

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CAROL M. MCDONOUGH, SARA SHUCK,
LAWRENCE B. MCNALLY, EVELIA Y.
RAGSDALE, JENNIFER SULLIVAN,
SARAH L. OTAZO, AMY GALVIN
GROGAN, ERIN M. HALL, MELISSA
NUTTALL, JULIE LINDEMANN,
STEPHANIE BOZZO, DARCY TRZUPEK
and YOSSI ZARFARTI, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs,

v.

TOYS "R" US, INC. d/b/a Babies "R" Us;
BABIES "R" US, INC.; TOYS "R" US-
DELAWARE, INC.; BABYBJORN, AB;
BRITAX CHILD SAFETY, INC.; KIDS LINE,
LLC; MACLAREN USA, INC.; MEDELA,
INC.; PEG PEREGO U.S.A., INC., and
REGAL LAGER, INC.,

Defendants.

**CONFIDENTIAL-FILED UNDER SEAL-
SUBJECT TO PROTECTIVE ORDER**

Civil Action No. 2:06-cv-00242-AB

FOURTH AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

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Plaintiffs Carol M. McDonough, Sara Shuck, Lawrence B. McNally, Evelia Y. Ragsdale, Jennifer Sullivan, Sarah L. Otazo, Amy Galvin Grogan, Erin M. Hall, Melissa Nuttall, Julie Lindemann, Stephanie Bozzo, Darcy Trzupke, and Yossi Zarfati (collectively “Plaintiffs”), individually and on behalf of all others similarly situated, for their Fourth Amended Consolidated Class Action Complaint, allege against defendants “Toys “R” Us, Inc., doing business as Babies “R” Us, Babies “R” Us, Inc., Toys “R” Us - Delaware, Inc. (collectively “BRU”); Britax Child Safety, Inc. (“Britax”), Kids Line, Inc. (“Kids Line”), Baby Bjorn, AB (“Baby Bjorn”), Maclaren USA, Inc. (“Maclaren”), Medela, Inc. (“Medela”), Peg Perego U.S.A., Inc. (“Peg Perego”) and Regal Lager, Inc. (“Regal Lager”) (collectively or individually, the “Baby Product Manufacturer(s)” or “Manufacturer(s)”) as follows based upon personal knowledge, the investigation of their counsel, information and belief, and publicly-available information:

I. NATURE OF THE ACTION

1. Plaintiffs are consumers and direct purchasers of high-end baby and juvenile products (“Baby Products”) manufactured by the Baby Product Manufacturers and sold at BRU. Plaintiffs seek damages and equitable relief from Defendants under Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2. As detailed below, Plaintiffs allege that BRU, a dominant, multi-brand retailer, conspired with the Baby Product Manufacturers to enter into and/or maintain and/or enforce minimum resale price maintenance (“RPM”) agreements with retailers of Baby Products (the “Retailers”).¹

¹The multiple agreements in restraint of trade developed between BRU and the Baby Product Manufacturers that the Baby Product Manufacturers would impose, amend, enforce, and/or heighten enforcement of minimum resale price maintenance agreements with respect to the Retailers, and/or otherwise to prevent Retailers from discounting Baby Product Manufacturers’ products and/or protect BRU from having to suffer the profit-

2. The Baby Products Manufacturers-Retailers Agreements imposed upon the retailers at the behest of and by way of agreement with BRU prevented the Retailers, on penalty of termination (i.e., being refused supply), from charging prices that were lower than the agreed minimum prices for Baby Products.

3. The Baby Product Manufacturer Defendants are all manufacturers of high-end Baby Products. Britax is a high end manufacturer of strollers and “one of the premium car seat brand(s) in the industry”²; Peg Perego is a high-end manufacturer of strollers, car seats and high chairs, focused on “attract(ing) and captur(ing) the hearts and souls of consumers who are looking for that special ‘premium’ branded product”³; Medela is a manufacturer of high-end “premium products, such as the Pump In Style” with a “long-standing image as a provider of premium-quality products”⁴; Maclaren is a high-end manufacturer of “premium juvenile product(s)” including strollers⁵; KidsLine is a high-end retailer of baby bedding, known for “distributing high quality, premium products”⁶; and Baby Bjorn is a high-end manufacturer of baby and infant carriers, which acted at all relevant times by and through its former United States agent Regal Lager. The relevant Baby Products manufactured by the Baby Products Manufacturers were sold during the period January 1, 1999 to the present (“Relevant Period”) by BRU.

4. Both the BRU-Baby Product Manufacturer Agreements and the resulting Baby

lowering effects of retail price competition, shall hereinafter be referred to as the “BRU-Baby Product Manufacturer Agreements.” The agreements between the Manufacturer Defendants and the Retailers to maintain minimum resale prices and/or otherwise not to discount shall hereinafter be referred to as the “Baby Product Manufacturer-Retailer Agreements.” Where appropriate, both types of agreements shall be referred to collectively as “the Agreements.”

2 See BRX0000433176.

3 See Perego2-00000130.

4 See Perego3-00015277; MED00006339

5 See MUSA000018.

6 See KL0000032-KL000034.

Product Manufacturer-Retailer Agreements are comprised of a combination of contracts, conspiracies, whether oral or written, express or tacit. The conspiratorial actions on the part of the Defendants are alleged based upon the personal knowledge of the Retailer Plaintiffs in the industry and multiple sources of evidentiary support. The totality of the circumstances excludes the possibility of innocent independent conduct by the Defendants.

5. The Agreements, and each of them, unreasonably restrain trade in the relevant market(s) (defined below), causing substantial anti-competitive effects and inflated prices to consumers, in violation of § 1 of the Sherman Act.

6. Moreover, the Agreements were part of an anti-competitive scheme under which BRU leveraged its substantial market power and dominance to induce the Baby Product Manufacturers into agreeing to do one or more of the following: (a) impose minimum resale price maintenance agreements on the Retailers; (b) enforce the price maintenance agreements as to the Retailers; and/ or (c) cut off supply to price-cutting retailers.

7. The BRU-Baby Product Manufacturer Agreements, and the scheme in restraint of trade, have harmed competition in the relevant market(s) and caused prices to be higher in the relevant market(s) than the prices would have been without the Agreements.

8. The Agreements were specifically intended to protect BRU from price competition from highly efficient Retailers by either mandating higher price levels and thereby neutering the competition or by eliminating the price cutting entirely. The Agreements were also part of BRU's monopolistic scheme, which was designed to preserve and enhance BRU's dominance and monopoly power. This scheme achieved its goals, and thereby substantially inflated prices to consumers like Plaintiffs.

9. Absent Defendants' anti-competitive conduct, Plaintiffs and the other Class members would have paid less for each of the Baby Products purchased during the Class Period. The direct consequence of Defendants' unlawful conduct was that Plaintiffs and other Class members paid overcharges on their purchases of Baby Products throughout the Class Period. Plaintiffs thus seek damages and equitable relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15(a) and 26, for violations of Section 1 and Section 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2.

II. JURISDICTION AND VENUE

10. Plaintiffs bring this action pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26, to recover treble damages, equitable relief, costs of suit and reasonable attorneys' fees for Defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. Subject matter jurisdiction is proper pursuant to Section 4(a) of the Clayton Act, 15 U.S.C. §15 (a), and 28 U.S.C. §§1331 and 1337, because the action arises under the laws of the United States.

11. Venue is proper in this federal judicial district under 15 U.S.C. § 15(a) because Defendants reside, or are found, or have an agent here. Alternatively, venue is proper in this judicial district pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §1391 (b) and (c) because during the Class Period, Defendants resided, transacted business, were found, or had agents in this district, and because a substantial part of events giving rise to Plaintiffs' claims occurred, and a substantial portion of the affected interstate trade and commerce described below has been carried out, in this district.

12. The Court has personal jurisdiction over Defendants pursuant to Section 12 of the

Clayton Act, 15 U.S.C. § 22.

III. PARTIES

13. Plaintiff Carol M. McDonough is a resident of Minocqua, Wisconsin and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

14. Plaintiff Sara Shuck is a resident of Chicago, Illinois and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

15. Plaintiff Lawrence B. McNally is a resident of Mundelein, Illinois and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

16. Plaintiff Evelia Y. Ragsdale is a resident of Van Nuys, California and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

17. Plaintiff Jennifer Sullivan is a resident of New Jersey and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

18. Plaintiff Sarah L. Otazo is a resident of Upper Montclair, New Jersey and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

19. Plaintiff Amy Galvin Grogan is a resident of Elmhurst, Illinois and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class

Period, and was thus injured by Defendants' conduct.

20. Plaintiff Erin M. Hall is a resident of Brookfield, Illinois and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

21. Plaintiff Melissa Nuttall is a resident of Downers Grove, Illinois and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

22. Plaintiff Julie Lindemann is a resident of Shorewood, Minnesota and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

23. Plaintiff Stephanie Bozzo is a resident of Phoenix, Arizona and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

24. Plaintiff Darcy Trzupsek is a resident of Chicago, Illinois and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

25. Plaintiff Yossi Zarfati is a resident of North Woodmere, New York and purchased one or more Baby Products manufactured by the Manufacturer Defendants from BRU during the Class Period, and was thus injured by Defendants' conduct.

26. Defendant Toys "R" Us, Inc., d/b/a Babies "R" Us, is a corporation duly organized and existing under the law of the State of Delaware, with a principal place of business located at One Geoffrey Way, Wayne, NJ 07470. According to its website, Toys "R" Us is "an \$11 billion

dollar company with approximately 1,500 stores worldwide. The company is a market share leader in both the U.S. and Japan. In the U.S., its largest market, it operates the largest free-standing destination toy and baby specialty stores. According to its website, Babies "R" Us is "one of the premier baby product retailers - the largest baby product specialty store chain in the world and a leader in the juvenile industry." At the start of 2005, Babies "R" Us stores numbered more than 200.

27. Defendant Toys "R" Us - Delaware, Inc. is a corporation duly organized and existing under the law of the State of Delaware, with a principal place of business located at One Geoffrey Way, Wayne, NJ 07470.

28. Defendant Babies "R" Us, Inc. is a corporation duly organized and existing under the law of the State of Delaware, with a principal place of business located at One Geoffrey Way, Wayne, NJ 07470. According to its website, Babies "R" Us is "one of the premier baby product retailers - the largest baby product specialty store chain in the world and a leader in the juvenile industry." At the start of 2005, Babies "R" Us stores numbered more than 200.

29. Defendant Baby Bjorn is a Swedish corporation with the address Box 595 S-18215 Daneryd, Sweden. At all relevant times, Baby Bjorn acted by and through its United States agent, Regal Lager.

30. Defendant Britax is a corporation duly organized and existing under the laws of the state of South Carolina, with a principal place of business located at 1350 South Ridge Drive, Charlotte, NC 28273.

31. Defendant Kids Line is a limited liability company duly organized and existing under the laws of the state of Delaware, with a principal place of business located at 2601 Sequoia

Drive, South Gate, CA 90280.

32. Defendant Maclaren is a corporation duly organized and existing under the laws of the state of Delaware, with a principal place of business located at 4 Testa Place, Norwalk, CT 06854.

