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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE: MUSICAL INSTRUMENTS AND EQUIPMENT ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS

CASE NO. 3:09-md-02121-LAB-DHB
(and related cases)

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

The Hon. Larry A. Burns, District Judge
The Hon. David H. Bartick, Magistrate Judge

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Plaintiffs' opposition all but concedes that, despite the benefit of limited discovery, plaintiffs have not alleged evidentiary facts that provide a basis for their claim that defendants conspired during private meetings at or around NAMM events—or at any other time. As a result, plaintiffs' opposition rests primarily upon the same conclusory allegations the Court previously rejected. The opposition tries to camouflage this in two ways: (1) by asserting that paragraph after paragraph of the Second Amended Consolidated Class Action Complaint ("SAC") supposedly contains allegations that satisfy plaintiffs' pleading burden, when in fact the cited paragraphs do not contain any allegations of evidentiary facts plausibly suggesting an unlawful agreement; and (2) by contending that the SAC contains allegations which nowhere appear in that pleading. Those efforts at distortion cannot change the result. *Twombly*, *Kendall*, and this Court's prior order make clear that plaintiffs' failure to plead *evidentiary* facts plausibly suggesting that the defendants entered into an unlawful agreement in restraint of trade requires dismissal of their complaint.

The pleaded product market (new, high-end guitars and guitar amplifiers) is not plausible because "fretted musical instruments are not reasonably interchangeable" with each other or with amplifiers, and thus the alleged market remains as functionally "blurred" as before. (Aug. 22, 2011 Order (Dkt. 133) at 6:9-19.) The opposition tries to hide this deficiency by asserting that the SAC includes allegations of "product clusters" or "submarkets." The SAC, however, nowhere includes evidentiary facts about either "submarkets" or "product clusters," and plaintiffs cannot amend their complaint through argument in their opposition.

Plaintiffs' opposition also misstates their burden in pleading a hub and spoke conspiracy. The law is clear that plaintiffs must allege facts plausibly indicating that the supposed hub (Guitar Center) orchestrated an agreement among the spokes (the manufacturer defendants). To plausibly allege something other than consciously parallel conduct by the manufacturer defendants, plaintiffs must allege that the manufacturer defendants' implementation of MAP policies was against their individual self-interest. That is especially true here because plaintiffs allege (SAC ¶ 91) that the manufacturer defendants developed "new and more restrictive" MAP policies in 2001, long before the time-period of the alleged conspiracy. As a result, plaintiffs must allege evidentiary facts suggesting that conduct during the alleged conspiracy period of 2004-2007 was

something other than parallel continuation of an existing course of business. Plaintiffs do not allege any such facts; accordingly, they cannot state a hub and spoke conspiracy claim.

Plaintiffs had the benefit of discovery and direction from the Court on what they needed to plead, and still fail to plead evidentiary facts in support of their conspiracy claims. Accordingly, plaintiffs' SAC should be dismissed with prejudice.

ARGUMENT

I. The SAC Cannot Survive On The Same Conclusory Allegations That This Court Already Held To Be Insufficient

Plaintiffs' SAC fails to satisfy the Court's directive that, to avoid dismissal, their complaint would need to include specific allegations about the allegedly private meetings at or around NAMM trade shows at which defendants supposedly conspired. Plaintiffs do not contest their failure to do so, but instead argue that focusing on the lack of such allegations improperly "parses" or "dismembers" the SAC instead of viewing it as a whole. (Opp. at 3:7-4:5.) Pointing out plaintiffs' failure to plead such essential facts is not a dissection of the parts of the SAC; it is an evisceration of plaintiffs' entire conspiracy theory. The lack of new allegations of evidentiary facts is especially damning given that plaintiffs took discovery about supposed private meetings at or around NAMM shows and, even with the benefit of this discovery, pleaded no evidentiary facts to suggest any private communications of MAP policies between or among the defendants.

