No. 09-40506

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PSKS, INC.,

Plaintiff–Appellant,

v.

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,

Defendant–Appellee.

Appeal from the United States District Court
for the Eastern District of Texas, No. 2:03-CV-107-TJW

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that *amicus curiae* American Antitrust Institute is a non-profit corporation and, as such, no entity has any ownership interest in it. The American Antitrust Institute has no financial interest in the outcome of this litigation.

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INTEREST OF *AMICUS CURIAE*

All parties have consented to the filing of this brief. The American Antitrust Institute ("AAI") is an independent nonprofit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The Advisory Board of AAI, which serves in a consultative capacity, consists of over 90 prominent antitrust lawyers, law professors, economists, and business leaders. For a description of AAI's activities and personnel, see http://www.antitrustinstitute.org. AAI frequently appears as *amicus curiae* in important antitrust cases including, recently, *Pacific Bell Tel. Co. v. linkLine Communications, Inc.*, 129 S. Ct. 617 (2008), which it argued before the Supreme Court. AAI's Board of Directors[1] has approved the filing of this brief because this is the first opportunity for an appellate court to apply the Supreme Court's directive in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007), that lower courts should "establish the litigation structure to ensure that the rule [of reason] operates to eliminate anticompetitive [resale price maintenance] restraints from the market," and because

[1] The AAI is managed by its Board of Directors, which alone has authorized this filing. The individual views of members of the Advisory Board may differ from the positions taken by AAI. No counsel for a party authored this brief in whole or in part, and no person or entity other than AAI or its counsel has made a monetary contribution to the preparation or submission of this brief. Plaintiff's expert, Prof. Gregory Gundlach, is a member of AAI's Advisory Board, but played no role in the Directors' deliberations or the preparation or submission of the brief.

the district court's dismissal of the complaint for a failure to define the relevant market ensures the opposite.

SUMMARY OF ARGUMENT

In *Leegin*, the Supreme Court overturned the *per se* rule governing resale price maintenance ("RPM") 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.'" 551 U.S. at 894 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). 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"). Accord-

ingly, 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.

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 non-price vertical restraints, which commentators have long noted amounts to a rule of *de facto* per se legality.[2] 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". *Id.* at 897-98. The Court said nothing about proof of a relevant market. Indeed, it 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

[2] *See* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 Antitrust L.J. 67 (1991); Philip E. Areeda & Hebert Hovenkamp, *Antitrust Law* ¶ 1620.1 (Supp. 2009) ("Since the *Sylvania* decision in 1977, very few private plaintiffs have successfully challenged vertical nonprice restraints."). Because "litigation under the rule of reason generally is extraordinarily expensive in relation to the size of the interests at stake," *id.*, the full-blown rule of reason deters even meritorious claims from being brought in the first instance. An unstructured rule of reason "is likely to be even more costly for a practice as poorly understood and as complex as RPM" and, as a result, "many instances of anticompetitive RPM may go unchallenged." *Id.*

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.

The district court did not follow these directions. Rather than adopt a litigation structure that roots out anticompetitive uses of RPM from the market, it ignored and underestimated the anticompetitive consequences of the practice by requiring the plaintiff to define a relevant market and imposing an unduly high standard for satisfying this requirement. This was incorrect as a matter of law and policy. *Leegin* does not require a plaintiff, in order to make a prima facie case, to meet a strict test of market definition. On the contrary, *Leegin* can and should be read as allowing for a rule of prima facie illegality under the "inherently suspect" paradigm articulated by the Federal Trade Commission in *Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29 (D.C. Cir. 2005). Alternatively, the presence of one of the anticompetitive factors identified by the Supreme Court in *Leegin*, or other factors, should be sufficient to establish a prima facie case, without a strict market definition. Finally, even if market definition is required in an RPM case, the court erred in concluding that the complaint failed to allege a legally cognizable relevant market.

ARGUMENT

I. RESALE PRICE MAINTENANCE AGREEMENTS SHOULD GENERALLY BE TREATED AS PRIMA FACIE ILLEGAL

This court should borrow the litigation structure followed by the Federal Trade Commission in its treatment of "inherently suspect" restraints under which RPM generally would be condemned "unless the defendant comes forward with some plausible (and legally cognizable) competitive justification for the restraint . . . ." *Polygram Holding,* 416 F.3d at 35-36; *see N. Texas Specialty Physicians v. Fed. Trade Comm'n*, 528 F.3d 346, 360-61 (5th Cir. 2008) (upholding the use of "inherently suspect" paradigm as a form of "quick look" rule of reason analysis countenanced by Supreme Court precedent). Under such a framework, proof of market definition and market power is not required in the first instance because "[i]f there is no legitimate justification for the practice, there is no need for a burdensome inquiry into market conditions*."* *In re N. Texas Specialty Physicians*, 140 F.T.C. 715, 771 (2005).

