

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

PSKS, Inc. d/b/a Kay's Kloset...Kay's Shoes;	§	
and Toni Cochran, L.L.C., d/b/a Toni's	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 2:03-CV-107-TJW
	§	
Leegin Creative Leather Products, Inc.	§	
	§	
Defendant.	§	

SECOND AMENDED COMPLAINT

For its causes of action against Defendant LEEGIN CREATIVE LEATHER PRODUCTS, INC., PSKS, INC. d/b/a KAY'S KLOSET...KAY'S SHOES, states and alleges as follows:

**I.
Parties**

1. Plaintiff PSKS, Inc. d/b/a Kay's Kloset...Kay's Shoes ("Kay's Kloset") is a corporation duly organized and registered in accordance with Texas law.

2. Defendant Leegin Creative Leather Products, Inc. ("Leegin") is a California Corporation. Defendant may be served with process by serving its registered agent, Jerry Kohl at 14022 Nelson Ave., Industry, California 91746.

**II.
Jurisdiction**

3. This Court has jurisdiction in this case under 28 U.S.C. §1331, 28 U.S.C. §1337, and 28 U.S.C. §1367. This Court also has jurisdiction in this case as it involves a federal question. More specifically the case involves the Sherman Anti-Trust and Clayton Acts.

4. The court has jurisdiction over the state law claims by virtue of supplemental jurisdiction pursuant to 28 U.S.C. §1367.

III. Venue

5. Venue of this case is appropriate in the Eastern District of Texas under 15 U.S.C. §15(a). More specifically, Defendant is doing business in the Eastern District and has agents in the Eastern District. Additionally, venue of this case is appropriate in the Eastern District of Texas under 28 U.S.C §1391(b) and (c). Leegin has sufficient contacts with this district to subject it to personal jurisdiction. In fact, numerous retail stores, including ladies' boutiques, sell Brighton products supplied by Defendant Leegin. Further, the Brighton Ladies Division Manager for Defendant Leegin is Laura Young, who resides in Tyler, Texas. She has regional and/or national responsibility for Defendant Leegin, was a significant party to transactions involving Defendant Leegin and the Plaintiff Kay's Kloset, and on information and belief, at all natural times acted in the course and scope of her employment.

IV. Facts of the Case

6. During the operative time at issue, Plaintiff PSKS, Inc., did business as Kay's Kloset...Kay's Shoes in Lewisville, Texas. Kay's Kloset was a retail store for fashions, shoes and accessories. For a number of years, it was a retail store for "Brighton" products, a line of handbags, belts, jewelry and accessories manufactured by Defendant Leegin. It was instrumental in introducing Leegin's Brighton line of products to the market Kay's Kloset serves. Over the course of the years, these products have accounted for a substantial portion of Plaintiff's

business, and in the last 36 months that Plaintiff bought and sold Brighton products, those products accounted for approximately \$1,500,000 or more in retail sales.

7. Kay's Kloset principally served customers in the greater Dallas market area. It primarily acquired its products from manufacturers and distributors who offered those products to independent retail stores at the Dallas Market. It competed with other independent retail stores, which also primarily obtained their goods offered for resale from manufacturers and distributors that sold at periodic shows at the Dallas Market.

8. In the early 1990's, Leegin began to manufacture the Brighton brand of products, which it markets as its signature product. Leegin distributes the Brighton line in two primary methods. It sells to independent retailers directly. It does so by showcasing its merchandise at period product shows at the Dallas Market center and at other product shows at certain other market centers. By virtue of its presence at the Dallas Market, it has recruited many retailers and established its brand as a dominant brand for independent retailers of women's accessories to offer. The other manner of distributing these products is through stores directly owned or controlled by Leegin, its divisions or subsidiaries, or its owner.

