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Squire, Sanders & Dempsey L.L.P.

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UNITED STATES

Nine West Petitions FTC To Modify Order Banning Resale Price Maintenance

In April 2000 Nine West settled charges brought by the Federal Trade Commission (FTC) that the shoe manufacturer entered into unlawful agreements with retailers to fix minimum resale prices and to restrict promotional periods when retailers could sell its shoes at discounted prices. Nine West allegedly had enforced these agreements by threatening to suspend and, in some instances, actually suspended supply to retailers who deviated from its policies. Minimum resale price maintenance agreements were at the time *per se* unlawful under Section 1 of the Sherman Act. To settle the FTC's charges Nine West agreed to a consent order imposing a US$34 million fine and barring the company from controlling the resale prices of its footwear and from pressuring dealers to adopt or adhere to any resale price.

In November, Nine West filed a petition with the FTC urging the Commissioners to review terms of the consent order banning resale price maintenance in light of the Supreme Court's decision in June of this year in *Leegin Creative Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). Under *Leegin*, resale price maintenance schemes are now evaluated under the rule of reason standard. This paradigm shift in the antitrust laws, Nine West argues, requires that the order be reexamined. The petition also states that "considerations of fairness and the public interest" likewise necessitate that the order be revised to correct the competitive disadvantage that Nine West now faces because its competitors are free fix resale prices. The Commission will decide whether to approve a modified consent order with Nine West after considering responses received during the period for public comment which closed on December 6.

Two French Executives Plead Guilty in Marine Hose Price-Fixing Conspiracy; Three UK Executives Charged

The Antitrust Division of the US Department of Justice (DOJ) has announced guilty pleas entered by two French executives for their roles in an international cartel in the marine hose market. Marine hose is used to transport oil between tankers and storage facilities. It is estimated that during the conspiracy period hundreds of millions of dollars worth of marine hose was sold worldwide at artificially inflated prices. Major US purchasers included numerous offshore oil extraction companies and the US Navy.

In November, the DOJ filed a one-count felony charge against Christian Caleca and Jacques Cognard, executives of the French company Trelleborg Industrie S.A.S. Each executive agreed to serve 14 months in jail, and to cooperate with the DOJ's ongoing investigation. In addition, Caleca, president of Trelleborg's Industrial Fluid Systems business unit, will pay a US$75,000 criminal fine, and Cognard, Trelleborg's product area manager for oil and marine products, will pay a US$100,000 criminal fine.

In a related action, the DOJ filed criminal charges during the first week of December against three UK executives for their roles in the marine hose conspiracy. The executives included Peter Whittle, the sole proprietor of the UK-based consulting firm PW Consulting (Oil & Marine) Ltd., and Bryan Allison and David Brammar of Dunlop Oil & Marine Ltd. Whittle, Allison and Brammar were charged with discussing the sale of marine hose products during meetings and in correspondence

with competitors, and agreeing during those discussions to rig bids, fix prices and allocate customers. Whittle was charged with participating in and facilitating the cartel by circulating information to cartel participants and coordinating prices charged to US customers. The three UK executives were arrested in Houston, Texas on May 2, 2007, following a meeting of the cartel. If convicted, each faces up to 10 years imprisonment and statutory fines of up to US$1 million. The fines could increase to twice the gain derived from the conduct or twice the loss suffered by the victims, if either amount exceeds the statutory maximum.

To date, the investigation into the marine hose price-fixing conspiracy has produced criminal charges against nine executives, all from non-US companies. The investigation is ongoing, and is being conducted jointly by the DOJ, the Defense Criminal Investigative Service of the Department of Defense's Office of Inspector General, the US Navy Criminal Investigative Service and the FBI.

Qantas Pleads Guilty to Role in Price-Fixing Conspiracy Affecting Air Cargo Rates

Australia-based Qantas Airways Limited is the latest airline to be charged in the DOJ's ongoing investigation of price fixing in the market for international air cargo rates. On November 27, 2007 the DOJ filed a single count criminal complaint against Qantas charging the company with violating Section 1 of the Sherman Act. At the same time, the DOJ filed a proposed plea agreement which, if approved, will require Qantas to pay a US$61 million fine and cooperate with the agency's further investigation of the conspiracy. With the plea agreement, Qantas joins co-conspirators British Airways Plc and Korean Air Lines Co. Ltd., both of which pleaded guilty in August and agreed to pay a US$300 million fine for their roles in the conspiracy.

The DOJ has alleged that Qantas conspired with rival international air cargo carriers, between January 1, 2000 and February 14, 2006, to fix cargo rates charged to US customers for international air shipments. According to the charges, Qantas participated in meetings and other communications, in the US and elsewhere, wherein it agreed with competitors to fix rates for shipments on certain trans-Pacific routes to and from the United States. The DOJ estimated that Qantas earned more than US$600 million from shipments between the United States and Australia during its participation in the conspiracy.

