

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

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In the Matter of)	
)	
NATIONAL ASSOCIATION OF)	Docket No. C-4255
MUSIC MERCHANTS, INC.)	
)	
a corporation.)	
)	

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the National Association of Music Merchants, Inc. (hereinafter “NAMM” or Respondent), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent NAMM is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 5790 Armada Drive, Carlsbad, CA 92008.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

THE PARTIES

- A. “Respondent” or “NAMM” means the National Association of Music Merchants, Inc., its successors and assigns, and its directors, trustees, officers, representatives, committees, subcommittees, boards, divisions, agents, and employees.
- B. “Commission” means the Federal Trade Commission.

OTHER DEFINITIONS

- C. “Antitrust Compliance Officer” means a person appointed under Paragraph II.B.1.(a) of this Order.
- D. “Antitrust Counsel” means a lawyer admitted to practice law in one or more of the judicial districts of the courts of the United States. Antitrust Counsel may delegate obligations under this Order to another lawyer supervised by Antitrust Counsel.
- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. §41 *et. seq.*, and the Sherman Act, 15 U.S.C. §1 *et. seq.*
- F. “Distribution” or “Distributed” means, with respect to Prepared Remarks or Written Materials, transmittal or delivery by any means.
- G. “Global Economic Summit” or “Global Summit” means the particular recurring event attended by Musical Products industry leaders, media, and advisors, including those events held in Carlsbad, California, such as the Fifth Global Summit in 2004, the Sixth Global Summit in 2007, and any future event held where NAMM performs the same, or substantially the same, organizing and hosting role as it did for previous Global Summits.
- H. “Member of the Board of Directors” means any member of Respondent’s Board of Directors, including any Member of the Executive Committee, acting in an official capacity or having the apparent authority to act in an official capacity.

- I. “Member of the Executive Committee” means any member of Respondent’s Executive Committee, acting in an official capacity or having the apparent authority to act in an official capacity.
- J. “Minimum Advertised Price Policy” means any Musical Product Manufacturer’s policy, program, or provision of any program that conditions the sale or continued sale of its Musical Products to Musical Product Dealers upon the advertisement or display of Musical Products at or above a specified minimum dollar amount.
- K. “Musical Product(s)” means any musical instrument or musical instrument accessory sold or offered for sale by Respondent’s members.
- L. “Musical Product Dealer” means any person, corporation, or entity that in the course of its business offers for sale or sells to consumers any Musical Product in or into the United States, including, but not limited to, retail establishments, catalogue sellers, and internet retail sites, and the officers, agents, and employees thereof.
- M. “Musical Product Manufacturer” means any person, corporation, or entity that manufactures or distributes Musical Products to Musical Product Dealers for resale to consumers, and the officers, agents, and employees thereof.
- N. “NAMM Event” includes any trade show, town hall meeting or any similar event that NAMM sponsors and organizes and for which NAMM has final authority over the list of invitees. NAMM Event also means any meeting or teleconference of Respondent’s Board of Directors or Executive Committee to which the entire Board of Directors or Executive Committee has been invited to participate.
- O. “Prepared Remarks” means the final version of any script, speech, or other statement prepared for Distribution at, or in advance of, a NAMM Event, a Global Summit, or an event at which any Member of the Board of Directors, employee or agent of Respondent delivers a speech or statement.
- P. “Price Terms” means:
 - 1. The retail or wholesale prices, resale prices, credit terms, or terms defining, setting forth, or relating to monetary or non-monetary compensation paid by or on behalf of any Musical Product Dealer or other person who acquires one or more Musical Products; or
 - 2. The retail or wholesale prices, resale prices, credit terms, return policies, volume or other discounts, rebates, or other policies, programs, conditions, or terms defining, setting forth, or relating to monetary or non-monetary compensation of any Musical Product Manufacturer.

Provided, however, that Price Terms do not include purchase for personal use by an employee of Respondent or donation for charitable use.

- Q. “Resale Price Maintenance Policy” means any Musical Product Manufacturer’s policy, program, or provision of any program that conditions the sale or continued sale of its Musical Products to Musical Product Dealers upon the sale of Musical Products at or above a specified minimum dollar amount.

