Case No. 12-56674

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: MUSICAL INSTRUMENTS AND EQUIPMENT ANTITRUST LITIGATION,

JOSHUA RAMSEY, et al.,

Plaintiffs - Appellants,

v.

NATIONAL ASSOCIATION OF MUSIC MERCHANTS, INC., et al.,

Defendants - Appellees.

Appeal from an Order of the United States District Court
for the Southern District of California by the Honorable Larry A. Burns

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APPELLANTS' OPENING BRIEF

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I. PRELIMINARY STATEMENT

Plaintiffs-appellants appeal from the order of the District Court of the Southern District of California (Burns, J.) dismissing with prejudice their claim for violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, under Federal Rule of Civil Procedure 12(b)(6). The District Court did not rule on defendants' motion to dismiss plaintiffs' additional state law claims, but directed the clerk "to enter judgment as to this one claim only so that Plaintiffs, if they wish, may take an immediate appeal." ER 9. Plaintiffs filed a timely appeal.

II. STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over plaintiffs' Sherman Act claim under the federal question provisions of 15 U.S.C. § 1 *et seq*. and 28 U.S.C. §§ 1331 and 1337.

This Court has jurisdiction over the District Court's final judgment dismissing the Sherman Act claim under 28 U.S.C. § 1291 and Fed. R. Civ. P. 54(b). Judgment was entered on August 21, 2012, and plaintiffs filed a timely notice of appeal on September 10, 2012. ER 89-91; 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

III. STATEMENT OF ISSUES

1. Have plaintiffs stated a claim for violation of section 1 of the Sherman Act under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), by alleging parallel conduct and additional well-pleaded facts that raise a plausible inference that defendants agreed to fix the minimum price at which guitars and guitar amplifiers could be advertised to consumers?

2. Did the District Court err in requiring plaintiffs to plead direct evidence that defendants held private meetings at which they agreed to fix prices for guitars and guitar amplifiers and to eliminate the possibility of independent action?

IV. STATEMENT OF THE CASE

A. The Nature of the Case

Plaintiffs purchased guitars and guitar amplifiers from defendant Guitar Center, Inc., the largest retail seller of musical instruments in the United States. The guitars and amplifiers were made by five top manufacturers, defendants Fender Music Instruments Corporation, Gibson Guitar Corporation d/b/a Gibson U.S.A., Yamaha Corporation of America, Hoshino U.S.A., Inc., and Kaman Music Corp. ER 43-45, 57-58. Plaintiffs allege that between 2004 and 2009, Guitar Center and the manufacturer defendants, along with trade association National Association of Music Merchants (known as NAMM), conspired to implement and

enforce "minimum advertised price policies" or "MAPs" that fixed the minimum price at which retailers could advertise guitars and guitar amplifiers. ER 38-42. The MAPs did not limit the actual sales price of the guitars and amplifiers, but they prevented retailers from advertising or quoting prices to customers that were lower than the price set forth in the MAP. ER 40, 61-63. The MAPs therefore had the effect of restraining competition and fixing the retail prices for guitars and guitar amplifiers. *Id*.

B. The Course of Proceedings

1. The FTC Investigation and Settlement

On March 7, 2007, the FTC initiated a non-public investigation into price fixing in the music products industry. ER 72. In the course of its investigation, the FTC issued subpoenas to Guitar Center, Fender, Gibson, Yamaha, and others seeking documents related to price fixing, MAPs, and the sharing of confidential cost, pricing and other business information at NAMM events. ER 72-74.

Two years later, on March 4, 2009, the FTC announced that it had tentatively settled charges that NAMM had violated the FTC Act "by arranging and encouraging the exchange among its members of competitively sensitive information that had the purpose, tendency, and capacity to facilitate price coordination and collusion among competitors." ER 72-73.

The FTC alleged that between 2005 and 2007, NAMM organized various meetings and programs for its members at which competing retailers of musical instruments "discussed strategies for raising retail prices." ER 72-74. At these events, "[f]irms also exchanged information on competitively-sensitive subjects—prices, margins, minimum advertised price policies and their enforcement." *Id*. The FTC said that NAMM was the lynchpin of this anticompetitive activity because "its representatives set the agenda and helped steer the discussions." ER 74.

The FTC concluded that "NAMM's activities crossed the line that distinguishes legitimate trade association activity from unfair methods of competition." ER 73. The FTC explained that the joint conduct NAMM encouraged "can facilitate the implementation of collusive strategies going forward."

> For example, such discussions could lead competing NAMM members to refuse to deal with a manufacturer, distributor, or retailer unless minimum advertised price policies, or increases in minimum advertised prices, were observed and enforced against discounters. Alternatively, NAMM members could lessen price competition in local retail markets. Any or all of these strategies may result in higher prices and harm consumers of musical instruments.