9. Defendant Leegin has, at material times, had a retail pricing and promotional policy to eliminate or suppress price competition among retailers of Brighton products. Leegin fixed suggested retail prices ("SRP") for the Brighton line through a so-called "Retail Pricing and Promotion Policy." A copy of this Policy, as it existed during a portion of the time, is attached hereto as exhibit "A." This Policy solicits agreement from retailers not to discount Brighton products, permitting discounts only when agreed to in writing by Jerry Kohl, the owner of Leegin, or Laura Young, Ladies Division Sales Manager.

10. Leegin also entered into a series of contracts with its independent retail stores. Beginning in 1998, it formed a program called the “Heart Store” program. Certain selected “Brighton” retail dealers were invited to participate in this program. Under the terms of the program, these Brighton retail dealers were provided incentives, in the form of payment terms, sales assistance, and other benefits for agreement to the terms of participating in the program. To join the program, retail dealers were required to execute and return a form that demonstrated its agreement to participate. One of the terms of participation was that the retail dealer agreed to adhere to the Brighton retail pricing policy, or that it sell only at the suggested price.

11. Brighton provided certain products pursuant to other contracts. One such contract was the “Luggage Agreement.” One of the provisions of that contract was that the Brighton luggage would be sold only at the Brighton fixed retail price.

12. Brighton entered into franchising contracts with a number of franchisees. Those franchisees agreed in the franchise contract to certain terms, one of which was an agreement to sell Brighton goods only pursuant to the Suggested Brighton policy.

13. After Leegin introduced its “Retail Pricing and Promotion Policy” and “Heart Store” programs, and at the insistence of many of its most faithful retail dealers, Leegin made changes to the language of the “Retail Pricing and Promotion Policy”, began to enforce the Policy with greater regularity and began to respond to complaints from its retail dealers regarding discounting retailers with greater levels of enforcement.

14. Brighton would, following the suggestion and concurrence of retail dealers, from time to time amend the Policy. One such instance occurred in January 2003, when Brighton invited some of its most successful retail dealers to Hawaii. One topic discussed at this conclave

of retailers was the Brighton pricing policy. A consensus of the retailers was reached, and the result of that meeting resulted in a policy being announced: “What we have decided is OK after talking to more than 100 retailers is a birthday Club that on your birthday (or within a short time of your birthday) a consumer can get a discount on 1 piece of merchandise in your store (everything not only Brighton).”

15. Brighton frequently intervened to reconcile pricing disputes between competing retailers of Brighton who were competing. As a Defendant sales representative disclosed to Phil Smith, Defendant’s management would “try to work up some agreement from the middle man. I mean, maybe this would blow up and * * * they’ll discuss it with [one retailer]. They’ll discuss it with the [other retailer], you know, make everybody play by the rules.” In this manner, Brighton would act as the hub in a classic spoke and hub horizontal price fixing conspiracy.

16. Leegin products are differentiated from other products by virtue of carrying the “Brighton” brand. On its website, Leegin acknowledges and boasts of how it is different from other products:

Today Brighton is the only major accessories line featuring products that coordinate from head to toe. A customer might choose a lipstick case that matches a wallet, jewelry that matches a pair of sunglasses, a handbag that matches her footwear, or an entire coordinating collection consisting of multiple accessories.

The company prides itself on the “Brighton Difference,” which is rooted in the philosophy that the difference is in the details.

17. Because Leegin offers products that are highly differentiated, it has market power.

18. Leegin also has market power because it occupies a dominant position as supplier to independent women’s specialty stores. It occupies the single largest show room at market; it

is able to disrupt other sales efforts by offering extensive product seminars; it is viewed as the preferred supplier to stores offering women's accessories because of the selection and nature of the product offerings, and the fact that it has decided to offer its products through a large network of independent retailers. It is, in fact, the largest supplier of women's accessories to distribute its goods through such a network.

19. Leegin took many and frequent steps to maintain its market power and to discourage competitors and potential competitors from competing with the Brighton product. These steps included: (a) broadly and vigorously asserting trademark infringement cases against other manufacturers who sought to offer competing products; (b) requiring retailers to carry minimum levels of product, so as to limit and foreclose the ability of those retailers to offer competing goods; (c) refusing to sell to retail dealers that carry certain competing product lines; and (d) exercising its dominant position in the Dallas market to discourage traffic to other distributors at certain times.