- R. “Written Materials” means the final version of any written or paper document, or any electronic version of any document, audio recording, video recording, photograph, or other data, created on, included in, or stored on any computer, computer file, electronic mail, audio CD, DVD, or other electronic or magnetic storage media prepared for Distribution at, or in advance of, a NAMM Event, a Global Summit, or an event at which any Member of the Board of Directors, employee or agent of Respondent delivers a speech or statement.

II.

IT IS FURTHER ORDERED that:

- A. Respondent, acting directly or indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, forthwith shall cease and desist from:
 - 1. Urging, encouraging, advocating, suggesting, coordinating, participating in, or facilitating in any manner the exchange of information between or among Musical Product Manufacturers or Musical Product Dealers relating to:
 - (a) the retail price of Musical Products; or
 - (b) any term, condition or requirement upon which any Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised Price Policies or Resale Price Maintenance Policies.
 - 2. Entering into, adhering to, enforcing, urging, encouraging, advocating, suggesting, assisting or otherwise facilitating any Musical Product Manufacturer or Musical Product Dealer to enter into, adhere to or enforce any combination, conspiracy, agreement or understanding between or among any Musical Product Manufacturers or Musical Product Dealers relating to:
 - (a) the retail price of any Musical Product;

- (b) any term, condition or requirement upon which any Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised Price Policies, or Resale Price Maintenance Policies; or
- (c) the refusal to do business, or the reduction of business, with particular Musical Product Manufacturers or Musical Product Dealers.

Provided, however, that nothing in this Paragraph II.A prohibits Respondent from engaging in, participating in, coordinating, urging, encouraging, or suggesting to others to engage in any conduct protected by the *Noerr-Pennington* doctrine;

Provided, further, however, that nothing in this Paragraph II.A prohibits the participants in Respondent's trade shows from conducting their commercial activities on the show floor in their ordinary and customary manner;

Provided, further, however, that nothing in this Paragraph II.A applies to meetings of industry participants not attended by Respondent at which Respondent's role is limited to the provision of a venue, a speaker, administrative support, refreshments, or other incidentals; and

Provided, further, however, that nothing in this Paragraph II.A prohibits Respondent from publishing or disseminating, by any means: (i) information relating to creditworthiness, product safety, and warranty service issues; (ii) links to individual web sites of Musical Product Manufacturers, Musical Product Dealers, distributors, sales representatives, consultants, industry associations, education and arts associations, societies, and organizations; (iii) NAMM or third-party publications or material containing advertisements, brand image, or public relations material; (iv) aggregated survey data, such as that published in Music Trades, The NAMM Global Report Featuring Music USA, and the Cost of Doing Business Survey; or (v) in the context of industry education, including the sharing of best practices and training materials, generic references to Price Terms, Resale Price Maintenance Policy, and the terms and conditions on which Musical Product Manufacturers and Musical Product Dealers do business.

B. Respondent shall:

- 1. Institute a program to comply with this Order and with the Antitrust Laws, which program shall require:
 - (a) The appointment and maintenance of an Antitrust Compliance Officer for the duration of this Order. For the first three (3) years of this Order, the Antitrust Compliance Officer shall be Antitrust Counsel. After the third

anniversary of the date this Order becomes final, a new Antitrust Compliance Officer may be appointed who shall be Antitrust Counsel, a Member of the Board of Directors, or the general counsel of Respondent. Respondent shall direct the Antitrust Compliance Officer to take reasonable steps to develop, implement, administer, monitor, and actively supervise a program to obtain Respondent's compliance with this Order and with the Antitrust Laws.