33. Defendant Medela is a corporation duly organized and existing under the laws of the state of Delaware, with a principal place of business at 1101 Corporate Drive, McHenry, IL 60050.

34. Defendant Peg Perego is a corporation duly organized and existing under the laws of the state of Indiana, with a principal place of business at 3625 Independence Drive, Fort Wayne, IN 46818.

35. Defendant Regal Lager is a corporation duly organized and existing under the laws of the state of Georgia, with a principal place of business at 1100 Cobb Place Boulevard, Kennesaw, GA 30144.

IV. INTERSTATE TRADE AND COMMERCE

36. The activities of Defendants, as described in this Complaint, were within the flow of, and substantially affected, interstate commerce.

37. During the time period covered by this Complaint, Defendants sold and distributed Baby Products throughout the United States.

38. Defendants have sold and shipped substantial quantities of Baby Products in a continuous and uninterrupted flow of interstate commerce to customers located in states other than the states in which the Defendants produced Baby Products.

V. FACTS

A. BRU DEVELOPED AND IMPLEMENTED A RESALE PRICE MAINTENANCE SCHEME IN CONSPIRACY WITH THE MANUFACTURERS TO FORESTALL INNOVATION, MAINTAIN HIGH MARGINS FOR ITSELF AND ARTIFICIALLY INFLATE CONSUMER PRICES

1. BRU Has Sufficient Leverage To Dominate The Baby Products Industry

39. BRU is a dominant, multi-brand retailer of baby and juvenile products. BRU sells high chairs, strollers, car seats, infant carriers, infant and juvenile bedding, infant feeding supplies including breast pumps, juvenile furniture, play yards, monitoring systems, booster seats, toddler and infant toys, clothing, and infant care products.

40. As the self-proclaimed “undisputed leader in the juvenile market,” BRU considers itself and seeks to maintain itself as the “quintessential source for everything new and expectant moms need.” BRU also retails over the internet at www.babiesrus.com.

41. BRU opened its first six stores in 1996. With just six stores, BRU obviously did not have the power to enforce an RPM scheme. However, that quickly changed in 1997, when BRU bought 76 Baby Super Stores. Almost immediately, BRU wielded immense power over the manufacturers, such as Peg Perego, whose products BRU was then carrying.

42. As soon would become evident to market participants, manufacturers could experience enormous sales growth simply by selling to BRU. During this early period, many manufacturers had not yet come to realize the immense power of BRU. For instance, in 1996, manufacturers still had the option of focusing entirely on baby specialty stores, which numbered over 2,700. However, with time, that market was being squeezed by BRU and by the new innovation in the retail business: internet retailing. Thus, by 2002, the number of baby specialty stores had been reduced by more than 75 percent to just 600 stores. Meanwhile, BRU added, on

average, 17.9 stores per year between 1998 and 2007. As of January 2007, BRU operated over 250 Babies "R" Us stores throughout the United States.

2. BRU Reacted, And Continues To React, Illegally Towards Internet Retailers, Which Created An Innovative Distribution Scheme

43. Relative to BRU, internet based retailers are small companies that compete in the relatively new trade channel known variously as "electronic commerce," "e commerce," "etailing," "internet retail," etc. Internet retailers of high end baby and juvenile products are highly efficient competitors because, among other reasons, their operating expenses are low. This allows them to compete vigorously on price, both with other internet retailers and with retailers in other trade channels, such as BRU (which operates through "brick and mortar" stores as well as on the internet). Thus, when allowed to compete freely, internet retailers' price competition enhances consumer welfare by bringing down prices.

44. By the late 1990s, BRU recognized that the increased popularity of "e-commerce," with its associated increase in price competition, posed a substantial threat to BRU's sales and profits. Thus, BRU, which is considered a "traditional" brick-and-mortar retailer because it primarily sells products through its physical store locations, considered ways to thwart internet retailer competitors.

45. In publicly-available documents, BRU voiced its fears that competitors like the Retailer Plaintiffs would force it to give greater discounts to its customers and thereby lower BRU's profits. BRU reacted aggressively to this important threat to its pricing freedom and profitability. BRU sought to avoid such competitive constraints on its ability to garner increased sales volume and inflated prices.

46. BRU's response to internet retailing was both predictable and anticompetitive. As recognized at an FTC 2002 public workshop, entitled "Possible Anticompetitive Efforts to Restrict Competition on the Internet," one expert explained:

The promise of the world of electronic commerce is to create an environment where consumers can freely shop between various competitive alternatives. By reducing transaction costs and improving transparency, the Internet offers the potential of dramatically improving competition in various retail markets.

[But] as new market forces arise, . . . "traditional" competitors often respond to the threat by trying to create barriers to thwart those new entrants.

See David A. Balto, Testimony Before the FTC, Office of Policy Planning, Public Workshop on E-Commerce, at 1-2 (October 10, 2002) (emphasis added).

47. Just as the experts predicted, BRU devised an illegal plan to combat internet retailers by exacting agreements from the manufacturers of products being sold through its stores (or that desired to sell products at its stores) to require, on penalty of termination and as a condition of doing business with BRU, that the manufacturer ensure that its other retailers refrain from discounting.

48. BRU enforced its requirements by rejecting manufacturers' attempts to sell their products to BRU until Manufacturers agreed to impose minimum resale pricing on its other Retailers in a form acceptable to BRU, or by threatening to cancel and/or actually cancelling its orders of a manufacturer's products if the manufacturer did not agree with BRU to enforce minimum resale pricing and "prove" to BRU its enforcement of such minimum resale pricing upon BRU's competitors in the retail industry.

49. As part of their agreement with BRU, the manufacturers, in turn, demonstrated their compliance by threatening, intimidating, individually negotiating with, cajoling, exhorting and

requiring that the retailers raise and maintain retail prices at the manufacturers' suggested retail price ("MSRP"). As a further sign of their agreement with BRU, in some instances, when threats and intimidation seemingly failed, the manufacturers actually terminated retailers' accounts, denied credit, and/or stopped or delayed shipment on existing orders.

50. Each of these actions was taken directly because of the pressure BRU was placing on the manufacturers to protect BRU's margins. Thus, BRU sought and received agreements from manufacturer defendants that they would only sell to retailers who would not discount the product, even if and when it reduced the manufacturers' sales and/or profits by slowing sales of the manufacturers' respective Baby Products.

51. More specifically, the manufacturer defendants agreed to work with BRU to co-develop strategies to execute their respective agreements with BRU that pricing by internet retailers be kept under control. This aggressive stance was effective for BRU, since while manufacturer defendants shut down internet retailers, BRU.com, BRU's internet retailing arm, did not suffer the same fate but, by 2002, made up 25% of all sales by BRU.

52. BRU sought and obtained the agreement of the manufacturer defendants to impose and enforce minimum resale pricing solely for BRU's benefit and not for any legitimate pro-competitive reason.

53. BRU is driven to maintain its product and profit margins, as its margins are threatened by newer, more efficient distribution channels like internet retail. That a dominant retailer, like BRU, in a traditional trade channel, would react anti-competitively to threats to its pricing freedom, such as those posed by retailers in a new and efficient trade channel, have been recently acknowledged by the United States Supreme Court.

54. The Supreme Court not only recognized that minimum resale pricing may be imposed by a dominant retailer for that retailer's benefit, but stated that such behavior violates the antitrust laws. Indeed, in a holding that could have been written for this case, the Supreme Court cautioned that:

[r]esale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider 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. See Overstreet 31; 8 P. Areeda & H. Hovenkamp, *Antitrust Law* 47 (2d ed. 2004) (hereinafter *Areeda & Hovenkamp*); cf. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937-938 (CA7 2000).

As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.

Leegin Creative Leather Products, Inc. v. PKS, Inc., 127 S.Ct. 2705, at 2719-20 (2007).

3. BRU Used Its Market Dominance To Ensure Manufacturer Agreement To Impose And Enforce RPM

55. The manufacturer defendants sell substantial shares of their total volume of the products at issue through BRU, and are dependent upon BRU for their businesses.

56. Because the manufacturer defendants depend on retailers (like BRU) to sell their products, it is not surprising that a dominant retailer in a traditional trade channel would use that dominance to protect against price competition by agreeing with suppliers like the manufacturer defendants to disadvantage retailers in the new, efficient trade channel.

57. In addition to the Supreme Court's concern about dominant retailers imposing retail price maintenance, the FTC underscored the potential threat to competition posed by a dominant retailer (like BRU), whom suppliers, like the manufacturer defendants, cannot do without. A dominant retailer like BRU could use its market power to coerce key suppliers into

disadvantaging competing retailers, and thereby protect, preserve and expand its market dominance:

Competition among distributors for a given manufacturer's favor is almost certainly healthy. But problems may arise where distributors in one channel exercise their market power to disadvantage distributors in another channel. [C]an Internet distribution even gain a strong foothold in some product areas where the entrenched distribution channel, members who manufacturers cannot do without, at least until e-commerce matures, use hardball tactics to make sure that the transition period never begins?

See FTC, Public Workshop: Possible Anticompetitive Effects to Restrict Competition on the Internet, transcript of proceedings, at 797:12-16, 799:7-12 (October 10, 2002) (remarks of Commissioner Sheila Anthony).

58. Indeed, BRU leveraged its position as a dominant retailer in the relevant market(s), to require the manufacturer defendants' imposition, enforcement, and/or heightened enforcement of minimum resale pricing with the goal of eliminating competition among retailers and thereby increasing or protecting BRU's profit margins and artificially inflating retail prices.

59. BRU caused the Baby Product Manufacturer-Retailer Agreements to be maintained, and in some cases created and enforced to further its dominance in the relevant market(s) and for the anti-competitive purposes of earning excess profits and/or insulating itself from price competition from other Retailers.

60. The manufacturer defendants who were faced with BRU's threats to reduce or eliminate its business with the manufacturer defendants if they did not maintain the Agreements, did in fact maintain and enforce those Agreements, both to the detriment of the manufacturer defendants' own sales and profits and to consumers, who thereby paid higher prices.

61. Specifically, the Baby Product Manufacturers, by and through their various representatives, and specifically pursuant to their agreement with BRU: (a) met with, exhorted,

threatened, warned, cajoled, and/or negotiated with Retailers, on an individualized basis, concerning the prices at which the Retailers sold their products, (b) sought the Retailers' acquiescence to and assurances of compliance with the terms of the Baby Product Manufacturer-Retailer Agreements, (c) threatened the Retailers with termination of product supply for noncompliance, and (d) on certain occasions terminated Retailers.

B. PEG PEREGO AND BRU ENTERED AN AGREEMENT IN RESTRAINT OF TRADE TO IMPOSE RETAIL PRICE MAINTENANCE

1. Peg Peregó Imposed Minimum Resale Pricing On Retailers As Part of Its Agreement With BRU

62. In 1996, at a time when BRU had just six stores and had not yet fully effectuated its RPM scheme, Peg Peregó was already selling its products to BRU. At the same time, Peg Peregó was selling its products to Baby Super Stores, which had 76 stores across the country. Baby Super Stores was thus an important retail account for Peg Peregó.

