

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,

Plaintiff

v.

BROWN SHOE COMPANY, INC.,
G. R. KINNEY CO., INC.,

Defendants

Civil No. 10527

Filed: November 28, 1955

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this Civil Action to obtain equitable relief against the above-named defendants and complains and alleges as follows:

JURISDICTION AND VENUE

1. This complaint is filed and this action instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for other Purposes," commonly known as the Clayton Act, in order to prevent and restrain the violation by the defendants, as hereinafter alleged, of Section 7 of said Act.

2. Brown Shoe Company, Inc., transacts business and is found within the Eastern District of Missouri.

DEFENDANTS

3. Brown Shoe Company, Inc., hereinafter referred to as "Brown," is made a defendant herein. Brown, a corporation organized and existing under the laws of the State of New York, maintains its principal offices in St. Louis, Missouri.

4. G. R. Kinney Co., Inc., hereinafter referred to as "Kinney," is made a defendant herein. Kinney, a corporation organized and existing under the laws of the State of New York, maintains its principal offices in New York City.

TRADE AND COMMERCE

5. Brown was incorporated in New York in 1913 and is engaged in the manufacture, distribution and sale throughout the United States of men's, women's and children's shoes. Brown is one of the leading manufacturers of shoes in the United States and is in active competition with a few other large and many small producers of shoes. In the year 1954 only two other shoe manufacturers had a higher total dollar sales than Brown.

6. In the fiscal year ended October 31, 1954, total sales by Brown were in excess of \$138,000,000. Total dollar value of Brown's sales at wholesale exceeded \$100,000,000 and sales at retail amounted to more than \$38,000,000.

7. Brown manufactures and sells men's, women's and children's shoes under various trade names, including the following: "Roblee," "Regal," "Pedwin," "Air Step," "Risque," "Naturalizer," "Westport," "Life Stride," "Buster Brown," and "Robin Hood."

8. Prior to 1951 Brown did not own or operate any retail outlets. Its entire output was sold at the wholesale level. Since 1951, as a result of a series of corporate acquisitions, as hereinafter set forth, Brown has entered into the ownership and management of retail outlets. Brown now owns or operates over 470 retail shoe stores (of which 370 have been acquired and 100 have been established since 1951) or other outlets located throughout the United States. These stores are engaged in the business of selling shoes which have been produced by Brown or which have been purchased from other manufacturers for resale through Brown's retail stores.

9. In addition to sales through owned or operated retail outlets Brown sells to independently owned stores operating under the Brown franchise plan. These stores are committed to a program under which they concentrate their business within the grades and price lines covered by the Brown franchise and will have no lines conflicting with Brown's brands. They account for over 16% of Brown's total dollar sales

at wholesale. During the period of time covered by this complaint Brown has actively increased the number of stores covered by the Brown franchise plan. In 1949 there were 441 stores operating under the plan. Today there are more than 580 Brown franchise stores. In the last fiscal year these stores purchased supplies from Brown having a retail value of more than \$25,000,000.

10. In addition, Brown sells at wholesale through its Wohl division to approximately 330 independent retail outlets located throughout the country which operate under the so-called "Wohl Plan." These stores are committed by oral understanding and informal agreement to concentrate their purchases on lines which Brown sells through its Wohl division. They account for approximately 30% of all the shoes which the Wohl division sells at wholesale. During the fiscal year ending October 31, 1954 sales by the Wohl division to these stores represented shoes which had a retail value in excess of \$4,000,000.

11. In a series of transactions beginning in October of 1950, Brown has acquired stock or assets of corporations engaged in the manufacture, distribution or sale of shoes. All the acquired corporations, in the regular course of business, either manufactured, shipped and sold shoes throughout the United States or purchased or received shipment of shoes from manufacturers located in states other than the one in which they did business. Such acquisitions included the following:

(a) In October of 1950 Brown acquired Spalsbury-Steis Shoe Company, a Missouri corporation, which manufactured and sold shoes for sale to customers located throughout the United States.

