procompetitive justifications,” the Court emphasized that “they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation.” *Id.* at 892; *see also id.* at 897 (“Resale price maintenance, it is true, does have economic dangers.”). Indeed, the Court declared: “the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.” *Id.* at 894; *see also id.* at 915 (“resale price maintenance can cause harms with some regularity”) (Breyer, J., dissenting); Thomas R. Overstreet Jr. & Alan A. Fisher, *Resale Price Maintenance and Distributional Efficiency: Some Lessons from the Past*, 3 Contemp. Pol’y Issues 43, 45 (1985) (“the historical experience, or practice of RPM [is] largely a sorry record of abuses, in sharp contrast to the contention of RPM’s missionaries”). Accordingly, the Court instructed the lower courts “to be diligent in eliminating [the] anticompetitive uses [of RPM] from the market” under the rule of reason, 551 U.S. at 897, which is designed to “distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest,” *id.* at 886.

Given the degree of anticompetitive danger posed by RPM, the Court did not simply relegate it to the unstructured, full-blown rule of reason applicable to nonprice vertical restraints. *See 8 Philip E. Areeda & Hebert Hovenkamp, Antitrust Law ¶ 1620e (3d ed. 2010)* (“[T]here is a strong consensus that RPM poses greater threats to competition than do most nonprice restraints, perhaps significantly greater.”); *id.* ¶ 1630a (“Even under the rule of reason, resale price maintenance might properly be regarded with greater suspicion [than nonprice restraints], leading to stronger presumptions against it (or weaker presumptions in its favor).”). Rather, the Court identified “certain factors . . . relevant to the inquiry,” including “the number of manufacturers that make use of the practice in a given industry,” the “source of the restraint,” and the market power of the “relevant entity.” 551 U.S. at 897-98. The Court said nothing about proof of a relevant market nor required proof of market power of any entity. Indeed, the Court did not identify any particular element that a plaintiff must prove, other than noting that “[a] party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation.” *Id.* at 898. The Court invited the lower courts to
“establish the litigation structure to ensure that the rule [of reason] operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.”

_Id._ Specifically, the Court advised: “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.” _Id._ at 898-99.

Neither the Fifth Circuit nor the district court followed these directions. Rather than adopt a litigation structure that roots out anticompetitive uses of RPM from the market, the courts ignored and underestimated the anticompetitive consequences of the practice by requiring the plaintiff to strictly define a relevant market and establish defendant’s substantial market power within that market, without regard to the nature of the potential anticompetitive harms from RPM in general or the allegations of anticompetitive effects in the complaint in particular.

The district court dismissed the complaint because the alleged product market was not “tenable,” and refused to consider the alleged anticompetitive effects “[b]ecause PSKS has not defined a relevant market . . . .” _Pet. App._ 22a, 26a. The Fifth Circuit agreed that the complaint “fails . . . as a matter of market definition,” _id._ at 7a, and held that a complaint must satisfy a market-power screen: “To allege a vertical restraint claim sufficiently, a plaintiff must plausibly allege the defendant’s market power,” _id._ at 10a. The court concluded that “[a] market-power screen is . . . compatible with _Leegin_ and our precedent and that of our sister circuits,” citing cases of nonprice vertical restraints. _Id._ Like the district court, the Fifth Circuit rejected plaintiff’s allegations of anticompetitive effects, based on the circular proposition that consumers could not have paid “‘artificially’ high prices for Brighton products” because, “[a]bsent market power, an artificial price hike by Leegin would merely cause it to lose sales to its competitors.” _Id._ at 11a. 