- (b) The appointment and maintenance of Antitrust Counsel, who shall also serve as the Antitrust Compliance Officer until at least the third anniversary of the date this Order becomes final. Within fifteen (15) days of the date this Order becomes final, Respondent shall appoint Antitrust Counsel to provide legal advice to Respondent. Respondent shall direct Antitrust Counsel to take reasonable steps to develop, implement, administer, monitor, and actively supervise a program to obtain Respondent's compliance with this Order and with the Antitrust Laws. Antitrust Counsel shall also train an Antitrust Compliance Officer to take reasonable steps to obtain Respondent's compliance with this Order and with the Antitrust Laws.
- (c) Annual in-person training of Respondent's Board of Directors concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct;
- (d) Annual training of Respondent's employees and agents concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct;
- (e) Review and written approval by the Antitrust Compliance Officer, prior to Distribution, of:
 - (i) All Written Materials and Prepared Remarks by any Member of the Board of Directors, or by any employee or agent of Respondent, acting in an official capacity or having the apparent authority to act in an official capacity, that concern or relate to the Price Terms, margins, profits, Minimum Advertised Price Policies, or Resale Price Maintenance Policies for Musical Products; and
 - (ii) All final agendas and materials Distributed at, in advance of, or after any meeting of Respondent's Board of Directors or Executive Committee.

- (f) Provision of a written statement that provides context-appropriate guidance on compliance with the Antitrust Laws to all Musical Product Manufacturers or Musical Product Dealers who are scheduled speakers at NAMM Events and Global Summits;
 - (g) Certification, in writing, by each Musical Product Manufacturer or Musical Product Dealer who is a scheduled speaker at a NAMM Event or Global Summit that he or she is in receipt of, and has read, the written statement provided in Paragraph II.B.1(f);
 - (h) Implementation and administration of a procedure to enable persons (including, but not limited to, Respondent's members, officers, directors, employees, and agents) to report violations of this Order and the Antitrust Laws to the Antitrust Compliance Officer and Antitrust Counsel, confidentially and without fear of retaliation of any kind; and
 - (i) Implementation of internal policies and procedures that provide for discipline for members of Respondent's Board of Directors, employees, and agents for failure to comply fully with this Order, which policies and procedures shall require, among other steps, the termination or discharge of any such person who engages in such conduct only after conviction and all appeals have run or after civil liability and all appeals have run, provided that such termination or discharge does not violate any other applicable U.S. law.
2. Require the personal attendance of Antitrust Counsel at all NAMM Events and Global Summits for three (3) years from the date this Order becomes final.
 3. Require that Antitrust Counsel be present at, or be a party to, any meeting or teleconference conducted by Respondent to which the entire Board of Directors or Executive Committee has been invited to participate, for three (3) years from the date this Order becomes final.
 4. Require the recitation of a statement:
 - (a) At the commencement of each meeting of the Board of Directors and Executive Committee that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws; and
 - (b) At the commencement of each NAMM Event and Global Summit that provides context-appropriate guidance on compliance with the Antitrust Laws.

Provided, however, that Respondent may satisfy the requirements of this Paragraph II.B.4 with respect to NAMM University or “NAMM U” sessions (other than NAMM U breakfast sessions) by enclosing in any materials provided to session attendees a copy of a written statement that provides context-appropriate guidance on compliance with the Antitrust Laws.

5. Require the audio or video recording of each panel discussion or presentation at all NAMM Events and Global Summits, prompt delivery of each such recording to the Antitrust Compliance Officer, and the retention of each such recording in the custody and control of the Antitrust Compliance Officer for five (5) years, provided that Respondent need not require the audio or video recording of meetings of the Board of Directors or Executive Committee.
6. Publish a copy of this Order and the Complaint issued by the Commission, and the internet address of the link to the Commission’s press release concerning this Order on the Commission’s web site at www.FTC.gov, in the first electronic edition of NAMM’s newsletter prepared for publication after this Order becomes final, in the same size and font as regularly featured items in NAMM’s newsletter.
7. Within thirty (30) days after the date this Order becomes final:
 - (a) Distribute, electronically or by other means, return receipt requested, to each Member of the Board of Directors a copy of this Order and the Complaint issued by the Commission, and a letter in the form of the letter attached as Exhibit A to this Order; and,
 - (b) Publish on Respondent’s official web site until the termination of this Order, a copy of this Order and the Complaint issued by the Commission, and a letter in the form of the letter attached as Exhibit A to this Order, with a link from NAMM’s home or menu page, entitled “Antitrust Compliance,” in the same size and font provided to other menu items. The Order shall remain accessible through common search terms and archives on the web site until the termination of Respondent’s obligations under this Order.
8. Within thirty (30) days of the date any person becomes a Member of the Board of Directors, distribute electronically or by other means, return receipt requested, a copy of this Order and the Complaint issued by the Commission. In addition, a hard copy of this Order and the Complaint shall be provided to any new member at the first subsequent meeting of the Board of Directors, and any new member shall certify in writing that he or she is in receipt of, and has read, this Order and the Complaint.