63. In 1997, BRU bought Baby Super Stores and quickly became a dominant source of Peg Peregó's business. Peg Peregó quickly acquiesced to the sudden pressure from BRU to enter into a BRU-Baby Product Manufacturer Agreement. With BRU's newfound ability to wield significant threats to hurt Peg Peregó's business if Peg Peregó did not comply, Peg Peregó began to research how it could meet BRU's conditions.

64. In 1997, Peg Peregó did not yet have a retail price distribution policy in place. However, knowing that other Baby Product Manufacturers were in the same subordinate position vis-à-vis BRU, Peg Peregó worked with other Baby Product Manufacturers to determine what types of minimum resale pricing could be imposed that would meet BRU's conditions. During this time, Peg Peregó obtained a copy of Medela's Policy and one of its executives asked, "M&E

– If we adopted this policy – would BRU go along – ?? Dale.”⁷

65. Peg Perego allowed BRU to control the manner in which Peg Perego did business with its other Retailers. In fact, BRU was controlling not just the prices at which BRU sold Peg Perego products at its own stores, but also the prices at which Peg Perego products were being sold at competing Retailers.

66. As early as January 1999, BRU realized the potential for internet retailers to significantly impact its business. Thus, BRU was actively conducting surveillance of the websites of internet competitors, tracking prices, sales and products being sold.

67. BRU was not conducting or using this surveillance itself to decide how it should price its own products in order to effectively compete. Instead, BRU used the results of its surveillance to insist that Peg Perego fix the situation by requiring the internet retailers that carried Peg Perego’s products to raise their prices.

68. Peg Perego agreed with BRU to impose RPM. Peg Perego had no choice but to agree because of the importance of BRU to its business. In 1999, BRU made up 35.5% of Peg Perego total sales through September 30, 1999. The next largest seller of Peg Perego products, Burlington Coat Factory, had only 6.1% of Peg Perego total sales in 1999.

69. Beginning as early as January 12, 1999 and continuing forward, BRU peppered Peg Perego with complaints about other retailers’ prices for Peg Perego products.

70. By April 26, 1999, with the results of BRU’s surveillance of internet retailers in hand, BRU’s buyer pressured Peg Perego’s President directly, stating:⁸

I wanted to bring to your attention my findings on the internet this morning. Below you will find what I see as ‘problems’ with both Baby Center and iBaby which are two

⁷ PEREGO3-015278.

⁸ PEREGO3-09543-44

juvenile internet sights [sic] . . . As discussed on previous occasions, retailers such as these on the internet affect my entire chain of stores. In addition, the fact they are able to offer new 1999 merchandise prior to Babies 'R' Us having their goods is very upsetting. Your immediate attention to this matter is greatly appreciated.

71. With the knowledge that BRU was carefully policing the internet retailer competitors selling Peg Perego's products, knowing that it could not afford to lose BRU as a customer, and pursuant to its agreement with BRU, Peg Perego took immediate action. Within just two weeks, on May 15, 1999, Peg Perego issued its initial Retail Distribution Policy. However, Peg Perego quickly realized that the policy did not include all of the provisions necessary to protect BRU from internet competitors per its agreement with BRU.

72. Thus, Peg Perego contacted Medela to determine what policy Medela was using for products sold through BRU and its competitors. As a result, on June 16, 1999, Medela faxed its Pump In Style Pricing Policy to Peg Perego.

73. With Medela's RPM policy in hand, Peg Perego revised its policy in order to meet BRU's approval. Per Peg Perego's agreement with BRU, the revised policy required catalog and e-commerce accounts to sell at the suggested retail price.

74. As a result of BRU's demands, price differences that would result from competition in the markets for Peg Perego's relevant baby products at competing retailers virtually disappeared. Indeed, Peg Perego demanded that pricing of Peg Perego products at competing internet retailers "must, of necessity, reflect BRU prices to a great degree."⁹

75. The foregoing steps to impose and enforce RPM were taken pursuant to Peg Perego's agreement with BRU. The result was that BRU controlled the manner in which Peg Perego did business, including decisions regarding the retail prices at which Peg Perego would require its

9 PEREGO4-00012001.

relevant baby products to be sold. For example, on April 26, 2004, handwritten notes summarizing a meeting with BRU's buyer, Pat Filenbaum, stated that with respect to retail pricing for a Peg Perego product called the Prima Pappa, BRU "will not go for 129 too low, her suggestion is 139." In addition, Peg Perego's national sales manager agreed to "check it out" with Sandee Springer, the Vice President, divisional merchandise manager at BRU.¹⁰

2. BRU Threatened Peg Perego With Significant Monetary Sanctions If Peg Perego Refused To Agree To Its Demand To Ensure Other Retailers Were Not Discounting

76. As a result of BRU's pressure, knowing that BRU was doing the same, and pursuant to its agreement with BRU, Peg Perego regularly surveilled the pricing of other retailers and aggressively pressured them to comply with the MSRPs, especially before Peg Perego shipped products.

77. For example, in or around June 1999, Peg Perego's representative, Sue Walker, contacted Baby Club, seeking Baby Club's agreement to raise prices on certain products that were also carried by BRU. Peg Perego threatened Baby Club with termination if it refused to go along with the RPM regime. In response, in order to avoid termination, Baby Club acquiesced in Peg Perego's demand by agreeing to raise its prices.

78. The next year, BRU decided to carry additional Peg Perego products. With the expanded line came BRU's concomitant requirement, to which Peg Perego acquiesced, that competing retailers maintain the MSRP on those same products so that BRU did not have to compete with those retailers on price as to those additional Peg Perego products. Accordingly, Peg Perego agreed to, and did, communicate to retailers, including Baby Club, the SKU numbers

¹⁰ PEREGO3-09894- 95 at 09894.

of the Peg Perego products that BRU would carry that year so that the competing retailers would maintain minimum pricing as to those SKUs.

79. Peg Perego continued to exert pressure on BRU's competitors throughout the Relevant Period. For example, BabyAge also experienced repeated pressure from Peg Perego to increase prices.

80. In 2003, at a time when BabyAge's business was growing approximately 100% a year, Peg Perego was receiving pressure from BRU to halt discounting by BabyAge, a demand to which Peg Perego acquiesced. BRU even required Peg Perego to halt discounting by BabyAge that was not covered by the Peg Perego Retail Distribution Policy that Peg Perego earlier had issued as part of its agreement with BRU.

81. In or around September 2003, BabyAge negotiated the purchase from Peg Perego of 1,000 units of a model of Peg Perego strollers that was formerly sold through BRU. Yet, Peg Perego's sales representative, Enzo Trimachi, later informed BabyAge that it needed to increase the retail price on the closeout strollers, a demand in which Baby Age acquiesced. Mr. Trimachi explained that Peg Perego was receiving pressure from BRU and that BRU threatened to cancel orders and issue "chargebacks" (demands for refunds) if Peg Perego did not agree to take action and require BabyAge not to discount the strollers.

82. Under threat of termination by Peg Perego, BabyAge increased its prices on Peg Perego products. However, as a result of the price increases, BabyAge's sales plummeted. To boost sales and reduce inventory, BabyAge again decreased the price of the closeout Peg Perego strollers.

83. As soon as BabyAge decreased the price again, in or around October 2003, Mr.

Trimachi and Bob Schaab of Peg Perego contacted BabyAge, told BabyAge about the need to increase BabyAge's retail prices for Peg Perego products because of pressure from BRU, and asked BabyAge to raise those prices. Peg Perego told BabyAge that BRU was threatening to cancel orders and issue massive chargebacks if Peg Perego did not obtain BabyAge's agreement to raise its price to agreed levels. BabyAge acquiesced in Peg Perego's demands, but then began to discount once again. In or around February 2004, Mr. Trimachi and Mr. Schaab once again contacted BabyAge, threatening that if BabyAge did not raise its prices on Peg Perego products to the MSRP level, Peg Perego would terminate BabyAge as a dealer of Peg Perego products.

84. On February 23, 2004, BabyAge's account was suspended by Peg Perego. Shortly thereafter, BabyAge's account was terminated. BabyAge later learned that Peg Perego cut them off to make a statement to BRU and demonstrate compliance with the BRU-Baby Product Manufacturer Agreement that Peg Perego had with BRU.

85. Internal documents show that, in addition to BabyAge and Baby Club, other retailers were asked by Peg Perego to raise retail prices and acquiesced in such requests. These other retailers include, but may not be limited to: Smith's in Salt Lake City, Babycenter, Baby & Teen, Kidspace and Babyride.

3. Peg Perego Adopted And Enforced The RPM Policy Because Of Its Agreement With BRU And Not For Any Other Reasons

86. Peg had adopted its RPM policy to merely meet BRU's demands.

87. In fact, Peg Perego's capitulation to BRU's requirements on retail pricing hurt Peg Perego's sales and profits.

88. Peg Perego acknowledged that it benefited more from business with independent

stores than with BRU, stating in one analysis:¹¹

[Compared with BRU,] [o]ur independents do not get big breaks from us. The return rate on independents is under 1%. They pay full price. And if they get to \$125,000 they get 2% rebate. The business is clean.

89. The result of BRU's dominance was that specialty shops and internet retailers could not compete. Peg Perego had the facts and recognized that its agreement with BRU hurt specialty shops and internet retailers, and thus Peg Perego's bottom line, but it nonetheless continued to enforce the RPM regime pursuant to its agreement with BRU because it did not want to lose BRU as a customer.

4. The RPM Policy Was Not Implemented To Increase Customer Service At BRU

90. Peg Perego did not implement the RPM regime in order to provide BRU with additional margins to implement programs at its stores that would increase customer service. In fact, Peg Perego recognized that BRU not only did not increase customer service for its products within its stores, but that BRU's in-store help actually *hurt* sales of Peg Perego's products.

C. MEDELA AND BRU ENTERED AN AGREEMENT IN RESTRAINT OF TRADE

1. BRU Required Medela To Agree To Enforce Minimum Resale Pricing On Medela's Flagship Product Before BRU Would Begin Buying That Product From Medela

91. In or about October 1999, BRU agreed to purchase the breast pump product known as the "Pump In Style" ("PNS") from Medela for sale at BRU's stores.

92. Just after entering this agreement but before BRU began buying the PNS from Medela, Medela received a "surprise visit" from two BRU representatives, including BRU's

¹¹ PEREGO3-02682-84.

President.

93. At this meeting, BRU's President required Medela to do two things as a condition of BRU's buying the PNS from Medela: (i) agree that both parties would uphold Medela's pricing policy and that the PNS would be priced by all retailers between \$249.50 and \$277.00; and (ii) provide BRU with a list of internet retailers selling Medela products, so that BRU could watch to ensure that Medela enforced the pricing policy on BRU's competitors. Medela agreed to BRU's demands.

94. With these commitments from Medela in hand, BRU began selling the PNS at its stores.

2. Due To Medela's Fear Of Losing BRU As A Customer, Medela Agreed To Allow BRU To Control Medela's Pricing

95. From that moment forward, BRU effectively set the terms under which Medela would do business with its other retailer customers. For instance, Medela rarely made a decision regarding retail price without first seeking BRU's agreement and approval.