Senators Urge Heightened Scrutiny of Google-DoubleClick Merger

In a letter to FTC Chairman Deborah Platt Majoras, Senators Herb Kohl (D-Wis.) and Orrin Hatch (R-Utah) urged the Commission to consider carefully the proposed US$3.1 billion acquisition by Internet search engine Google of the Internet advertising firm DoubleClick. Senator Kohl, the chairman of the Senate subcommittee on antitrust, competition policy, and consumer rights, and Senator Hatch, the ranking Republican on the Committee, hosted a hearing on the proposed acquisition in September. The hearing, which included testimony from representatives of Google and Microsoft Corporation (an outspoken critic of the merger) brought to light concerns about harm to competition and consumer privacy. According to Senators Kohl and Hatch, the implications of the merger "for the Internet advertising market – and for the Internet as a whole – are profound and potentially far-reaching."

The FTC, which began investigating the transaction in May of this year, is considering the extent of overlap between the Internet advertising markets occupied by Google and DoubleClick. During the Senate subcommittee hearings, counsel for Microsoft argued that Google would be able to leverage its dominant position in the market for online search ads by obtaining a "dominant gateway position" to the other principal Internet advertising market, that of nonsearch advertising such as banner ads. If the merger were allowed to proceed, Microsoft warned, Google would become "the overwhelmingly dominant pipeline for all forms of online advertising." Such alleged dominance would be due in part to Google's ability to gather large amounts of information about consumers' online behaviors and preferences, and apply such information to targeted online advertising. The prospect of Google's expanded information gathering capacity has sparked wide-spread opposition by consumer groups over the lack of controls in place to ensure consumer privacy and security. Google, in response, insisted that the proposed acquisition does not raise competition concerns because the companies offer complementary – not competing – advertising services. It likened the companies' relationship to that of FedEx Corp. and Amazon.com. Google added that online advertising "benefits consumers, promotes free speech and helps small businesses succeed," and it further pledged to pursue these goals while protecting consumer privacy.

In their letter to Chairman Majoras, Senators Kohl and Hatch admitted that the subcommittee had reached no conclusions about the effect of the merger on the market for Internet advertising. The letter merely states, "We urge that you only approve the merger if you determine that it will not cause any substantial lessening of competition." Notably, the Senators' concerns are supported by the antitrust think-tank, the American Antitrust Institute, which published a memorandum in November warning of the harm to the Internet advertising market posed by the transaction.

DOJ Sides with Microsoft in Opposing Oversight Extension

In an *amicus* brief filed with the US District Court for the District of Columbia, the DOJ argued against extending provisions of the 2002 consent decree with Microsoft Corporation that were set to expire on November 12, 2007. In October, several state attorneys general formed two groups, each filing separate petitions for a five year extension of the consent decree. The court, in response, granted a three month extension to allow it until January 2008 to consider the parties' arguments.

The group of state respondents led by California – which included Connecticut, Iowa, Kansas, Minnesota, Massachusetts and Washington DC – argued that in the absence of the protections accorded by the consent decree, Microsoft would wield its market dominance to harm competition. In particular, the California group pointed to the consent decrees' provisions concerning so-called middleware (software used to connect other software components), stating that such provisions are "more necessary now than ever and should not be allowed to lapse precisely when they could be the most useful." The California group also argued that the extension was appropriate in light of Microsoft's stalling for almost five years in publishing certain technical documentation, which was mandated under the final judgment. Another respondent group led by New York – which included Maryland, Louisiana and Florida – concurred in the California group's arguments and characterized Microsoft as "an entrenched monopolist."

Opposing the states' motions to extend the consent decree, the DOJ argued that an extension was not supported by law, would undermine its antitrust settlement framework and would constitute bad public policy. According to the DOJ, the consent decree had achieved its principal objectives to cause Microsoft to cease its illegal practices, to prevent the recurrence of those practices and to restore competition with Microsoft's products from middleware. The California group's assertion that the consent decree had been ineffective because Microsoft's market power still existed, and that the company might abuse its market power in the future, are not legally sufficient bases for extending the consent decree. The DOJ further argued that if a few states "are granted a substantial modification of the decree . . . it would destabilize the finality of consent decrees and thereby undermine the ability of the United States to settle antitrust cases in general, and in particular to settle cases jointly with antitrust enforcers in the states."