Provided, however, that nothing in this Paragraph II.B prohibits Respondent from instituting additional components to its compliance program; and

Provided further, however, that full compliance with Paragraph II.B is not a defense to a violation of Paragraph II.A.

III.

IT IS FURTHER ORDERED that:

- A. Within sixty (60) days after the date the Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order. For the period covered by this report, the report shall include, but not be limited to:
1. The names, business addresses, e-mail addresses, and business phone numbers of the Antitrust Compliance Officer and Antitrust Counsel;
 2. A description in reasonable detail of the program instituted by Respondent to comply with Paragraph II.B.1 of this Order;
 3. A list of the NAMM Events and Global Summits held within sixty (60) days after the date the Order became final, including the title of each NAMM Event and Global Summit, and the dates on which and the locations at which each was held;
 4. A copy of all Written Materials and Prepared Remarks Distributed by Respondent, and reviewed by the Antitrust Compliance Officer under Paragraph II.B.1(e), at each NAMM Event, Global Summit, or other event at which any Member of the Board of Directors, employee or agent of Respondent delivered a speech or statement within sixty (60) days after the date the Order became final;
 5. The names, business addresses, e-mail addresses, and business phone numbers of each Member of the Board of Directors and each Member of the Executive Committee;
 6. The name and business address of each Member of the Board of Directors to whom Respondent distributed, electronically or by other means, a copy of this Order and the Complaint issued by the Commission, the date Respondent distributed the documents, and the date each person signed for receipt or electronic receipt was received by Respondent;
 7. A copy of NAMM's newsletter in which Respondent published this Order and the Complaint issued by the Commission; and

8. A description and explanation, in reasonable detail, of any affirmative action taken by Respondent with regard to Paragraph II.B.1(i) of this Order.
- B. One (1) year after the date the Order becomes final, annually for the next nine (9) years on the anniversary of the date the Order becomes final, and at such other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order. For the periods covered by these reports, these reports shall include, but not be limited to:
1. The names, business addresses, e-mail addresses, and business phone numbers of the Antitrust Compliance Officer and Antitrust Counsel;
 2. The name and business address of each Member of the Board of Directors to whom Respondent distributed, electronically or by other means, a copy of this Order and the Complaint issued by the Commission, the date Respondent distributed the documents, and the date each person signed for receipt or electronic receipt was received by Respondent;
 3. The name, title, and business address of each person required to receive, and who has received, annual in-person training concerning Respondent's obligations under this Order, an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct, and the identity of the Antitrust Compliance Officer, and the name, title, and business address of the person who conducted the training; and
 4. A description and explanation, in reasonable detail, of any affirmative action taken by Respondent with regard to Paragraph II.B.1(i) of this Order.

Provided, however, that nothing in this Paragraph III shall require the provision of information protected by the attorney-client privilege, work product doctrine, or other applicable privilege.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger or consolidation of Respondent; or
- C. Any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

V.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on April 8, 2029.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: April 8, 2009

EXHIBIT A

(Letterhead of NAMM)

Dear Member:

As many of you know, the Federal Trade Commission has conducted an investigation concerning Minimum Advertised Price policies (“MAP policies”) and retail pricing in the music products industry.

To end the investigation expeditiously and to avoid disruption to its core functions, NAMM has voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement and a Decision and Order by the Federal Trade Commission, pertaining to NAMM’s practices with regard to NAMM events and programs and other related matters.

In general, the Federal Trade Commission has prohibited NAMM from engaging in certain activities involving information exchanges among its members relating to MAP policies, retail margins, and retail pricing in connection with the sale and marketing of musical products. In addition, NAMM will be required to implement an antitrust compliance program. A copy of the Federal Trade Commission Decision and Order is enclosed and sets forth the specific requirements of the Order that apply to NAMM. The Decision and Order is also available on the Federal Trade Commission website at www.FTC.gov.