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2 The allegations in the complaint are more than ample to allege likely anticompetitive effects under the _Leegin_ factors. While the complaint does not specifically allege that the initial RPM policy was adopted at the behest of Leegin’s independent retailers, the complaint does allege that “at the insistence of many of its most faithful retail dealers, Leegin . . . began to enforce the [RPM] Policy with greater regularity and began to respond to complaints from its retail dealers regarding discounting retailers with greater levels of enforcement.” _Second Am. Compl._ ¶ 13. Moreover, the complaint alleges that Leegin was not only a manufacturer of Brighton products, but it owned or controlled retail outlets that sold those products in competition with its independent retailers. _See id._ ¶¶ 8, 29. Indeed, petitioner had asserted that “Defendant’s retail operations are a substantial part of its business, up to 40% overall.” _Plaintiff’s Mot. to Reconsider Order Granting Defs. Mot. to Dismiss (Doc. 168) at 3_. The complaint alleges that the RPM program was not instituted to promote distribution efficiencies, _see Second Am. Compl._ ¶ 31 (the “products at issue do not require service, instruction, or other post-sale aspects that would be likely to be underprovided in the absence of a pricing restriction”), but rather to “insulate the retail stores it owns or controls from price competition and protect retailers who have cartelized from price competition from more innovative and efficient retailers,” _id._ ¶ 22. The complaint also suggests that RPM was widespread in the industry. _See id._ ¶ 32 (“Brand-named women’s accessories, and especially the area of handbags, can be characterized by the wide-spread adoption of practices that have the effect of limiting price competition among competing brands.”). As the cert petition
The Fifth Circuit’s requirement of a strict definition of the relevant market and adoption of a manufacturer market-power screen for all vertical restraints cases is inconsistent with Indiana Dentists and Leegin, bad antitrust policy, and contrary to the positions taken by the Justice Department and the Federal Trade Commission.

Direct Evidence of Anticompetitive Effects Obviates the Need for Independent Proof of Markets in All Types of Antitrust Cases

It is well settled that direct evidence of anticompetitive effects obviates the need to circumstantially prove effects by first defining a relevant market and then inferring market power from a high market share. See Fed. Trade Comm’n v. Indiana Fed’n of Dentists, 476 U.S. 447, 460-61 (1986) (“Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, ‘proof of actual detrimental effects, such as a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’”) (quoting 7 P. Areeda, Antitrust Law ¶ 1511, at 429 (1986)); NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 109-10 & n. 42 (1984) (“[W]here the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.”) (quoting Solicitor General’s brief with approval); see also Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 477 (1992) (“It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so.”); see also United States v. Addyston Pipe & Steel Co., 85 F. 271, 292 (6th Cir. 1898) (“The most cogent evidence that [defendants] had [market] power is the fact . . . that they exercised it.”).

The rule that anticompetitive effects may be proved directly, without independent proof of the relevant market and a high market share, not only applies in rule of reason cases under Section 1 of the Sherman Act, it also has been extended to Section 2 cases where proof of monopoly power is an element of the offense. See, e.g., Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196-97 (1st Cir. 1996); PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 107-08 (2d Cir. 2002); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 n.3 (3d Cir. 2007); Re/Max Int’l, Inc. v. Realty-One, Inc., 173 F.3d 995, 1018-19 (6th Cir. 1999); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995).3

Leading commentators agree that “evidence of the actual ability to restrict output, raise prices, or otherwise determine product characteristics normally shaped by competition, establishes market power . . . and it may do so more reliably than market share evidence.” Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, Antitrust Law in Perspective 919 (2d ed. 2008); see Lawrence A. Sullivan & Warren S. Grimes, The Law of Antitrust 74 (2d ed. 2006) (“Disputes about market definition . . . are of little consequence in the face of actual evidence of anticompetitive effects.”); Steven C. Salop, The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium, 68 Antitrust L.J. 187, 200 (2000) (“If there is direct evidence of anticompetitive effect, then a separate test of market power, let alone a threshold test of market power, is redundant. In essence, the evidence of anticompetitive effect also proves market power in the affected market.”).

There is no reason to exempt vertical restraints in general, or RPM agreements in particular, from the “direct evidence” rule. See Andrew I. Gavil, On the Utility of “Direct Evidence of Anticompetitive Effects”, Antitrust, Spring 2005, at 59, 62 (“direct evidence is more, not less reliable, than notoriously uncertain inquiries into relevant markets and market shares”); Mark A. Lemley & Christopher R. Leslie, Categorical Analysis in Antitrust Jurisprudence, 93 Iowa L. Rev. 1207, 1265 (2008) (noting that direct evidence goes to the ultimate question of whether a restraint causes anticompetitive effects regardless of whether the restraint is categorized as vertical or horizontal). On the contrary, an independent market-power requirement in a vertical case makes less sense than in a horizontal or monopolization case because the market power of the manufacturer may be entirely unrelated to commonly accepted theories of anticompetitive harm in vertical cases.

