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11
12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA

14 **IN RE: MUSICAL INSTRUMENTS AND**
15 **EQUIPMENT ANTITRUST LITIGATION**

) No. MDL 2121

) **CONSOLIDATED CLASS**
16 **ACTION COMPLAINT**

17 This Document Relates To:

) DEMAND FOR JURY TRIAL

18 ALL ACTIONS
19
20

1 Plaintiffs, individually and on behalf of all others similarly situated, allege as follows:

2 **NATURE OF THE ACTION**

3 1. This case arises out of an alleged conspiracy to raise, fix, maintain or stabilize the prices
4 of new, high-quality fretted instruments¹ and guitar amplifiers (defined below as “Musical Instruments
5 and Equipment”) by the National Association of Music Merchants (“NAMM”), Guitar Center, Inc.
6 (“Guitar Center”), and manufacturers and retailers of Musical Instruments and Equipment. The
7 membership of NAMM, the primary trade association for the music industry, includes most U.S.
8 manufacturers, distributors and dealers of musical instruments and related products. Guitar Center, the
9 dominant specialty retailer of Musical Instruments and Equipment, has market power that permits it to
10 threaten and/or coerce manufacturers in their dealings with other specialty music retailers, most of
11 which are small privately held businesses.

12 2. In the late 1990s, manufacturers and retailers in the retail music industry entered into
13 and/or agreed to observe Minimum Advertised Price Policies (“MAPPs”) that precluded retailers from
14 advertising prices for Musical Instruments and Equipment below a specified amount, or
15 communicating to potential customers their willingness to discount or sell Musical Instruments and
16 Equipment below the MAPP price. These MAPPs were vertical contracts between individual
17 manufacturers and retailers and were not enforced rigorously.

18 3. Starting in the early 2000s, the retail music industry was threatened by the emergence of
19 internet-based retailers and big box retailers in the music business. These retailers sold Musical
20 Instruments and Equipment at prices below those the specialty music retailers could offer. In
21 response, beginning in or about 2004, Guitar Center, other retailers, and manufacturers of Musical
22 Instruments and Equipment, acting through NAMM, entered into a contract, combination or
23 conspiracy to raise, fix, maintain or stabilize the prices of Musical Instruments and Equipment through
24 strict enforcement of the MAPPs. The conspiracy to implement and enforce the MAPPs served no
25

26 ¹ A fretted instrument is a stringed instrument, such as a guitar, banjo, bass or mandolin that is played
27 by striking or plucking the strings, either with fingers or a pick.

1 legitimate pro-competitive function and was designed solely to fix retail prices for Musical
2 Instruments and Equipment.

3 4. The MAPPs between Defendants Fender, Gibson, Yamaha, Kaman, Ibanez, and Roland,
4 (defined below as the “Manufacturer Defendants”), on the one hand, and the retailers of Musical
5 Instruments and Equipment on the other, were neither independent contracts implemented unilaterally
6 by manufacturers nor designed to increase inter-brand competition. Rather, the MAPPs were the
7 product of conspiratorial conduct and were substantially standardized across the industry so that all
8 retailers would have the same minimum prices.

9 5. The conspiracy was developed and implemented through NAMM. As the dominant
10 specialty music retailer, Guitar Center was able to and did use its dominant position in the market to
11 enforce the conspiracy by threatening manufacturers that were lax in their own enforcement of the
12 MAPPs. The conspiracy therefore took the form of a series of vertical restrains on trade (the MAPPs),
13 but had the effect of a horizontal restraint on trade because the Manufacturer Defendants agreed to
14 enforce similar MAPPs.

15 6. On March 4, 2009, the Federal Trade Commission (“FTC”) filed a complaint alleging
16 that “[b]etween 2005 and 2007, NAMM organized various meetings and programs at which competing
17 retailers of musical instruments were permitted to and encouraged to discuss strategies for
18 implementing minimum advertised price policies, the restriction of retail price competition, and the
19 need for higher retail prices.” *In the Matter of National Association of Music Merchants, Inc.*, FTC
20 File No. 001 0203. After reviewing and analyzing documents subpoenaed from various industry
21 participants, the FTC issued a cease and desist order to NAMM. The FTC found that NAMM’s acts
22 and practices “constitute unfair methods of competition in or affecting commerce” in violation of 15
23 U.S.C. § 45. The published FTC analysis of the NAMM complaint and settlement stated, “the
24 allegation is that here – taking into account the type of information involved, the level of detail, the
25 absence of procedural safeguards, and overall market conditions – the exchange of information
26 engineered by NAMM lacked a pro-competitive justification.”

1 12. Plaintiff David Giambusso is a resident of Jersey City, New Jersey. During the Class
2 Period, Mr. Giambusso purchased a Fender Stratocaster guitar from a Guitar Center retail store in New
3 Jersey.

4 13. Plaintiff Jeremy Haskell is a resident of Portland, Maine. During the Class Period, Mr.
5 Haskell purchased an Ibanez Artcore AF75D guitar from a Guitar Center retail store in Massachusetts.

6 14. Plaintiff David Keel is a resident of Corona Del Mar, California. During the Class
7 Period, Mr. Keel purchased a Fender guitar from a Guitar Center retail store in California.

8 15. Plaintiff Robert Lesko is a resident of Modesto, California. During the Class Period, Mr.
9 Lesko purchased a Gibson Les Paul guitar, an Ovation CSD225-RRB double neck acoustic guitar, and
10 a Fender '65 Deluxe Reverb guitar amplifier from Guitar Center retail stores in California.

11 16. Plaintiff Kenneth Manyin is a resident of Cherry Hill, New Jersey. During the Class
12 Period, Mr. Manyin purchased a Fender Rumble 100/115 Combo guitar amplifier from a Guitar Center
13 retail store in Illinois.

14 17. Plaintiff Ronald A McCain is a resident of Austin, Texas. During the Class Period, Mr.
15 McCain purchased a Gibson Flying V Guitar, a Fender Geddy Lee Jazz Bass Guitar and a Yamaha
16 FG750S Acoustic Guitar from Guitar Center retail stores in Texas.

17 18. Plaintiff Suzanne Ondre is a resident of San Francisco, California. During the Class
18 Period, Ms. Ondre purchased a Takamine guitar from a Guitar Center retail store in California.

19 19. Plaintiff Bonnie Ornitz is a resident of Granada Hills, California. During the Class
20 Period, Ms. Ortiz purchased a Fender Stratocaster guitar from a Guitar Center retail store in California.

21 20. Plaintiff Dr. David Palmer is a resident of Portland, Maine. During the Class Period, Dr.
22 Palmer purchased a Fender guitar, a Fender American Standard Stratocaster guitar, and a Roland
23 guitar amplifier from Guitar Center retail stores in Maine.

24 21. Plaintiff Niranjan Parikh is a resident of Houston Texas. During the Class Period, Mr.
25 Parikh purchased a Fender guitar and a Fender guitar amplifier from a Guitar Center retail store in
26 Texas.

1 22. Plaintiff Lisa Pritchett is a resident of San Mateo, California. During the Class Period,
2 Ms. Pritchett purchased an Ibanez AF75D-TOR Artcore Series Hollowbody Transparent Orange guitar
3 from a Guitar Center retail store in California.

4 23. Plaintiff Johan Edward Rigor is a resident of Burlingame, California. During the Class
5 Period, Mr. Rigor purchased a Sound Gear by Ibanez SR 305DX bass guitar from a Guitar Center
6 retail store in California.

7 24. Plaintiff Joshua Seiler is a resident of Allston, Massachusetts. During the Class Period,
8 Mr. Seiler purchased a Fender Telecaster guitar from a Guitar Center retail store in Massachusetts.

9 25. Plaintiff Alexander Teller is a resident of Chicago, Illinois. During the Class Period, Mr.
10 Teller purchased a Fender FB-54 Banjo from a Guitar Center retail store in Illinois.

11 **B. Defendants**

12 26. Defendant National Association of Music Merchants, Inc. (“NAMM”) is a New York
13 corporation with its principal place of business located at 5790 Armada Drive, Carlsbad, California
14 92008. NAMM is a music industry trade association comprised of more than 9,000 members. Most
15 U.S. manufacturers, distributors and dealers of musical instruments and related products, including
16 Guitar Center and the named manufacturer or distributor Defendants in this case, are members of
17 NAMM.

18 27. Defendant Guitar Center, Inc. (“Guitar Center”) is a Delaware corporation with its
19 principal place of business at 5795 Lindero Canyon Road, Westlake Village, California. Guitar Center
20 is the leading retailer of Musical Instruments and Equipment in the United States with 315 stores and
21 the nation’s largest direct response retailer (both catalog and online) of musical instruments.