(b) In 1951 Brown acquired Wohl Shoe Company (now operating as the Wohl division of Brown), a Missouri corporation, engaged in the sale of shoes at wholesale and at retail through the more than 250 outlets which it owned or operated. In addition to sales through its owned or operated outlets the Wohl company at the time of acquisition sold to a number of

independent retail stores operating under the "Wohl Plan" as described above. Wohl manufactured no shoes but purchased its requirements from a large number of independent shoe manufacturers located throughout the United States including purchases from Brown Shoe Company. In the year immediately prior to acquisition Wohl obtained approximately 10% of its requirements from Brown. Brown estimates that in the fiscal year ending October 31, 1955 it will have supplied Wohl with more than 31% of its requirements. Since acquisition by Brown, Wohl has acquired or established approximately 100 additional retail outlets.

(c) Between March 31, 1952 and July 2, 1953 Brown acquired all the outstanding capital stock of Wetherby-Kayser Shoe Company, a California corporation, which operated three retail shoe stores in the State of California.

(d) In 1952 Brown acquired the Bourbeuse Shoe Company, a Missouri corporation, which manufactured shoes in Union, Missouri for sale throughout the United States.

(e) In 1953 Brown acquired Monogram Footwear, Inc., a Missouri corporation, which manufactured and sold shoes throughout the United States.

(f) In 1953 Brown acquired Kaut, Lauman, Winter, Inc., a Missouri corporation, which manufactured girl's and children's shoes and sold them throughout the United States.

(g) In 1953 Brown acquired O'Donnell Shoe Corporation, a Tennessee corporation, which manufactured and sold shoes to customers located outside the State of Tennessee.

(h) In 1954 Brown acquired Regal Shoe Corporation, a Massachusetts corporation, which manufactured and sold shoes throughout the United States including sales through its chain of approximately 110 owned or operated shoe stores.

(i) In 1954 Brown acquired Barnes & Company, a Texas corporation, which operated two retail shoe stores in Midland, Texas.

(j) In 1955 Brown acquired T. D. Reilly Shoe Company

which operated two retail shoe departments in Columbus, Ohio.

12. Based on annual sales for each acquired corporation during the year immediately preceding its acquisition, the total annual sales of the corporations heretofore acquired by Brown exceeded \$51,000,000. Over \$32,000,000 of these sales represented sales at retail including sales through the more than 370 acquired retail outlets. The remaining sales were at wholesale to dealers, retail stores and other outlets, including outlets operating under the Brown franchise plan and the Wohl plan.

13. Kinney is engaged in the manufacture, distribution and sale throughout the United States of men's, women's and children's shoes. Kinney operates four factories and owns or leases approximately 360 shoe stores which sell men's, women's and children's shoes. Kinney is the ninth largest seller of shoes by dollar value in the United States. It markets shoes under a number of trade names, including the following: "Educator," "Style Craft," "Revette" and "Kin-i-kins." Its annual sales for the fiscal year 1954 were approximately \$46,000,000. Ninety-one percent of these sales were sales at retail through Kinney's owned or operated shoe stores and the remainder were at wholesale. Approximately 67% of the shoes sold at retail were obtained from sources other than Kinney.

14. Brown and Kinney are both engaged in interstate commerce. Their combined sales for the year 1954 were in excess of \$185,000,000. Only one corporation engaged in the manufacture, distribution or sale of shoes in the United States had larger annual dollar sales.

OFFENSE CHARGED

15. On July 25, 1955 the directors of Kinney and Brown voted to submit to the stockholders a stock exchange plan which would result in the acquisition by Brown of all outstanding stock in Kinney in exchange for stock in Brown. A copy of the proposed "Merger Agreement" together with the proposed "Certificate of Consolidation" are attached

hereto and expressly made a part hereof. Special meetings of stockholders of both companies have been called for December 1, 1955 to consider the pending acquisition by Brown of Kinney. The pending acquisition will become effective upon the affirmative vote of the holders of at least two-thirds of the outstanding common stock of Brown and the affirmative vote of the holders of at least two-thirds of the outstanding \$5 Prior Preferred stock and common stock of Kinney. If the acquisition is approved, a certificate of consolidation will be executed and filed in the office of the Secretary of State of the State of New York and a stock exchange will take place immediately thereafter.

