

ATTORNEY GENERAL OF THE STATE OF NEW YORK
ANTITRUST BUREAU

IN THE MATTER OF GSI
COMMERCE, INC.

ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW § 63(15)

Pursuant to the provisions of Section 63 of the New York Executive Law and Section 22-A of the New York Gen. Bus. Law §§ 340 and 349, ELIOT SPITZER, Attorney General of the State of New York, caused an investigation to be made into the business practices of GSI Commerce, Inc. ("GSI"). Based upon his investigation, the Attorney General has made the following findings:

Background

1. GSI is a publicly-traded corporation incorporated in the State of Delaware. GSI provides a variety of e-commerce services, including the creation and operation of websites for on-line retailers. GSI initially provided such services primarily for retailers selling sporting goods on-line, although it has since expanded into other product areas. As used in this Assurance, "GSI Partner" means any entity that sells sporting goods, as to which GSI plays any role in providing e-commerce services or in otherwise administering a website identified with the entity.

2. "GSI Retailer Partner" or "Retailer Partner" means any GSI Partner that operates at least one brick-and-mortar retail store, except where GSI does not set any prices on the Partner's website.
3. GSI has entered into agreements with many brick-and-mortar sporting goods retailers. These retailers, listed in Exhibit A, include some of the largest sporting goods stores in the country. Of the top ten sporting goods retailers listed in 2003 by *Sporting Goods Business Magazine*, four had entered into agreements with GSI.
4. GSI also operates its own website, www.fogdog.com, that sells sporting goods, and that does not have a retail presence outside the Internet. Further, GSI designs and administers websites for certain sports leagues and franchises and for general retailers that sell sporting goods.
5. Under the GSI agreements to which this assurance pertains, GSI designs and manages the GSI Partners' websites; decides on the products to be sold; purchases, owns and ships the merchandise; and responds to customer service inquiries.
6. GSI licenses GSI Retailer Partners' names and trade dress, so that GSI-operated sites appear to be owned and operated by the retailers themselves. By agreement, the "look and feel" of the sites are to be consistent with the retailer's brand. For their part, the retailers promote the sites at their stores and in their promotional literature, without disclosing GSI's role.
7. GSI's agreements also generally require that GSI Retailer Partners sell sporting goods on the Internet only via a GSI-designated website.

GSI's Pricing

8. GSI generally sets the prices by which goods are sold on GSI Retailer Partners' websites, although the GSI Retailer Partners have some influence over such pricing through the mechanisms described below.
9. GSI establishes the price for each item of merchandise in its inventory. Some, but not all, GSI Retailer Partners regularly send in-store price data files to GSI. GSI then compares these files with the prices it has established, and GSI posts the prices received from a retailer to that retailer's site unless they leave GSI with what it considers to be too low a profit margin. In the latter instances, GSI reviews the prices, and often declines to post the prices or items on the retailer's website that it operates.
10. GSI also receives advertising circulars from some GSI Retailer Partners. It posts on a retailer's website some of the prices shown on these circulars, but sometimes declines to post the discounted items when the prices would leave GSI with what it considers to be insufficient margins.
11. Some Retailer Partners in whose name GSI operates websites do not send pricing information to GSI for technical or other reasons. Further, some of the products sold on the Retailer Partner's website are not available in the Partner's stores, and some of the products that a particular retailer carries are not in GSI's inventory, and thus are not available on the GSI-operated website.
12. Individual Retailer Partners have, from time to time, complained about disparities between the prices listed on the website operated in their name, and those listed on sites for competitive GSI Partners. From time to time, GSI has also agreed that it will post a price for a given item exclusively on the website operated in a particular retailer's name,

thereby preventing other GSI Partners from publicizing discounts for that same product over the Internet.

13. In sum, the ability of certain retailers who wish to use the Internet to advertise discounted products or to entice consumers to their stores by displaying lower prices than their competitors is, and has been, restricted by arrangements with GSI.