Because the SAC contains none of the required allegations concerning who allegedly met with whom, what was said or what was supposedly agreed, plaintiffs are forced to rely on the same allegations that this Court previously held to be insufficient. For instance, plaintiffs again argue that the FTC's consent order with NAMM suggests a conspiracy (Opp. at 15:23-17:10, 24:9-25:2), even though that matter was not pursued under Section 1 and thus did not involve any alleged conspiracy, and even though, as this Court previously observed, plaintiffs' recital of the FTC proceedings is "far from sufficient to show a conspiracy to fix prices." (Aug. 22, 2011 Order (Dkt. 133) at 3:6-7.) Similarly, plaintiffs again assert that NAMM had a "motive and interest in furthering the conspiracy" (Opp. at 24:21), ignoring the well-established law that an alleged motive to conspire does not suggest a conspiracy. *E.g.*, *In re Late Fee & Over-Limit Fee Litig.*,

528 F. Supp. 2d 953, 964 (N.D. Cal. 2007) (allegations of motive are "never enough").[1] And, plaintiffs again argue that their allegations concerning the open meetings at NAMM events support a conspiracy, even though this Court has already held that they do not and, on that basis, permitted plaintiffs to take discovery regarding supposed private meetings at or around NAMM events to see if they could find any factual basis to support their theory.

Recognizing the insufficiency of their allegations, plaintiffs resort to arguing that defendants seek to impose a heavier pleading burden than is required by *Twombly* and *Kendall*. (Opp. at 4:12-5:23, 19:3-20:16.) Not true. Plaintiffs' pleading burden is properly set forth in this Court's August 22, 2011 Order, which makes clear that plaintiffs cannot rely on conclusory allegations about what "manufacturers in general did," but must plead facts that specify "who is alleged to have conspired with whom, what exactly they agreed to, and how the conspiracy was organized and carried out." (Aug. 22, 2011 Order (Dkt. 133) at 8:3-5, 9:13-17.) This is not only a requirement of this Court, but also of the Supreme Court, which in dismissing the complaint in *Twombly* stated that "the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies" and that "the complaint here furnishes no clue as to which of the four [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007).

Plaintiffs' SAC fails because it pleads no evidentiary facts suggesting that any private communication to discuss MAP policies took place—or, even more critically, that any defendants reached an *agreement* concerning MAP policies. (Defs.' Br. at 7:12-10:1.) Plaintiffs' only response to this fatal defect is to assert that, unlike the plaintiffs in *Kendall*, they pleaded "dates and locations during which Defendants reached an anticompetitive agreement." (Opp. at 4:23-24.) However, the only dates and locations pleaded concern the same open meetings and panel

[1] Plaintiffs also argue that two NAMM documents provide a "plausible basis to infer that NAMM participated in and facilitated the alleged conspiracy." (Opp. at 18:4-12.) However, plaintiffs do not identify a single evidentiary fact that links these documents to any other defendant, let alone to a supposed agreement to adopt or enforce a MAP policy. (*See* Defs.' Br. at 21:17-22:25.) In fact, plaintiffs nowhere address the absence in the SAC of a single allegation that anyone from NAMM ever communicated with Guitar Center, the supposed "hub" of the alleged conspiracy, about MAP policies, let alone implementation or enforcement of MAP policies by the manufacturer defendants. (*See id.* at 3:1-14.)

discussions at NAMM shows that the Court has repeatedly told plaintiffs are insufficient to support a claim of conspiracy. (Aug. 22, 2011 Order (Dkt. 133) at 12:1-4, 13:6-8; Feb. 6, 2012 R.T. 20:6-11; Feb. 7, 2012 Order (Dkt. 174) at 2:5-6; *compare* Consolidated Class Action Complaint ¶¶ 92-107 *with* SAC ¶¶ 110-129.)[2] Indeed, plaintiffs' allegations do not even rise to the level of those in *In re California Title Insurance Antitrust Litigation*, No. C 08-01341 JSW, 2009 U.S. Dist. LEXIS 103407 (N.D. Cal. Nov. 6, 2009), where the district court dismissed the complaint, stating that although "Plaintiffs have added allegations about when the rate-setting organizations and CTLA held meetings and allegations about which of the Defendants' representatives may have attended those meetings. . . . *[T]here still are no factual allegations about communications between the Defendants that could be construed as invitations to conspire or responsive actions by the other Defendants*." *Id.* at *14-15 (emphasis added).[3]

Defendants have not overstated the holding in *Kendall*, as plaintiffs assert. (Opp. at 4:12-15.) Just as in *Kendall*, the defendants here have "hundreds of employees" and Guitar Center communicates frequently with each manufacturer defendant about the products that each manufacturer defendant sells. In such circumstances, "[a] bare allegation of a conspiracy is almost impossible to defend against." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

This Court should dismiss the SAC with prejudice because plaintiffs have failed to include evidentiary allegations plausibly suggesting that defendants entered into an unlawful agreement.