96. For example, in 2001, Medela specifically sought BRU's permission to lower certain suggested retail prices. Medela desired to lower prices because sales of its product were "under performing" in "mass retail (i.e., Target) where we do not outsell competition and retailers are requesting lower retails."¹²

97. Initially, in May 2001, BRU took the position that Medela could change prices "*as long as the pricing of the product remains consistent across the market*, which with your product isn't an issue."¹³

¹² MED013038-40, at MED013038.

¹³ MED013082-83; at MED013082 (emphasis supplied).

98. At no time during this discussion did BRU suggest the idea of increasing prices in order to stimulate service, information production, advertising, access to better shelf space, or any other service or product of any use to Medela.

99. BRU's only concern was consistent – or fixed – prices across the market.

100. However, as Medela's discussions with BRU in 2001 progressed, BRU's president began to veto Medela's requests that it be permitted to lower retail prices on its breast pumps, other than the PNS, again dictating the terms under which Medela would do business with its other retailer customers. BRU steadfastly refused to allow Medela to lower its prices based on BRU's desire to protect its own margins and revenue goals.

101. BRU also demanded that Medela take action against BRU's retail competitors that were discounting Medela's products. As a result, at BRU's behest, Baby Age, Baby Club, and other retailers on information and belief, received "Dear Customer" letters that stated that they were required to maintain MSRPs.

102. For example, in 2001, Medela, by letter, and later by telephone calls in which various Medela representatives and sales representatives, including Vernon Reizman, Leonard Aronson, and Joan Aronson, participated, sought the acquiescence of Baby Club to raise its prices to meet Medela's required minimum resale prices, in which requests Baby Club acquiesced by promising to raise its prices so long as other retailers that were in violation of Medela's required minimum resale prices did so as well.

103. With BRU dictating the terms under which Medela would conduct business with its other retail customers, Medela could not act in contravention of BRU's decisions without the risk that it would lose BRU's business.

104. Thus, in March 2002, Medela discontinued its RPM policy which had allowed retailers to sell the PNS at discounted prices so long as the discount was less than 10% below the suggested retail price.

3. BRU Terminated Medela For Medela's Perceived Failure To Enforce The RPM Agreement

105. In its continuing efforts to control the terms and conditions under which Medela did business with its various retailer customers, following the discontinuation of Medela's written RPM policy, BRU sought Medela's agreement to enforce unwritten minimum resale pricing provisions and to terminate internet retailer accounts that discounted, in order to protect BRU's margins.

106. By February 2002, Medela was characterizing the fact that "BRU is our largest customer, 13% of sales" as "Bad News." Medela recognized that it had become very dependent on BRU as a customer, and thus "[i]f BRU doesn't order, we have a bad month."¹⁴

107. For that reason, Medela proposed a sales project in order to grow other existing retailer accounts and to add new retailer accounts "to offset BRU."¹⁵ But Medela couldn't offset BRU's power or its reliance on BRU's distribution network fast enough.

108. During 2002, BRU was tracking the internet retailers to which Medela was selling its products, and growing increasingly upset with Medela's continued sale of its products to internet discounters who had lowered retail prices for the PNS.

109. Fearing a loss of BRU's business, Medela agreed with BRU to attempt to force its retail customers once again to maintain Medela's MSRPs. However, at least one customer,

¹⁴ MED011854-69.

¹⁵ *Id.*, at MED00011863.

Baby Club, reminded Medela that it did not have any written RPM policy in place on the PNS.

110. BRU then decided to punish Medela for its failure to abide by BRU's orders to ensure that other retailers were not underselling BRU on the PNS, and to coerce Medela into once again allowing BRU to set the terms and conditions under which Medela did business. BRU sent Medela's National Sales Manager the following message: "*As of last night, please cancel all orders.*"¹⁶

111. The message was received loud and clear. Medela immediately held meetings and discussions with BRU. During these discussions, BRU's President told Medela executives he had "felt 'cornered', [and that] using 'power of pencil with order' was only way to make a statement." BRU further told Medela it had to stop allowing discounters to sell Medela's products.¹⁷ Medela agreed.

4. In Direct Response To BRU's Intimidation, Medela Again Agreed To Enforce The RPM Regime

112. Within two days of termination, Medela responded by agreeing to BRU's demand, making clear that it would cooperate and "correct the market" in order to conform to BRU's conditions.¹⁸

113. BRU thus moved swiftly to reassert its control over the manner in which Medela did business. On June 21, 2002, after tracking Medela's customers and finding competing retailers selling the PNS for significantly less than suggested retail price, BRU sent an e-mail to its stores stating that Medela had a strict policy requiring the retail price of the PNS to be \$279.99. BRU then communicated to Medela that Medela should enforce the policy

¹⁶ MED017914 (emphasis supplied).

¹⁷ MED018670-73, at MED018670.

immediately.

114. Although Medela initially objected, BRU demanded that Medela then terminate retailers that thereafter discounted Medela's products.

115. Medela ultimately agreed to carry out the purge of competing retailers that BRU demanded, fearing retribution from BRU. At BRU's demand, Medela also agreed that Medela would "develop a list of people to close down."¹⁹

116. In the past, Medela had rarely, if ever, closed accounts for discounting. However, in the face of BRU's demands, Medela decided it had no choice but to develop a list of retailers who would be terminated as Medela accounts. Medela's then-Director of Sales and Marketing sent the list to Medela's Former Vice President of Finance, stating:²⁰

Here is the list. Sales is united in shutting down only the following:

1. Those with PNS prices below \$200 and
2. Those with Hi visibility - a score of 3.

Medela's Vice President replied:

Debra-
REDACTED

The selling price can not be a factor. You keep coming back to price so I will ask you one more time to not use price as a decision factor. This is very important and I can not go forward with this if you use this word again.

REDACTED

117. Thus, in order to avoid identifying price in writing as a factor in the selection process of the retailers to close, Medela's Sales and Marketing Director re-sent the email later in the day, being sure to avoid the forbidden word "price" and instead citing the "excessive value on

18 MED031-034, at MED032.

19 MED033.

20 MED018726.

PNS.”

118. Ten days later, as BRU and Medela agreed, Medela terminated 17 internet sellers. All were companies that had competed with BRU aggressively on price.

119. One of the companies whose account Medela terminated is Plaintiff Baby Club of America (“BCA”). BCA’s president was caught completely by surprise.

120. Thus, BCA’s President had discussions with Medela’s representatives and executives. During those conversations, Medela was unable to justify its actions, and in fact affirmed to him, and during internal discussions, that BCA’s president is a “good businessman” and “very reasonable” and that he had been selling Medela’s products successfully for eight years. Medela admitted that BCA “did nothing wrong, that it was an internal issue, that Medela was trying to decide how to go to market.”²¹

121. Of course, it wasn’t an internal issue at all: Medela terminated BCA because it had agreed with BRU that it would do so, in order to insulate BRU from price competition, even though such a result was not in Medela’s economic interests. In fact, in one document, Medela expressly states: “we have discontinued internet sellers to protect BRU’s business and margin and therefore accepted considerable legal risk.”²²

122. Remarkably, at this time Baby Age was not shut down. According to the Medela sales representative working with Baby Age, Baby Age had flown under BRU’s radar during the BRU-required purges. Medela’s rep told Baby Age that he was going to avoid visiting Baby Age in an attempt to keep Baby Age’s visibility low. However, in the next wave of cuts resulting from the pressure BRU placed on Medela, Baby Age was terminated.

²¹ MED017693.

5. Medela Did Not Enforce The RPM Regime For Any Pro-competitive Reasons, But Did So Only To Protect BRU's Margins

123. Medela did not take the position that internet sales per se have any detrimental effects on its product. Rather, any discussion of internet sales occurred solely with regard to their threat to BRU's business. Some examples include Medela statements that: "BBB seems to be the most major threat to BRU"; "Babycenter.com is the most major threat to BRU.com"; and "BRU feels Babycenter.com is 'discounting' PNS at \$259.99."²³

124. Accordingly, Medela did not include BRU.com in the list of internet retailers to pressure or close. In fact, during the time Medela was shutting down 17 internet retailer accounts at the behest of BRU, BRU's own website- BRU.com - made up 25% of all sales at BRU.

125. Significantly, on August 22, 2002, Medela prepared for a meeting with BRU in response to BRU's May order cancellation. In preparation, Medela internally stressed the need for a new retail pricing agreement for all accounts in order to, per BRU, "address internet pricing issues." MED017696-700, at MED017699.

126. Medela also set its objectives for the meeting, including:²⁴

Prevent from reoccurrence of threats experienced. The goal is long term partnership with bi-lateral planning. We (Medela) want to grow with you (BRU). But because BRU is becoming a large and increasing percentage of Medela's business we need to protect Medela's business and employees.

Further, in the section titled, "What does Medela have to offer?" is the note:

We have discontinued internet sellers to protect BRU's business and margin and therefore accepted considerable legal risk.

127. Medela thus admitted that it discontinued internet sellers, who competed

22 MED018682-83.

23 MED018670-71.

24 MED018682-83 (emphasis supplied).

aggressively on price, not to advance any pro-competitive business justifications or to attain any pro-competitive results but instead to protect BRU's business and margin.

128. Nor can BRU or Medela claim that the RPM regime created higher margins for BRU so that BRU could offer better service than internet retailers. In fact, Medela did not require BRU to use these higher margins to provide benefits or better service. Rather Medela provided significantly more extensive programs to BRU, at Medela's own cost, than Medela provided to other retailers, including, *inter alia*, retail representative in-servicing, allowances, amounts for advertising, making exclusive products available, and markdown monies.

129. Moreover, BRU did not in fact offer better service to customers than internet retailers. Rather the opposite is true. Return rates on the PNS to BRU stores were significantly higher than return rates at other outlets. Medela blamed the high return rates on BRU's poor customer service.

6. In Response To BRU's Continued Demands And Not For Any Other Reason, Medela Adopted A New RPM Policy With Specific Restrictions On Internet Retailers

130. Throughout this period, Medela recognized that, in order to keep BRU's business, it would be necessary to adopt a new RPM policy that protected BRU from competing internet retailers.

131. On June 23, 2002, a Medela executive authored a memo that attempted to justify discontinuing supply of the PNS to all internet retailers. Even he recognized, however, that such a move would result in the immediate loss of \$3-5 million of business, clearly a move not in Medela's independent economic interests.

132. Internal Medela reaction to the memo's suggestion that all PNS supply to internet

retailers be stopped was unfavorable as it was against Medela's independent economic interest and was being done solely to protect BRU. The suggested plan was characterized as a move that "kills the whole channel," "punishes all to address the few," and "cut[s] off our nose to spite our face."²⁵

133. Thus, by early July 2002, Medela sought out alternative RPM policies in place at "market leaders" selling to BRU and likely to meet BRU's conditions. Medela obtained the RPM policies of defendants Britax, Peg Perego and Regal Lager, among others.