22 28. Defendant Fender Music Instruments Corporation (“Fender”) is a Delaware corporation
23 with its principal place of business at 8860 East Chaparral Road, Suite 100, Scottsdale, Arizona.
24 Fender manufactures and distributes fretted musical instruments and guitar amplifiers, and produces
25 the highest-selling line of guitars in the United States. Fender’s Chief Executive Officer, Bill
26 Mendello, served on the NAMM board from 2006 to 2009.

1 29. Defendant Gibson Guitar Corporation d/b/a Gibson U.S.A. (“Gibson”) is a Delaware
2 corporation with its principal place of business located at 309 Plus Park Boulevard, Nashville,
3 Tennessee 37217. Gibson manufactures and distributes fretted musical instruments and guitar
4 amplifiers. Gibson is best known for its specialty-product lines such as the Les Paul guitar.

5 30. Defendant Yamaha Corporation of America (“Yamaha”) is a California corporation with
6 its principal place of business located at 6600 Orangethrope Avenue, Buena Park, CA 90620. Yamaha
7 manufactures or distributes fretted musical instruments and guitar amplifiers. Terry Lewis, as Senior
8 Vice President at Yamaha, served on the NAMM board of directors from 2003-2005. In 2009,
9 Yamaha Senior Vice President, Rick Young, was elected to the NAMM board of directors. Mr.
10 Young’s board term ends in 2012.

11 31. Defendant Hoshino U.S.A., Inc. (“Hoshino” or “Ibanez”) is a Pennsylvania corporation
12 with its principal place of business located at 1726 Winchester Rd, Bensalem, PA 19020-4542.
13 Hoshino manufactures or distributes fretted instruments and guitar amplifiers under the Ibanez brand.
14 Hoshino’s President, Bill Reim, served on the NAMM board of directors from 2006 to 2009.

15 32. Defendant Kaman Music Corp. (“Kaman”) has been a wholly owned subsidiary of
16 Fender since 2008, and has its principal place of business located at 55 Griffin Road South,
17 Bloomfield, Connecticut, 06002-0507. Kaman manufactures and distributes fretted instruments under
18 the Ovation, Adamas, Takamine, and Hamer brands, as well as guitar amplifiers. Paul Damiano,
19 Kaman’s Vice President of Marketing and Sales, served on the NAMM board of directors from 2003
20 to 2006. Fender purchased Kaman in early 2008 for \$124 million.

21 33. Defendant Roland Corporation U.S. (“Roland”) is a Delaware corporation with its
22 principal place of business located at 5100 S. Eastern Ave., Los Angeles, CA 90040-2938. Roland
23 manufactures and distributes electronic guitars, guitar amplifiers and other musical instrument
24 products. Roland’s CEO and President, Dennis Houlihan, served on the NAMM board of directors for
25 a decade, culminating in NAMM’s first commercial chairman, a position held by Mr. Houlihan from
26 2005 through 2007.

1 **CLASS ACTION ALLEGATIONS**

2 38. Plaintiffs bring this action on behalf of themselves and as a class action pursuant to
3 Federal Rules of Civil Procedure 23(a), 23(b)(1), (b)(2) and/or (b)(3), and 23(c)(4) on behalf of the
4 following Class:

5 All persons who directly purchased one or more of the products within the below defined
6 subclasses from Guitar Center, Inc. in the United States from January 1, 2004 through
7 March 4, 2009:

8 a. All purchasers of new fretted instruments or guitar amplifiers
9 manufactured or distributed by Fender Music Instruments Corporation or its affiliates,
10 including Kaman;

11 b. All purchasers of new fretted instruments or guitar amplifiers
12 manufactured or distributed by Gibson Guitars d/b/a Gibson USA or its affiliates;

13 c. All purchasers of new fretted instruments or guitar amplifiers
14 manufactured or distributed by Hoshino U.S.A., Inc. or its affiliates;

15 d. All purchasers of new fretted instruments or guitar amplifiers
16 manufactured or distributed by Yamaha Corporation of America USA or its affiliates;

17 e. All purchasers of new guitar amplifiers manufactured or distributed by
18 Roland Corporation U.S. or its affiliates;

19 39. Excluded from the Class are Defendants; the subsidiaries and affiliates of any Defendant;
20 any person or entity who is a partner, officer, director, or controlling person of any Defendant;
21 members of Defendants' immediate families and their legal representatives, heirs, successors or
22 assigns; and any entity in which any Defendant has or had a controlling interest.

23 40. This action has been brought and may properly be maintained on behalf of the Class
24 proposed above under the criteria of Rule 23 of the Federal Rules of Civil Procedure.

25 41. **Numerosity.** Members of the Class are so numerous that their individual joinder is
26 impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and
27 can only be ascertained through appropriate discovery, Plaintiffs believe that there are thousands of
28 Class members. Plaintiffs also believe that Class members are sufficiently numerous and

1 geographically dispersed throughout the United States that joinder of all Class members is
2 impracticable.

3 42. **Existence and predominance of common questions.** Common questions of law and
4 fact exist as to all members of the Class and predominate over questions affecting only individual
5 Class members. These common questions include:

6 a. Whether Defendants conspired or engaged in concerted action in restraint of
7 trade;

8 b. The identities of the co-conspirators;

9 c. The duration of the alleged combination or conspiracy and nature and character
10 of the acts done in furtherance of the alleged combination or conspiracy;

11 d. Whether Defendants' conduct as alleged herein caused Plaintiffs and Class
12 members to pay more for Musical Instruments and Equipment than they otherwise would have paid
13 in an unrestrained, competitive market;

14 e. Whether the alleged combination or conspiracy violated Section 1 of the
15 Sherman Act;

16 f. Whether the alleged combination or conspiracy, and the nature and character of
17 the acts done in furtherance of the alleged combination or conspiracy, violated the California
18 Cartwright Act, California Business and Professions Code §§ 16700 *et seq.*, the California Unfair
19 Competition Law, California Business and Professions Code §§ 17200 *et seq.*, and/or the unfair
20 business practices law of Massachusetts;

21 g. Whether Defendants actively concealed the contract, combination or conspiracy
22 from Plaintiffs and other Class members;

23 h. Whether Plaintiffs and other members of the Class were injured by the conduct
24 of defendants and their co-conspirators and, if so, the appropriate class-wide measure of damages
25 and appropriate injunctive relief; and

1 a. The prosecution of separate actions by the individual members of the Class
2 would create a risk of inconsistent or varying adjudications with respect to individual Class
3 members and would establish incompatible standards of conduct for defendants;

4 b. The prosecution of separate actions by individual Class members would create
5 a risk of adjudications with respect to them that would, as a practical matter, be disparities of the
6 interests of other Class members not parties to the adjudications, or substantially impair or impede
7 the ability of other Class members to protect their interests;

8 c. Defendants have acted or refused to act on grounds generally applicable to the
9 Class, making final injunctive relief or corresponding declaratory relief with respect to the members
10 of the Class as a whole an appropriate form of relief; and

11 d. The claims of Class members are comprised of common issues that are
12 appropriate for certification under Rule 23(c)(4).

13 **TRADE AND COMMERCE**

14 48. The activities of Defendants, as described in this Complaint, were within the flow of, and
15 substantially affected, interstate commerce.

16 49. In the conduct of their businesses, Defendants directly or indirectly have used the means
17 and instrumentalities of interstate commerce in furtherance of the acts and communications alleged
18 herein. The alleged meetings and exchanges of information arranged by Defendant NAMM were
19 initiated and effectuated by and through, among other things, the United States postal system,
20 nationwide telecommunication networks and/or the nation's common carrier or transportation systems.
21 Guitar Center and the Manufacturer Defendants were members of NAMM.

22 50. During the Class Period, these Defendants marketed, sold, distributed or shipped
23 substantial quantities of Musical Instruments and Equipment in a continuous and uninterrupted flow of
24 interstate commerce to customers located in states other than the states in which these Defendants
25 manufactured, produced, distributed, marketed or sold such Products.

1 **SUBSTANTIVE ALLEGATIONS**

2 **A. Guitar Center Is The Dominant Retailer Of Musical Instruments And Equipment**
3 **And Enjoys Market Power In Its Dealings With Manufacturers**

4 51. The music products industry includes companies that manufacture, supply, distribute or
5 sell musical instruments, accessories, and products for amplifying and recording music.