16. The acquisition by Brown of Kinney's stock will violate Section 7 of the Clayton Act in that the effect, with respect to the above described trade and commerce, may be substantially to lessen competition or to tend to create a monopoly, among other ways, as follows:

(a) Actual and potential competition between Brown and Kinney in the production, distribution and sale of shoes may be eliminated.

(b) Actual and potential competition generally in the production, distribution and sale of shoes may be substantially lessened.

(c) Brown's competitive advantage over other producers, distributors and sellers of shoes may be enhanced to the detriment of actual and potential competition.

(d) Competitive manufacturers may be foreclosed from a market represented by Kinney's retail outlets whose annual sales exceed \$42,000,000.

(e) Addition of Kinney to the previously acquired corporations would bring the total annual sales by acquired corporations to approximately \$97,000,000, including sales at retail through acquired retail outlets.

(f) Independent retailers including those who purchase shoes from Brown, may be deprived of a fair opportunity to compete with Brown's own retail outlets.

(g) Acquisition of the exclusive right to use additional valuable trade names may enable Brown to maintain or establish advantageous buyer and seller relationships to the detriment of competing manufacturers and retailers.

(h) Industry-wide concentration of ownership, management and control of retail outlets in a few large shoe companies may be increased.

17. The defendants threaten to carry out the above described acquisition, and plaintiff believes it will be carried out and that it will have continuous unlawful effects unless the relief hereinafter prayed for is granted.

PRAYER

WHEREFORE, plaintiff prays:

1. That a temporary restraining order and/or a preliminary injunction issue enjoining the defendants, their officers, directors, agents, employees and all other persons acting on their behalf from taking any further action to consummate the stock acquisition, and from making any changes in Kinney's corporate structure or Kinney's commercial operations and policies with regard to the manufacture, distribution and sale of shoes pending final adjudication of the merits of this complaint.

2. That the threatened acquisition of Kinney described herein be adjudged a violation of Section 7 of the Clayton Act.

3. That the defendant Brown, its officers, directors, agents and all other persons acting on its behalf be perpetually enjoined from acquiring the stock or assets of Kinney, or of any corporation engaged in the manufacture, distribution or sale of shoes.

4. That pursuant to Section 15 of the Clayton Act an order be made and entered herein requiring defendant Kinney to be brought

before the Court in this proceeding and directing the Marshal of the Southern District of New York to serve summons upon it.

5. That plaintiff have such other and further relief as the Court may deem just and proper.

6. That plaintiff recover the costs of this suit.

s/ Herbert Brownell, Jr.
HERBERT BROWNELL, JR.
Attorney General

s/ Stanley N. Barnes
STANLEY N. BARNES
Assistant Attorney General

s/ Ephraim Jacobs
EPHRAIM JACOBS
Attorney, Department of Justice

s/ Harry Richards
HARRY RICHARDS
United States Attorney

s/ James J. Coyle
JAMES J. COYLE

s/ Edward G. Gruis
EDWARD G. GRUIS

s/ Mark E. Fields
MARK E. FIELDS

s/ John T. Duffner
JOHN T. DUFFNER

Attorneys
Department of Justice

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

James J. Coyle, being duly sworn, deposes and says that he is an attorney employed by the Department of Justice of the United States; that he has been actively engaged in the preparation of this proceeding; that he has read the foregoing complaint and knows the contents and is familiar with the subject matter thereof; that he is informed and believes that the allegations of fact contained therein are true; and that the sources of his information are written statements, data and documents submitted to the Department of Justice by the defendants, information contained in documents filed by the defendants as public documents with the Securities and Exchange Commission and information obtained from recognized trade and Government sources.

s/ James J. Coyle
_____ JAMES J. COYLE

Subscribed and sworn to before me this 25th day of November 1955.

s/ Sara B. McGrann
_____ Notary Public
My commission expires the 1st
day of May 1956.