20. Beginning in late Fall 2002, and continuing thereafter, Leegin began to enforce the SRP policy against Kay's Kloset, attempting to secure agreement from Plaintiff to comply with the policy, while at the same time receiving agreements from other retailers to adhere strictly to Leegin's pricing policy. In conversations trying to secure Plaintiff's agreement to adhere to the policy, Brighton's sales representative was asked whether a competitor of the Plaintiff had agreed to the policy. Plaintiff was assured that the competitor had agreed to the policy, and that the competitor no longer would be discounting Brighton products.

21. Plaintiff, Kay's Kloset, had, at certain times, offered to its customers 20% off Leegin-related products to directly compete within Plaintiff's market. Leegin demanded that

signs promoting the sale be removed, and threatened sanctions of loss of the Leegin product line. As stated by Leegin's sales representative, Jan Clinkscale, told the owners of Kay's Kloset: "When people discount, it always comes back to haunt them. We don't want people to discount – we want people to sell Brighton at regular price." When Plaintiff refused to adhere to the SRP, Leegin stopped shipping products to Kay's Kloset. At the time that Plaintiff was informed of the action taken by Leegin, Plaintiff was told that the action was subject to review if Plaintiff would indicate agreement to adhere to the SRP in the future.

22. Defendant and its retail dealers have deliberately set up an unlawful retail pricing policy which Defendant enforces to unreasonably restrain prices. Defendant's actions reduce competition. Its conduct exploits its market power in the provision of women's accessories to independent retail stores in the Dallas market area, and it exploits the market power it has by offering branded products that are highly differentiated from other products. By enforcing independent retailers to agree not to discount, Defendant can 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.

23. As a result of the Plaintiff's attempting to exercise its protected right to compete, and because it chose to offer products at prices below those mandated by Leegin, Leegin deliberately punished Plaintiff and cut off all future purchases of Leegin-related products. As a result of Leegin's termination of sales to Plaintiff of Brighton goods, Plaintiff was no longer able to operate a profitable retail business and has been forced to close its store.

24. The relevant product markets at issue in this case are: (a) the wholesale sale of brand-name women's accessories to independent retailers; and (b) the retail market for Brighton

women's accessories. The relevant geographic market is the greater Dallas, Texas area. At all relevant times up to and including the present, Defendant had a substantial market power in the relevant product and geographic market.

25. Brighton-brand products are unique. Many customers do not consider other accessories suitable substitutes for their use of Brighton-brand products, nor would they substitute other accessories for Brighton-brand products, nor would they do so even in response to a significant, non-transitory increase in the price of Brighton-brand products.

26. Brighton-brand products are distinct products characterized by an inelasticity in demand, and little cross-elasticity of demand between Brighton-brand products and demand for competing products.

27. The purpose, effects, tendency, or capacity of the acts and practices described herein lessened or tended to lessen competition in the relevant market. Specifically, the course of conduct charged herein had the following effects, among others:

- a. Prices paid by consumers of Brighton-brand products were maintained at artificially high and anti-competitive levels;
- b. Consuming members of the public were deprived of free and open competition in the purchase of Brighton-brand products;
- c. Plaintiff was hindered in its ability to acquire competing products; and
- d. Members of the consuming public were forced to pay artificially high, anti-competitive prices for Brighton-brand products.

Causes of Action

28. Anti-Trust Violations: Defendant has committed anti-competitive acts in violations of the federal and state anti-trust laws. Defendant Leegin is a manufacturer,

distributor, and retailer of the Brighton line of accessories. Plaintiff was a retailer of Brighton products with Defendant. The Brighton products affect interstate commerce in that the product line is sold and used throughout the country.