134. With these policies in hand and having agreed with BRU to further protect its sales and margins from internet competition, Medela agreed with BRU to modify its distribution policy with respect to internet retailers. The new policy attempted to restrict internet retailers by imposing a requirement that Medela would not sell to retailers who derived less than 50% of their Medela revenue from direct in-person sales (the "50/50 policy"). However, not only did Medela specifically exempt BRU (which maintains an internet site at www.babiesrus.com) from the policy, but made the change to benefit BRU and pursuant to its agreement with BRU.

D. BRITAX AND BRU ENTERED AN AGREEMENT IN UNREASONABLE RESTRAINT OF TRADE

1. Britax Imposed And Enforced The RPM Policy At BRU's Behest

135. BRU demanded, and Britax agreed, to impose and enforce minimum resale pricing against BRU's retailer competitors. Britax agreed with BRU, because BRU was the dominant retailer, and Britax believed it had little choice but to accommodate BRU's demands and conditions for price restraints because it needed to sell through BRU's distribution network.

136. In 2001, BRU accounted for 35% of all Britax business. By 2004, BRU's web

²⁵ MED00002756-57, at 2757.

business accounted for \$25 million in sales. Buy Buy Baby was a distant second with sales under \$3 million. Britax realized that such dominance of, and reliance upon BRU, put Britax in a precarious position. Speaking of BRU in a 2004 internal memo, Brian Moore, the President of Britax, stated “Although we do not want any account controlling our decision process, [BRU does] control 40+% of biz at this stage.”²⁶

137. BRU’s dominance allowed BRU to make demands of Britax, to which demands Britax agreed, concerning the manner in which Britax conducted business with other retailers. For instance, according to a January 2003 Britax action plan, Britax delayed shipping product to Baby Club (who was selling product below MSRP) until “after BRU demands are met.”²⁷ BRU had demanded that Britax not ship product to Baby Club until Baby Club raised its retail prices, to which demand Britax agreed.

138. As another example, Britax permitted BRU to dictate the terms and conditions under which Britax would be able to sell certain Britax products to other Retailers. For instance, BRU required Britax to ask BRU’s permission before selling certain Britax products to BRU’s retailer competitors, and conditioned its grant of permission upon Britax’s promise not to permit the other retailers to discount those products.

139. Moreover, Britax permitted BRU to dictate what minimum resale prices should be for various Britax products.

140. Because of BRU’s demand, Britax conducted “shuttle diplomacy” between and among 20 retailers, getting each to agree to raise and maintain retail prices on Britax products on the promise that Britax was securing such promises from the others. Such retailers included: A Running Stroller, Baby Center, Babyage, Baby Club of America, Baby Love, Baby Outfitters, Baby Proofer, Baby Town, BareBabies.com, Cullen’s Playland, Dreamtime Baby, eStyle, Goore’s for Baby, Great Beginnings, Kidstown/Babyland, Lullaby Lane, Lullaby Shop, Niche

26 BRX432742

27 BRX244563.

Retail, Traveling Tykes, Baby Universe, Indoor & Outdoors, Baby Center, and Baby Town.

141. Britax, pursuant to its agreement with BRU, sought and obtained the agreement of Babyage to raise its retail prices for Britax products, including in the following instances:

- a. In or around November 2003, directly following a meeting with BRU, Britax representatives, including Brian Moore and Pam Brown, visited Babyage. During this meeting, Britax pressured Babyage to raise its prices on Britax products and not thereafter lower its prices below a certain level. Britax told Babyage that Britax wanted its compliance so that other retailers, including Albees, Baby Catalog, and Baby Universe, would also get “on board” with the MSRP. Babyage acquiesced in and agreed to Britax’s minimum pricing for fear that Britax would otherwise terminate Babyage.
- b. Between approximately December of 2004 and January of 2005, representatives of Britax, including Pam Brown, contacted Babyage several times concerning Babyage’s subsequent noncompliance with minimum pricing, seeking Babyage’s cooperation with minimum pricing.
- c. In or around June of 2005, Britax representatives, including Gary Kester, contacted Babyage, again seeking its agreement to raise prices, and attempted to use Babyage’s pending request for additional credit from Britax to negotiate Babyage’s acquiescence in its demands that Babyage raise its prices. Britax also encouraged Babyage to report other MSRP violators to Britax.

142. Britax sought and obtained the agreement of Baby Club to raise its retail prices for Britax products, including in the following instances:

- a. From December of 2003 through February of 2004, Britax representatives, including Fran Corda and Doug Oaks, contacted Baby Club several times, seeking Baby Club’s cooperation with and acquiescence in minimum retail pricing, and

threatened the cancellation of orders if Baby Club did not so agree. Fran Corda told Joe Randazzo of Baby Club that she was trying to get all of the retailers to go along with the MSRP policy, and that Baby Club could help lead the way as a key player: “- you know, everybody kind of needs to go ahead and ante up to the pot to make it all happen. People hang back and, you know, it isn’t going to work because the others are going to say, hey, I’m losing money. . . I’m losing money at \$249 and I said I would do it thinking that others would be joining me.”²⁸

- b. Fran Corda told Baby Club that she had “spoken already with a number of online retailers” and encouraged Baby Club to check the prices of other online retailers.²⁹
- c. Britax encouraged Baby Club to report other MSRP violators to Britax.
- d. In or around December of 2003, Joan Aronson, a Britax sales representative, told Baby Club that the reason Britax was attempting to secure agreement with Baby Club regarding minimum pricing was that Britax was fearful of BRU.

143. Britax engaged in what it called an “ongoing dialog with e-tailers nationwide concerning MSRP”³⁰ and resorted to exhorting, threatening, warning, cajoling, and/or negotiating with retailers in order to obtain compliance with the MSRP. In addition to threatening termination, Britax would offer incentives or impose penalties to seek compliance from retailers, for instance:

- a. Britax delayed product shipments when retailers failed to comply with MSRP. For example, in December, 2003, after a meeting between Britax and Babyage, Brian Moore “committed to work on product flow if they would honor MSRP.” Babyage responded that it was “on board” with the MSRP if it would help keep them in stock.” According to a January 2003 Britax action plan, Britax delayed

28 Corda Transcript, pp. 10-11.

29 *Id.*, at p. 3.

30 BRX45316

shipping product to Baby Club (which was selling product below MSRP) until “after BRU demands are met;”³¹

- b. Britax adjusted credit limits based on MSRP compliance; and
- c. Britax withheld specials, including closeouts, from retailers who were not honoring the MSRP.

144. Britax would regularly enforce the retailers’ continued compliance with its Retail Distribution Policy, using these same tactics to keep the retailers, including Babyage, Kids Palace, Buy Buy Baby, Little Folks Shop, and others “on board” with the MSRP.

145. Britax eventually terminated certain discount retailers for violation of the Retail Distribution Policy, including Rainbow Baby, Baby Ant, Milton’s Storkland, and Baby Outlet.

146. Britax took the foregoing actions in acquiescing to BRU’s demands.

147. By 2005, even Britax itself was afraid to sell its own product on its own website for fear of BRU reprisals.

2. In Agreement with BRU, Britax Implemented Additional Minimum Resale Pricing Designed To Target Internet Retailers Competing With BRU

148. Throughout 2004, BRU had become increasingly concerned with online sales from competing retailers of Britax’s products. Thus, BRU demanded, and Britax agreed to provide, stringent enforcement of BRU’s retailer competitors’ retail pricing. BRU was “under pressure to compete against other online juvenile competitors,” including Babyage, which Britax had recognized as having “implemented very powerful on line sales and marketing programs.”³²

149. In acceding to BRU’s demands, Britax issued an Internet Pricing Policy. Britax stated that it implemented the Internet Pricing Policy in order to “eliminate the potential of margin equalization requests from Britax’s largest customer base” due to a decline in retail

³¹ See BRX2610; BRX45303; BRX244563; BRX55550.

prices.³³ In other words, Britax implemented the Internet Pricing Policy pursuant to an agreement with BRU, pursuant to which Britax had agreed to ensure that BRU's retail competitors were charging minimum prices in order to protect BRU from the profit-lowering effects of retail price competition, and to compensate BRU for failing to do so.

150. Britax imposed and enforced minimum retail pricing on BRU's retailer competitors at BRU's behest, for BRU's own benefit, in order to protect BRU from competition from more efficient retailers, and to forestall innovation in distribution that decreases costs, thus helping BRU earn higher profits.

3. Britax Did Not Adopt And Maintain The Retail Distribution Policy For Any Pro-Competitive Purposes: "If BRU asks for it, you know they'll get it"

151. Britax did not adopt any RPM policies for procompetitive reasons such as enabling BRU to provide customers with better services. In fact, a 2003 Britax Sales Report concludes just the opposite: "[T]he fact is, the consumer is coming to the Independent accounts to get product knowledge and service not offered at BRU and then after the Independent has invested employee resources to train the consumer they announce 'thanks for all your help but I really like the Sports Racer fabric' and off they go to the nearest BRU!"³⁴

152. Furthermore, through generous advertising allowances exclusive to BRU, Britax already paid for most of the services BRU furnished.

153. From 2002 to 2005, BRU's allowance income from Britax rose from \$1.3 million to \$2.7 million, and during that same time period, Britax's total contribution (including GPM, advertising allowance, and RGD) rose from \$10.3 million to \$18 million. Intercompany correspondence indicates that BRU dictated these allowances from Britax. (Neither Baby Club

32 See BRX72034; BRX45295.

33 BRX204659

34 BRX256972

nor Babyage nor, on information and belief, other similar internet retailers) received any advertising allowance from Britax.

154. Britax, by its own admissions, clearly put BRU first, and gave BRU many advantages over other retailers. Britax management recognized that “If BRU asks for it, you know they’ll get it.”³⁵

4. Britax Allowed BRU To Control Its Prices

155. Not only did Britax agree with BRU to enforce RPM agreements in general, but Britax also consulted and agreed with BRU as to the specific MSRP’s of certain Britax products, and the timing of MSRP increases or decreases, in order to “accommodate BRU”.

156. Britax was aware that BRU similarly controlled other Manufacturers’ pricing policies, noting in a September 2003 Sales Report that “Perego’s 10% price increase was rescinded partially until the first of October due to Babies R Us refusing to raise the manufacturer’s MSRP until then.”³⁶

157. Further, BRU at times deigned to grant Britax permission to offer BRU exclusive products to the other retailers, but only “AS LONG AS THEY DON’T DISCOUNT THEM.”³⁷ To further BRU’s scheme, Britax agreed with BRU not enforce the RPM policy against BRU, so that BRU could offer illusory discounts and thereby undersell its retail competitors by a small amount (but far less than BRU would have been forced to discount but for the conduct challenged in this lawsuit) .

5. BRU Was The Only Benefactor Of Britax’s RPM Regime

158. Britax was aware that its agreement with BRU and its willingness to meet BRU’s demands that it impose and enforce minimum resale prices caused BRU’s sales to increase at the expense both of more efficient retail competitors (who were prevented from competing on price)

35 BRX426318

36 BRX69718

37 BRX233744

and of consumers (who paid higher prices than they would have with full and fair competition).