Competitive Effects

14. Price advertising plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977).
15. Brick-and-mortar retailers offer merchandise over the Internet not only to sell their goods, but also to advertise their assortment and pricing, so as to increase consumer traffic in their stores. For their part, consumers use the Internet as a tool to comparison shop, so that they may use the information obtained on the Internet to make purchases in brick-and-mortar stores, as well as on-line.
16. By virtue of GSI's arrangements, consumers who use the Internet to comparison shop sporting goods retailers can gain the impression that certain retailers charge identical prices for certain merchandise, even though consumers could buy that merchandise at different, or lower, prices by going to the retailer's store. That is because consumers only see prices set by GSI, even though the websites appear to be operated by competitive sporting goods retailers.
17. Indeed, in some instances, consumers who use search engines to compare pricing get a listing of multiple retailers charging the same price, all of which are websites run by GSI. In such instances, the consumer may conclude that: 1) he or she has perused a significant

number of competitors; and 2) no lower price for the item in question is available. Both of these impressions can be false. The sites, however, do not clearly disclose to the consumer the role played by GSI in their operation and pricing. Indeed, the user will find reference to GSI on the Partners' website only by clicking on a link marked "terms and conditions."

18. GSI's arrangements with retailers also may restrict the ability of competitors to use the Internet to convey information about in-store pricing to consumers.
19. GSI's Partners constitute a significant percentage of the total national sales by full-line sporting goods retailers.
20. While some sporting goods are available from specialty stores, or from mass market retailers, others can be bought primarily, or almost exclusively, at full-line sporting goods stores. In some instances, GSI sites have been the only venues that sell or advertise particular sporting goods on the Internet.
21. GSI's agreements restrict the ability of a significant portion of full-line sporting goods retailers to convey competitive price information through the Internet. Specifically, certain agreements bar GSI's Partner from "*directly or indirectly* through one or more third parties, offer[ing], market[ing] or sell[ing] Sporting Goods and/or related services on or through the Internet . . . [or] assist[ing] any third party in the offering, marketing and/or selling of Sporting Goods and/or related services on or through the Internet." (Emphasis added.)
22. Further, because GSI sells sporting goods directly through a website that competes with GSI's Partners, fogdog.com, its agreements and pricing decisions restrict the ability of its direct competitors to advertise in-store prices over the Internet.

23. Thus, one effect of the GSI agreements is to restrict competitive price advertising on the Internet among full-line sporting goods retailers.
24. For these reasons, the Attorney General finds that the practices described warrant the relief that follows, pursuant to New York General Business Law §§ 340 and 349, and New York Exec. Law § 63(12).
25. It now appears that respondent is willing to enter into this Assurance of Discontinuance for purposes of settlement only. This Assurance does not constitute an admission by GSI of the truth of any of the allegations, or that any of its practices violate any law.

AGREEMENT

IT IS HEREBY UNDERSTOOD AND AGREED by and between GSI Commerce, Inc. and the Attorney General that:

Definitions

1. As used in this Assurance, the following terms shall have the meanings specified below:
 - a. "Agreement" means any contract, combination, agreement, understanding, promise or other concert of action.
 - b. "Assurance" means this Voluntary Assurance of Discontinuance, and its exhibits.
 - c. "Communication" means any conversation, discussion, letter, memorandum, meeting, note or other transfer of information, whether written, oral, or by any other means, including e-mail or other electronic media.

- d. "Document" means any handwritten, typewritten, printed, recorded or graphic matter, however produced or reproduced, and any mechanical, magnetic, or electronic recording of any voice, sound, image or data, including e-mail.
- e. "Effective Date" means August ¹⁶11, 2005. *aw*

Conduct

2. GSI shall not communicate non-public pricing information concerning the pricing of one GSI Partner with another GSI Partner. It is understood, however, that GSI does not violate this Assurance if a GSI Partner simply views the prices that are posted on another GSI partner's publicly available website or catalog, or receives an email or circular of general distribution. GSI shall not alter any price on a GSI Partner's site in response to communications from a different GSI Partner, or agree with a GSI Partner to increase or refrain from discounting the price for any product displayed on the website operated for any other GSI Partner. GSI shall not enter into or enforce any Agreement with any GSI Partner concerning the prices to be charged on another GSI Partner's site.
3. GSI shall not communicate non-public pricing information received from one GSI Partner to another GSI Partner.
4. GSI shall not enter into or enforce any Agreement that bases any price displayed on the website operated by GSI for one GSI Partner on price information provided by another GSI Partner.
5. GSI shall not enter into any Agreement with any GSI Partner that limits the rights of any other GSI Partner to: 1) set price; or 2) advertise a particular product, or the pricing for