Parties engaged in resale price maintenance should have the initial burden of justifying it because 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). Treating resale price maintenance as "inherently suspect" is consistent with the economic learning cited in *Leegin* as well as common sense

because the direct and intended effect of RPM is to raise prices to consumers,[3] which is precisely what the complaint alleges in this case. *See* Second Am. Compl., ¶ 32 ("the effect of the price fixing practices of the Defendant results in consumers paying more").

Moreover, RPM not only increases intrabrand prices; it prevents restricted dealers "from engaging resellers of other brands in price competition." 8 Areeda & Hovenkamp, *supra*, ¶ 1630b, at 303; Greg Shaffer, *Slotting allowances and resale price maintenance: a comparison of facilitating practices*, 22 Rand J. Econ. 120, 122 (1991) ("RPM is an example of a contractual provision that inhibits a firm from reacting to its competitors."); *see Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977) ("[U]nlike nonprice restrictions, [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; second alteration in original). The effect on interbrand prices is particularly pronounced 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

[3] *See Leegin,* 551 U.S. at 895 ("'price surveys indicate that [resale price maintenance] in most cases increased the prices of products sold'") (quoting Thomas R. Overstreet, Jr., *Resale Price Maintenance: Economic Theories and Empirical Evidence* 160 (FTC Bureau of Economics Staff Report 1983)) (alteration in original); *see also* 8 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1604b, at 40 (2d ed. 2004) ("[R]esale price maintenance tends to produce higher consumer prices than would otherwise be the case. The evidence is persuasive on this point.").

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. And RPM prevents retail intrabrand price competition from placing downward pressure on wholesale interbrand prices. *See* 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"); *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).

An increase in prices paid by consumers, *at least absent other information*, constitutes an actual anticompetitive effect. *See National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 692 (1978) ("[p]rice is the central nervous system of the economy") (internal quotes omitted); Amended States' Comments Urging Denial of Nine West's Petition, *In re: Nine West Group*, *Inc.*, FTC Dkt. C-3937, at 8 (Jan. 17, 2008) ("If consumers pay more because of vertical price-fixing, the restraint should be 'inherently suspect.'") (comments of 26 States), *available at* http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Amended_State_comments_011

708-9west.pdf. Accordingly, there is no need for a plaintiff to show market definition or market power, at least in the first instance. *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)).

To be sure, *Leegin* rejected the price-elevating effect of RPM as an argument for retaining the *per se* rule[4] because higher prices may be accompanied by additional services that consumers value.[5] However, that does not mean it is inappropriate to place the *initial* burden on the manufacturer to demonstrate a procompetitive rationale for barring discounting on the products it sells. In the absence of other evidence, eliminating discounting may be presumed to harm consumers, and the manufacturer is in the best position to provide that evidence, if it exists.

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[4] *See Leegin*, 551 U.S. at 895 ("Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct.").

[5] *See id.* (higher prices "'do not necessarily tell us anything *conclusive* about the welfare effects of [resale price maintenance] because the results are generally consistent with both procompetitive and anticompetitive theories'") (quoting Overstreet, *supra*, at 106) (emphasis added; alteration in original). The Court also suggested that if additional services increase demand for the manufacturer's product, then interbrand competition is fostered "from which lower prices can later result." *Id. But see* Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* 331 (2d ed. 2006) (noting that distribution restraint may promote brand differentiation, "[b]ut interbrand competition recedes as brands become more differentiated – consumer demand for a particular maker's product becomes less elastic").