MERGER AGREEMENT

AGREEMENT dated _____, 1955, between Brown Shoe Company, Inc., a New York corporation (hereinafter called "Brown"), and G. R. Kinney Co., Inc a New York corporation (hereinafter called "Kinney").

Whereas, the respective Boards of Directors of Brown and Kinney have determined that it is advisable and in the best interests of such corporations and their respective stockholders that Kinney be merged into Brown, which shall be the surviving corporation in the merger,

Now, therefore, it is agreed as follows:

1. Brown and Kinney will cause special meetings of their respective stockholders to be called and held on or before December 30, 1955, or such later date as the Board of Directors of Brown and Kinney shall approve, to consider and vote upon the merger of Kinney into Brown on the terms and conditions set forth in the form of "Certificate of Consolidation" attached hereto as Annex A. If the merger is approved by the stockholders of Brown and Kinney in accordance with the laws of New York, subject to the provisions of paragraph 3 hereof, as promptly as possible thereafter, a Certificate of Consolidation shall be executed and filed in the office of the Secretary of the State of New York. The Certificate of Consolidation so filed shall be substantially in the form of Annex A hereto, with such changes therein as the Board of Directors of Brown and Kinney shall approve. The date and time at which said Certificate of Consolidation is filed with the Secretary of State of the State of New York is herein called the "effective date of the merger".

2. At or prior to the effective date of the merger:

(a) There shall have been deposited with a bank or trust company doing business in the Borough of Manhattan, City of New York, moneys sufficient for the payment of the redemption price of all outstanding shares of \$5 Prior Preferred Stock of Kinney, and notice of redemption of such stock shall have been mailed to all holders of \$5 Prior Preferred Stock of Kinney, all to the end that all rights of holders of said \$5 Prior Preferred Stock as stockholders of Kinney, except the right to receive the redemption price, shall cease and determine at the effective date of the merger;

(b) Kinney will not (i) engage in any activity or transaction otherwise than in the ordinary course of business without first obtaining the approval of Brown other than as set forth in (a) above; (ii) make any change in its authorized capital stock other than as set forth in (a) above; or (iii) issue or sell, or issue options to purchase or rights to subscribe to, any shares of its capital stock; and Kinney will not declare any dividend on any shares of its capital stock other than quarterly dividends of not more than forty cents per share on its Common Stock and \$1.25 per share on its \$5 Prior Preferred Stock, and in the event the effective date of the merger is on or after December 15, 1955, a dividend of not more than ten cents per share on its Common Stock;

(c) Brown will not make any change in its authorized capital stock; and

(d) Brown will not declare any dividend on any shares of its Common Stock which is payable in Common Stock.

3. Anything herein or elsewhere to the contrary notwithstanding, the merger shall not be made effective if prior to the effective date of the merger

(a) The Boards of Directors of Brown and Kinney elect that it shall not be made effective, or

(b) The holders of a sufficiently large number of shares of Common Stock of Kinney shall have objected to the merger and demanded payment for their stock pursuant to Section 87 of the New York Stock Corporation Law so as to render it inadvisable, in the opinion of the Board of Directors of Brown, to proceed with the merger, or

(c) Satisfactory arrangements shall not have been made for re-funding Kinney's outstanding Notes, held by Massachusetts Mutual Life Insurance Company, at or prior to the effective date of the merger,

or if any material litigation shall be pending or threatened against or affecting Brown or Kinney, or any of their respective assets, or the merger, which in the judgment of the Board of Directors of either Brown or Kinney, renders it inadvisable to proceed with the merger.