For instance:

- a. On January 19, 2004, Britax, referring to the artificial stabilization of retail prices that BRU sought from Britax, reported that BRU's "positive sales trend can most likely be attributed to MSRP project success; the playing field has been leveled."³⁸
- b. Moreover, throughout 2005 and 2006, Britax authored numerous internal documents that lauded the success of the IPP on sales to BRU, the fact that the IPP allowed BRU to compete with internet retailers, and the fact that IPP provided sales to BRU from consumers that could no longer find discounted Britax products on the Internet.

159. While the Retail Distribution Policy greatly benefitted BRU, it actually harmed Britax. According to Britax, its efforts to impose and enforce minimum resale prices at BRU's behest caused Britax "loss of business."³⁹ For example, an October 2003 Britax Sales Summary notes that "Marathons not selling as well as expected. Holding MSRP may be reason as they compared with other major websites."⁴⁰

E. MACLAREN AND BRU ENTERED AN AGREEMENT IN UNREASONABLE RESTRAINT OF TRADE

1. Maclaren Imposed Minimum Resale Prices On Retailers In Order To Obtain And Maintain BRU As A Customer

160. Maclaren formally entered the U.S. high-end baby products market in 1999. Shortly thereafter, on or about March 1, 2000, Maclaren required minimum resale pricing by retailers of Maclaren baby products.

161. Maclaren imposed minimum resale pricing on its retailers because BRU refused

38 BRX69446

39 BRX71619; BRX72115.

40 BRX271829. *See also* BRX325723.

to sell products from a manufacturer that did not have such a policy in place at that time.

2. BRU Refused To Expand Its Maclaren Product Offerings Until Maclaren Agreed To Permit BRU To Dictate Resale Price For Maclaren Products

162. By March 2002, Maclaren realized the impact that BRU could have on its sales. Thus, Maclaren sought to expand the number of Maclaren products that BRU carried as well as the number of BRU stores carrying the line.

163. In March of 2002, Maclaren met with representatives of BRU about the expansion of Maclaren products at BRU stores. However, BRU was resistant unless Maclaren agreed to protect BRU from price competition from other retailers and allow BRU to dictate Maclaren's retail pricing terms and conditions.

164. Maclaren responded that it would agree to BRU's demand if BRU put Maclaren's products in all 170 of BRU's stores. BRU agreed to do so.

165. With an agreement struck, Maclaren's sales at BRU stores skyrocketed. In 2002, BRU comprised 51 percent of Maclaren's sales to chain stores. Moreover, sales at BRU of Maclaren's products quadrupled in 2002 over previous sales levels in 2000 and 2001.

3. BRU Demanded, and Maclaren Agreed, To Enforce Minimum Pricing Against BRU's Retail Competitors

166. BRU's tactics with Maclaren were consistent with the tactics it used successfully with other manufacturer defendants. Before BRU would agree to purchase additional Maclaren products in early 2002 (if not before), on information and belief, BRU exacted an agreement from Maclaren that Maclaren would actively enforce minimum retail pricing against BRU's competitors.

167. Consistent with its agreement with BRU to increase the breadth and depth of Maclaren products at BRU stores, Maclaren began a campaign of aggressive and heightened enforcement of its pricing agreement against BRU's retail competitors. Examples include, but are not limited to:

- a. At several times during 2005, Maclaren's representative, Robert Stiskin, contacted Baby Club by telephone and email, seeking Baby Club's agreement to raise its prices to the MSRP. Stiskin also complained to Maclaren executives about the negotiations, noting that it was unfair to ask Baby Club to raise its prices when others, notably BRU, had not.
- b. In June 2005, Maclaren put pressure on other retailers that were pricing products below Maclaren's MSRP, to get their prices in line. Maclaren representatives spoke with the violators and procured their agreement to raise prices.

4. Maclaren Purposefully Allowed Only BRU To Violate The RPM Policy Through Illusory Discounting

168. Realizing the importance of BRU to its business, Maclaren and BRU agreed that BRU would not be required to comply with minimum resale pricing. In contrast to its strict enforcement against other retailers, Maclaren allowed BRU to offer illusory discounts that gave BRU an advantage over its retail competition. Maclaren permitted BRU these illusory discounts (which allowed BRU to price far higher than it would have profitably been able to without losing sales to competitors, but for the conduct challenged in this lawsuit), despite complaints from competing retailers about BRU's conduct.

169. As evidence of such an agreement, in March 2004, two Maclaren representatives

discussed the fact that a retailer wished to offer consumers lower prices, via a coupon to customers. The Maclaren representatives remarked that the retailer “seems to think he is BRU and can do this all the time . . . !!! Maybe you need to do something with him.”⁴¹

5. Maclaren’s Imposition And Enforcement Of Minimum Resale Pricing Was Not In Its Economic Interests

170. The implementation and enforcement of minimum resale pricing was not in Maclaren’s best economic interests. Rather, Maclaren made the various agreements with BRU because it had little choice but to accommodate BRU’s demands, lest it risk losing a significant percentage of its total sales.

171. While Maclaren agreed to protect BRU’s profits and took the above actions to do so, at no time did BRU offer to use its profits or margins to provide additional customer service.

172. Instead, Maclaren was supposed to increase or provide better customer service at its own costs.

F. KIDS LINE AND BRU ENTERED AN AGREEMENT IN UNREASONABLE RESTRAINT OF TRADE

1. Kids Line Agreed With BRU To Limit Internet Sales In Order To Protect BRU From Price Competition

173. By 2001, BRU accounted for a significant portion of Kid Line’s sales.

174. Thus, BRU dictated the terms and conditions under which Kids Line would deal with its other retailer customers. For instance, Michael Levin of Kids Line and Pam King of BRU worked to determine where to set the minimum retail prices on a Kids Line bedding set.

175. On information and belief at BRU’s behest, Kids Line implemented a policy

41 MUSA001503

against opening any new internet sales accounts starting around late 2001 or early 2002. On information and belief, Kids Line did this pursuant to an agreement with BRU. Yet, Kids Line acknowledged internally that denying additional sales outlets on the internet was against Kids Line's own economic interests.

176. On or about October 27, 2003, Kids Line sought and obtained a copy of Peg Perego's latest "retail distribution policy" dated 4/28/03, which Peg Perego had previously determined would meet with BRU's approval. Kids Line thereafter issued a substantially similar version of that "policy."

177. Kids Line considered a request from BRU for Kids Line to compensate BRU for shipping charges incurred by BRU as a result of a "no shipping charges" promotion/sale BRU had run on the internet. On information and belief, Kids Line did so pursuant to its prior agreement with BRU that Kids Line would protect BRU from profit-lowering price competition from BRU's retail competitors by requiring BRU's retail competitors to charge a minimum price. That BRU requested that Kids Line compensate it for having to compete with other retailers by offering free shipping shows that BRU considered Kids Line to have breached that agreement with BRU.

2. Pursuant To Its Agreement With BRU, Kids Line Enforced Minimum Pricing Against BRU's Competitors

178. In or around May 2005, in response to a complaint from Babyage about BRU's pricing below Kids Line minimum retail pricing policy, representatives of Kids Line stated that they would consider permitting Babyage to match BRU's prices.

179. On information and belief, Kids Line raised this issue with BRU and BRU

soundly rejected it because it was in contravention of Kids Line's agreement with BRU.

Accordingly, Kids Line did not want to breach its agreement with BRU for fear of losing BRU's business.

180. Thus, just one month later, Kids Line threatened Babyage by indicating that Babyage should not consider lowering its prices below Kids Line's minimum resale prices in order to match BRU's prices because it would force Kids Line to "choose between" Babyage and BRU.

181. In accordance with Kids Line's agreement with BRU to protect BRU from the profit-lowering effects of retail price competition, Kids Line took enforcement action against BRU's retail competitors. Kids Line routinely discussed pricing levels with its retailers, and threatened to cut them off or refuse them credit if they did not get their price up to the minimum levels required by Kids Line, including the following instances:

- a. In or around May of 2005, in response to an inquiry from Babyage, representatives of Kids Line, including Charles Ginn and Angelo Dubbioso, stated that Kids Line would consider permitting Babyage to price lower than minimum resale price, inasmuch as BRU was doing so, but in or around June of 2005, a representative of Kids Line, Charles Ginn, told Babyage that Babyage should not consider lowering its prices past minimum agreed resale prices to match BRU prices, because it would force Kids Line to "choose between" Babyage and BRU;
- b. In or around November of 2005, Kids Line contacted its manufacturer's representative for Babyage, Barry Weismer, and instructed him to obtain Babyage's acquiescence in raising its prices to the agreed minimum resale price,

- the manufacturer's representative did so, and Babyage did, in fact, acquiesce;
- c. on November 23, 2005, in response to a request for an order and additional credit by Babyage, Maura Ostergaard of Kids Line told Barry Weismer, sales representative for Kids Line, "I will go for this offer, but I need for him to get his pricing in line first...I would feel better if this was a pre pay..perhaps a credit card pay?"⁴² Barry Weismer did contact Babyage and asked them to get their prices up, to which request Babyage agreed;
 - d. In or around December of 2005, Barry Weismer, a representative of Kids Line, in response to an inquiry from Babyage about increasing its credit line with Kids Line, told Babyage that Babyage would first have to increase prices on certain products;
 - e. In, among other years, 2003 and 2004, a representative of Kids Line, including Mele Liss-Schwartz and Leslie Miller, personally visited Baby Club approximately twice a year, each time seeking Baby Club's acquiescence in Kids Line's minimum pricing agreements, to which requests Baby Club ultimately agreed.

182. Kids Line's enforcement strategy for its retail distribution pricing policy against retailers such as Babyage and Baby Club, included, but was not limited to, numerous calls and visits, restriction of credit lines, delayed shipping, and threats to stop shipping altogether. Through this strategy, Kids Line was able to enforce minimum pricing on retailers such as Nursery Depot, AllBabyBedding.com, and Kids Palace.

183. When a retailer would not comply, Kids Line would stop shipments. For example,

on or about July 25, 2005, Kids Line learned that retailer Baby Mania was discounting so Kids Line called to tell the retailer to stop discounting. Baby Mania did not return the phone calls, so Kids Line stopped shipments to the retailer.

G. REGAL LAGER, BABY BJORN AND BRU ENTERED AN AGREEMENT IN UNREASONABLE RESTRAINT OF TRADE

1. Regal Lager Was Baby Bjorn's Agent

184. Regal Lager became the exclusive United States distributor for Baby Bjorn products in 1991. On information and belief, Baby Bjorn had little interest in the U.S. market and for the most part let Regal Lager handle U.S. distribution up until the time that the prospect of selling to BRU became a reality.

185. Once negotiations with BRU commenced in early 1999 however, Baby Bjorn altered its distribution strategy with Regal Lager and started to assume direct control of all administrative, legal, financial, and marketing activities of Baby Bjorn products to BRU in the United States.

186. At that time, Regal Lager was heavily dependant on sales of the Baby Bjorn carrier. That dependence, coupled with the fact that Baby Bjorn was free to terminate the distribution agreement with Regal Lager at any time without cause, made it easy for Baby Bjorn to assert its control over Regal Lager.

187. In fact, in late 2004, a few months after Regal Lager attempted to resist a retail price change on baby carriers that Baby Bjorn had directed Regal Lager to make, Baby Bjorn announced that its relationship with Regal Lager would terminate on April 30, 2005. Baby Bjorn

did in fact terminate its distributor agreement with Regal Lager on or about April 30, 2005 and it has since replaced Regal Lager with a company named Baby Swede LLC.