ER 74. The FTC said that "the allegation is that here—taking into account the type of information involved, the level of detail, the absence of procedural safeguards,

and overall market conditions—the exchange of information engineered by NAMM lacked a pro-competitive justification." *Id.*

As is customary with these types of settlements, NAMM did not admit or deny the charges,[1] and the FTC did not recover any monetary damages. But the consent order requires NAMM to cease and desist from "[u]rging, encouraging, advocating, suggesting, coordinating, participating in, or facilitating in any manner the exchange of information among Musical Product Manufacturers or Musical Product Dealers relating to" retail prices, margins, profits, or pricing policies, including MAPs. ER 74. NAMM agreed to read a statement to attendees of future meetings that says, in part:

> Any meeting such as this, where direct competitors such as manufacturers and retailers come together, has the potential to create antitrust problems …. NAMM must not facilitate,

[1] In recent years, district courts have rejected settlements of enforcement proceedings in which the defendant did not admit or deny liability. *See, e.g., Fed. Trade Comm'n v. Circa Direct LLC*, No. Civ. 11-2172 RMB/AMD, 2012 WL 3987610, at *6 (D.N.J. Sept. 11, 2012) (noting that consent decrees without admissions or denials of liability by defendants do not serve the public's interest in knowing whether the government's claims are accurate and ordering the FTC and defendants to revise the decree to publicly disclose FTC's allegations and supporting documentation of its claims); *S.E.C. v. Citigroup Global Markets Inc.*, 827 F. Supp. 2d 328, 334 (S.D.N.Y. 2011) ("[T]he combination of charging Citigroup only with negligence and then permitting Citigroup to settle without either admitting or denying the allegations deals a double blow to any assistance the defrauded investors might seek to derive from the SEC litigation in attempting to recoup their losses through private litigation, since private investors not only cannot bring securities claims based on negligence, … but also cannot derive any collateral estoppel assistance from Citigroup's non-admission/non-denial of the SEC's allegations."), *appeal docketed*, No. 11-5227-cv (2d Cir. Dec. 19, 2011).

> encourage, or allow participants at its events to engage in any conduct which restricts competition on price or output. … Remember, all NAMM members must make pricing decisions independently of any agreement or understanding with competitors.

ER 75. NAMM must also file periodic compliance reports. *Id*. In its reports NAMM has represented that it provided antitrust training to its board of directors, revised its antitrust policy, and has antitrust counsel attend events. *Id*. NAMM also represented to the FTC that it distributed copies of its antitrust policy to its members and provided approximately 1,000 attendees with an overview of the antitrust laws and guidance on how to comply with those laws. *Id*.

2. Centralization of the Case in the Northern District of California

Between September and December 2009, after the FTC announced that it had closed its investigation, numerous plaintiffs filed complaints alleging that defendants had agreed to fix the retail prices of musical instruments and engaged in related wrongdoing. On December 9, 2009, the Judicial Panel on Multidistrict Litigation centralized twenty-eight cases in the Southern District of California before the Honorable Larry A. Burns. ER 336-38. The District Court entertained motions for appointment of lead-liaison counsel and appointed Girard Gibbs LLP to serve in that role.

3. Status Conferences and Discovery Stay

The District Court held an initial status conference on May 28, 2010 and directed plaintiffs to file a consolidated complaint by July 16, 2010. ER 311, 314. The defendants asked the Court to stay discovery until the Court ruled on the defendants' motion to dismiss, arguing that the Court should heed the Supreme Court's concerns about the expense and burden of antitrust discovery in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). ER 311-312. The Court imposed a temporary stay and ordered the parties to brief whether the stay should continue. ER 313-314.

The Court held a hearing on defendants' motion to stay on September 15, 2010. Plaintiffs proposed that instead of a complete stay of discovery, the defendants produce a copy of the documents they had previously produced to the FTC, as well as organizational charts and transactional data that had been created since their production to the FTC. ER 266-69. The burden on defendants to produce these documents would be minimal—most of the defendants acknowledged that their productions to the FTC had been on CDs—and they would give plaintiffs the opportunity to review the evidence developed in the course of the FTC investigation, which defendants claimed had exonerated them. ER 272-74, 276-78.