6 52. *The Music Trades*, a leading industry publication, reported that in 2004-2007, retail sales
7 of musical instruments and related products in the United States ranged from approximately \$7.3
8 billion to \$7.5 billion. Sales of fretted instruments, plus guitar amplifiers, generated \$1.545 billion in
9 retail sales in 2004 and almost \$1.667 billion in retail sales in 2007 – roughly 20% of the total sales of
10 musical instruments and related products in the United States.

11 53. Specialty music retail stores, such as Guitar Center, are the main retail sales venue for
12 music instrument sales in the United States. According to a national Gallup Poll sponsored by
13 NAMM, 57% of all poll respondents preferred specialty music stores, as compared to 23% who prefer
14 to shop on line, and 15% who preferred big box retailers such as Best Buy, Costco or Wal-Mart.

15 54. Guitar Center is the dominant retail outlet for Musical Instruments and Equipment. Over
16 the last decade, Guitar Center has grown through acquisitions of former competitors, and achieved
17 dominance in an ever-more-concentrated retail market. In June 1999, Guitar Center acquired
18 Musicians Friend, Inc., an Oregon-based catalog and e-commerce instrument retailer. In April 2001,
19 Guitar Center bought American Music Group, Ltd., a musical instrument retailer, with 12 retail stores,
20 specializing in the sale and rental of band instruments and accessories serving the student and family
21 market. In April 2005, Guitar Center purchased Music and Arts Center, Inc., a Maryland-based
22 musical instruments retailer with 80 store locations. In February 2007, Guitar Center acquired out of a
23 bankruptcy proceeding substantially all of the assets of Dennis Bamber, Inc., also known as The
24 Woodwind & The Brasswind, a catalog and internet retailer. As a result of acquisitions and decreased
25 competition, Guitar Center's share of the retail market for musical instruments and related products
26 grew from 6.1% to 26.6% during the period 1997-2007.

1 55. As of 2008, Guitar Center had 315 retail stores – eight times the number of retail stores of
2 its next largest competitor, Sam Ash Music Corporation (“Sam Ash”). Guitar Center is also the
3 nation’s largest catalog and online retailer musical instruments.

4 56. Guitar Center consistently ranks as nation’s retail sales leader in *The Music Trades*
5 annual report, Retail Top 200. *The Music Trades* estimated that Guitar Center’s estimated sales were
6 \$1.5 billion in 2004 and rose to \$2.1 billion in 2007. Based on these estimates, during the Class
7 Period, Guitar Center had nearly 30% of the total music industry retail sales in the United States.
8 Guitar Center had an even greater percentage of total retail sales of high-quality fretted instruments
9 and related products in the United States.

10 57. Guitar Center’s market dominance increased over the Class Period. Guitar Center’s
11 estimated annual revenues of \$1.5 billion in 2004 were approximately equal to the combined annual
12 revenues of the 28 next largest specialty music retailers, according to data published by *The Music*
13 *Trades*. By 2007, Guitar Center’s estimated annual revenues of \$2.1 billion exceeded the combined
14 revenues of the 100 next largest specialty music retailers. Guitar Center’s 2007 estimated annual
15 revenues were almost five times those of its next largest competitor, Sam Ash. Sam Ash, in turn, had
16 over three times the revenues of American Music Supply, the third largest specialty music retailer.

17 58. The retail industry for Musical Instruments and Equipment is characterized by significant
18 entry barriers. To compete with existing retailers, new entrants, including warehouse retailers seeking
19 to sell Musical Instruments and Equipment effectively, must make large investments in real estate,
20 retail selling space and inventory.

21 59. As one NAMM observer reported in the March 1, 2008 issue of *The Music Trades*: “To
22 generate reasonable sales volumes, you need a lot of SKUs. I am not sure [Best Buy] will be able will
23 be able to achieve the kind of volume they’re hoping for in just 2500 square feet of space.” To
24 emphasize the point, Guitar Center has publicly reported that its average large store selling space is
25 12,000 to 30,000 square feet and includes average inventory of approximately 7,200 core SKUs. By
26 contrast, Best Buy devotes relatively few (2500) square feet within its retail store to musical
27

1 instruments and related products, and offers consumers only approximately 1000 SKUs – or
2 approximately one-seventh of the product inventory offered at a large Guitar Center store.

3 60. According to publicly-available financial reports filed in 2007, Guitar Center serves as
4 the largest retail customer of many of its instrument manufacturers and suppliers, including Fender and
5 Gibson. Guitar Center had significant market power in its relationships with the manufacturers of
6 Musical Instruments and Equipment during the Class Period, because the volume of its purchases and
7 its dominance as a distribution channel enabled it to control prices and exclude competition.
8 Manufacturers, including the Manufacturing Defendants, had little choice but to accommodate Guitar
9 Center’s demands for vertical price restraints (the MAPPs), because they needed access to Guitar
10 Center’s retail customer base.

11 61. Guitar Center’s market power manifested itself in various ways. For example, according
12 to former Guitar Center employees, Guitar Center “strong armed” guitar manufacturers, including
13 Yamaha and Fender, into not selling their products to competing stores that planned to open near
14 Guitar Center store locations. In addition, Guitar Center corporate personnel have acknowledged to
15 store managers that Guitar Center dictated the MAPPs for fretted instruments to manufacturers,
16 including Gibson.

17 62. According to independent retailers, Guitar Center wields enormous power in the Musical
18 Instruments and Equipment market, enabling it to influence product offerings and pricing factors. For
19 instance, in an interview in the April 2007 issue of *Musical Merchandise Review*, Alan Levin of
20 Chuck Levin’s Washington Music Center stated: “The biggest concern [for independent retailers] is
21 Guitar Center. They are many [Music Product] manufacturers’ biggest customers and changes are
22 being made . . . to suit them alone.”

23 63. At a discussion published in *The Music Trades* in February 2007, a retailer commented
24 on Guitar Center’s power, stating, “As big as GC is, what’s a little manufacturer to do? Not
25 surprisingly, they do what GC demands.” Another retailer similarly stated, “With CG’s deep pockets,
26 I suspect that they’re getting special deals” Similarly, another member of NAMM was quoted in
27

1 the March 1, 2008 issue of *The Music Trades* as saying, “Guitar Center has too much leverage [with
2 suppliers]. . . .”

3 64. Guitar Center exercised its market power, as a matter of common practice, by obtaining
4 exclusive rights to sell new “limited edition” fretted instruments from the Manufacturer Defendants.
5 For example, Gibson offered Guitar Center the exclusive right to sell its limited edition Billy Gibbons
6 “Pearly Gates” electric guitar, a replica of a rare 1959 Gibson Les Paul Standard electric guitar named
7 after a guitarist from ZZ Top.

8
9 **B. The Manufacturer Defendants Enjoy Market Power In Their Dealings With
Retailers Other Than Guitar Center**

10 65. Fretted instruments are among one of the largest segments of the music products industry.
11 Throughout the Class Period, sales of fretted instruments in the United States constituted
12 approximately 16% to 17% of total domestic music product sales. The Manufacturer Defendants rank
13 among the largest manufacturers and distributors of fretted instruments.

14 66. The manufacturing industry for Musical Instruments and Equipment is characterized by
15 significant barriers to entry. For example, new production facilities, such as the plant that Fender
16 opened in 1998, can cost as much as \$20 million.

17 67. High-quality fretted instruments and guitar amplifiers constitute the relevant product
18 market(s) in the litigation. The Manufacturer Defendants dominate the relevant product market(s).
19 The limited publicly-available data shows that the Manufacturer Defendants collectively possess
20 market power over the relevant product market(s).

21 68. During the Class Period, the Manufacturer Defendants and their affiliates collectively had
22 significant market power in their relationships with retailers other than Guitar Center, because the
23 volume of their sales and their dominance in the relevant product market(s) enabled them to coerce
24 these retailers to agree to MAPPs in their distribution contracts.

69. Most famous rock guitarists play the Manufacturer Defendants' fretted instruments, giving these companies dominant stature in the relevant product market(s) and serving as an additional barrier to entry by potential new competitors.