Leegin also observed that "the interests of manufacturers and consumers are aligned with respect to retailer profit margins," and that, "[a]s a general matter . . . a single manufacturer will desire to set minimum resale prices only if the increase in demand resulting from the enhanced service … will more than offset a negative impact on demand of a higher retail price." *Leegin*, 551 U.S. at 896 (internal quotes omitted). However, this observation does not undercut treating RPM as generally prima facie unlawful because an alignment between manufacturer and consumer interests cannot be assumed unless, at a minimum, the manufacturer's choice is unconstrained by retailer bargaining power. *See* Areeda & Hovenkamp Supp., *supra*, ¶ 1620.1 ("When RPM emanates from the unconstrained decision of the manufacturer one would expect higher output."). Yet such retailer power is common in modern multibrand retailing. *See* 8 Areeda & Hovenkamp, *supra*, ¶ 1604d3, at 49 ("Multibrand dealers' ability to substitute other brands gives the dealers considerable leverage."); *cf.* Shaffer, *Slotting Allowances*, *supra*, at 121 ("Although manufacturers would prefer lower retail prices and hence greater sales, the competition among themselves for the scarce shelf space provides the incentives for [RPM] contracts.").

Placing the initial burden of justification on the defendant is also warranted by the fact that RPM has another anticompetitive tendency, regardless of the purpose for which it is employed, 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. As Justice Breyer noted, resale price maintenance agreements "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 . . . ." *Leegin*, 551 U.S. at 911 (Breyer, J., dissenting).[6] The majority recognized this effect when it noted, "Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the [RPM] agreement." *Id.* at 893.

Under the *Polygram* framework, the defendant could rebut the initial presumption of illegality by "identify[ing] some reason the restraint is unlikely to harm consumers or identify[ing] some competitive benefit that plausibly offsets the apparent or anticipated harm." *Polygram Holding*, 416 F.3d at 36. As applied to RPM, this means the defendant must come forward with evidence sufficient to establish that RPM was adopted to achieve one of the procompetitive purposes identified by *Leegin*, or some other legitimate purpose that benefits consumers, and that

[6] *See* 8 Areeda & Hovenkamp, *supra*, ¶ 1632c4, at 320 ("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_oft/economic_research/oft981.pdf (study showing that abolition of RPM on books in the United Kingdom in the mid 1990s contributed to the rapid growth of innovative forms of book retailing).

RPM is reasonably necessary to serve that purpose. *Cf.* 8 Areeda & Hovenkamp, *supra*, ¶ 1633d, at 337 ("[W]e can reasonably expect at least substantial evidence that the manufacturer has a legitimate business problem, that resolution of that problem would confer a nontrivial benefit, that the restraint can be reasonably effective for the claimed purpose, and that less restrictive alternatives would be significantly more costly or significantly less effective."). If the defendant satisfies its burden of production, then the plaintiff must "show that anticompetitive effects are in fact likely." *Polygram*, 416 F.3d at 36.

This structured rule of reason framework is similar to the approach followed by the European Union, which treats RPM as a "hardcore" restraint that is presumed to be unlawful. Parties can rebut the presumption by showing that the agreement is indispensible to the achievement of substantial efficiencies that benefit consumers. *See* Luc Peeperkorn, *Resale Price Maintenance and its Alleged Efficiencies*, 4 Eur. Comp. J. 201, 203 (2008); European Commission, *Draft Commission Notice, Guidelines on Vertical Restraints* ¶¶ 47-48, 219-221 (July 28, 2009), *available at* http://ec.europa.eu/competition/consultations/2009_vertical_agreements/draft_notice_en.pdf.

II. PROOF OF ONE OF THE "*LEEGIN* FACTORS" SHOULD BE SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE

Assuming, *arguendo*, that *Leegin* does not allow for treating RPM as inherently suspect as a general matter, RPM should at least be treated as inherently suspect when it raises prices and one of the factors identified by the Court as likely to create significant anticompetitive risks is present. This is the approach adopted by the Federal Trade Commission. *See 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 12, 2008 WL 2061410 ("The *Leegin* decision may be read to suggest a truncated analysis, such as the one applied in *Polygram Holding*[], might be suitable for analyzing minimum resale price maintenance agreements, at least under some circumstances."); *id.* at 14 ("The Court's elaboration of these relevant factors provides an approach for identifying when RPM might be subject to closer analytical scrutiny, such as that anticipated by *Polygram Holding*[] or other truncated rule of reason analyses.").