Court Dismisses Antitrust Indictments Against Stolt-Nielsen

A federal district court judge has dismissed the criminal antitrust indictments against Norway-based shipping company Stolt-Nielsen SA and two of its executives for their roles in an international bid-rigging scheme. Judge Bruce W. Kauffman of the US District Court for the Eastern District of Pennsylvania threw out the indictments due to an amnesty agreement entered by Stolt-Nielsen and the DOJ under the agency's leniency program. "The [Antitrust] Division has no reasonable basis upon which to void or revoke the agreement," Kauffman ruled, "because it has not demonstrated any breach by Stolt-Nielsen or the individual defendants."

The DOJ revoked the amnesty agreement with Stolt-Nielsen in 2004 after discovering that the company had engaged in anticompetitive behavior for a longer period than it originally reported to the DOJ. This was the Antitrust Division's first ever revocation of an amnesty agreement. Nevertheless, in January 2005, Stolt-Nielsen obtained an injunction from the district court barring the DOJ from pursuing indictments against them. The injunction was subsequently overturned by the Third Circuit Court of Appeals, which held that the district court lacked authority to enjoin the DOJ prior to its obtaining an indictment, and the Supreme Court declined to rule on the matter.

EUROPEAN UNION

Commission Adopts Non-Horizontal Merger Guidelines

On November 28, 2007 the European Commission (Commission) adopted guidelines for the assessment of "non-horizontal mergers" including mergers between companies at different levels of the supply chain (vertical mergers) and mergers between companies active in related markets (conglomerate mergers). Such mergers generally raise fewer competition concerns than horizontal mergers, in that they do not immediately decrease the numbers of competitors in the market, and they can lead to greater production efficiency. In some cases, however, vertical mergers restrict competition by denying access to important suppliers or increasing prices of inputs. Among other things, the new Guidelines provide concrete examples of non-horizontal mergers that restrict competition, drawing from past Commission decisions in the energy and health care sectors including the prohibition of Elecricidade de Portugal's and ENI Corp.'s proposed takeover of Gas

de Portugal and the compulsory divestiture ordered in Johnson & Johnson's acquisition of Pfizer Consumer Healthcare.

German Supreme Court Overrules FCO on *De Minimis* Market Clause

The German Supreme Court has delivered its long-awaited judgment on one of the jurisdictional thresholds of German merger review. German merger control is characterized by very low thresholds, which renders many acquisitions by large multinationals notifiable in Germany, even in cases where the target firm has only limited sales in Germany. Under the so-called *de minimis* market clause, a transaction is not notifiable (or cannot be prohibited) if it affects a market that has been in existence for at least five years and in which, during the financial year prior to the merger, the turnover of all goods or services did not exceed €15 million. The law does not provide, however, whether this threshold applies only as regards the German market or whether the potentially larger economic market (e.g. EU-wide) must be taken into consideration. Germany's competition authority, the Federal Cartel Office (FCO) took the latter view, thereby extending its jurisdiction considerably. The Supreme Court, however, considered that a jurisdictional rule must be limited to Germany. It consequently overruled the FCO and supported an earlier court decision that had annulled a previous FCO decision.

For industries such as the chemical industry, where a narrow market definition may lead to high market shares of individual companies, this judgment may have a significant impact on risks or delays associated with proposed acquisitions.

Professional Videotape Producers Fined for Roles in Price-Fixing Cartel

The Commission has imposed fines on Sony, Fuji and Maxell totaling €74.8 million for a price fixing cartel for professional videotapes in Europe. The companies, whose combined market share amounts to more than 85 percent of the professional videotape market, allegedly held regular meetings between 1999 and 2002 where they agreed to raise and control prices. Sony's fine was increased by 30 percent because one of its employees refused to answer questions during the Commission's investigation and another employee shredded relevant evidence during the dawn raids. Fuji's and Maxell's fines were reduced by 40 percent and 20 percent respectively under the Commission's Leniency program.

This case marks the first instance where the Commission has applied its 2006 Guidelines for determining fines in antitrust cases. The Guidelines may be downloaded from the European Commission's website at: http://ec.europa.eu/comm/competition/antitrust/legislation/fines.html.

EU Slaps Flat Glass Producers With €487 Million Fine

The Commission has levied fines totaling €487 million on Asahi, Guardian, Pilkington and Saint-Gobain for having coordinated price increases and other commercial conditions for flat glass in the European Economic Area (EEA) between 2004 and 2005. The cartel concerned flat glass used in the construction sector for windows, doors and mirrors including basic float glass, low emissivity glass (glass coated to reduce heat transfer), laminated glass and unprocessed mirror glass. The cartel participants, which collectively held approximately 80 percent of the flat glass market in the

EEA, were alleged to have conducted meetings to discuss and agree on the level and timing of price increases, target prices as well as minimum prices, and to have exchanged sensitive business information. The investigation was initiated by the Commission on the basis of information gathered by several Member States' Competition Authorities.