C. Pricing Changes In The Market For Musical Instruments And Equipment During The Class Period

70. **Fretted Instruments.** The Manufacturer Defendants and their affiliates manufactured and distributed guitars and other fretted instruments. In the years leading up to the Class Period, the guitar segment of the music products industry (exclusive of other fretted instruments) saw a significant increase in unit volume sales. The number of units sold between 1997 and 2004 increased over 300 percent. As indicated in Table 1 below, the number of guitar units sold leveled off in 2004, and thereafter declined.²

Table 1: Electric and Acoustic Guitars

Year	Electric and Acoustic Guitars units sold	% Change year over year	Average retail price per unit	% change year over year
1997	1,090,329	-0.33%	\$652	0.93%
1998	1,153,915	5.83%	\$602	-7.67%
1999	1,337,347	15.90%	\$570	-5.32%
2000	1,648,595	23.30%	\$560	-1.75%
2001	1,742,498	5.70%	\$529	-5.52%
2002	1,942,625	11.49%	\$474	-10.42%
2003	2,341,551	20.54%	\$386	-18.64%
2004	3,302,670	41.05%	\$310	-19.71%
2005	3,309,722	0.21%	\$350	13.03%
2006	2,991,260	-9.62%	\$372	6.13%
2007	2,868,000	-4.12%	\$389	4.82%
2008	2,769,650	-3.43%	\$375	-3.65%

² Tables 1 and 2 represent data from publicly-available sources. The information in these tables is over-inclusive in that the underlying data includes products outside of the relevant product market(s), such as low-cost imports.

Year	Guitar amplifier units sold	% Change year over year	Average retail price per unit	% change year over year
2005	1,240,921	-3.00%	\$320	9.97%
2006	1,092,000	-12.00%	\$330	3.13%
2007	1,112,000	1.83%	\$339	2.73%
2008	1,096,000	-0.01%	\$310	-8.55%

D. NAMM Was The Industry Vehicle For Discussing And Controlling Prices

74. NAMM is the predominant trade association for the music product industry. NAMM is comprised of more than 9,000 members, including most U.S. manufacturers, distributors and dealers of musical instruments and related products. As the FTC observed in its March 4, 2009 press release, entitled *National Association of Music Merchants Settles FTC Charges of Illegally Restraining Competition*, NAMM “serves the economic interests of its members by, among other things, promoting consumer demand for musical instruments, lobbying the government, offering seminars and organizing trade shows. In the United States, NAMM sponsors two major trade shows each year, where manufacturers introduce new products and meet with dealers and competing manufacturers, distributors and retailers of musical instruments meet and discuss issues of concern to the industry.”

75. From the mid-1990s through at least 2008, NAMM sponsored two major trade shows each year where manufacturers introduced new products and met with dealers and competing manufacturers, distributors and retailers to discuss issues of concern to the industry. NAMM also hosted an invitation-only “Global Economic Summit” or “Global Summit” once every three years where key industry leaders, including representatives of the Defendants named herein, met to explore emerging markets, reinforce relationships and share visions for industry growth. At each of these meetings and programs, NAMM members were encouraged to and did exchange cost and pricing information, and discussed strategies for implementing MAPPs, restricting retail price competition and increasing retail prices for Musical Instruments and Equipment.

1 76. NAMM trade shows are considered an indispensable resource by Music Product retailers.
2 As one NAMM member stated in an interview published in the *Musical Merchandise Review* in
3 February 2007:

4 Many years ago, the importance of attending a NAMM show may not have seemed
5 important, today it is absolutely necessary. Owners and key personnel should be at
6 NAMM . . . the education seminars are priceless. The interaction with the industry
7 people and colleagues is priceless.

7 **E. Before The Class Period, Defendants' Efforts To Fix Prices Had Limited Success**

8 77. Commencing in the late 1990s and continuing thereafter, NAMM and the other
9 Defendants and their co-conspirators fashioned, encouraged and adopted MAPP pricing as a means to
10 maintain or increase high profit margins.

11 78. The FTC Complaint asserts that numerous leading musical instrument manufacturers
12 adopted MAPPs beginning in 1999. *Musical Merchandise Review* reported in 2006 that MAPPs had
13 been a staple of the music instruments industry for more than a decade.

14 79. Certain manufacturers enforced MAPPs in the late 1990s or early 2000s, sanctioning or
15 terminating retailers that sold below the MAPP approved retail price. The MAPPs were not, however,
16 enforced consistently by all manufacturers in the late 1990s and early 2000s.

17 80. On August 1, 2001, *The Music Trades* published a report on how Music Product
18 manufacturers and retailers could use MAPPs to protect or increase revenues. The report stated:

19 Last year [2000] when we polled leading m.i. dealers about the value of minimum
20 advertised price (MAP) policies, only 31% said they had a positive effect on gross
21 margins. 60% said that MAP had no effect at all on selling prices, while 9% said the
22 programs actually decreased margins. When asked the same questions this year [2001],
23 retailers expressed a major change of heart. 51% said that MAP policies had improved
24 their gross margins during the past 12 months, and only 44% deemed the policies
25 ineffectual.

26 81. *The Music Trades* concluded that this 20-point shift in opinion, over the one-year period
27 from 2000 to 2001, was due to the fact that "the biggest benefit of MAP policies has been to rid the
28 internet of loss-leader pricing." The report continues:

As a result [of the MAP policies], these days when you type the name of a popular
product into a search engine, you'll get a screen full of results offering the same MAP

1 regulated price. As our poll indicates, brick-and-mortar retailers obviously appreciate the
2 fact that they don't have to deal with a legion of customers coming into the store
3 brandishing a computer printout and demanding, "Why can't you beat this price?"

4 82. At the January 2001 NAMM trade show there was significant discussion of MAPPs. *The
5 Music Trades* reported on the trade show as follows:

6 For the first time in memory, manufacturers seemed to be doing more than paying lip
7 service to retail profit concerns, as evidenced by the flurry of new and more restrictive
8 Minimum Advertised Price (MAP) policies that were rolled out at NAMM. ... The trend
9 is towards more expansive MAP policies that prohibit phone or email price quotes below
10 MAP price, all in a bid to give brick and mortar stores an incentive to lay in inventory.

11 83. The existence and effectiveness of MAPPs remained a concern a year later at the January
12 2002 NAMM trade show. *The Music Trades* reported on the trade show and stated, "Manufacturers
13 have acknowledged the retail concern with profitability by instituting minimum advertised price, or
14 MAP policies. In fact, mention of MAP pricing was routinely included in just about every new
15 product presentation."

16 **F. During The Class Period Defendants Entered Into A Contract, Combination Or
17 Conspiracy To Fix Prices For Musical Instruments And Equipment Through Strict
18 Enforcement Of MAPPs**

19 84. Starting in or about 2004, NAMM facilitated discussions among its members to prop up
20 retail prices for fretted instruments and other Musical Instruments and Equipment by preventing
21 discounting from MAPPs. These discussions were designed to eliminate retail price competition.

22 85. NAMM, Guitar Center, the Manufacturer Defendants, and NAMM's retailer members
23 agreed to set MAPPs at higher levels than before and to strictly enforce the MAPPs. By uniformly
24 requiring and enforcing MAPPs with higher retail prices, the Manufacturer Defendants could maintain
25 and increase their wholesale prices to the Guitar Center and other retailers, which could then sell to
26 consumers without the risk of inter- or intra-brand price competition.

27 86. The conspiracy took the form of a series of vertical restraints on trade (the MAPPs), but
28 had the effect of a horizontal restraint on trade, because the Manufacturer Defendants and other
manufacturers agreed to require and enforce MAPPs with similar terms. The Manufacturer
Defendants required retailers to enter into and accept MAPPs as part of written retail distribution

1 contracts. The MAPPs were substantially similar across the industry. They were not distinct contracts
2 implemented by manufacturers to increase inter-brand competition.

3 87. NAMM and its constituent retailer members provided the impetus for the conspiracy.
4 The conspiracy benefited NAMM, because it was composed primarily of small independent specialty
5 music retailers, and it had seen a steady year-to-year erosion of its member base before the Class
6 Period. The conspiracy was intended to protect NAMM's dwindling members from competition from
7 internet-based retailers and other low-cost retailers.

8 88. The conspiracy benefited Guitar Center which, as the largest traditional bricks and mortar
9 specialty music retailer, was threatened by competition from internet-based retailers and other low-
10 cost retailers. Maintaining stability in the industry permitted Guitar Center to continue enjoying its
11 advantages over small independent retailers (name recognition, volume discounts from wholesalers,
12 etc.), increase its profits, and remain the dominant specialty music retailer. Moreover, the conspiracy
13 enabled Guitar Center to use its market power to procure and enter into preferential contracts with
14 manufacturers. Guitar Center continued to seek and obtain quantity discounts, free goods,
15 discontinued goods and close outs, preferential pricing from manufacturers, and other preferences
16 relating to transportation, shipping, and warehousing.