The factors cited by the Court include: (1) "the number of manufacturers that make use of the practice in a given industry," for "if many competing manufacturers adopt the practice," oligopoly pricing is more likely and consumers are deprived "of a meaningful choice between high-service and low-price outlets," *Leegin*, 551 U.S. at 897 (internal quotes omitted); (2) "[t]he source of the restraint," for "[i]f there is evidence that retailers were the impetus for a vertical

price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer," *id.* at 897-98; and (3) the "market power" of "the relevant entity," *id.* at 898, for "[a] manufacturer might consider that it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network," *id.* at 893-94, but "[i]f a retailer lacks market power, manufacturers likely can sell their goods through rival retailers," *id.* at 898.[7]

A fourth factor ought to be sufficient for plaintiff to establish a prima facie case, namely whether the manufacturer engages in dual distribution, i.e., owns retail outlets that compete against its dealers, because under dual distribution, the presumed alignment between the manufacturer's and consumer's interest in low prices is undermined. *See Abadir & Co. v. First Mississippi Corp.*, 651 F.2d 422, 427 (5th Cir. 1981) ("normal market factors encouraging a supplier to let its distributors compete are less effective to the extent that [a manufacturer] also competes as a distributor"); *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1576 (11th Cir. 1983) ("when a manufacturer also acts a dealer, competing with other dealers, it may no longer have the exclusive interest in a low margin, high volume distribution system we ordinarily attribute to it"). Just as RPM de-

[7] The Court also thought that 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 distribution outlets." *Leegin*, 551 U.S. at 898.

signed "to give inefficient retailers higher profits" is anticompetitive, *Leegin*, 551 U.S. at 893, so too is RPM designed to protect the profits of a manufacturer's own retail outlets.

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. Complt. ¶ 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, plaintiff has asserted that "Defendant's retail operations are a substantial part of its business, up to 40% overall." Plaintiff's Motion to Reconsider Order Granting Defendant's Motion 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.").

The lower court declined to address whether the complaint alleged anticompetitive effects, noting, "Because PSKS has not defined a relevant market, the court cannot assess the alleged price fixing agreement's anticompetitive effect." Mem. Opinion & Order at 9. Similarly, the court was dismissive of the dual distributorship allegations because they did not suggest per se treatment was appropriate,[8] and "the same deficiencies in the rule of reason analysis above [i.e., lack of tenable market definition] are present in PSKS's dual distributorship case." *Id.* at 12. The court's refusal to consider the allegations of anticompetitive effects is plain error because in any rule of reason case, actual detrimental effects can obvi-

[8] It is true that nonprice distribution restraints adopted in a dual distribution situation have frequently been treated as vertical restraints and judged under the rule of reason, rather than as horizontal restraints subject to the per se rule. *But see* National Ass'n of Attorneys General, Vertical Restraints Guidelines ¶ 2.3 (rev. 1995) ("If the intent or predominant effect of the restraint is to prevent competition for the firm in its dealer capacity, the restraint will be treated as horizontal in nature and effect."), *available at* http://www.naag.org/assets/files/pdf/at-vrest_guidelines.pdf. However, that does not mean that dual distribution does not have significance under the rule of reason, even with respect to nonprice vertical restraints. In *Graphic Products Distributors*, for example, although the Eleventh Circuit treated the dual-distributor manufacturer's nonprice restraint as vertical, "its motivation to restrict competition from its independent distributors [was] a factor in" its rule of reason analysis. 717 F.2d at 1576.

ate the need to prove a relevant market or market power. *See Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); *Surgical Care Center of Hammond, L.C. v. Hospital Service Dist. No. 1*, 309 F.3d 836, 840 (5th Cir. 2002); *Spectators' Comm'ns Network Inc. v. Colonial Country Club*, 253 F.3d 215, 225 (5th Cir. 2001); *Great Western Directories, Inc. v. S.W. Bell Tel. Co.*, 63 F.3d 1378, 1384 (5th Cir. 1995), *modified on other grounds*, 74 F.3d 613 (1996), *vacated pursuant to settlement agreement* (Aug. 21, 1996). This is all the more so under a truncated or quick-look analysis such as *Polygram*. *See In re N. Texas Specialty Physicians*, 140 F.T.C. 715, 771 (2005) ("[i]t is obviously necessary to identify the goods or services that are subject to the price fixing or other anticompetitive restraint … [i]t is not necessary, however to show that these goods or services constitute a relevant antitrust product market, as described, for example, in the *Horizontal Merger Guidelines*.") (alterations in original; internal quotes omitted).