If the Board of Directors of either Brown or Kinney elects that the merger shall not be made effective as provided in this paragraph 3, notice shall be given to the other, and thereupon, or upon the election of both such Boards of Directors that it shall not be made effective as provided in subparagraph (a) of this paragraph 3, this agreement shall become wholly void and of no effect and there shall be no liability on the part of either Brown or Kinney or their respective Boards of Directors or stockholders.

4. If the merger becomes effective, Kinney authorizes Brown to take or cause to be taken such steps as Brown may deem necessary or advisable in order to effect the distribution, on the basis and terms specified in said "Certificate of Consolidation", of the Brown stock certificates which holders of Kinney stock shall be entitled to receive under the terms of the merger.

5. Kinney agrees, to the extent permitted by law, from time to time, as and when requested by Brown or by its successors or assigns, to execute and deliver, or cause to be executed and delivered, all such deeds and instruments, and to take, or cause to be taken, such further or other action as Brown may deem necessary or desirable in order to vest in and confirm to Brown title to, and possession of, any property of Kinney acquired by reason of or as a result of the merger herein provided for, and otherwise to carry out the intent and purposes hereof, and the proper officers and directors of Kinney and the proper officers and directors of Brown are fully authorized, in the name of Kinney or otherwise, to take any and all such action.

In Witness Whereof, Brown and Kinney have caused this agreement to be executed by their duly authorized officers.

Brown Shoe Company, Inc.

By _____

Attest:

G. R. Kinney Co., Inc.

By _____

Attest:

CERTIFICATE OF CONSOLIDATION

of

BROWN SHOE COMPANY, INC.

and

G. R. KINNEY CO., INC.

into

BROWN SHOE COMPANY, INC.

Pursuant to Section 86 of the Stock Corporation Law.

* * * * *

Brown Shoe Company, Inc., a New York corporation (hereinafter sometimes called "Brown" and sometimes called the "consolidated corporation") desiring to consolidate with G. R. Kinney Co., Inc., a New York corporation (hereinafter sometimes called "Kinney"), pursuant to Section 86 of the Stock Corporation Law of New York so as to form a single corporation which shall be Brown, the President or a Vice-President and the Secretary or an Assistant Secretary of Brown and Kinney (Brown and Kinney being herein sometimes collectively called the "Constituent Corporations") do hereby respectively certify as follows:

First: The names of each corporation to be included in the consolidation are Brown Shoe Company, Inc. and G. R. Kinney Co., Inc. The Certificate of Incorporation of Brown was filed in the Department of State of the State of New York January 2, 1913 and the Certificate of Incorporation of Kinney was so filed January 23, 1917.

Second: The total number of shares which Brown is authorized to issue is 3,000,000 of the par value of \$15 each. The total number of shares which Kinney is authorized to issue is 370,000 shares, of which 60,000 shares are \$5 Prior Preferred Stock without par value and 310,000 shares are Common Stock of the par value of \$1 each.

Third: The name of the consolidated corporation shall be Brown Shoe Company, Inc.

Fourth: The amount of the capital stock of the consolidated corporation shall be \$45,000,000 and shall consist of 3,000,000 shares of Common Stock of the par value of \$15 each.

Fifth: The office of the consolidated corporation in the State of New York is to be located in the City of New York, County of New York, and the address to which the Secretary of State of the State of New York shall mail a copy of process in any action or proceeding against the corporation which may be served upon him is Room 332, 120 Broadway, New York 5, N. Y.

Sixth: The duration of the consolidated corporation shall be perpetual.

Seventh: The number of directors of the consolidated corporation shall be not less than 7 nor more than 21, divided into three classes. At each annual election the term of one class of directors shall expire, and the successors of the directors of such class shall be elected for a term of three years. Each class shall consist of such number of directors

as may be provided in the by-laws of the consolidated corporation; provided, however, that at least one-fourth in number of the directors of the consolidated corporation shall be elected annually.

The directors of Brown on the effective date of the consolidation shall continue to be directors of the consolidated corporation of the class and for the terms for which they were elected, and until their successors are elected and qualified as provided by law and the by-laws of the consolidated corporation.