17 89. Guitar Center was at the hub of the conspiracy. Guitar Center was the dominant retailer
18 for high-quality fretted instruments and guitar amplifiers. Guitar Center had market power over the
19 relevant product market(s) to enforce violations of MAPPs and was in a position to monitor industry
20 prices. Guitar Center could and did threaten to order fewer products or terminate its relationship with
21 the manufacturers that failed to enforce their MAPPs. Because Guitar Center was the most important
22 distribution outlet for all manufacturers, it could enforce the MAPPs for all Musical Instruments and
23 Equipment and thereby limit price erosion of its own products.

24 90. The conspiracy benefited the smaller independent specialty music retailers, because it
25 protected them from competition from internet-based retailers and other low-cost retailers of Musical
26 Instruments and Equipment. Maintaining stability in the industry permitted the independent specialty
27

1 music retailers to continue competing with Guitar Center, internet-based retailers, and low-cost
2 retailers on service and convenience, but eliminated retail price competition.

3 91. The conspiracy benefited the Manufacturer Defendants, because it permitted them to
4 stabilize and increase wholesale prices. In addition, maintaining higher retail prices assisted the
5 individual Manufacturer Defendants in preserving their brand images.

6 92. NAMM held industry shows twice every year, providing an opportunity for competitors
7 to meet, to exchange information, and to collude regarding the setting of prices in an effort to increase
8 profits for manufacturers and retailers to the detriment of consumers. The shows were not open to the
9 general public. NAMM held the following semi-annual shows during the Class Period:

10 **Table 3: NAMM Semi-Annual Shows**

11 Show	12 Dates	13 Location
14 2004 NAMM Winter Show	15 January 16-18, 2004	16 Anaheim, California
17 2004 NAMM Summer Show	18 July 23-25, 2004	19 Nashville, Tennessee
20 2005 NAMM Winter Show	21 January 20-23, 2005	22 Anaheim, California
23 2005 NAMM Summer Show	24 July 22-24, 2005	25 Indianapolis, Indiana
26 2006 NAMM Winter Show	27 January 19-22, 2006	28 Anaheim, California
2006 NAMM Summer Show	July 14-16, 2006	Austin, Texas
2007 NAMM Winter Show	January 18-21, 2007	Anaheim, California
2007 NAMM Summer Show	July 27-29, 2007	Austin, Texas
2008 NAMM Winter Show	January 17-20, 2008	Anaheim, California
2008 NAMM Summer Show	July 20-22, 2008	Nashville, Tennessee

21 93. The Manufacturer Defendants attended NAMM events and met with each other, Guitar
22 Center, NAMM and other co-conspirators to exchange information and discuss strategies for
23 implementing MAPPs, restricting price competition, and maintaining or increasing retail prices for
24 Musical Instruments and Equipment.

25 94. As most of the Manufacturer Defendants were represented on NAMM's Board of
26 Directors during the Class Period, they knew or were aware of, participated in or approved NAMM's
27

1 encouragement, implementation and enforcement of MAPPs, and assisted NAMM in facilitating the
2 conspiracy.

3 95. At the 2004 NAMM Summer Show, manufacturers and retailers discussed the need for
4 and effectiveness of MAPPs. Reporting on the 2004 NAMM Summer Show, *The Music Trades* wrote:
5 “A number of exhibitors also announced higher MAP prices in a bid to shore up dealer margins.”

6 96. NAMM hosted its Fifth Global Economic Summit or Global Summit in August 2004 in
7 Carlsbad, California. This was an invitation-only meeting to bring key industry leaders, media and
8 advisors together “to explore emerging markets, reinforce global relationships and share different
9 visions of the path to long-term, sustainable industry growth.”

10 97. At the 2005 NAMM Summer Show, NAMM hosted a discussion entitled “Does the
11 Industry Need a MAP makeover?” According to a November 2005 article published in *The Music*
12 *Trades*, Music for Everyone, at this session, an association of thirteen Greater Los Angeles musical
13 instrument retailers, presented a “voluntary MAP formula/guideline” which was urged and
14 “recommended for general use” by Music Product retailers.

15 98. At the 2006 NAMM Winter Show, NAMM again hosted a panel discussion on MAPPs.
16 The panel included several industry leaders, including Tom Sumner, vice-president and general
17 manager of Yamaha’s Pro-Audio and Combo Division; Bob LeClaire, sales manager of Avedis
18 Zildjian; and Robert Lee, sales manager at Kaman; and several retailers. As reported in the March 1,
19 2006 edition of *The Music Trades*, the panelists were “unanimous, offering a guardedly positive
20 assessment of MAP policies.”

21 99. At this panel discussion, only one independent internet retailer, Bryan Junk of
22 massmusic.net, spoke in favor of price competition for the benefit of consumers, stating: “We’re
23 supposed to compete, aren’t we?” *The Music Trades* captured some of the dialogue in its March 1,
24 2006 publication:

25 Whether or not you agree with him, Bryan Junk, an internet retailer, deserves credit for
26 staring down an auditorium packed with independent retailers and stating that MAP
27 should be scrapped. To audible boos, he declared, “Consumers like low prices, and we
try to give them what they want. Why shouldn’t we be able to grow our business by

1 *offering the lowest possible prices without interference from the manufacturers?”*
 [Emphasis added.]

2 100. Mr. Junk did not sway his fellow panelists, however. As reported in *The Music Trades*,
 3 panel members persisted in their views that: (i) absent MAPPs “prices would rapidly migrate down to
 4 10% over cost...”; (ii) MAPPs are “only as effective as [their] enforcement”; and (iii) current MAPP
 5 pricing guidelines should be revised “upwards to give retailers a better profit margin.”

6 101. At a separate session hosted by NAMM at the 2006 NAMM Winter Show, Music for
 7 Everyone published and presented with NAMM’s participation and consent two MAP pricing formula
 8 schedules based on retail costs, which were proposed and “designed for all instruments and all combo
 9 and audio products”:

10 Proposed MAP Formula
 Recommended Minimum Profit Formulas for A & B Discounts

11
 12 Retail [\$1-\$149] x 0.05 x 2.00 = MAP (0% off retail)*
 13 Retail [\$150-\$249] x 0.5 x 1.90 = MAP (5% off retail)*
 14 Retail [\$240-\$299] x 0.5 x 1.85 = MAP (7.5% off retail)*
 15 Retail [\$300-\$349] x 0.5 x 1.80 = MAP (10% off retail)**
 16 Retail [\$350-\$399] x 0.5 x 1.75 = MAP (12.5% off retail)**
 17 Retail [\$400-\$449] x 0.5 x 1.70 = MAP (15% off retail)*
 18 Retail [\$450-\$499] x 0.5 x 1.65 = MAP (17.5% off retail)*
 19 Retail [\$500 and up] x 0.5 x 1.60 = MAP (20% off retail)*
 20 Retail [\$500-\$599] x 0.5 x 1.55 = MAP (22.5% off retail)**

21 * Formula A

22 ** Formula B

23 102. In its NAMM January 2006 presentation, Music for Everyone encouraged manufacturers
 24 to adopt the MAP pricing reflected in the Formula A schedule, capping permitted discounts at 20
 25 percent. Music For Everyone urged that no MAPP price should be lower than that reflected in the
 26 Formula B schedule, stating “the formula B profits are the minimum the brick-and-mortar full service
 27 music instrument retailers require to survive, and hopefully thrive.”

28 103. At the 2006 NAMM Summer Show, NAMM again sponsored a roundtable discussion on
 MAPPs, profitability and competition. This session featured NAMM President and CEO Joe
 Lammond, Tom Sumner of Yamaha Electronics Corporation, and Fender Chairman and CEO, Bill
 Mendelo, among others. NAMM described this discussion in its preview materials as follows: “In the

1 two-hour session suppliers and retailers of all sizes will be able to share views about critical issues
2 affecting profitability, including MAP pricing . . . and the entrance of mass consumer merchandisers
3 into the industry.” Among the topics discussed at this session were MAPP prices that were set too low
4 and industry profit margins.

5 104. A roundtable discussion of dealers conducted by *The Music Trades* in February 2007
6 highlighted that retailers knew MAPPs were designed to limit competition and prop up retail prices for
7 Musical Instruments and Equipment. As part of the roundtable discussion, George Hines, of George’s
8 Music Stores located in Berwyn, Pennsylvania, and a member of NAMM’s Board of Directors from
9 2003-2005, stated that the industry’s “great challenge” was to get “all distribution channels
10 [independents, national chains, mass merchants and internet providers] working together for the health
11 of the industry.” He expressed his view that MAPPs could keep the industry profitable as long as
12 retailers and suppliers understood each others’ needs in setting the best MAPP pricing. Hines stated
13 that allowing market forces to control the industry would “not necessarily be for the better” and that
14 what was needed was a “joint effort” to keep independents as the “heart and soul” of the industry with
15 “manufacturer support.” He noted that the internet had commoditized products and pricing in the
16 music industry.