To be sure, this court has noted "the first step in analyzing a Section 1 claim is defining the relevant product and geographic markets." *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 627 (5th Cir. 2002). But *Apani Southwest* and other similar cases cited by the district court and the defendant did not involve claims of "actual detrimental effects" under *Indiana Federation of Dentists*, nor resale price maintenance agreements, as to which the Court has instructed

lower courts to be "diligent in eliminating their anticompetitive uses from the market." *Leegin*, 551 U.S. at 897.

III. THE COMPLAINT SUFFICIENTLY ALLEGES A RELEVANT MARKET

Even if market definition is required, the district court erred in concluding that the complaint fails to allege a tenable product market. The complaint alleges that "the retail market for Brighton women's accessories" is a relevant product market. Am. Compl. ¶24. In support of this market definition, the complaint alleges that Brighton-brand products are "unique" and "distinct, *id.*, ¶¶ 25, 26, in part because, according to Leegin's marketing materials, "Brighton is the only major accessories line featuring products that coordinate from head to toe," *id.*, ¶ 16. According to the complaint, Brighton-brand accessories are "characterized by an inelasticity in demand, and little cross-elasticity of demand between Brighton-brand products and … competing products," *id.*, ¶ 26, such that many customers would not substitute other accessories "even in response to a significant, non-transitory increase in the price of Brighton-brand products," *id.*, ¶ 25. The complaint alleges that Leegin has "market power" because it offers products that are highly differentiated, *id.*, ¶ 17, and "occupies a dominant position as supplier to independent women's specialty stores," *id.*, ¶ 18. Moreover, while acknowledging that the Brighton brand competes with other brands in a larger market of "brand-name women's accessories," *see id.* ¶ 24, interbrand competition is weak: because

"[b]rand-named women's accessories … can be characterized by the wide-spread adoption of practices that have the effect of limiting price competition among competing brands[,] . . . . the effect of the price fixing practices of the Defendant results in consumers paying more and harm to those consumers." *Id.*, ¶ 32.

The district court found these allegations to be insufficient because of the "clear law that a single brand cannot be its own market." Mem. Opinion & Order at 5. This was error because the case law is that while a single brand ordinarily is not a separate market, it can be. As the Supreme Court has noted, "This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482 (1992) (holding that parts for Kodak equipment could be a relevant market), citing among other cases, *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (relevant market of NCAA football broadcasts), *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959) (relevant market of professional boxing championships), *IBM Corp. v. United States*, 298 U.S. 131 (1936) (relevant market of manufacturer's tabulating machines), and *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977) (relevant market of air conditioners for Volkswagens). And whether a single-brand market exists, like market definition in general, is a matter of fact that generally ought not to be determined on a 12(b)(6) mo-

tion. *See Kodak*, 504 U.S. at 482 ("The proper market definition … can be determined only after a factual inquiry into the 'commercial realities' faced by consumers."); *see also Apani Southwest*, 300 F. 3d at 628 ("Whether a relevant market has been identified is usually a question of fact . . . ."); *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (Sotomayor, J.) ("Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market.").

The key issue for market definition – even in its most technical application – is the extent of cross elasticity of demand between the products in the putative market and products outside the putative market. A single brand of a differentiated product could be in its own relevant market if a small, but significant non-transitory increase in price of the product would not lead so many customers to switch to competing brands to make a price increase unprofitable. *See* Sullivan & Grimes, *supra*, at 50 n.33 ("Courts usually define a relevant market by looking at cross-elasticity of demand, a method that could still produce a single brand market when buyer demand for that brand is inelastic."); *cf.* U.S. Dept. of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 1.11 (rev. 1997) ("SSNIP" test for defining relevant market), *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.pdf. That is exactly what the complaint alleges. *See* Second Am. Compl., ¶ 25; *cf. Babyage.com, Inc. v. Toys "R" Us, Inc.*, 558 F. Supp. 2d 575, 581

"R" Us, Inc., 558 F. Supp. 2d 575, 581 (E.D. Pa. 2008) ("[B]y invoking the [Horizontal Merger] Guidelines market definition [test], they clearly have accounted for all [reasonably interchangeable] substitutes."). That the Brighton brand competes with other brands, which comprise a larger relevant market, does not foreclose a single-brand market, as the doctrine of "submarkets" recognizes. *See, e.g., Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984) (articulating submarket doctrine but upholding summary judgment for defendant where facts did not support single brand market in section 2 case).[9]