29. Defendant has engaged in a price fixing scheme for the Brighton line of products that is illegal *per se*. At all times pertinent hereto, Defendant operated as a retailer of Brighton-brand products, and agreed with other retailers of Brighton-brand products on the price at which those goods would be sold to the consuming public. Those agreements, constitute horizontal cartel activities and constitute *per se* violations of the Sherman Antitrust and Clayton Acts.

30. Plaintiff was injured in its business and property by the Defendant's enforcing this illegal agreement against it, and refusing to sell to Plaintiff. As a result of these illegal agreements, and the Defendant's conduct, Plaintiff is entitled to treble damages.

31. Defendant's conduct also is a violation of the antitrust laws, in that it constitutes an unreasonable restraint on trade under the rule-of-reason, as that rule was described by the United States Supreme Court in this case. The conduct at issue in this case harmed the actual and potential competition in the above-described markets. 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; the use of pricing restrictions in this case serve to restrict and does not enhance entry into the market; to the extent that any services are required to be offered by retailers, those services could be required directly, such that the incentives created by a price fixing scheme are not a more efficient means of achieving the results; the price fixing scheme facilitates the organization and operation of a retail cartel in the sale of these goods; and, the

Defendant exercises its market power to limit or discourage the sales by stores of products by new entrants.

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. Because of the lack of price competition among competing products, the effect of the price fixing practices of the Defendant results in consumers paying more and harm to those consumers.

33. For these various reasons, the price fixing scheme practiced by the Defendant is anticompetitive, and violates the Sherman and Clayton Acts.

34. Defendant has also violated Texas Business and Commerce Code §15.05, et seq., relating to monopolies, trusts, and conspiracies in restraint of trade. Defendant has committed the unlawful practices as described above, including: a) entering into a contract, combination, or conspiracy in restraint of trade or commerce; b) monopolizing, attempting to monopolize, or conspiring to monopolize trade or commerce; and/or c) selling, leasing, or contracting for the sale or lease of goods for use, consumption, or resale, or to fix a price for such use, consumption, or resale, or to discount from or rebate upon such price, on the condition, agreement, or understanding that the Plaintiff would not be permitted to sell Brighton products without conforming to a price fixing scheme, where the effect of the condition, agreement, or understanding may be to lessen competition substantially in trade or commerce.

35. As a consequence of Defendant's actions, Plaintiffs have suffered injury in the form of prospective lost profits, and are entitled to actual and treble damages. Defendant has taken actions to hurt the value and market share of Plaintiffs' retail business to the benefit of

Defendant. As a result of Defendant's actions, Plaintiffs have suffered injury and are entitled to actual and treble damages in accordance with the federal and state anti-trust statutes.

WHEREFORE, ON THE ABOVE PREMISES, Plaintiffs respectfully requests, after trial of this cause, that Plaintiff be awarded; a) actual damages; b) treble damages; c) attorney's fees and costs; and d) all other relief to which Plaintiffs may be justly entitled, including equitable relief necessary to protect Plaintiffs' interest and/or to reinforce the applicable protection of federal and state law.

DEMAND FOR JURY TRIAL

PSKS, Inc., demands a jury trial on all issues so triable.

Dated: December 29, 2008

Respectfully submitted,

D. Neil Smith, State Bar No. 00797450
NIX, PATTERSON & ROACH, L.L.P.
205 Linda Drive
Daingerfield, TX 75638
Telephone: (903) 645-7333
Facsimile: (903) 645-4415

and

/s/ Robert W. Coykendall
Ken M. Peterson, Kansas State Bar No. 07499
Robert W. Coykendall, Kansas State Bar No. 10137
MORRIS, LAING, EVANS, BROCK
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300 North Mead, Suite 200
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Phone: (316) 262-2671
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of December 2008, a true and correct copy of the above **Second Amended Complaint** was filed with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to all counsel who have registered for receipt of documents filed in this matter.

/s/ Robert W. Coykendall

Robert W. Coykendall



Brighton Retail Pricing And Promotion Policy

We continue to be fully committed to furthering our relationship with you, our retailers, and to promoting the image and reputation of Brighton Accessories. Our goal is to make the Brighton name and accessory line the leading, most successful brand in the marketplace.