17 105. Also during the roundtable, Frank Hayhurst of Zone Music in Cotati, California stated
18 that manufacturers would follow the lead of Guitar Center. He urged retailers to join together with
19 those “whom they used to consider their ‘competitors’ and create strategic alliances for their mutual
20 benefit.” Regarding the use of MAPPs specifically, Hayhurst said:

21 Some very clever work was done suggesting a sliding scale of much higher MAPs on
22 lower price point products, higher MAPs on medium price point products, and slightly
23 higher MAPs on higher cost products. The common theme is that MAPs need to go up,
24 but everyone is afraid to do that because some other manufacturer might not. The
solution? Independents need to band together and favor manufacturers that provide a
MAP system that allows for independents to stay in business.

25 106. NAMM continued to facilitate industry discussions of MAPPs and MAPP pricing at the
26 2007 NAMM Winter Show. At least one roundtable discussion focused on, among other things, profit
27

1 margins and MAPP pricing. *See, e.g., The Music Trades* (Jan. 1, 2007), “Why Going to NAMM is a
2 total no-brainer: new products, smart people, and tons of educational seminars add up to the single
3 biggest business opportunity of the year. If you’re serious, there’s only one thing to do: Show Up!”;
4 NAMM 2007 PREVIEW; Calendar.

5 107. NAMM held its Sixth Global Summit in 2007, in Carlsbad, California. According to one
6 press account published in the October 17, 2007 issue of *The Music and Sound Retailer*, NAMM
7 Global Summit attendees “primarily consist[] of supplier decision makers as well as retailers.” Guitar
8 Center’s Chief Executive Officer, Marty Albertson, addressed the assembly at the NAMM Sixth
9 Global Summit in 2007. Albertson or other key representatives of Guitar Center also attended or
10 participated in prior Global Summit events.

11 **G. Defendants Unreasonably Restrained Trade, Prevented Competition, And Imposed**
12 **Supra-Competitive Prices On Consumers**

13 108. Defendants agreed to and did adopt, impose or enforce MAPPs throughout the Class
14 Period. The MAPPs imposed and enforced by Defendants went well beyond typical cooperative
15 advertising programs where manufacturers place restraints on the prices dealers may advertise in
16 advertisements funded in whole or in part by the manufacturer. Instead, with NAMM’s knowledge,
17 cooperation and assistance, Defendants and other unnamed co-conspirators devised a plan to exact
18 agreements from Music Product manufacturers sold through Guitar Center and other NAMM retailers
19 to require, on penalty of termination and as a condition of doing business, that the manufacturer ensure
20 that its other retailers maintain the MAPPs and/or refrain from discounting.

21 109. The MAPPs imposed on music retailers by Defendants are anticompetitive. According to
22 a *Wall Street Journal* report dated October 23, 2008, Bradley Reed, sales manager for Musician’s
23 Advocate, Inc., said that his company “had very little choice but to honor manufacturer’s policies on
24 advertised prices because otherwise it risks having its supplies cut off or being delisted as an
25 authorized distributor.”

1 110. As detailed above, NAMM arranged meetings and discussions, assisted and encouraged
2 its members to exchange competitively sensitive information, and sought and obtained the agreement
3 of its members, to impose and enforce these MAPPs, which had no legitimate pro-competitive
4 purpose.

5 111. The Manufacturer Defendants did not simply enter into a series of vertical restrains on
6 trade or unilaterally suggest retail prices to retailers; require retailers to maintain minimum retail
7 prices to protect brand image; require retailers to provide levels of advertising or service and in return
8 assure retailers that they would not be undercut by other retailers in intra-brand completion; announce
9 or enforce policies of sanctioning or terminating retailers that failed to maintain the MAPP price; and
10 sanction or terminate retailers that failed to maintain the MAPP price.

11 112. Rather, Defendants and their co-conspirators entered into a contract, combination or
12 conspiracy that had the effect of a horizontal restraint on trade. The Manufacturer Defendants did not
13 act or unilaterally or merely in their own economic interest when they entered into written MAPPs
14 with retailers; sought to have all retailers, including internet retailers and big box retailers, charge
15 minimum retail prices; or sanctioned or terminated retailers that failed to maintain the MAPP price.

16 113. The efforts of Defendants to implement and enforce MAPPs during the Class Period paid
17 off in the form of higher retail prices. After falling for several years, the average unit prices of
18 Musical Instruments and Equipment all leveled off or started to rise in 2004 and 2005. Consumers
19 paid the higher prices that manufacturers required and retailers charged under the MAPPs.

20 **H. The Anticompetitive Effects Of Defendants' Conduct**

21 114. Defendants' actions in adopting, implementing and enforcing MAPPs have had the
22 following anticompetitive effects:

- 23 a. Competition has been unreasonably restrained or suppressed;
- 24 b. Purchasers of Musical Instruments and Equipment have been denied the benefits
25 of competition in a free and open market and have been forced to pay artificially high prices for such
26 products;

1 c. Defendants have enjoyed, and will continue to enjoy, supra-competitive profits to
2 the detriment of competitors and purchasers of Musical Instruments and Equipment.

3 115. These anticompetitive effects of Defendants' conduct in the relevant product market(s)
4 outweigh any conceivable pro-competitive benefits.

5 **I. The FTC Found That NAMM's Actions Were Anticompetitive And Served No**
6 **Legitimate Business Purpose**

7 116. On March 7, 2007, the FTC initiated a non-public investigation into price fixing in the
8 music products industry. The FTC subsequently issued subpoenas to Guitar Center, Fender, Gibson,
9 Yamaha, Ibanez, Roland, and others regarding price fixing, MAPPs, and the sharing of confidential
10 cost, pricing and other business information at NAMM events.

11 117. Following a two year investigation, on March 4, 2009, the FTC publicly issued a
12 proposed cease and desist order to NAMM and at the same time announced that it had tentatively
13 settled FTC charges that NAMM had "permitted and encouraged" acts constituting violations of
14 Section 5 of the FTC Act, 15 U.S.C. §45 and had engaged in acts and practices that "constitute unfair
15 methods of competition in or affecting commerce," also in violation of 15 U.S.C. § 45. The FTC's
16 press release stated that the proposed consent order was "designed to remedy NAMM's
17 anticompetitive conduct."

18 118. The FTC's Complaint alleged that between 2005 and 2007, NAMM organized various
19 meetings and programs for its members, such as Defendants herein, at which competing retailers of
20 Musical Instruments and Equipment and others "were permitted and encouraged to discuss strategies
21 for implementing MAPPs, the restriction of retail price competition, and the need for higher retail
22 prices." The FTC asserted that NAMM was the lynchpin of this anticompetitive activity, stating
23 "Representatives of NAMM determined the scope of information exchange and discussion by
24 selecting moderators and setting the agenda for these programs." The FTC complaint further alleged
25 that "[a]t these NAMM sponsored events, competitors discussed the adoption, implementation, and
26 enforcement of minimum advertised price policies; the details and workings of such policies,
27

1 appropriate and optimal retail prices and margins; and other competitively sensitive issues.” The
2 Commission voted to approve the complaint and proposed consent order by a 4-0 vote.

3 119. Following a 30 day period for comment, the FTC issued its Decision and Order on April
4 10, 2009. The FTC states in its “Analysis of Agreement” that NAMM settled charges that it violated
5 Section 5 “by arranging and encouraging the exchange among its members of competitively sensitive
6 information that had the purpose, tendency, and capacity to facilitate price coordination and collusion
7 among competitors.” Although the FTC’s Decision and Order is directed to NAMM, the FTC’s
8 conclusion that an order was required to stop NAMM from arranging and encouraging collusive
9 behavior presupposes the existence of the collusive behavior between and among NAMM’s members,
10 including Guitar Center and the other Defendants.

11 120. In assessing NAMM’s conduct, the FTC was cognizant of the fact that trade associations
12 may “serve numerous valuable and pro-competitive functions, such as expanding the market in which
13 its members sell; educating association members, the public and government officials; conducting
14 market research; establishing inter-operability standards; and otherwise helping firms to function more
15 efficiently.” Nonetheless, the FTC concluded that, “NAMM’s activities crossed the line that
16 distinguishes legitimate trade association activity from unfair methods of competition.”