The district court's more significant error was failing to consider the allegations in light of the reasons why definition of the relevant market might be important to a section one claim in general, or an RPM claim in particular. Insofar as market definition is necessary to assess the alleged anticompetitive effects of the agreement, *see* Mem. Opinion & Order at 9 ("Because PSKS has not defined a relevant market, the court cannot assess the alleged price fixing agreement's anticompetitive effect."), the complaint adequately describes the markets in which such effects are alleged: the intrabrand market consisting of Brighton women's accessories, and the interbrand market consisting of brand name women's accesso-

[9] The district court acknowledged the doctrine of submarkets, but dismissed its significance because "submarkets are [not] exempt from the law requiring a market to constitute more than a single brand." Mem. Opinion & Order at 5.

ries.[10] Insofar as market definition is necessary to assess the manufacturer's market power, which was Leegin's central argument below, then the complaint should not have been dismissed because proof of a manufacturer's market power is not a necessary prerequisite to an RPM claim, at least not in terms of showing that the manufacturer has a significant share of the interbrand market.

As an initial matter, proof of actual detrimental effects under *Indiana Federation of Dentists* obviates the need to prove either a relevant market *or* market power. *See Indiana Fed'n of Dentists*, 476 U.S. at 460-61. More significantly, *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 – retailer-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. To be sure, absent *some* market power, RPM used by a single manufacturer will not be effective in raising prices; consumers will simply switch to other brands. *Cf. Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981) (vertical restraint cannot raise prices to consumers absent manufacturer market power).

[10] The district court acknowledged, "It is plausible that PSKS would be able to amend its complaint to allege facts necessary to support an allegation that 'brand name' accessories are important to its product definition." Mem. Opinion & Order at 7. However, it concluded that "granting leave to do so would be in vain, because alleging such facts would not be enough to salvage the case in light of its other deficiencies." *Id.* at 7-8. Yet the only deficiency identified by the court was market definition.

However, the very fact that a manufacturer adopts RPM is good evidence that it has sufficient market power to make RPM effective, i.e., to raise retail prices.[11] *See* 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, insofar as market power of the manufacturer is a prerequisite, the only market power that the law requires is the market power of the manufacturer's brand in a product-differentiated market. *See* Areeda & Hovenkamp Supp., *supra*, ¶ 1620.1.[12] As such, a single brand market may be perfectly appropriate for RPM cases.[13]

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[11] The notion of interbrand competition acting to discipline the exercise of intrabrand market power is also fallacious insofar as competing manufacturers use common multibrand retailers. A multibrand retailer may respond to one manufacturer's adopting RPM by *raising* the price on competing brands in order to earn the greater profits on the RPM-covered product. *See* Shaffer, Theories of Harm, *supra*.

[12] Where the theory is that retailers have induced RPM, a showing of retailer market power may be required, but this requirement could be satisfied with evidence that the retailer(s) seeking RPM make up a significant share of the manufacturer's sales and are not easily replaced. *See Leegin*, 551 U.S. at 893-94. Alternatively, in the case of dual distribution, a showing that the manufacturer's own retail outlets comprise a significant share of its overall revenues should suffice.

[13] Some cases from this circuit, and elsewhere, have adopted a market power requirement for non-price vertical restraints that requires a plaintiff to show that that the manufacturer has a significant share of the interbrand market. *See Muenster Butane*, 651 F.2d at 298. However, the relatively stringent requirements for challenging non-price vertical restraints are not appropriate for RPM agreements because "there is a strong consensus that RPM poses greater threats to competition than do most nonprice restraints, perhaps significantly greater." Areeda & Hovenkamp Supp., *supra*, ¶ 1620.1.

CONCLUSION

If courts are going to give substance to the Supreme Court's directive to be diligent in eliminating anticompetitive uses of RPM from the market, they need to adopt the presumption of illegality approach used for "inherently suspect" restraints, either as a general matter or at least whenever one of the "*Leegin* factors" is present. In all events, trial courts should not be permitted to toss out RPM complaints based on strict pleading requirements for defining the relevant market, as the district court did in this case. Rather, an RPM complaint should be allowed to proceed whenever it gives fair notice of the affected markets, and alleges that the RPM will raise consumer prices without any substantial likelihood of offsetting competitive benefits. Accordingly, the decision below should be reversed.

Respectfully submitted,

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s/ Richard Brunell

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I hereby certified that on the 14th day of August 2009, I caused two copies of the foregoing brief to be served by first class mail, and an electronic pdf copy by e-mail, on the following counsel of record:

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