Hungarian Competition Authority Raids Construction Companies

On November 20, 2007 the Hungarian Competition Authority carried out surprise inspections at the premises of railway, roads and bridge construction companies including Hochtief Construction, Strabag, Swietelsky and several local contractors. The companies are accused of bidrigging on public works contracts for the renovation and reconstruction of parts of Hungary's railway network between 2006 and 2007. The parties are also alleged to have agreed on financial compensation for members of the cartel. The Authority believes that such practices resulted in the offer of comparatively higher prices for public works.

Commission Raids Fresh Exotic Fruit Producers and Importers

Commission officials, accompanied by their counterparts from the national competition authorities, carried out surprise inspections at the premises of several producers and importers of fresh exotic fruits. The inspections were aimed at collecting evidence of alleged cartels and restrictive business practices infringing Article 81 of the EC Treaty. There is no deadline for the Commission to complete the investigation; its duration depends on the complexity of the case and the cooperation of the parties.

AROUND THE WORLD

BRAZIL – WTO Affirms Ruling Against Brazil's Ban on Imported Used Tires From the EU

A World Trade Organization (WTO) Appellate Body has upheld the WTO panel decision that Brazil's restrictions on imported retreaded tires from the EU violate the General Agreement on Tariffs and Trade of 1994 (the GATT). In June 2005 the EU brought a complaint in the WTO challenging Brazil's ban on importation of retreaded tires and fines imposed on the marketing, transportation and storage of retreaded tires. The EU also challenged an exemption to the ban on such imports which Brazil extended to certain South American countries. In response, Brazil argued before the WTO panel that it had a right to impose a ban on imports when "necessary to protect human, animal or plant life." In this case, Brazil asserted, such a ban was required because used tires have short lifespans and quickly become nonrecyclable waste. Moreover, discarded tires can hold stagnant water and become dangerous breeding grounds for disease-carrying mosquitoes.

The WTO panel issued its decision in June 2007 confirming Brazil's right to restrict imports that threaten its population and the environment. It further concluded, however, that by permitting imports from its Latin American neighbors, Brazil's import ban became "a disguised restriction on international trade." Affirming, the WTO Appellate Body also recognized the right to restrict imports on medical or environmental grounds, but held that Brazil's exemption for certain Latin American countries constituted arbitrary and unjustifiable trade discrimination.

JAPAN – JFTC Investigates CRT Cartel

The Japan Fair Trade Commission (JFTC) has opened an investigation into MT Picture Display Corporation, a wholly owned subsidiary of Matsushita Electric Industrial Co. Ltd., on suspicion that it formed an international cartel to fix global prices of cathode-ray tubes (CRTs) in Korea, Hong Kong and Taiwan. CRTs are the principal component of low definition television displays and computer monitors. Although the worldwide market for CRTs is decreasing due to the recent penetration of liquid crystal displays and plasma displays, CRT's annual global sales remain at approximately 500 billion yen (about US$4.48 billion).

On November 9, 2007 a spokesperson for Matsushita announced that company offices around the world had been raided by investigators from the JFTC and others foreign competition authorities. The JFTC is coordinating its investigation with its counterparts in the United States, the European Union and South Korea. Other companies that were subject to similar surprise inspections included Samsung SDI Co. Ltd., a division of Korea-based Samsung Electronics, and Royal Philips Electronics NV.

JAPAN – JFTC Publishes Compilation of Antimonopoly Act Consultations

The JFTC has published a compilation of its responses to requests for Antimonopoly Act consultation dating back over six years. On October 1, 2001 the JFTC implemented a system whereby companies could consult the JFTC about whether prospective business activities are likely to violate the Antimonopoly Act. The recently published compilation included consultation documents that the agency believed would serve as a useful reference to companies in avoiding Antimonopoly Act violations.

Under the Prior Consultation System, the JFTC provided a written response within 30 days of receipt of an application for prior consultation, except where the agency required additional information or documentation in order to render its advice. A determination through a prior consultation that a business activity posed no conflicts with the Antimonopoly Act barred the JFTC from later taking legal action against the activity.

SOUTH AFRICA – Tiger Brands Settles Price-Fixing Charges

Tiger Consumer Brands Ltd. has settled charges brought by the South Africa Competition Commission that the company colluded with others to fix prices in the bread and milling markets. As part of the consent order, Tiger Brands has agreed to assist the Commission in its ongoing investigation of price fixing in the industries, to circulate a memorandum to all its bread and milling business employees which gives the details of the consent order, to implement a business-wide compliance program, and to pay a ZAR98.8 million (approximately US$14.8 million) administrative penalty. The administrative penalty equals approximately 5.7 percent of the annual turnover of Tiger Brand's bread operations in 2006. The Competition Tribunal, which approved the consent order, is authorized to impose a penalty of up to 10 percent of a firm's annual turnover.

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