- any particular product, on the Pricing Website, described below, or any Internet site not operated by GSI. GSI shall not enforce any such Agreement.
6. GSI shall not enter into or enforce any Agreement that restricts the ability of a GSI Partner to market its in-store products on a site not operated by GSI, so long as the GSI Partner does not sell products on that site (or permit another party to sell those products under that Partner's name).
 7. GSI shall place and maintain a hyperlink labeled "Product Availability and Price" on the front page of each GSI Retailer Partner site, which will be linked to another page, window or source so that, by clicking on the hyperlink, a user will obtain information disclosing GSI's role in running that site and the sites for other sporting goods retailers. The text of the message that will appear when the consumer clicks on that hyperlink is set forth in Exhibit B to this Assurance.
 8. At a GSI Retailer Partner's request, GSI shall place and maintain on the website operated under the name of the GSI Retailer Partner a link to a site designated by the GSI Retailer Partner ("the Pricing Website"). The Pricing Website may present such information as the GSI Retailer Partner wishes to provide to site visitors, including any in-store pricing, mail order pricing, or other price or pricing information. The link to the Pricing Website shall be clearly visible on the front page of the site operated under the name of the GSI Retailer Partner by GSI and may have whatever reasonable name the GSI Retail Partner may provide. GSI shall place and maintain the link by directing customers to whatever URL the GSI Retailer Partner provides. GSI shall have no obligation to provide any funds for the Pricing Website, or to provide the GSI Retailer Partner with photographs or product descriptions to be used as an input into that Pricing Website. Nothing in this

- agreement shall bar GSI from posting a reasonable addition to the disclosure set forth in Exhibit B disclaiming responsibility for the content of the Pricing website. GSI shall notify each GSI Retailer Partner, by August 31, 2005, of this provision by letter including the text attached as Exhibit C, with a copy of the letter to the Attorney General.
9. If any GSI Retailer Partner raises any question about the letter set forth in Exhibit C, GSI shall communicate the substance of any such Communication to the Attorney General, and provide it with copies of any written Communication, within ten days of receipt.
 10. During the pendency of this Assurance, for the purpose of securing or determining compliance with it, and subject to any legally recognized privilege, GSI shall permit any duly authorized representative of the Attorney General:
 - a. Access, following reasonable notice, during office hours and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and Documents in the possession, custody or control of GSI relating to any part of this Assurance; and
 - b. Upon reasonable notice, and without restraint or interference from GSI, to interview, under oath and on a transcribed record, any director, officer, employee or other agent of GSI, who may have counsel present for that individual.
 11. The agreement entered into between GSI and the Attorney General on January 11, 2002 shall govern any information obtained by the Attorney General under this paragraph. GSI shall produce to the Attorney General all future written Agreements with GSI Partners defining their relationship to GSI, including any modifications or revisions to such Agreements. GSI shall provide information in response to any other reasonable

requests from the Attorney General, made by letter and concerning any part of this Assurance.

Fees and Costs

12. GSI shall pay the Attorney General the sum of \$30,000, as full payment for any costs and fees incurred by the Attorney General in the course of its investigation of GSI and to be incurred in connection with monitoring GSI's compliance. The Attorney General does not, by this provision, waive its right to any fees as to which it may be otherwise entitled in any action to enforce this Assurance.

Termination

13. This Assurance will terminate, without any further action by the parties, five years from the Effective Date.

General Provisions

14. This Assurance shall not be construed or interpreted to signify express or implied approval by the Attorney General, or any of its agencies, departments or divisions, of any of acts, practices, policies or agreements carried out or entered into by GSI.
15. This Assurance shall not be construed as binding on any person not a signatory, or as resolving any issue of law not specifically addressed in this Assurance.
16. The Attorney General shall not institute any proceeding or take any action under New York consumer protection, unfair competition or antitrust statutes for any conduct prior to the date of the execution of this Assurance based on any practice that is addressed in

this Assurance, except as allowed by law to enforce this Assurance in the event of a violation.