188. Based on the foregoing, Regal Lager, at all relevant times through April 30, 2005 was an agent of Baby Bjorn.

2. BRU Required Baby Bjorn To Agree That It Would Not Permit Discounting As A Condition Precedent to BRU's Sale of Baby Bjorn's Products

189. On information and belief, BRU approached Baby Bjorn, no later than March of 1999, to discuss BRU's interest in becoming a retailer of Baby Bjorn's products. During multiple meetings in 1999, BRU discussed with Baby Bjorn the agreements it had entered with Peg Perego and Britax and the fact that BRU was not discounting their products.

190. BRU and Baby Bjorn agreed that BRU would not discount the Baby Bjorn carriers. As a result, BRU required that Regal Lager and Baby Bjorn change the terms and conditions of its dealings with its other retailer customers, which, if and when enforced, had permitted discounting up to 10%. Regal Lager and Baby Bjorn agreed to do so.

3. BRU Required Regal Lager To Adopt Peg Perego's No Discounting Pricing Policy As A Condition Precedent To the Sale of Baby Bjorn's Products

191. Regal Lager, during the same timeframe that the negotiations with BRU were ongoing, obtained a copy of Peg Perego's minimum retail pricing document titled Retail Distribution Policy for Peg Perego Products Effective 5/15/99. Regal Lager knew that BRU would not place any orders for Baby Bjorn products without a required no discounting minimum resale pricing in effect.

192. With Peg Perego's document in hand, Regal Lager put together its New Retail Distribution Policy for Baby Bjorn products with an effective date of February 1, 2000. Regal Lager expected that, once adopted, BRU would begin to order Baby Bjorn products.

193. Knowing that Peg Perego's policy had passed muster with BRU, Regal Lager adopted Peg Perego's Retail Distribution Policy dated May 15, 1999, essentially word for word.

194. To ensure that BRU was aware that Regal Lager had complied with BRU's requirement that a policy be put in place, Regal Lager disseminated multiple copies to BRU's representatives:

- a. On January 13, 2000, Regal Lager faxed a copy of its new policy to Carol Christensen, a buyer at Babies R Us. The Fax indicated that Regal Lager wanted Carol Christensen to be aware that the new retail pricing policy had been adopted by Regal Lager and that Regal Lager was looking forward to receiving BRU's first order.
- b. Also on January 13, 2000, Regal Lager faxed a copy of its new policy under separate cover to Marcia Costello, another buyer at Babies R Us. This fax also indicated that Regal Lager wanted Marcia Costello to be aware that the new retail pricing policy had been adopted by Regal Lager and that Regal Lager was awaiting BRU's first order.
- c. On January 20, 2000, Bengt Lager, of Regal Lager, sent a correspondence to Marty Fogelman, Vice President of Babies 'R Us, enclosing yet another copy of the new RPM policy. This correspondence confirmed that Regal Lager had previously sent the policy to the two BRU buyers. Mr. Lager also reiterated that

Baby Bjorn and Regal Lager were ready to ship the first orders as soon as BRU was ready. However, BRU did not place an order with Regal Lager for Baby Bjorn products at that time.

195. Not surprisingly, it was not until February 2, 2000, one day after Regal Lager's Retail Distribution Policy officially took effect, BRU finally placed its first order with Regal Lager for Baby Bjorn products.

4. BRU Required Baby Bjorn And Regal Lager To Enforce Their New RPM Policy

196. Pursuant to its agreement with BRU, Regal Lager began enforcing its new RPM policy immediately.

197. By February 3, 2000, Regal Lager had already contacted Baby Center about the minimum pricing and obtained its agreement to get their prices up. Regal Lager also contacted other retailers to remind them to read the new distribution policy.

198. These types of enforcement actions continued throughout the Relevant Period, pursuant to Regal Lager and Baby Bjorn's agreement with BRU.

199. In order to secure agreement with BRU's retail competitors, Regal Lager would place discounting retailers' accounts on hold and not ship out their orders until the retailers finally agreed to, and did, comply with the minimum pricing. Examples include but are not limited to:

- a. in late 2003, Sweet Pea's account was placed on hold due to failure to comply with the RPM policy;

- b. in January 2004, First Step was placed on “Credit Hold” until its retail pricing was back in line with MSRPs;
- c. in March 2004, Regal Lager did not process the open orders of Dreamtime Baby until confirmation was received that Dreamtime Baby had updated its website to reflect the correct retail pricing on Baby Bjorn products;
- d. in July 2004, Forever Young was placed on “hold” and the hold was released once confirmation was obtained that its internet pricing was no longer in violation of Regal Lager’s minimum pricing;
- e. in 2005, Baby Age’s account was placed on hold until it excluded the Regal Lager product from a sale it was running that violated Regal Lager’s minimum pricing.

200. At time between 1999 and 2001, representatives of Regal Lager and Baby Bjorn, including Jeff Durkee, Richard Clarke, and Ann-Sofie Cardenas, met with Baby Club several times, seeking Baby Club’s agreement to raise prices on various Baby Bjorn products, to which requests Baby Club agreed.

5. BRU Required Baby Bjorn And Regal Lager To Maintain Retail Prices Mandated By BRU

201. BRU dictated the terms and conditions under which Baby Bjorn and Regal Lager would do business with their other retailer customers. For instance, BRU communicated to Baby Bjorn and Regal Lager the retail prices that BRU expected Baby Bjorn and Regal Lager would require all retailers to charge for the products. Baby Bjorn and Regal Lager agreed to do so.

202. The acquiescence and compliance by BRU’s retailer competitors in minimum pricing was, to the Baby Product Manufacturers, preferable to termination or non-supply of

noncompliant retailers, because the Baby Product Manufacturers wanted, and profited from, sales to the Retailers. Nevertheless, the Baby Product Manufacturers did not benefit from the higher prices at the retail level, nor did they benefit from the Agreements more generally, except insofar as by entering into the Agreements, the Baby Product Manufacturers avoided harsh retaliation from BRU.

203. In sum, the Baby Product Manufacturers did *not* simply or unilaterally:

- a. refrain from selling to uncongenial retailers;
- b. suggest resale prices that were widely followed;
- c. sanction and/or terminate retailers who failed to maintain a minimum resale price;
- d. announce and enforce policies of sanctioning and/or terminating retailers who failed to maintain a minimum resale price; or
- e. sanction and/or terminate other retailers following, or in response to, complaints by retailers such as BRU.

204. Rather, the Agreements represent a conscious commitment to a common scheme, designed to achieve an unlawful objective, between BRU, the Baby Product Manufacturers, and other retailers.

205. The Baby Product Manufacturers did not act unilaterally or independently, or in their own economic interests, when:

- a. entering into the BRU-Baby Product Manufacturer Agreements;
- b. seeking retailers' acquiescence to, and compliance with, the terms of the Baby Product Manufacturer-Retailer Agreements;
- c. seeking to have retailers charge minimum resale prices; or

d. terminating retailers for violating the Agreements.

In fact, absent threatened penalties or sanctions by BRU, it would not be in the Baby Product Manufacturers' economic interest to enter into, maintain, or enforce the Agreements.

VI. MONOPOLY/MARKET POWER

206. The relevant product market in this case is retail sales of high-end baby and juvenile strollers, breast pumps, bedding, car seats, high chairs and infant carriers. Alternatively, there are several relevant product markets, including separate markets for retail sales of high-end baby and juvenile strollers; for retail sales of high-end breast pumps; for retail sales of high-end baby bedding; for retail sales of high-end car seats; for high-end high chairs; and for retail sales of high-end infant carriers.

207. The relevant geographic market in this case is the United States of America.

208. By virtue of its power to control prices and exclude competition in the relevant market(s), BRU at all relevant times possessed monopoly power in the relevant market(s). Moreover, at all relevant times BRU possessed dominant shares of the market(s) for retail sales of high-end baby and juvenile strollers, breast pumps, bedding, car seats, high chairs and infant carriers, respectively, and was a critical outlet for the Baby Product Manufacturers.

209. Likewise, the Baby Product Manufacturers at all relevant times each possessed substantial market power in the market(s) for their respective products, due, in part, to the high level of product differentiation in the industry. Specifically, each of the Baby Product Manufacturers: (a) sold their respective high-end baby and juvenile strollers, breast pumps, bedding, car seats, high chairs and infant carriers at prices substantially in excess of marginal costs, (b) enjoyed high profit margins thereon, (c) sold such products substantially in excess of

the competitive price, (d) enjoyed substantial barriers to market entry and growth, and (e) would not, by raising prices for their respective relevant baby products a small but significant nontransitory amount, lose sufficient sales to other manufacturers to make such a price increase unprofitable. Despite this market power, the Baby Product Manufacturers were and are nevertheless substantially reliant upon BRU for their respective sales, sales growth, and profitability.

210. There is substantial concentration among the firms that manufacture the products in the relevant market(s).

VII. MARKET EFFECTS OF AND ANTITRUST INJURY DUE TO DEFENDANTS' ANTICOMPETITIVE CONDUCT

211. The overall effect of Defendants' anti-competitive, exclusionary scheme has been to substantially foreclose and impair competition (and the threat of such competition) from lower-priced Baby Products. As alleged above, had BRU not improperly foreclosed or stifled actual or potential competitors from competing in markets for the Baby products, other actual or potential rival manufacturers would have achieved much greater sales than they actually did (or threatened to do), given the cheaper prices that they charged (or could have charged upon entry), and would have posed a far greater competitive threat to BRU. Additionally, absent BRU's exclusionary conduct, barriers to entry to each of the markets would have been lower, which: (a) would have made it easier for existing or new competitors to enter or expand their positions in the market for the Baby Products, and (b) would have caused existing or potential competitors to be attracted to the Baby Product market because of the supra-competitive prices that BRU was charging. As a result, absent BRU's misconduct, BRU would have rationally perceived that there was a greater threat of potential competition in each of the relevant markets if BRU did not

reduce its supra-competitive prices.

212. The presence of unfettered competition from actual or potential competitors, which were selling lower-priced Baby Products, would have forced BRU to lower the prices for its Baby Products in order to remain competitive and/or to counter a perceived threat of additional entry.

213. During the relevant period, Plaintiffs and the other members of the Class purchased Baby Products directly from BRU. As a result of BRU's alleged illegal conduct, members of the Class were compelled to pay, and did pay, artificially inflated prices for the Baby Products they purchased. Plaintiffs would have been able to, *inter alia*, purchase less-expensive Baby Products had potential competitors been able to engage in unfettered competition. The prices that Plaintiffs and the other Class members paid for Baby Products during the Class Period were substantially greater than the prices that Plaintiffs and the Class members would have paid absent the illegal conduct alleged herein because: (1) the prices of all Baby Products were artificially inflated by BRU's illegal conduct; and (2) Class members were deprived of the opportunity to purchase Baby Products from BRU's competitors at substantially lower prices. Thus, Plaintiffs and the Class have, as a consequence, sustained substantial damages in the form of overcharges.

