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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE: MUSICAL INSTRUMENTS AND EQUIPMENT ANTITRUST LITIGATION	CASE NO. 3:09-md-02121-LAB-DHB (and related cases)
This Document Relates To: **ALL ACTIONS**	MDL No. 2121
	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT
	Date: December 3, 2012 Time: 11.15 A.M. Place: Courtroom 9, 2nd Floor
	The Hon. Larry A. Burns, District Judge The Hon. David H. Bartick, Magistrate Judge

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In its August 2011 Order dismissing plaintiffs' Consolidated Class Action Complaint, the Court addressed plaintiffs' federal and state-law claims *together* when it concluded that plaintiffs' failure to plead an antitrust violation necessitated dismissal of the entire complaint. And in its recent August 20, 2012 Order addressing the Second Amended Consolidated Class Action Complaint, the Court dismissed plaintiffs' Sherman Act claim for failure to plead an antitrust conspiracy and again recognized that "without a conspiracy, there is no federal claim, and claims premised on violations of federal law must also fail."

Pursuant to Federal Rule 59(e), defendants Fender Musical Instruments Corporation, Gibson Guitar Corp., Guitar Center, Inc., Hoshino (U.S.A.), Inc., Kaman Music Corp., Yamaha Corporation of America, and National Association of Music Merchants, Inc. (collectively "Defendants") respectfully request that the Court amend the August 21, 2012 judgment to reflect the conclusion that the Court has already reached and that is inevitable: plaintiffs' state-law claims fail because they are premised upon the dismissed federal claim. Under these circumstances, a Rule 54(b) judgment dismissing only the federal claims will create significant finality and jurisdictional questions on appeal that could lead the Ninth Circuit to reverse and remand. Instead, defendants request that the Court amend the judgment to dismiss any remaining state-law claims. Such amendment would make it unnecessary for the Ninth Circuit to confront whether state and federal claims explicitly premised on the same conspiracy are separate "claims" for purposes of Rule 54(b) or whether the clear overlap in the legal and factual issues means that partial judgment does not serve the Rule's purposes. Also as plaintiffs stated in their second amended consolidated complaint, the Court has original jurisdiction over the state-law claims under the Class Action Fairness Act. The Court may not remand or decline jurisdiction over the state-law claims under that Act and will have to rule upon those claims eventually, which it effectively already has done by dismissing the federal claim upon which they are based. Accordingly, entering an amended order that dismisses all of the claims before the Court will allow this litigation to proceed toward a just, efficient and final resolution, will conserve the resources of the parties and the Court, and will eliminate the potential for jurisdictional issues before the Court of Appeals.

BACKGROUND

Plaintiffs assert that defendants engaged in a conspiracy to raise, fix, maintain, or stabilize prices of guitars and guitar amplifiers. This Court dismissed plaintiffs' Consolidated Class Action Complaint in its entirety, including the dependent state-law claims, because plaintiffs failed to plead sufficient allegations of conspiracy. (Dkt. 133.) Plaintiffs subsequently amended their complaint twice, resulting in the operative Second Amended Consolidated Class Action Complaint (the "SACCAC"). (Dkt. 178.)

The SACCAC contains four claims: (1) violation of the Sherman Act, 28 U.S.C. § 1; (2) violation of the California Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.*; (3) violation of California's Unfair Competition Law, Cal. Bus. Code §§ 17200 *et seq.* ("UCL"); and (4) violation of the Massachusetts Consumer Protection Act, Massachusetts General Law 93A §§ 2 *et seq.* ("MCPA"). (*See* SACCAC ¶¶ 163-92.) Plaintiffs candidly acknowledged in their Opposition to Defendants' Motion to Dismiss the SACCAC that each of those claims is based upon an alleged conspiracy in violation of the Sherman Act. (*See* Dkt. 183 at 25 ("Plaintiffs' claims under California and Massachusetts law, . . . arise from the same allegations and assert the same price-fixing conspiracy [as] Plaintiffs' Sherman Act claim . . . .").