RPM Can Be Anticompetitive Without Significant Manufacturer Market Power

Leegin indicated that “market power” was but one relevant factor to be considered in the rule of reason analysis of RPM agreements, and the other two factors cited by the Court – retailer(s)-as-source-of-the-restraint and widespread use among manufacturers – can result in anticompetitive harm (higher prices without additional services; lack of consumer choice) regardless of the defendant manufacturer’s market power.4 Indeed, significant manufacturer market power may be inconsistent with the anticompetitive scenario in which a “dominant retailer . . . request[s] resale price maintenance to forestall innovation in distribution that decreases costs,” and the “manufacturer . . . accommodate[s] the retailer’s demands [because] it needs access to the retailer’s distribution network.” Leegin, 551 U.S. at 893-94. The more market power the manufacturer has, the less likely a retailer or retailers could pressure it to adopt RPM that serves retailer interests. See Areeda & Hovenkamp ¶ 1620e (“[I]n a case of RPM imposed by a powerful dealer, the relevant power is that of the dealer in the market in which it

4 The Court said that the lack of manufacturer market power is relevant because “if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distributions outlets.” Leegin, 551 U.S. at 898. That hardly suggests that the lack of manufacturer market power amounts to a complete defense, let alone that manufacturer market power is a necessary element of an RPM claim.
purchases.”); see also id. ¶ 1604d3 (“Multibrand dealers’ ability to substitute other brands gives the dealers considerable leverage.”).

To be sure, without some market power, a single manufacturer’s use of RPM may be ineffective in raising prices if consumers can simply switch to other, unencumbered brands. See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19 (1977) (“[W]hen interbrand competition exists . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.”). However, the very fact that a manufacturer adopts RPM is good evidence that it has sufficient market power to make it stick. See Lester G. Telser, Why Should Manufacturers Want Fair Trade?, 3 J. L. & Econ. 86, 87 (1960) (“[A] necessary condition to a manufacturer’s use of resale price maintenance is that he must possess some degree of monopoly control over the price of the product because his product is differentiated in economically relevant respects from competing products.”); Ward S. Bowman, Jr., The Prerequisites and Effects of Resale Price Maintenance, 22 U. Chi. L. Rev. 825, 849 (1955) (“Price maintenance appears to be incompatible with an assumption of pure competition among both sellers and resellers.”). Accordingly, to the extent that market power on the part of the manufacturer is a prerequisite for an RPM claim, it is not the power indicated by a high share of the interbrand product market. Rather, the “market power of the manufacturer’s brand” in “a product-differentiated market . . . may be all that the law requires.” Areeda & Hovenkamp ¶ 1620e. As such, a single-brand market may be perfectly appropriate for RPM cases. Cf. Sullivan & Grimes § 7.3a1, at 384-88 (a manufacturer with a relatively small market share but a powerful brand may have significant market power).

RPM Tends to Adversely Affect “Interbrand” Competition

Furthermore, it makes little sense to look to “interbrand” competition to discipline the exploitation of “intrabrand” market power insofar as RPM itself impairs interbrand competition.5 See GTE Sylvania, 433 U.S. at 52 n.18 (“[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands.”) (internal quotes omitted; alteration in original). It does so not merely by facilitating collusion among manufacturers, but also by preventing restricted dealers “from engaging resellers of other brands in price competition.” Areeda & Hovenkamp ¶ 1630b; see Greg Shaffer, Slotting Allowances and Resale Price Maintenance: A Comparison of Facilitating Practices, 22 Rand J. Econ., No. 1, at 120, 122 (1991) (“RPM is an example of a contractual provision that inhibits a firm from reacting to its competitors.”).

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5 The Fifth Circuit also erred in suggesting that an RPM complaint must specifically allege “harm to interbrand competition.” Pet. App. 12a. Putting aside the fact that the complaint does appear to allege such harm, see Second Am. Compl. ¶ 32, Leegin did not indicate that proof of interbrand harm is required in RPM cases, nor has the Court ever held that such proof is required in nonprice vertical restraints cases. See GTE Sylvania, 433 U.S. at 51-52. It is obvious, for example, that the retailer-as-source-of-the-restraint theory (including dealer cartels) does not necessarily involve harm to interbrand competition at the manufacturer level.
Moreover, RPM can prevent retail intrabrand price competition from placing downward pressure on wholesale interbrand prices. See Daniel P. O’Brien & Greg Shaffer, Vertical Control With Bilateral Contracts, 23 Rand J. Econ., No. 3, at 299 (1992); Leegin, 551 U.S. at 911 (RPM agreements “will tend to prevent price competition from ‘breaking out’; and they will thereby tend to stabilize producer prices”) (Breyer, J., dissenting); e.g., S. Robson Walton, Antitrust, RPM, and the Big Brands: Discounting in Small-Town America (II), 15 Antitrust L. & Econ. Rev., No. 2, at 11, 16 (1983) (Wal-Mart executive explaining that “competitive pricing at the retail level creates more pressure on manufacturers’ factory prices than is present when they’re able to set retail prices as well”).