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[2] Plaintiffs persist in asserting that allegations of open meetings at NAMM events give rise to "a context" that suggests a conspiracy. (Opp. at 13:5-14:9 (citing *In re Text Messaging Antitrust Litig.*, 630 F.3d 622 (7th Cir. 2010)).) The Seventh Circuit did not, as plaintiffs suggest, base its opinion on allegations similar to those here. Rather, the complaint alleged that "all at once" defendants changed their pricing structures, then "simultaneously jacked up their prices by a third," and that the change was "so rapid" that it could not have been accomplished without agreement. 630 F.3d at 628. No such allegations are present here. Plaintiffs allege that MAP policies were changed beginning in 2001, and that any changes between 2004 and 2007 were gradual. (SAC ¶¶ 91, 96-97.)

[3] Plaintiffs erroneously rely on *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179 (N.D. Cal. 2009) and *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896 (N.D. Cal. 2008). Not only were those cases predicated on guilty pleas by defendants (*In re Flat Panel*, 599 F. Supp. 2d at 1183; *In re SRAM*, 580 F. Supp. 2d at 903), but the district court that decided both of these cases itself later distinguished them in *In re California Title Insurance*, observing that in those cases "the plaintiffs alleged facts regarding particular communications between the defendants, including public statements regarding pricing as well as allegations that the defendants communicated with one another about pricing by telephone calls, e-mails and instant messages." 2009 U.S. Dist. LEXIS 103407, at *15.

II. Plaintiffs Plead No Evidentiary Facts To Support Their Allegation That The MAP Policies Are "Substantially Similar" Or That The Manufacturer Defendants "Simultaneously" Adopted Or Amended Their MAP Policies In 2004

Plaintiffs assert that they pleaded that the manufacturer defendants' MAP policies "were substantially similar in structure, scope, and in their advertising restrictions." (Opp. at 11:8-9.) But plaintiffs do not (and cannot) identify a single evidentiary fact pleaded in their SAC that actually suggests any similarity among or between any of the manufacturer defendants' alleged MAP policies, much less one that was the result of a supposed agreement. This is remarkable in light of plaintiffs' representation to the Court that they have copies of the written MAP policies for several of the defendants and planned "to show that there are similar enforcement provisions and similar restrictions over time." (Feb. 6, 2012 R.T. 14:15-21; *see* Defs.' Br. at 10:18-11:5.)

Plaintiffs cannot cure this defect by asserting that the manufacturer defendants all had the same "goal" in allegedly adopting and enforcing MAP policies, and that the alleged MAP policies had the same "effect" of allegedly setting what the plaintiffs call "street" prices. (Opp. at 11:9-14.) The assertion about "goals" and "effects" of the alleged MAP policies just heaps new conclusory assertions on top of old ones; it does not come close to identifying evidentiary facts. [4]

Apparently recognizing that they need to plead a radical shift in defendants' positions in order to attempt to state a claim, plaintiffs now assert that the manufacturer defendants supposedly adopted or amended their MAP policies "abruptly" and "simultaneously" in 2004. (Opp. at

[4] Plaintiffs mistakenly contend that three cases support their contention that they have sufficiently pleaded anticompetitive effects of the MAP policies. (Opp. at 10:8-17.) First, *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), has nothing to do with MAP policies. Second, while *In the Matter of Sony Music Entertainment, Inc.*, Dkt. No. C-3971 , 2000 WL 1257796 (F.T.C. Aug. 30, 2000), did concern MAP policies, the consent order is inapposite. The consent order was based on Section 5 of the FTC Act and did not involve an alleged "hub and spoke conspiracy." Moreover, unlike plaintiffs' allegations here, the FTC alleged in Sony specific changes to compact disc distributors' MAP policies. *Id.* at *2. Since plaintiffs here have pleaded no evidentiary facts about any supposed "similarity" in the manufacturer defendants' MAP policies, the consent order is no help to plaintiffs. Third, the plaintiffs in *Babyage.com, Inc. v. Toys "R" Us, Inc.*, 558 F. Supp. 2d 575 (E.D. Pa. 2008), were found to have sufficiently pleaded that the MAP policies caused artificially increased prices, delayed or "blocked" sales that otherwise would have been made, "reduced overall output," and a "decrease in customer service" (*id.* at 583-84), none of which plaintiffs here plead. Indeed, plaintiffs here rely solely on their allegation that the MAP policies supposedly caused a price increase, but this allegation is inherently flawed because it is based on data that does not report on the market alleged in the SAC. (*See* Defs.' Br. at 13:16-18.) And, plaintiffs admit that the alleged changes in MAP policies actually began to occur in 2001, which further undermines their assertions regarding price changes in 2004.