On August 20, 2012, the Court dismissed the Sherman Act claim and certified the dismissal of only that claim as a final judgment under Federal Rule of Civil Procedure 54(b). (Dkt. 198.) The following day, the Clerk of the Court entered final judgment as to plaintiffs' Sherman Act claims only under Rule 54(b). (Dkt. 199.) Defendants now move to alter or amend that partial final judgment.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 59(e),[1] Defendants respectfully request that

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[1] Federal Rule of Civil Procedure 59(e) grants district courts "broad discretion" to reconsider and amend a previous order. *See* 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[4] (3d ed. 2000); *see also Turner v. Burlington Northern Santa Fe R.R.*, 338 F.3d 1058, 1063 (9th Cir. 2003) ("A district court has considerable discretion when considering a motion to amend a judgment under Rule 59(e).").

Plaintiffs filed a Notice of Appeal on September 10, 2012, ten days before the September 20 deadline. This Court nevertheless retains jurisdiction to decide this Rule 59(e) motion. *See, e.g.*, *Tripati v. Henman*, 845 F.2d 205, 205-06 (9th Cir. 1988) (per curiam) ("The dispositive issue in

the Court amend its Rule 54(b) partial judgment because, as this Court previously recognized, plaintiffs' remaining state-law claims for relief all rest on the dismissed Sherman Act conspiracy claim.

I. A PARTIAL JUDGMENT UNDER RULE 54(B) WILL CREATE SIGNIFICANT AND UNNECESSARY JURISDICTIONAL ISSUES BEFORE THE COURT OF APPEALS

Amendment of the judgment to reflect dismissal of the state-law claims is appropriate, not only because it follows *a fortiori* from the Court's dismissal of the federal claim, but also because it would obviate any questions on appeal about the Court's Rule 54(b) certification. Because the state-law claims in these cases depend on the same theory and factual allegations of conspiracy as the federal claim that the Court has already dismissed, the Court of Appeals may conclude that they are not separate "claims" within the meaning of Rule 54(b) or that separate appellate consideration does not serve the purposes of the Rule. Those questions would needlessly complicate the appeal and may delay the final resolution of these cases.

A. The Court Recognized That State-Law Claims Premised Upon the Alleged Sherman Act Violation Necessarily Fail

The Court's finding that plaintiffs have not adequately alleged a conspiracy under the Sherman Act means that plaintiffs' other claims must fail. (S*ee* August 20, 2012 Order (Dkt. 198) at 9:9-10.) This Court recognized that "without a conspiracy, there is no federal claim, and claims premised on violations of federal law must also fail." (*Id.*) Plaintiffs have acknowledged that their "claims under California and Massachusetts law, . . . arise from the same allegations and assert the same price-fixing conspiracy [as] Plaintiffs' Sherman Act claim." (Dkt. 183 at 25.)

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this appeal is whether a district court retains subject matter jurisdiction to consider a timely Fed. R. Civ. P. 59(e) motion to alter or amend a judgment when the motion is filed subsequent to a notice of appeal. We reverse the district court's holding that it lacked jurisdiction over the Rule 59(e) motion."); *see also San Luis & Delta-Mendota Water Auth. v. Salazar*, 2011 U.S. Dist. LEXIS 47661, at *12-13 (E.D. Cal. May 4, 2011) ("The district court has subject matter jurisdiction to consider a timely motion under Rule 59(e) even where such motion is filed subsequent to a notice of appeal. The filing of a Rule 59(e) motion suspends the operation of a notice of appeal until it is resolved, at which point the notice of appeal becomes effective." (internal citation omitted)); *Williams v. Ahlin*, 2011 U.S. Dist. LEXIS 43176, at * 2-3 (E.D. Cal. Apr. 21, 2011) ("Here, the motion was filed after Petitioner filed his notice of appeal. However, it is established that a district court retains subject matter jurisdiction to rule on a tolling motion even though a notice of appeal has been previously filed." (internal citation omitted)).

This Court has already recognized that the Cartwright Act claim is derivative of the Sherman Act claim. It is based on the same alleged factual conspiracy and the same pleading standards apply. The Court's conclusion that plaintiffs failed to adequately plead "plus factors" to support an inference of conspiracy under the Sherman Act thus requires dismissal of the Cartwright Act claim as well. *See Eddins v. Redstone*, 134 Cal. App. 4th 290, 303-08 (Cal. Ct. App. 2005). Courts consistently have recognized that Cartwright Act claims stand or fall with parallel claims under the Sherman Act. *See, e.g., Rick-Mik Enters. v. Equilon Enters., LLC*, 532 F.3d 963, 976 n.5 (9th Cir. 2008) ("The state law antitrust claims are derivative of the federal law claims. Because the federal claims fail, the state law claims fail."); *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) ("The analysis under California's antitrust law mirrors the analysis under federal law because the Cartwright Act . . . was modeled after the Sherman Act."); *Universal Grading Serv. v. eBay, Inc.*, 2012 U.S. Dist. LEXIS 2325, at *29 (N.D. Cal. 2012) ("Plaintiffs' allegations under the Cartwright Act . . . are also derivative of plaintiffs' Sherman Act claims. . . . [and] it is well established that [i]nterpretation of federal antitrust law is . . . applicable to the Cartwright Act." (internal quotation marks and citation omitted)).