It is particularly dubious to expect interbrand competition to protect consumers when RPM is used with multibrand retailers, as it gives those retailers an incentive to raise the price of competing products in order to steer consumers to the product with the higher margin guaranteed by RPM. See Greg Shaffer, Theories of Harm from Resale Price Maintenance, FTC Hearings on Resale Price Maintenance, Feb. 19, 2009, available at http://www.ftc.gov/opp/workshops/rpm/docs/gschafferppt0219.pdf; see also Patrick Rey & Thibaud Verge, Resale Price Maintenance and Interlocking Relationships, J. Indus. Econ. (forthcoming) (July 1, 2008 ms. at 24-26), available at http://www.ftc.gov/be/seminardocs/090219prey.pdf. (recommending “cautious attitude towards price restrictions in situations where rival manufacturers rely on the same competing retailers” because it allows manufacturers to eliminate or soften interbrand competition).

RPM has another “interbrand” anticompetitive tendency at the retail level, namely it prevents more efficient retailers from passing on the benefits of their lower costs to consumers and raises a barrier to entry and expansion by innovative retailers. Leegin recognized this effect when the Court noted (in connection with the dealer cartel theory) that “[r]etailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the [RPM] agreement,” and (in connection with the dominant retailer theory) that RPM may “forestall innovation in distribution that decreases costs.” Leegin, 551 U.S. at 893; see also id. at 911 (Breyer, J., disseting) (RPM “can inhibit expansion by more efficient dealers whose lower prices might otherwise attract more customers, stifling the development of new, more efficient modes of retailing”). Indeed, this anticompetitive tendency occurs regardless of the purpose for which RPM is employed.6

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6 See Areeda & Hovenkamp ¶ 1632c4 (“When resale prices are not fixed, price competition among dealers favors the expansion of those with efficient scale and methods, thus lowering the cost of distribution.”); B.S. Yamey, Introduction: The Main Economic Issues, in Resale Price Maintenance 5 (B.S. Yamey ed. 1966) (“By stopping price competition in retailing, the practice impedes the replacement of high-cost by low-cost forms of retailing, and of less efficient by more efficient firms. The brake on price competition is especially severe on the development of new forms of retailing.”); e.g., Office of Fair Trading, An Evaluation of the Impact Upon Productivity of Ending Resale Price Maintenance on Books (Feb. 2008), available at http://oft.gov.uk/shared_of/t/economic_research/oft981.pdf (study showing that abolition of RPM
Market-Power Screens Promote False Negatives

A manufacturer market-power screen is bad antitrust policy not only because it focuses on the wrong issue – manufacturer market power may be unrelated (or inimical) to well-accepted theories of anticompetitive harm – but also because the question of whether market power exists “invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, high technical, criteria to often ill-defined markets.” *Leegin*, 551 U.S. at 917 (Breyer, J., dissenting); see Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 Cal. L. Rev. 817, 825 (1987) (“[T]he measurement of market power, which requires the definition of relevant product and geographic markets, is the most elusive and unreliable aspect of antitrust enforcement.”); Phillip Areeda, *The Changing Contours of the Per Se Rule*, 54 Antitrust L.J. 27, 28 (1985) (“[P]roving markets and power is difficult, complex, expensive, and time-consuming.”). Even if the process of market definition and inferring market power from market shares were reliable, the expense and difficulty of overcoming a market-power screen deters meritorious lawsuits from even being brought. See Spencer Weber Waller, *Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 Chi-Kent L. Rev. 207, 230-31 (2003) (“[P]rivate plaintiffs and counsel will rarely have the resources or inclination to develop the full market definition, market power, economic and factual analysis necessary to proceed with [rule of reason] cases.”).