17 121. In its Analysis of Agreement, the FTC offered the following reasoning for its finding that
18 NAMM’s conduct during the Class Period lacked a legitimate business purpose:

19 A Respondent violates Section 1 of the Sherman Act and Section 5 of the FTC Act when
20 it engages in concerted conduct that had the principal tendency or the likely effect of
21 harming competition and consumers. *California Dental Ass’n v. Federal Trade*
22 *Commission*, 526 U.S. 756 (1999) (footnote omitted). The conduct of a trade association
23 or its authorized agents is generally treated as concerted action. *E.g., California Dental*
24 *Ass’n v. Federal Trade Commission*, 526 U.S. 756 (1999); *North Texas Specialty*
Physicians v. FTC, 528 F.3d 346, 356 (5th Cir. 2008) (“When an organization is
controlled by a group of competitors, it is considered to be a conspiracy of its
members.”).

25 The Complaint alleges that at meetings and programs sponsored by NAMM, competing
26 retailers of musical instruments and other NAMM members discussed strategies for
27 raising retail prices. Firms also exchanged information on competitively-sensitive
subjects – prices, margins, minimum advertised price policies and their enforcement.

1 And not only did NAMM sponsor these meetings, but its representatives set the agenda
 2 and helped steer the discussions. The antitrust concern is that this joint conduct can
 3 facilitate the implementation of collusive strategies going forward (footnote omitted).
 4 For example, such discussions could lead competing NAMM members to refuse to deal
 5 with a manufacturer, distributor, or retailer unless minimum advertised price policies, or
 6 increases in minimum advertised prices, were observed and enforced against discounters
 7 (footnote omitted). Alternatively, NAMM members could lessen price competition in
 8 local retail markets. Any or all of these strategies may result in higher prices and harm
 9 consumers of musical instruments. Any savings from lower manufacturing costs would
 10 be reserved to NAMM members, and not shared with consumers in the form of lower
 11 retail prices.

12 The potential for competitive harm from industry-wide discussions must be weighed
 13 against the prospect of legitimate efficiency benefits. Here, the Complaint alleges that no
 14 significant pro-competitive benefit was derived from the challenged conduct. The
 15 Commission does not contend the exchange of information among competitors is
 16 categorically without benefit (footnote omitted). Rather, the allegation is that here –
 17 taking into account the type of information involved, the level of detail, the absence of
 18 procedural safeguards, and the overall market conditions – the exchange of information
 19 engineered by NAMM lacked a pro-competitive justification.

20 122. As part of the settlement and consent order, the FTC ordered NAMM to cease and desist
 21 from:

- 22 1. Urging, encouraging, advocating, suggesting, coordinating, participating in, or
 23 facilitating in any manner the exchange of information between or among Musical
 24 Product Manufacturers or Musical Product Dealers relating to:
 - 25 a. the retail price of any Musical Product; or
 - 26 b. any term, condition or requirement upon which any Musical Product
 27 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.
- 28 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, including, but not limited to,

1 Price Terms, margins, profits, or pricing policies, including but not limited
2 to Minimum Advertised Price Policies or Resale Price Maintenance
Policies; or

- 3 c. the refusal to do business, or the reduction of business, with particular
4 Musical Product Manufacturers or Musical Product Dealers.

5 123. The Commission approved the NAMM consent order by a 4-0 vote.

6 124. The FTC's consent order requires NAMM to file periodic compliance reports. In those
7 reports, NAMM represented to the FTC that it has provided antitrust training to its board of directors,
8 has revised its Antitrust Policy, and has had antitrust counsel attend NAMM events. NAMM
9 represented that it provided each speaker at a recent NAMM show with a copy of its Antitrust Policy
10 and required the speakers to provide NAMM with advance notice if the speaker intended to present
11 any remarks or written materials regarding price terms, margins, profits, minimum advertised price
12 policies, or resale price maintenance policies. NAMM also represented to the FTC that it distributed
13 copies of its Antitrust Policies to its members and provided approximately 1,000 attendees with an
14 overview of the antitrust laws and guidance on how to comply with those laws.

15 125. Before future meetings, NAMM will read a statement to attendees that states, in pertinent
16 part: "Any meeting such as this, where direct competitors such as manufacturers and retailers come
17 together, has the potential to create antitrust problems. . . . NAMM must not facilitate, encourage, or
18 allow participants at its events to engage in any conduct which restricts competition on price or output.
19 . . . Remember, all NAMM members must make pricing decisions independently of any agreement or
20 understanding with competitors."

21 126. These substantial changes in NAMM's policies, practices and procedures confirm that
22 during the Class Period, NAMM had violated the antitrust laws by facilitating the price-fixing
23 conspiracy among Defendants.

24 127. Even after the FTC's investigation, its cease and desist order, and the revisions to
25 NAMM's antitrust policies, practices, and procedures, not all NAMM members appreciate the
26 seriousness of price-fixing. After hearing the NAMM antitrust statement at the start of a recent trade
27 association meeting, one NAMM member stated, "MAP is legal; you just can't talk about it."

1 128. The FTC continued its investigation following the entry of the NAMM consent order on
2 April 10, 2009. Several months later, on August 24, 2009, the FTC closed the investigation. The
3 FTC's letters to the other subjects of the investigation stated, "This action [the closure] is not to be
4 construed as a determination that a violation may not have occurred. . . . The Commission reserves the
5 right to take such action as the public interest may require."

6 **TOLLING OF STATUTE OF LIMITATIONS, ESTOPPEL, FRAUDULENT**
7 **CONCEALMENT AND EQUITABLE TOLLING**

8 129. Plaintiffs did not discover and could not have discovered through the exercise of
9 reasonable diligence the existence of the claims sued upon herein until March 4, 2009, when the FTC
10 announced its investigation had resulted in a proposed cease and desist order.

11 130. Defendants' actions were unlawful, unfair and deceptive. As a consequence, unwary
12 consumers were injured by Defendants' unlawful conduct. Defendants are estopped from relying on
13 any statute of limitations defense because of their unlawful, unfair or deceptive conduct.

14 131. Defendants' conduct was, by its nature, self-concealing. Defendants, through a series of
15 affirmative acts or omissions, suppressed the dissemination of truthful information regarding their
16 illegal conduct, and actively foreclosed Plaintiffs and the Class from learning of their anti-competitive,
17 illegal, unfair and/or deceptive acts.

18 132. Any applicable statutes of limitations have been tolled by Defendants' affirmative acts of
19 fraudulent concealment and continuing misrepresentations. Because of the self-concealing nature of
20 Defendants' actions and their affirmative acts of concealment, Plaintiffs and the Class assert the tolling
21 of any applicable statutes of limitations affecting the claims raised herein.

22 133. By reason of the foregoing, the claims of Plaintiffs and the Class are timely under any
23 applicable statute of limitations, pursuant to the discovery rule, estoppel principles, and the equitable
24 tolling and fraudulent concealment doctrines.

1 d. Agreeing to manipulate prices and the supply of Musical Instruments and
2 Equipment sold in the United States in a manner that deprived the market of free and open
3 competition; and

4 e. Selling Musical Instruments and Equipment to customers in the United States at
5 artificially-inflated, noncompetitive prices.

6 139. The actions of the Defendants directly or through NAMM constitute a combination in
7 restraint of trade. NAMM and the other Defendants are liable for the creation, maintenance and
8 enforcement of their agreements under a “quick look” or “rule of reason” standard. There was no
9 legitimate, pro-competitive business justification for Defendants’ combination or conspiracy, or their
10 constituent agreements to restrain competition and artificially inflate the price of Musical Instruments
11 and Equipment. Even if there were some conceivable justification, the individual agreements were
12 broader than necessary to achieve any legitimate purpose.

13 140. Plaintiffs and members of the Class were injured in their business or property by the
14 collusion and combination or conspiracy alleged above, which facilitated, enabled, assisted or
15 furthered Defendants’ actions to substantially limit competition in the relevant market(s). Plaintiffs
16 and the other members of the Class have been forced to pay higher prices for Musical Instruments and
17 Equipment than they would have paid in the absence of Defendants’ unlawful conduct.

18 **SECOND CLAIM FOR RELIEF**
19 **(Against Defendants for Violations of California’s Cartwright Act,**
20 **Cal. Bus. & Prof. Code § 16700 *et seq.*)**

21 141. Plaintiffs hereby incorporate by reference each preceding paragraph as though fully set
22 forth herein.

23 142. Defendants entered into the unlawful conspiracy and combination described above in the
24 State of California and the effects of that conspiracy occurred within and emanated from the State of
25 California. As alleged above, NAMM and Guitar Center devised, implemented and directed a scheme
26 from their principal places of business in California through which Guitar Center, Manufacturer
27 Defendants and other co-conspirators met and exchanged information, discussed strategies for

1 implementing MAPPs, and combined or conspired to restrict price competition and/or maintain or
2 increased the retail price for Musical Instruments and Equipment.