Plaintiffs' UCL and MCPA claims are also based on the failed antitrust conspiracy claim, and must be dismissed. *See, e.g., Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 374-75 (Cal. Ct. App. 2001) (rejecting a UCL claim on the same grounds as it rejected plaintiffs' Cartwright Act claim because "a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct"); *Suzuki of W. Mass, Inc. v. Outdoor Sports Expo, Inc.*, 126 F. Supp. 2d 40, 50 (D. Mass. 2001) (dismissing plaintiff's MCPA claims along with the "antitrust hosts" of those claims because plaintiff could not establish conduct distinct from the failed antitrust violation). Indeed, plaintiffs cite to *Chavez* and *Suzuki* to assert that their state law claims arise from the same allegations and the same alleged price-fixing conspiracy as the Sherman Act claim. (*See* Plfs.' Opposition to Motion to Dismiss (Dkt. 183) at 25: 4-6, n.5.) Because plaintiffs premised their UCL and MCPA claims upon the alleged Sherman Act conspiracy, their failure to plead the necessary conspiratorial conduct to support the Sherman Act claim means their UCL and MCPA

claims must fail too.[2]

The Court effectively recognized that all of the claims stand or fall together when it ruled on Defendants' initial motions to dismiss—it dismissed the entire Consolidated Class Action Complaint without distinguishing among the claims. (*See* August 22, 2011 Order (Dkt. 133) at 12:14.) That conclusion was correct, and plaintiffs did not appeal it. Plaintiffs admit that the "claims under California and Massachusetts law, while distinct from the Sherman Act claim, arise from the same allegations and assert the same price-fixing conspiracy." (*See* Plfs.' Opposition to Motion to Dismiss (Dkt. 183) at 25:4-6, n.5.) Plaintiffs conceded that the plausibility of their state-law claims depends entirely on the plausibility of their Sherman Act claim. (*See id.*) And in its August 20, 2012 Order this Court again recognized that "without a conspiracy, there is no federal claim, and claims premised on violations of federal law must also fail." (*See* August 20, 2012 Order, Dkt. 198 at 9:9-10.) The Court noted also that plaintiffs agreed at oral argument that they were proceeding only on the conspiracy theory. (*Id.* at 9:10-11.) Accordingly, it appears to be both clear and undisputed that the Court's reasoning in the August 20, 2012 Order requires dismissal of the pending cases in their entirety.

B. Causes Of Action Based On Closely Related Facts are Not Separate "Claims" for Purposes of Rule 54(b)

Rule 54(b) allows a court to enter a final judgment "as to one or more, but fewer than all, claims" when the "action presents more than one claim for relief" and "the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b).

The Rule applies only when there are multiple, separate claims. "The word 'claim' in Rule 54(b) refers to a set of facts giving rise to legal rights in the claimant, not to legal theories of recovery based upon those facts." *CMAX, Inc. v. Drewry Photocolor Corp.*, 295 F.2d 695 (9th Cir.

[2] Plaintiffs also failed to cite any case law that specifically supports the UCL or MCPA claims. (*See* Plfs.' Opposition to Motion to Dismiss (Dkt. 183) at 25:4-6, n.15.) This lack of distinct analysis signifies that the alleged conduct is unlawful only to the extent it violates the Sherman Act and Cartwright Act. *See Biljac Assocs. v. First Interstate Bank of Oregon, N.A.*, 218 Cal. App. 3d 1410,1422-23 (Cal. App. 1st Dist. 1990).