2:12-13, 9:13.) But, adverbs aside, plaintiffs' complaint actually alleges that the manufacturer defendants adopted or amended their MAP policies in response to evolving market conditions over an extended period from 2004 to 2007. (SAC ¶¶ 96-97.) And, plaintiffs' new assertion of an abrupt change is squarely contradicted by their own allegation that in January 2001, *The Music Trades* reported a "flurry of new and more restrictive Minimum Advertised Price (MAP) policies" and a "trend [] towards more expansive MAP policies that prohibit phone or email price quotes below MAP price . . . ." (*Id.* ¶ 91.) In other words, plaintiffs plead that defendants introduced supposedly more expansive MAP policies three years before they allegedly hatched the claimed conspiracy. That is of critical importance because plaintiffs need to plead evidentiary facts suggesting that any supposed changes in 2004-2007 were the result of a conspiracy rather than parallel continuation of an existing course of business.

In addition, rather than pleading, as required by *Twombly*, evidentiary facts demonstrating "parallel behavior that would probably not result from . . . independent responses to common stimuli," 550 U.S. at 557 n.4, plaintiffs plead, for example, that in response to the emergence of internet-based retailers, MAP policies were expanded to include internet advertising. Such allegations do not give rise to a plausible conspiracy. Since plaintiffs plead no evidentiary facts to suggest that any alleged "similarity" in the MAP policies supposedly adopted or amended in 2004-2007 was the result of anything other than parallel conduct independently undertaken by the manufacturer defendants, plaintiffs have not pleaded a plausible conspiracy. (Defs.' Br. at 15:24-16:13.)

III. Plaintiffs' Resort To "Submarkets" And "Product Clusters" Confirms That They Have Not Pleaded A Relevant Product Market

Plaintiffs have not cured their earlier failure to plead a plausible product market. (Aug. 22, 2011 Order (Dkt. 133) at 6:9-19 (holding that plaintiffs pleaded an "unidentifiable and overly broad [product] market" which included products that were "not reasonably interchangeable").) Plaintiffs' proposed market definition of "new, high-end guitars and guitar amplifiers" fails to heed the well-established principle that products alleged in a relevant market must be "reasonably interchangeable by consumers for the same purposes." *Golden Gate Pharm. Servs., Inc. v. Pfizer,*

Inc., No. C-09-3854 MMC, 2010 U.S. Dist. LEXIS 47896, at *7 (N.D. Cal. Apr. 16, 2010), *aff'd*, 2011 U.S. Dist. LEXIS 10266 (9th Cir. May 19, 2011). Nowhere have plaintiffs explained how or why electric guitars, acoustic guitars and bass guitars are reasonably interchangeable with one another, let alone how any or all might be interchangeable with amplifiers. In fact, plaintiffs concede that their market definition includes products that are not interchangeable or substitutable for one another. (Opp. at 23:9-17.) For this reason alone, plaintiffs' market definition fails as a matter of law. (*See* Defs.' Br. at 12:8-13:9.)

Nor can plaintiffs avoid dismissal by suggesting they need not plead a properly defined product market, so long as the proposed product market contains within it "identifiable product clusters" or "submarkets" comprised of interchangeable or substitutable products. (Opp. at 23:10-17.) Plaintiffs' cases provide no support for this contention. Their cases establish only that submarkets, when properly alleged and defined, are permitted, not that a plaintiff can sustain an otherwise defective product market by claiming that it contains submarkets. Moreover, although argued in their brief, plaintiffs do not actually plead submarkets in the SAC. It is a well-accepted principle in the Ninth Circuit that "'new' allegations contained in [an] opposition" must be ignored because "a court *may not* look beyond the complaint" when deciding a Rule 12(b)(6) motion. *Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (emphasis in original). The Court should see plaintiffs' "cluster" and "submarket" argument for what it is: a concession that they have not pleaded a plausible product market.