The defendants argued that the discovery stay should remain in place and that plaintiffs should be required to serve formal discovery requests. ER 269-71. The Court recognized that "probably the things produced to the FTC would have relevance in here if the case goes forward." ER 285. But the Court decided to maintain the stay on discovery, saying that any discovery, even production of the documents already assembled by defendants in response to FTC subpoenas, "ought to wait in light of *Twombly*." ER 271.[2]

4. The First Motion to Dismiss

Plaintiffs filed their consolidated class action complaint on July 16, 2010, alleging that defendants violated section 1 of the Sherman Act and the antitrust, trade regulation, and consumer protection laws of Massachusetts and California by fixing prices of fretted instruments and guitar amplifiers. Plaintiffs' allegations included information derived from the FTC's complaint and consent decree and from their own investigation. The manufacturer defendants filed an omnibus motion to dismiss, arguing that plaintiffs' allegations were insufficiently detailed to satisfy the requirements of specificity and plausibility the Supreme Court outlined

[2] At the time, the Court expected that it would be able to rule quickly on the motion to dismiss, and the stay would be short-lived. ER 286. Then the Court was assigned the criminal case of Jared Lee Loughner, who eventually pled guilty to the murder of several people, including Chief U.S. District Court Judge John Roll, and the attempted murder of Representative Gabrielle Giffords. The Court did not rule on the first motion to dismiss until August 22, 2011. ER 24-36.

in *Twombly*. NAMM joined in the omnibus motion, and also moved to strike allegations related to the FTC's investigation, complaint and consent decree.

The District Court issued an order on August 22, 2011, denying NAMM's motion to strike but granting in part defendants' omnibus motion. The Court concluded that "[w]hile the consolidated complaint's claims are not, taken as a whole, implausible, they are implausible in some respects and lack sufficient detail to meet the standards announced in [*Twombly*] and explained further in *Kendall*."[3] ER 29. The Court acknowledged that plaintiffs' complaint was "specific as to the meetings where the alleged conspiracies took place"—NAMM's semi-annual trade shows—and "the effects of the agreements, which included raising prices and restraining competition." ER 27-28. But the Court held that plaintiffs needed to provide additional detail about "who is alleged to have conspired with whom, what exactly they agreed to, and how the alleged conspiracy was organized and carried out." ER 27, 31. The Court also directed plaintiffs to narrow the market and products involved, clarify NAMM's role in the conspiracy, and "plead enough of the MAPs' terms to show how they restrained competition." ER 31-33, 35.

Because the Court agreed with defendants that "remarks at open panel discussions attended by many people at trade shows cannot reasonably constitute the terms of an illegal agreement in these circumstances," the Court authorized

[3] *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008).

plaintiffs to conduct limited discovery into private meetings at which the defendants discussed their agreement to fix prices. ER 35-36. To aid plaintiffs in pleading specifics about the "who, what and how" the Court believed *Kendall* requires, the Court authorized plaintiffs to conduct discovery "limited to who attended or participated in meetings alleged in the amended consolidated complaint and what was said or agreed to there." ER 36. The Court assigned Magistrate Judge Louisa Porter to oversee the discovery, and added,

> The meetings at issue, by nature, would all be private meetings at trade shows, not speeches or other open events, but they need not have been formal, structured, or scheduled. If additional meetings are uncovered during the limited discovery phase, Judge Porter may in her discretion extend discovery to those meetings as well.

Id. The District Court accordingly limited discovery to "private meetings," even though the FTC, and plaintiffs in turn, alleged that the anticompetitive agreements were the result of communications openly orchestrated by NAMM at industry conferences.

5. The Limited Discovery Allowed by the Court

Following the Court's order, plaintiffs served interrogatories and requests for documents relating to private meetings held at NAMM trade shows and documents reflecting the terms and effective dates of each defendant's MAPs. Plaintiffs requested the MAP documents because the District Court held that plaintiffs "must plead enough of the MAPs' terms to show how they restrained competition," and

because the timing of their implementation and similarity in their terms provided circumstantial evidence of meetings between the defendants and the substance of those meetings. ER 12, 21.

Defendants collectively produced around 2,500 pages of documents, many of which were duplicates. The production included corporate event schedules, some pricing announcements, personal schedules and scheduling emails reflecting meetings between the manufacturer defendants and vendors, general recaps of meetings, primarily from Guitar Center's meetings with manufacturers, and some NAMM working papers that were distributed at its global summits.

Defendants refused to produce their MAPs. Judge Porter ruled that defendants did not have to produce them because "[t]he Order did not contemplate the open-ended production of MAP policies." ER 22. She interpreted the District Court's order as limiting discovery to "what was said or agreed to" at private meetings, which did not extend to the MAP policies themselves. ER 21-22.

Plaintiffs deposed ten of the 56 individuals defendants identified as having attended or participated in NAMM-sponsored trade shows. At the first of these depositions, Yamaha's counsel instructed the deponent not to answer questions about comments he had made about MAPs at a NAMM trade show. ER 11-12, 167-77. Yamaha also refused to allow the witness to testify about the terms of his company's MAPs. *Id.*

When plaintiffs brought the issue to Judge Porter, she ruled in defendants' favor. She said that the District Court had only authorized discovery regarding "private meetings," not NAMM-sponsored events or panel discussions, so plaintiffs could not question the witnesses about any statements made at public events. She also reaffirmed her order that plaintiffs were not entitled to discovery of the terms of the MAPs. Judge Porter characterized the purpose of the limited discovery as providing plaintiffs with an opportunity to "allege the necessary detail concerning meetings at which the alleged conspiracy was consummated." ER 14-15.