1961).[3] Numerous courts have held that state-law claims based on the same facts as federal claims are not separate claims under Rule 54(b). *See Wood v. GCC Bend, LLC*, 422 F.3d 873, 882 n.5 (9th Cir. 2005) ("[S]tate law claims, to the extent they rely on the same set of facts common to a federal claim, do not constitute a separate 'claim' for purposes of Rule 54(b)." (citation omitted)); *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691, 694 (9th Cir. 1978) ("The state law claims, to the extent they rely on that conduct, represent only alternate legal theories based on a set of facts common to the federal claim. As such, they do not constitute separate 'claims' for which certification under Fed. R. Civ. P. 54(b) is appropriate.").

Absent amendment of the judgment to reflect dismissal of all claims in the SCCAC, the Ninth Circuit may conclude on appeal that the state-law claims in this case are not separate for purposes of Rule 54(b) because each is based on the same facts—the same alleged conspiracy. *See* SACCAC ¶¶ 171, 177, 186. If so, the Court of Appeals would conclude that the judgment is not a proper final judgment. Because a final order is a prerequisite to appellate jurisdiction, *see* 28 U.S.C. § 1291, the Court of Appeals cannot avoid this issue and indeed will be obliged to consider it *sua sponte* even if it is not raised by the parties.

C. A 54(b) Judgment Must Serve Sound Judicial Administration

Even if the Court of Appeals considers the claims to be separate, it may still conclude that a Rule 54(b) judgment will not serve "sound judicial administration" because of the factual and legal overlap among the claims. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956). "Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10 (1980). Rule 54(b) certification is generally "reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 964 (9th

[3] *See also* Wright & Miller, Federal Practice & Procedure § 2657 (2012) ("[W]hen a claimant presents a number of legal theories, but will be permitted to recover only on one of them, the bases for recovery are mutually exclusive, or simply presented in the alternative, and plaintiff has only a single claim for relief for purposes of Rule 54(b).").

Cir. 1981); *see also Curtiss-Wright*, 446 U.S. at 10 ("[S]ound judicial administration does not require that Rule 54(b) requests be granted routinely.").[4]

Courts often hold that "when the facts or legal issues underlying both the adjudicated and the unadjudicated claims significantly overlap, a substantial risk of duplicative appellate review is created" and Rule 54(b) is inappropriate. *See* 12 James Moore et al., Moore's Federal Practice § 54.23 (3d ed. 2000); *Morrison Knudsen*, 655 F.2d at 965 ("a similarity of legal or factual issues will weigh heavily against entry of judgment under [Rule 54(b)]"); *Wood*, 422 F.3d at 880 (finding Rule 54(b) inappropriate because the plaintiffs' "legal right to relief stems largely from the same set of facts and would give rise to successive appeals that would turn largely on identical, and interrelated, facts.").

On appeal, the Ninth Circuit will review *de novo* "'the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units.'" *Wood*, 422 F.3d at 878-79 (quoting *Curtiss-Wright*, 446 U.S. at 10). It may conclude that partial judgment on only the Sherman Act claim will result in piecemeal appeals and will not promote judicial economy. If it concludes that partial judgment under Rule 54(b) was improper, the Court of Appeals will remand the case for this Court to resolve the remaining claims. *Wood*, 422 F.3d at 880. Such a remand would introduce unnecessary delay and complication, when this Court has already made clear that it has concluded (correctly) that Plaintiffs' claims must be dismissed in their entirety.

II. REMAND IS UNAVAILABLE

In its most recent Order, the Court explained that "[i]f Plaintiffs do not intend to appeal, they are requested to promptly notify the Court. If they so notify the Court, or if they do not file a

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[4] A district court may enter judgment under Rule 54(b) "only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). The court must make "specific findings setting forth the reasons for its order," and cannot simply make "only a "summary determination" that there is no just reason for delay. *See Lindsay v. Beneficial Reinsurance Co.*, 59 F.3d 942, 951 (9th Cir. 1995). Given the overlap in the state and federal claims, and that the state-law claims suffer the same deficiencies as the federal claim, it would be just for the Court to dismiss the state-law claims immediately and to enter a final judgment on all claims. Any delay caused by entry of the order so ruling would be insignificant and justifiable, as it would allow an immediate appeal of all issues. At the very least, defendants request that this Court articulate the reasons it concluded there is no just reason for delay.

notice of appeal within the time permitted, the Court will issue a further order respecting any cases that include non-dismissed claims to be remanded." (August 20, 2012 Order (Dkt. 198) at 9:18-21.) Defendants respectfully believe that no remand procedure will be available in these cases, and that this Court will need to resolve plaintiffs' remaining claims at some point. The best course, therefore, is to dismiss them now in one consolidated judgment.