Even if plaintiffs were able to amend their complaint in their opposition, they would still fall short of alleging a cognizable product market. For instance, plaintiffs do not allege the most fundamental facts to show which products are reasonably interchangeable with each other—whether electric, acoustic, bass, four-string, six-string, twelve-string guitars, etc.—or why this is so, nor that there is any alleged cross-elasticity of demand between guitars and amplifiers.

Since plaintiffs have not pleaded a plausible product market, this Court should dismiss the SAC for this independent reason as well.

IV. Plaintiffs Have No Answer For Their Failure To Plead A Plausible Rim To The Wheel

Even if the Court were to overlook the many other failings of plaintiffs' SAC, dismissal with prejudice would still be warranted because: (1) plaintiffs concede they did not plead that each manufacturer defendant acted *against* its own self-interest by adopting and enforcing a MAP policy; and (2) the complaint does not plead that the manufacturer defendants each adopted or amended a MAP policy only because Guitar Center assured them that the other manufacturer defendants would do the same. (*See* Opp. at 21:3-22:13.)[5] Plaintiffs cannot plead a hub and spoke conspiracy without these allegations. (Defs.' Br. at 16:15-17:17 (discussing *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010)).)

Plaintiffs claim that the *Howard Hess* court did not expressly state the requirements of a hub and spoke conspiracy, but that is wrong. (Opp. at 21:23-22:2.)[6] The court held that plaintiffs' allegations there did not state a hub and spoke conspiracy because plaintiffs had failed to plead evidentiary facts suggesting (i) that the hub provided the spokes with assurances that all of the other spokes (the dealers) would agree to the hub's (the manufacturer's) demands if all of them did so (they pleaded only conclusory allegations that the manufacturer had "made clear" to each of its dealers that it was requiring all of them to agree to the same exclusive dealer arrangement), or (ii) that each dealer lacked independent economic motivation to become an exclusive dealer. *Howard Hess*, 602 F.3d at 255-56.

Plaintiffs' own cases make clear that a hub and spoke conspiracy requires allegations that would establish that the spokes joined the conspiracy only because they knew that all of their competitors would do so as well and that if left to their own devices, they would not have taken the

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[5] In their brief, plaintiffs assert that Guitar Center "assured" the manufacturer defendants that the other manufacturer defendants would implement and enforce MAP policies. (Opp. at 2:14-15, 7:13-14.) But their SAC does not include any such averment, and a conclusory assertion of assurance would not suffice in any event.

[6] Plaintiffs assert, without any supporting authority, that whether the MAP policies were in the manufacturer defendants' individual self-interest is an improper consideration on a motion to dismiss because it is supposedly a "question of fact." (Opp. at 22:6-8.) This argument has no merit. By definition, all factual averments in a complaint involve questions of fact. At the pleading stage, the question is whether plaintiffs have pleaded evidentiary facts suggesting conduct against self-interest sufficiently to suggest a plausible conspiracy. Plaintiffs concede that they have not done so.

action that the hub wanted them to take. For instance, in *Toys "R" Us, Inc. v. Federal Trade Commission*, 221 F.3d 928 (7th Cir. 2000), the evidence showed that Toys "R" Us was concerned that the emergence of Costco and other "club" stores as potential competitors in the sale of toys would erode its profits. *Id.* at 931. Toys "R" Us told toy manufacturers that, if they each continued to sell to club stores, Toys "R" Us would not promote their products. *Id.* at 931-32. The evidence also established that the toy manufacturers independently had decided that the club stores were a new and profitable source of toy sales. *Id.* at 932. However, all of them terminated their accounts with the club stores because Toys "R" Us assured them that other manufacturers were also terminating sales to those stores by "communicat[ing] the message 'I'll stop if they stop' from manufacturer to competing manufacturer." *Id.* at 932-33.[7]

Similarly, in *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), the distributors' adoption of a price fixing scheme proposed by the theater chains (the hub) was against the distributors' self-interest in that it carried the "risk of a substantial loss of the business and good will of [the movie chains' competitors]." *Id.* at 222. Evidence showed that each went along with scheme after the hub wrote an open letter to all of them. *Id.* at 216 n.3, 217, 226 ("Each distributor was advised that the others were asked to participate").[8]