17. This Assurance shall be governed by and construed in accordance with the laws of the State of New York applicable to an agreement negotiated, executed, entered into and performed solely within the State of New York.
18. GSI represents and warrants that it has fully read and understands this Assurance, that it understands the legal consequences of signing this Assurance, and that there are no other representations or agreements not stated in writing in this Assurance.
19. This Assurance may be signed in counterparts, each of which shall be deemed an original.
20. Any amendments to this Assurance must be in writing and signed by all parties.
21. The parties represent that an authorized representative of each has signed the Assurance with full knowledge, understanding and acceptance of its terms and that this person has done so with authority to legally bind the respective party.
22. All of the obligations of this Assurance that are binding on any party or parties shall be binding upon their successors, assigns and legal representatives.
23. Any notice or other writing required or permitted to be given under this Assurance shall be sufficient if made as follows:

To the Attorney General:

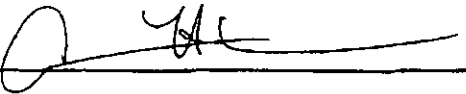
Jay Himes
Antitrust Bureau
Office of the Attorney General
120 Broadway
26th Floor
New York, NY 10271
Fax: (212) 416-6015

To GSI:

General Counsel
GSI Commerce, Inc.
1075 First Avenue
King of Prussia, PA 19406

WHEREFORE, the following signatures are affixed hereto this 16th day of August, 2005.

GSI COMMERCE, INC.

By: 

Dated: 8/16/2005

ARTHUR H. MILLER
Executive Vice President and General Counsel

STATE OF NEW YORK
ELIOT SPITZER
Attorney General

By: 

Dated: 8/23/05

JAY L. HIMES
Bureau Chief
Antitrust Bureau

Exhibit A

Bally Total Fitness
Blades Board and Skate
City Sports
Dick's Sporting Goods
Dunham's Sports
Gart Sports
G.I. Joe's
MC Sports
Modell's Sporting Goods
Olympia Sports
Pro Golf International, Inc.
Sport Chalet
The Sports Authority

Exhibit B

This website is operated by GSI Commerce, Inc. GSI also operates other websites, including those of other sporting goods retailers. Unless stated otherwise, the merchandise displayed on this website may differ from merchandise available at [the retailer's] in-store location. The price displayed on the website may differ from [the retailer's] price for the same item sold as in-store merchandise.

Exhibit C

In accordance with an agreement reached with the New York Attorney General, I write to clarify certain aspects of the agreement between GSI Commerce, Inc. and your company:

1. Nothing in the agreement between GSI and your company, or any other agreement entered into by GSI, precludes your company from advertising in-store products, or displaying in-store prices on the Internet. However, any provision in an agreement that you have with GSI that prevents your company from selling products on an Internet site other than one operated by GSI will still remain in effect.
2. If your company wishes to create an Internet page or pages (the "Pricing Website") displaying additional information, including any in-store pricing, mail order pricing, or other price or pricing information, GSI will provide a link to such a page from the home page of the website created pursuant to your agreement with GSI. You may provide, for inclusion on the GSI website, any reasonable name for such a link. GSI shall have no control over or input into the content of or responsibility for the information displayed on the page or pages that you create. GSI will place and maintain the link by directing customers to whatever URL for the Pricing Website that your company provides. The Pricing Website shall be set up at your sole expense, and GSI is not obligated to provide you with photographs or product descriptions to be used as an input into the Pricing Website. GSI may, via one of its own links, disclaim any responsibility for the content of the Pricing Website.
3. Nothing which GSI communicates to you can modify the agreement with the Attorney General. If you have any questions, please communicate them to GSI in writing. They will be shared with the Attorney General's Office, and we will endeavor to answer them. You may, of course, also communicate with the Attorney General directly, without advising GSI.