Commentators have long noted that the rule of reason in nonprice vertical restraints cases, under which courts have frequently – albeit mistakenly – applied a market-power screen, amounts to a rule of de facto per se legality. See Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 Antitrust L.J. 67 (1991) (“non-monopolists have been effectively freed from antitrust regulation of vertical nonprice restraints”); Herbert Hovenkamp, *Federal Antitrust Policy* § 11.6b, at 486 (3d ed. 2005) (“The rule of reason has come close to creating complete nonliability for vertical nonprice restraints.”).

As the Areeda and Hovenkamp treatise explains, “litigation under the rule of reason generally is extraordinarily expensive in relation to the size of the interests at stake, and it is likely to be even more costly for a practice as poorly understood and as complex as RPM.” Areeda & Hovenkamp ¶ 1620e. As a result, “many instances of anticompetitive RPM may go unchallenged.” *Id.* A market-power screen only reinforces this tendency. And a market-power screen combined with a strict application of *Twombly* threatens to completely undermine private antitrust challenges to RPM agreements.

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on books in the United Kingdom in the mid 1990s contributed to the rapid growth of innovative forms of book retailing).
The Agencies Have Rejected a Market-Power Screen for RPM

The Justice Department and the FTC have properly rejected market-power screens for vertical restraints cases in general, and RPM cases in particular. In 1993, the Justice Department withdrew its vertical restraints guidelines, which had contained a market-power screen for nonprice vertical restraints. See U.S. Dept. of Justice, Antitrust Division, Vertical Restraints Guidelines § 4.1, 50 Fed. Reg. 6263 (1985) (vertical restraint used by a firm with market share of less than 10% or in unconcentrated market will not be challenged). And recently, Assistant Attorney General Varney proposed a structured rule of reason analysis for RPM in which the market power of the manufacturer is irrelevant in cases of retailer-driven RPM. See Christine A. Varney, A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason, Antitrust, Fall 2009, at 22, 24 (“Evidence that retailer coercion was responsible for RPM . . . should go a long way toward making a prima facie showing of anticompetitive effects.”); cf. Willard K. Tom, Counselor to the Assistant Attorney General, Vertical Price Restraints, Address to the American Bar Ass’n Section of Antitrust Law, April 7, 1994 (“RPM causes prices to consumers to rise, at least in the most direct and immediate sense. Thus, if there is no discernible benefit to interbrand competition, the loss to intrabrand competition, and the consequent rise in price, might itself be deemed to be anticompetitive. This is of particular concern because it prevents efficient distributors from passing on the benefits of that efficiency to consumers.”).

The FTC in Nine West considered the supplier’s “modest market share” as a factor its decision to modify a pre-Leegin consent order barring RPM, but the presence of one of the other “Leegin factors” would have required “closer analytical scrutiny, such as that anticipated by Polygram Holding[] or other truncated rule of reason analyses.” In re Nine West Group, Inc., FTC Dkt. C-3937, Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, at 14-15, 2008 WL 2061410; cf. Remarks of Robert Pitofsky, Chairman, Fed. Trade Comm’n, Joint Venture Guidelines: Views From One of the Drafters, http://www.ftc.gov/speeches/pitofsky/jvg991111.shtm (Nov. 11 & 12, 1999) (noting that competitor collaboration guidelines reject an absolute market power screen: “Market definitions are sometimes too uncertain, and differentiation within markets may be too great, to rely on market share or concentration estimates to the exclusion of all other factors.”).
Conclusion

We believe that RPM “falls within the category of restraints that are likely, absent countervailing procompetitive justifications, to have anticompetitive effects – i.e., lead to higher prices or reduced output,” In re Polygram Holding, Inc., 136 F.T.C. 310, 352 (2003), and as such should generally be treated as inherently suspect under the Polygram framework, or at least suspect in the circumstances outlined in the FTC’s Nine West order. While higher intrabrand prices do not necessarily indicate that RPM is anticompetitive (because they may be accompanied by additional services that consumers value), higher prices may be sufficient to shift the burden of justification to the defendant, especially when the manufacturer’s and consumers’ interests do not appear to be aligned. See Indiana Dentists, 476 U.S. at 459 (“Absent some countervailing procompetitive virtue . . . an agreement limiting consumer choice by impeding the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.”) (internal quotes omitted). In any event, regardless of the details of a structured rule of reason, it is clear that a manufacturer market-power screen is inappropriate and should be strongly rejected by the agencies and the Solicitor General.

Very truly yours,

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