The officers of Brown on the effective date of the consolidation shall continue to be like officers of the consolidated corporation, and shall hold office until their respective successors are chosen and qualified as provided by law and the by-laws of the consolidated corporation.

Eighth: The terms and conditions of the consolidation, the mode of carrying the same into effect and the manner of converting the shares of Kinney into shares of Brown are as follows:

(a) The consolidated corporation is to be Brown, one of the Constituent Corporations, and the outstanding shares of Common Stock of the par value of \$15 each of Brown are not to be changed.

(b) On the effective date of the consolidation, each share of Common Stock of the par value of \$1 each of Kinney which shall be issued and outstanding and not owned by Brown or by Kinney shall be converted into two-thirds of a share of Common Stock of Brown of the par value of \$15 each. Brown shall not be required to issue any fraction of a share of its Common Stock, but shall issue and deliver scrip certificates representing such fractional shares or provide such other substitute for the issuance of fractional shares as the Board of Directors of Brown may determine.

On the effective date of the consolidation, all shares of \$5 Prior Preferred Stock without par value of Kinney which have theretofore been outstanding shall be redeemed by Kinney in the manner set forth in its Certificate of Incorporation, and shall no longer be outstanding.

After the effective date of the consolidation, each holder of an outstanding certificate or certificates theretofore representing Common Stock of Kinney may surrender the same to Brown, and such holder shall be entitled upon such surrender to receive a certificate or certificates representing the number of full shares of Common Stock of Brown into which the shares of Common Stock of Kinney theretofore represented by the certificate or certificates so surrendered shall have been converted as aforesaid. Until so surrendered, each outstanding certificate which, prior to the effective date of the consolidation, represented shares of Common Stock of Kinney shall be deemed for all corporate purposes, other than payment of dividends, to evidence ownership of the shares of Common Stock of Brown into which the same shall have been so converted. No dividend payable to the holders of record of Common Stock of Brown as of any date subsequent to the effective date of the consolidation shall be paid to the holder of any outstanding certificate representing Common Stock of Kinney until such certificate shall be so surrendered, but upon such surrender of any such outstanding certificate, there shall be paid to the record holder of the certificate or certificates for Common Stock of Brown issued upon such surrender the amount of such dividends which theretofore became payable with respect to such shares of Common Stock of Brown.

(c) On the effective date of the consolidation, each share of Common Stock of the par value of \$1 each of Kinney, if any, which shall be owned by Brown shall be cancelled and all rights in respect thereof shall cease.

Ninth: The By-Laws of Brown in effect on the effective date of the consolidation shall be the By-Laws of the consolidated corporation until amended, added to, rescinded, or repealed as provided therein or by law.

Tenth: On the effective date of the consolidation, all of the estate property, rights, privileges, powers, franchises and interests of each of the Constituent Corporations and all of their property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other choses in action belonging to either of them, shall be vested in Brown as the consolidated corporation without further act or deed; and all claims, demands, property and every other interest shall be as effectually the property of Brown as the consolidated corporation as they were of the Constituent Corporations, and the title to all real estate, vested in either of the Constituent Corporations, shall not be deemed to revert or to be in any way impaired by reason of the consolidation, but shall be vested in Brown as the consolidated corporation.

Eleventh: The Secretary of State of the State of New York is hereby designated as the agent of the consolidated corporation upon whom process in any action or proceeding against it may be served.

Twelfth: The consolidated corporation is to be one of the Constituent Corporations and not a new corporation. The name of the surviving Constituent Corporation is Brown Shoe Company, Inc.

In Witness Whereof, this Certificate of Consolidation has been subscribed by the President or a Vice-President and the Secretary or an Assistant Secretary of each of the Constituent Corporations this _____ day _____, 1955.

Vice President
Brown Shoe Company, Inc.

Assistant Secretary
Brown Shoe Company, Inc.

Vice President
G. R. Kinney Co., Inc.

Assistant Secretary
G. R. Kinney Co., Inc.