In this case, there are no evidentiary allegations that any of the changes that manufacturer defendants supposedly made to their MAP policies was against their self-interest. Even if

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[7] Plaintiffs argue that in *Toys "R" Us* the Seventh Circuit "rejected" the manufacturers' argument that a conspiracy could not be inferred from conduct that was consistent with their individual self-interest. (Opp. at 22:8-13.) This argument is misleading, at best. What the court rejected was the defendants' attempt to prove that the toy manufacturers had actually been motivated by their own self-interest to refuse to deal with the discount retailers; the court found defendants' evidence to be a mere pretext to attempt to cover for the group boycott. *Toys "R" Us*, 221 F.3d at 935-36, 937-38. Critically, it did *not* reject the importance of the inquiry into defendants' individual self-interest, which was paramount in the case. *Id.* at 932-33, 935.

[8] Plaintiffs also rely on *Babyage.com, Inc. v. Toys "R" Us, Inc.*, No. 05-6792, 2008 WL 2644207 (E.D. Pa. July 2, 2008). (*See* Opp. at 1:11-12, 5:3-5.) As an initial matter, *Babyage.com* was not a hub and spoke conspiracy case. There, the plaintiffs alleged a series of vertical agreements between manufacturers and retailers, with no alleged agreement between or among the manufacturers. *Babyage.com*, 558 F. Supp. 2d at 582-83. In any event, the district court's denial of the defendants' motion to dismiss rested in part on the plaintiffs' allegations that the vertical agreements were against "each manufacturer's independent self interest," which plaintiffs here do not plead. *Id.* at 583; *see also Babyage.com*, 2008 WL 2644207, at *3-4 (same on reconsideration).

plaintiffs had alleged such facts, plaintiffs do not plead any evidentiary facts suggesting that Guitar Center assured each manufacturer defendant that the other manufacturer defendants planned to adopt or amend their MAP policies, much less that Guitar Center provided each manufacturer defendant with specific terms or recommendations for their MAP policies. Thus, allegations that the hub orchestrated a horizontal conspiracy among the spokes is completely absent from the SAC, because it contains no allegations that the manufacturer defendants acted only because they knew or understood that Guitar Center had "contemplated and invited" concerted action among or between the manufacturer defendants. *See id.* at 226.

Plaintiffs' hub and spoke theory is not saved by their allegations that the manufacturer defendants "knew or were aware" that Guitar Center was "pressur[ing]" each of them to adopt and enforce a MAP policy, and that they "knew or were aware" (from information that was admittedly public) that the other manufacturer defendants were adopting or amending their MAP policies. (SAC ¶¶ 98, 101-02.) These allegations do not suggest a plausible conspiracy because, as plaintiffs concede, each manufacturer defendant was sufficiently motivated to adopt and enforce a MAP policy on its own because it was in its own self-interest to do so in response to the alleged "pressure" from Guitar Center, including to preserve their brand images, among other reasons. (*Id.* ¶¶ 8, 93-97, 101, 105); *see Garment Dist., Inc. v. Belk Stores Servs. Inc.*, 799 F.2d 905, 909 (4th Cir. 1986); *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151, 1156-59 (9th Cir. 1988). Plaintiffs fail, as a matter of law, to plead a hub and spoke conspiracy.

CONCLUSION

Since plaintiffs fail to plead a hub and spoke conspiracy as a matter of law, plead a defective relevant product market, and otherwise attempt to rely on allegations that this Court has already found to be insufficient to state a plausible conspiracy, the Court should dismiss their SAC. Dismissal should be with prejudice given that plaintiffs have failed again to plead a plausible conspiracy, even with the benefit of discovery.

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Second Amended Consolidated Class Action Complaint

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ELECTRONIC CASE FILING ATTESTATION

I, Margaret M. Zwisler, am the ECF User whose identification and password are being used to file this **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT**. I hereby attest that the concurrence in the filing of this has been obtained from signatories to this document.

s/ Margaret M. Zwisler
Margaret M. Zwisler

CERTIFICATE OF SERVICE

On May 4, 2012, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Southern District of California, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice of service of this document by electronic means. Any other counsel of record will be served by electronic mail and/or first class mail on the same date.

s/ Margaret M. Zwisler
Margaret M. Zwisler