VIII. CLASS ACTION ALLEGATIONS

214. Plaintiffs bring this action individually and on behalf of a Class defined as follows:

All persons who purchased one or more Baby Products from Toys "R" Us, Inc. d/b/a Babies "R" Us, Babies "R" Us, Inc. or Toys "R" Us – Delaware, Inc. manufactured by Britax Child Safety, Inc., Kids Line Inc., Medela Inc., Peg Perego USA, Baby Bjorn AB, or Maclaren USA Inc. during the period 1999 to the present.

215. **Numerosity:** Joinder of all Class members is impracticable. While the size of the Class is not yet known with certainty, based on the nature of the trade and commerce involved, Plaintiffs reasonably believe that the Class numbers potentially in the tens of thousands. Class members are geographically dispersed throughout the United States. The Class members are identifiable from information and records in Defendants' possession, as well as warranty and other records.

216. **Commonality:** Questions of law and fact are common to the Class, including, but not limited to:

- a. whether BRU obtained and maintained monopoly power in the markets for the Baby Products in the United States;
- b. whether BRU obtained and/or maintained monopoly power in the relevant markets through anti-competitive and unlawful activity;
- c. whether Defendants engaged in agreements, contracts, combinations, and conspiracies, which had the purpose and/or effect of unreasonably restraining competition and limiting purchaser access to competing and lower-priced Baby Products;
- d. whether Defendants' unreasonably restrained trade;
- e. whether Defendants anti-competitive contracts, combinations, and conspiracies have caused Plaintiffs and the other members of the Class to suffer antitrust injury in the nature of overcharges;
- f. whether Defendants' unlawful conduct caused Plaintiffs and other Class members to pay more for the Baby Products than they otherwise would have paid;

- g. the appropriate Class-wide measure of damages; and
- h. whether Defendants' anti-competitive conduct is continuing, thus entitling the Class to injunctive relief to promote unrestrained trade and free and fair competition.

217. **Typicality:** Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs and other Class members are direct purchasers of the Baby Products and were overcharged and thus injured by the same wrongful conduct of Defendants. Defendants' violation of the antitrust laws, the effects of such violations, and the relief sought are all issues or questions that are common to Plaintiffs and the other Class members.

218. **Adequacy:** As representatives of the Class, Plaintiffs will fairly and adequately protect the interests of all Class members.

219. **Predominance:** The questions of law and fact that are common to the members of the Class predominate over any questions affecting only individual Class members. Whatever possible difficulties may exist in the management of the class action are greatly outweighed by the advantages of the class action procedure. Those advantages include, but are not limited to, providing Class members with a method for redress of claims that might otherwise not warrant individual litigation.

220. **Superiority:** Class action treatment is a superior method for the fair and efficient adjudication of the controversy, in that, among other things, such treatment will permit a large number of similarly situated persons to prosecute his or her common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that numerous individual actions would engender. A class action enables injured persons

or entities to obtain redress on claims that might not be practicable to pursue individually. Class treatment also eliminates the potential for inconsistent adjudications.

IX. TOLLING OF THE STATUTE OF LIMITATIONS, FRAUDULENT CONCEALMENT, EQUITABLE TOLLING AND CONTINUING VIOLATIONS

221. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth herein.

222. Plaintiffs did not discover and could not have discovered through the exercise of reasonable diligence the existence of the claims sued upon herein until immediately prior to commencing this civil action.

223. Any applicable statutes of limitation have been tolled by Defendants' affirmative acts of fraudulent concealment and continuing misrepresentations, as the facts alleged above reveal.

224. Because of the self-concealing nature of Defendants' actions and their affirmative acts of concealment, Plaintiffs and the Class assert the tolling of any applicable statutes of limitations affecting the claims raised herein.

225. Defendants continue to engage in the deceptive practice, and consequently, unwary consumers are injured on a daily basis by Defendants' unlawful conduct. Therefore, Plaintiffs and the Class submit that each instance that Defendants engaged in the conduct complained of herein and each instance that a member of the Class purchased a Baby Product constitutes part of a continuing violation and operates to toll the statutes of limitation in this action.

226. Defendants are estopped from relying on any statute of limitations defense because of its unfair or deceptive conduct.

227. Defendants' conduct was and is, by its nature, self-concealing. Still, Defendants, through a series of affirmative acts or omissions, suppressed the dissemination of truthful information regarding their illegal conduct, and have actively foreclosed Plaintiffs and the Class from learning of their illegal, anti-competitive, unfair and/or deceptive acts.

228. By reason of the foregoing, the claims of Plaintiffs and the Class are timely under any applicable statute of limitations, pursuant to the discovery rule, the equitable tolling doctrine, and fraudulent concealment.

X. CAUSES OF ACTION

COUNT I

VIOLATION OF 15 U.S.C. §1 (AGREEMENTS UNREASONABLY RESTRAINING TRADE)

229. Plaintiffs hereby incorporate each preceding and succeeding paragraph as though fully set forth herein.

230. This claim is pled as to BRU and the Baby Product Manufacturers.

231. The Agreements, and their enforcement, constitute contracts, combinations and conspiracies that substantially, unreasonably, and unduly restrain trade in the relevant market(s), and harmed Plaintiffs and the Class thereby.

232. The Agreements cover a sufficiently substantial percentage of relevant market(s) to harm competition.

233. BRU and the Baby Product Manufacturers are liable for the creation, maintenance, and enforcement of the Agreements under a "quick look" and/or rule of reason standard.

234. BRU and the Baby Product Manufacturers each possess market power.

235. The Agreements harm competition by raising and increasing prices.

236. There is no legitimate, pro-competitive business justification for the Agreements, or any of them, that outweighs their harmful effect. Even if there were some conceivable justification, the Agreements are broader than necessary to achieve such a purpose.

237. Plaintiffs and members of the Class were injured in their business or property by the collusion and conspiracy alleged above which facilitated, enabled, assisted or furthered Defendants' substantial foreclosure and exclusion of competition in the relevant markets.

238. Without limiting the generality of the foregoing, Plaintiffs and the other members of the Class have been forced to pay higher prices for Baby Products than they would have paid in the absence of Defendants' unlawful conduct.

COUNT II

VIOLATION OF 15 U.S.C. § 2 (MONOPOLIZATION)

239. Plaintiffs hereby incorporate each preceding and succeeding paragraph as though fully set forth herein.

240. This claim is pled as to BRU only.

241. At all relevant times, BRU possessed monopoly power in the relevant market(s). BRU possessed the power to control prices in, prevent prices from falling in, and exclude competitors from the relevant market(s).

242. By the Agreements, BRU willfully maintained its monopoly power in the relevant market(s) using restrictive or exclusionary conduct, rather than by means of greater business acumen, and injured Plaintiffs and the Class thereby. It was BRU's conscious objective to further its dominance in the relevant market(s) by and through the Agreements.

243. BRU's conduct, including the BRU-Baby Product Manufacturer Agreements, the Baby Product Manufacturer-Retailer Agreements (which were a product of the BRU-Baby Product Manufacturer Agreements), their enforcement, and BRU's coercion of the Manufacturers, constitutes an anti-competitive scheme to acquire and maintain monopoly power in the relevant market(s).

244. BRU's willful maintenance of monopoly power has made it difficult or impossible for competitors to engage in fair competition.

245. Plaintiffs and members of the Class were injured in their business or property by BRU's monopolization of the relevant markets.

246. Without limiting the generality of the foregoing, Plaintiffs and the other members of the Class have been forced to pay higher prices for Baby Products in the relevant markets than they would have paid in the absence of BRU's unlawful conduct.

COUNT III

VIOLATION OF 15 U.S.C. § 2 (ATTEMPTED MONOPOLIZATION)

247. Plaintiffs hereby incorporate each preceding and succeeding paragraph as though fully set forth herein.

248. This claim is pled as to BRU only.

249. The Agreements were unreasonably exclusionary.

250. By the BRU-Baby Product Manufacturer Agreements, BRU conspired with the Baby Product Manufacturers for the Baby Product Manufacturers to enter into the Baby Product Manufacturer-Retailer Agreements, with the specific intent to achieve monopoly power in the relevant market(s).

251. The natural and probable consequence of the Agreements, which was plainly foreseeable to BRU, was to give BRU control over prices and/or to exclude or destroy competition in the relevant market(s), or any of them, to the extent it has not already succeeded.

252. There is a substantial and real chance, a reasonable likelihood, and/or a dangerous probability that BRU will achieve its goal of obtaining monopoly power in the relevant market(s).

253. Plaintiffs and members of the Class were injured in their business or property by Defendants' attempted monopolization of the relevant markets.

254. Without limiting the generality of the foregoing, Plaintiffs and the other members of the Class have been forced to pay higher prices for Baby Products in the relevant markets than they would have paid in the absence of BRU's unlawful conduct.

COUNT IV

VIOLATION OF 15 U.S.C. § 2 (CONSPIRACY TO MONOPOLIZE)

255. Plaintiffs hereby incorporate each preceding and succeeding paragraph as though fully set forth herein.

256. This claim is pled as to BRU and the Baby Product Manufacturers.

257. Through the Agreements, BRU and the Baby Product Manufacturers conspired to maintain and enhance BRU's monopoly power in the relevant market(s).

258. BRU and the Baby Product Manufacturers knowingly and intentionally entered into the Agreements.

259. BRU and the Baby Product Manufacturers specifically intended that the Agreements would maintain BRU's monopoly power in the relevant market(s), and injured

Plaintiffs and class members thereby.

260. BRU and each of the Baby Product Manufacturers committed at least one overt act in furtherance of the conspiracy.

261. Plaintiffs and members of the Class were injured in their business or property by Defendants' conspiracy to monopolize the relevant markets. Without limiting the generality of the foregoing, Plaintiffs and the other members of the Class have been forced to pay higher prices for Baby Products in the relevant markets than they would have paid in the absence of Defendants' unlawful conduct.

XI. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs on behalf of themselves and the Class, respectfully request that:

- A. The Court determine that this action may be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and direct that reasonable notice of this action, as provided by Rule 23, be given to the Class;
- B. The acts alleged herein be adjudged and decreed to be unlawful acts in violation of Sections 1 and 2 of the Sherman Act and that Defendants be enjoined from further violative conduct;
- C. Each member of the Class recover threefold the damages determined to have been sustained by each of them, and that judgment be entered against Defendants in favor of the Class;
- D. The Class recover its costs of suit, including reasonable attorneys' fees and costs as provided by law; and
- E. The Class be granted such other appropriate relief as may be determined to be just, equitable, and proper by this Court.

JURY DEMAND

Plaintiffs hereby demand a trial by jury on all issues so triable.

DATED: November 2, 2007

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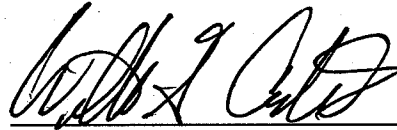
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Class Plaintiffs' Fourth Amended Consolidated Class Action Complaint has been duly served on all counsel on the attached service list *via* electronic mail on November 2, 2007.

A handwritten signature in black ink, appearing to read "W. G. Caldes", written over a horizontal line.

William G. Caldes

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