In order to accomplish this goal, our companies must work together and build consumer confidence in our product and our retailers. In this age of mega stores like Macy's, Bloomingdales, May Co. and with the selection of catalog shopping as well as the Internet and the myriad of other choices, consumers are perplexed by promises of product quality and support of product, which we believe, is lacking in many of these distribution channels. Consumers are further confused by the ever popular sale, sale, sale.

We at Leegin, choose to break away from the pack by selling specialty stores; specialty stores that can offer the consumer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis.

We realize that half the equation is Leegin producing great Brighton products and the other half is you, our retailer, creating great looking stores and selling our products in a quality manner.

Over the last 10 _ years we have created marketing opportunities for our retailers to promote and showcase the brand to the consumers in a way that conveys our philosophy of quality products and unique designs. We are a company that stands behind our product! In addition, we have backed up our philosophy by building the brand in specialty stores via educated employee events such as Brighton on the road, Personalized catalogs, Contests for the store consumers and incentives for your sales associates to sell Brighton. We have chosen these creative ways to sell our brand rather than basing our product on sales, deals, and phony promises.

We are advising all retailers of our Suggested Retail Prices stated below for Brighton Products. Below is a list of our Brighton product categories and unilaterally suggested prices, which have been in effect since 1997.

Suggested Retail Pricing

Handbags	Keystone Plus \$10.00
Mini Bags	Keystone Plus \$4.00
Ladies Wallets	Keystone Plus \$5.00
Watches	Keystone Plus \$5.00
Men's/Ladies belts	Keystone Plus \$4.00

a Division of
LEEGIN
Creative
LEATHER

14022 Nelson Avenue

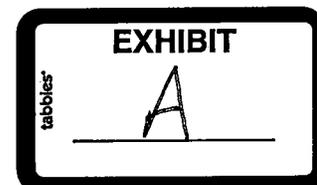
City of Industry

California 91746

626 • 961 • 9381

FAX 626 • 961 • 9380

www.brighton.com



Suggested Retail Pricing cont.

Jewelry	Keystone Plus \$3.00
Sunglasses	Keystone Plus \$6.00
Mens Wallets	Keystone Plus \$5.00
Western Belts	Keystone Plus \$2.00
Keyfobs	Keystone Plus \$2.00
Bandits	Keystone Plus \$2.00
Frames	Keystone Plus \$2.00
Rings	Keystone Plus \$5.00
Home Accessories	Keystone Plus \$2.00
Hair Clips	Keystone Plus \$2.00
Other Accessories	Keystone Plus \$2.00

We strive to keep Brighton as a brand that consumers love to own and are confident is priced fairly 365 days a year. Because of our commitment to this philosophy, we stand firm on our Suggested Retail Prices. We all know from time to time (in retail) you may have a style that's been in your store seasons and seasons, a style that is no longer available for re-order, in other words, you've had it "way to long" and you need to take a "final markdown". We certainly understand that this is just good business. The spirit of our philosophy is that you not make a practice of promoting Brighton 'on sale'. In fact, we ask that you exclude Brighton from your 'storewide' sales and that you not attempt to attract consumers into your stores by promoting Brighton sale incentives.

Our Suggested Retail Pricing and Promotional Policy have been issued by Leegin. Exceptions are not favored, should not be assumed, and will be granted only in extra-ordinary circumstances as determined independently by Leegin/Brighton. Any exceptions to this policy must be requested in writing and will be granted in writing only by either Jerry Kohl, Leegin owner and President, or Laura Young, Ladies Division Sales Manager; no other representative of Leegin is authorized to consider or grant these exceptions. Leegin reserves the right to make any changes in this Policy at our sole discretion.

We thank you for your understanding of our philosophies and hope this will help you to maximize your profits with Brighton for years to come.

Sincerely,

Jerry Kohl

Laura K. Young