3 143. Defendants' acts and practices, as described herein, constitute unlawful combinations in
4 restraint of trade in violation of Cal. Bus. & Prof. Code §§ 16700 *et seq.*

5 144. Defendants Guitar Center, NAMM, and the other Defendants combined or conspired with
6 each other and co-conspirators to unreasonably restrain trade and commerce by artificially reducing or
7 eliminating competition in the United States and/or by raising, fixing, maintaining or stabilizing the
8 prices for Musical Instruments and Equipment in the United States.

9 145. Plaintiffs and members of the Class were injured in their business or property by the
10 collusion and combination or conspiracy alleged above, which facilitated, enabled, assisted or
11 furthered Defendants' actions to substantially limit competition in the relevant market(s). Plaintiffs
12 and the other members of the Class have been forced to pay higher prices for Musical Instruments and
13 Equipment than they would have paid in the absence of Defendants' unlawful conduct.

14 **THIRD CLAIM FOR RELIEF**
15 **(Against Defendants for Violations of California's Unfair Competition Law,**
16 **Cal. Bus. & Prof. Code § 17200 *et seq.*)**

17 146. Plaintiffs hereby incorporate by reference each preceding paragraph as though fully set
18 forth herein.

19 147. Defendants entered into the unlawful conspiracy and combination described above in the
20 State of California and the effects of that conspiracy occurred within and emanated from the State of
21 California. As alleged above, NAMM and Guitar Center devised, implemented and directed a scheme
22 from their principal places of business in California through which Guitar Center, Manufacturer
23 Defendants and other co-conspirators met and exchanged information, discussed strategies for
24 implementing MAPPs, and combined or conspired to restrict price competition and/or maintain or
25 increased the retail price for Musical Instruments and Equipment.

26 148. The acts and practices of Defendants as described herein, constitute unlawful business
27 practices in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*, in that Defendants combined or
28

1 conspired with other Defendants and co-conspirators to unreasonably restrain trade and commerce by
2 artificially reducing or eliminating competition in the United States and/or by raising, fixing,
3 maintaining or stabilizing the prices for Musical Instruments and Equipment in the United States, in
4 violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and the California Cartwright Act,
5 Cal. Bus. & Prof. Code §§ 16700 *et seq.*

6 149. The acts and practices of Defendants, as described herein, also constitute unfair business
7 practices in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*, because the utility of Defendants'
8 alleged acts and practices in restricting competition in the Musical Instruments and Equipment market
9 in the United States is significantly outweighed by the gravity of the harm that such acts and practices
10 impose on Plaintiffs and Class members. Defendants' acts and practices also are oppressive,
11 unscrupulous or substantially injurious to Plaintiffs and Class members.

12 150. Plaintiffs and Class members have suffered injury in fact and have lost money or property
13 as a result of these Defendants' acts and practices, in that Plaintiffs and Class members paid artificially
14 high prices for Musical Instruments and Equipment due to Defendants' unlawful agreement,
15 combination or conspiracy and their unlawful, anticompetitive practices.

16 151. Plaintiffs and Class members have suffered harm as a proximate result of the wrongful
17 conduct of Defendants, and Plaintiffs therefore seek appropriate restitution.

18 152. Plaintiffs and Class members also seek an order, pursuant to Cal. Bus. & Prof. Code §
19 §17200 and 17203, enjoining Defendants from continuing to engage in the unlawful, unfair and
20 fraudulent acts and practices described herein.

21 **FOURTH CLAIM FOR RELIEF**
22 **(Against Defendants for Violation Massachusetts Consumer Protection Act,**
23 **Mass. G. L.93A § 2 *et seq.*)**

24 153. Plaintiffs Haskell and Seiler hereby incorporate by reference each preceding paragraph as
25 though fully set forth herein.
26
27

1 154. Plaintiffs Haskell and Seiler assert this claim on behalf of themselves and a Subclass of
2 persons who directly purchased new Musical Instruments and Equipment from Guitar Center, Inc. in
3 Massachusetts during the Class Period (“Massachusetts Subclass”).

4 155. Defendants are engaged in trade or commerce as defined by M.G.L. c. 93A, § 1(b).

5 156. Defendants have engaged in unfair competition or unfair acts or practices in violation of
6 Mass. G.L. c. 93A § 2. The acts committed by Defendants as alleged herein were unlawful contracts,
7 combinations and conspiracies were in violation of M.G.L. c. 93A, § 2, and against public policy. As
8 set forth in detail above, Defendants illegally combined the acts of two or more persons for the
9 purpose of: (a) creating or carrying out unreasonable restraints of trade or commerce; (b) preventing
10 competition in the manufacture and sale of Musical Instruments and Equipment sold in and/or
11 distributed to Massachusetts; (c) entering into, executing, and carrying out contracts, obligations, and
12 agreements in which they established and settled the price of Musical Instruments and Equipment so
13 as to directly or indirectly preclude a free and unrestricted competition among themselves.

14 157. Defendants’ intentional and purposeful anticompetitive acts described above, including
15 but not limited to, acts of collusion to set prices and the actual act of price fixing itself, were intended
16 to and did in fact cause Plaintiffs Haskell and Seiler and the Massachusetts Subclass members to pay
17 supra-competitive prices for Musical Instruments and Equipment purchased from Defendants or their
18 Co-Conspirators in the Commonwealth of Massachusetts.

19 158. The violations of Massachusetts G.L. c. 93A by Defendants were done willfully,
20 knowingly, or in bad faith, entitling Plaintiffs Haskell and Seiler and the Massachusetts Subclass to
21 double or treble damages.

22 159. As a direct and proximate result of Defendants’ unlawful conduct, Plaintiffs Haskell and
23 Seiler and the Massachusetts Subclass have been injured in their businesses and property in that they
24 paid more for Musical Instruments and Equipment than they otherwise would have paid in the absence
25 of Defendants’ unlawful conduct.

1 160. Demand has been made upon Defendants pursuant to Mass. G.L. c. 93A, §§ 2, 9 more
2 than 30 days prior to filing this claim for relief under Mass. G.L. c. 93A. More than thirty days have
3 passed since the demand letter was served, and each Defendant served has failed to make a settlement
4 offer. In the alternative, service of a demand letter on Defendants that did not maintain a place of
5 business within Massachusetts was excused.

6 161. As a result of Defendants' and their co-conspirators' violation of Mass. G.L. 93A,
7 Defendants are liable to Plaintiffs Haskell and Seiler and the Massachusetts Subclass for up to three
8 times the damages that they incurred, or at the very least the statutory minimum award of \$25 per
9 purchase of Musical Instruments or Equipment, together with all related court costs and attorneys'
10 fees.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiffs pray that:

13 A. The Court determine that his action may be maintained as a class action pursuant to Rule
14 23 of the Federal Rules of Civil Procedure, and enter an order appointing Plaintiffs as class
15 representatives for the Class and appointing Plaintiffs' counsel as Class Counsel;

16 B. The acts and practices herein alleged be adjudged and decreed to violate Section 1 of the
17 Sherman Act, the California Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.*, the California
18 Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, and the Massachusetts Consumer
19 Protection Act, Mass. G. L. c. 93A *et seq.*, and that Defendants be enjoined from further violative
20 conduct;

21 C. Plaintiffs and each member of the Class recover damages determined to have been
22 sustained by each of them, plus treble damages and any statutory or liquidated damages;

23 D. Plaintiffs and each member of the Class recover restitution determined to be owed to
24 them as permitted by the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17203;

25 E. Plaintiffs and the Class recover their costs of suit, including reasonable attorneys' fees,
26 litigation costs and expert fees as provided by law;

1 F. Judgment be entered against Defendants and in favor of Plaintiffs and the Class; and

2 G. Plaintiffs and the Class be granted such other appropriate relief as may be determined to
3 be just, equitable and proper by this Court.

4 **JURY TRIAL DEMANDED**

5 Plaintiffs hereby demand a trial by jury on those claims that can be tried to a jury.

6
7
8 DATED: July 16, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2010 I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List. Counsel of record are required by the Court to be registered e-filers, and as such are automatically e-served with a copy of the document(s) upon confirmation of e-filing.

I also certify that I will cause the foregoing to be served along with a court issued summons in accordance with Rule 4 of the Federal Rules of Civil Procedure on all defendants who have not been previously been served in this litigation.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 16, 2010.

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