All of the cases that include state-law claims were filed here in the Southern District of California. The Judicial Panel on Multidistrict Litigation ("JPML") did not transfer those cases originally. Instead, the cases were transferred to Judge Burns pursuant to the "low number" rule, Southern District of California Local Rule 40.1. *See, e.g., Giambusso v. National Association of Music Merchants, Inc., et al.*, No. 09-cv-2002-LAB (JMA); *Bohl v. National Association of Music Merchants, Inc.*, et al., No. 09-cv-02332-LAB (JMA) (Order Transferring Case to *Giambusso* Per Low Number Rule (*Bohl* Dkt. 10)). This Court's dismissal of the federal claims therefore resolves all of the cases originally transferred by the JPML and leaves nothing to remand.[5]

The Court also will not have the usual option to decline supplemental jurisdiction over remaining state-law claims. The Court retains original jurisdiction over all claims because the plaintiffs filed the class claims under the Class Action Fairness Act, 28 U.S.C. § 1332 ("CAFA"). Plaintiffs' SACCAC specifically claims federal jurisdiction over state-law claims under CAFA. (*See* SACCAC ¶ 19.) CAFA provides federal district courts with "original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs, and is a class action . . . ." 28 U.S.C. § 1332(d)(2).[6] Because the Court has

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[5] Even if state-law cases remain, this Court can only suggest remand to the JPML, which has the sole power to remand the Multidistrict Litigation cases from this Court. *See* 28 U.S.C. § 1407(a); s*ee also* 12 James Moore et al., Moore's Federal Practice Civil § 112.07 (2012) ("The transferee court may suggest to the Panel that it issue a remand order for an action or group of actions, but it may not order a remand itself.").

[6] "When the Federal Court has jurisdiction under CAFA, 'post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing.'" *Dunn v. Endoscopy Ctr. of S. Nev.*, 2012 U.S. Dist. LEXIS 84456, at *7 (D. Nev. June 19, 2012) (quoting *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d 1087, 1091-92 (9th Cir. 2010)); *Mansker v. Farmers Ins. Co.*, 2011 U.S. Dist. LEXIS 40092, at *12-13 (W.D. Wash. Apr. 6, 2011) ("Based on the foregoing case authority, as well as CAFA's legislative history, the court concludes its order on Defendants' motion to dismiss [destroying minimal diversity] did not oust it of subject matter jurisdiction over this litigation."). For example, even if the California citizens would comprise more than

original jurisdiction over the state-law claims, this is not a typical case in which jurisdiction over the state-law claims is based on supplemental jurisdiction. Thus, the Court would have no mechanism to decline jurisdiction even if the only remaining claims were based upon state law. *See Knepper v. Rite Aid Corp.*, 675 F.3d 249, 261 (3d Cir. 2012) ("Here, independent jurisdiction exists over plaintiffs' claims under CAFA, which provides no statutory basis for declining [supplemental] jurisdiction . . . ."); *Baas v. Dollar Tree Stores, Inc.*, 2007 U.S. Dist. LEXIS 65979, at *12-13 (N.D. Cal. Aug. 29, 2007) (rejecting defendant's analogy to case law discussing supplemental jurisdiction and noting that "the Court has original jurisdiction over Plaintiffs' state-law claims pursuant to CAFA [and] need not make a determination under 28 U.S.C. § 1367 as to whether it should decline to exercise supplemental jurisdiction over Plaintiffs' state-law claims"). The Court retains original jurisdiction and will have to rule upon those claims at some point in time. Defendants respectfully suggest that time is now.

CONCLUSION

For the reasons stated above, Defendants request that the Court amend its August 20, 2012 Order, enter judgment on the remaining state-law claims, and dismiss the consolidated action entirely.

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two-thirds of the remaining proposed classes, the CAFA exceptions would not apply because they did not apply when the SACCAC was filed. "Each CAFA exception requires the court to make an objective factual finding regarding the percentage of class members that were citizens of the forum state **at the time of filing the class petition**." 1-21 Lisa Saveri, et al., CA Antitrust and Unfair Competition Law § 21.03 (emphasis added).

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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 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT**. 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 September 17, 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