Plaintiffs objected to these rulings, arguing that Judge Porter had construed the Court's order too narrowly. ER 10-13. The District Court overruled plaintiffs' objections, however, affirming Judge Porter's view that plaintiffs were only allowed discovery about conspiratorial discussions defendants had at private meetings. *Id.* The Court said that while neither its order nor Judge Porter's orders precluded plaintiffs from asking deponents about MAPs, the "touchstone of discovery … was whether the MAPPs agreements were the subject of discussion or agreement at one of the private meetings." ER 11. Plaintiffs, the Court said, "were attempting to ask about MAPPs either apart from any meetings, or in the context of open meetings such as the National Association of Music Merchants trade shows." ER 11-12.

The Court also addressed plaintiffs' argument that they should be allowed to inquire about the terms of the MAPs to satisfy the Court's requirement that plaintiffs plead enough of the terms of the MAPs to show how they restrained competition:

> Plaintiffs also point to the August 22 order's point that "Plaintiffs must plead enough of the MAPs' terms to show how they restrained competition." That analysis, however, is limited to relevant MAPPs agreements. It is not enough that Plaintiffs plead MAPP agreements' terms in general; they must plead facts showing that MAPP agreements that were part of a price-fixing conspiracy restrained trade. What is missing from the argument here is any connection between MAPPs agreements and a conspiracy. If the MAPP agreements were not connected to or part of any conspiracy, they are properly excluded from the limited discovery at this stage.

ER 12.

In restricting discovery to documents and testimony about conspiratorial discussions at private meetings during NAMM events, the Court adopted defendants' argument that activities carried out at NAMM meetings could not give rise to a section 1 violation. The Court believed that section 1 required a closed-door, secretive conspiracy, in the cloak-and-dagger sense. The discovery allowed by the Court called for a Perry Mason moment.[4] The Court did not allow

[4] *See* http://en.wikipedia.org/wiki/Perry_Mason_moment ("In court proceedings in the United States, a Perry Mason moment is said to have occurred whenever information is unexpectedly (to most present), and often dramatically, introduced into the record that changes the perception of the proceedings greatly and often influences the outcome. Often it takes the form of a witness's answer to a question,

plaintiffs to take discovery into the terms of the MAPs themselves or the open-session NAMM meetings through which the MAPs were facilitated.

The most obvious circumstantial evidence in this case is the terms of defendants' MAPs and the timing of revisions. In the FTC's proceeding against the five largest distributors of music CDs and cassette tapes, for example, the evidence centered on the history, timing and similarity of provisions and restrictions in the distributors' MAPs. *See* Analysis to Aid Public Comment on Proposed Consent Order, *In re BMG Music, et al.*, 65 Fed. Reg. 31319, 31319-21 (FTC File No. 971-0080) (May 17, 2000).[5]

Plaintiffs sought to obtain the same type of documentary evidence collected by the FTC from NAMM and the other defendants, including documents identifying customers who violated the MAPs, communications between any of the defendants about MAPs, pricing, discounts or rebates, sales volumes, or production costs, documents relating to formal and informal NAMM meetings, documents relating to the impact of internet and big box retailers on sales volume and pricing, and transactional data, including annual and quarterly sales of each guitar,

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but it can sometimes come in the form of new evidence. It takes its name from *Perry Mason*, the popular mid-20th century television series where such dramatic reversals, often in the form of witnesses confessing to crimes others were accused of in response to the sudden exposure of an inconsistency in their alibi.").

[5] The private civil antitrust class action case that followed was settled for cash payments of $67.375 million and $75.7 million worth of CDs. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 208 (D. Me. June 13, 2003).

suggested retail or list prices, wholesale prices, and advertising and marketing expenditures.

6. The Second Motion to Dismiss

Plaintiffs filed their second amended consolidated complaint on February 22, 2012. ER 37-38. Unsurprisingly, the defendants had not produced any documents evidencing conspiratorial discussions at private meetings and none of the deponents confessed to conspiring to participate in a conspiracy to violate the antitrust laws at a private meeting. Plaintiffs were therefore not able to plead the type of "smoking gun" evidence the District Court expected. Plaintiffs did, however, plead substantial circumstantial evidence that the defendants colluded to restrain competition and fix retail prices for guitars and guitar amplifiers. *Id*. Plaintiffs also narrowed the products involved to guitars and guitar amplifiers—specifically, new, high-end acoustic, electric and bass guitars and guitar amplifiers, but not products recognized as toys, generics, knock-offs or unbranded products. ER 51-52. Defendants moved to dismiss, asserting largely the same arguments as in their prior motion.

C. The Disposition Below

On August 17, 2012, the District Court granted the defendants' motion to dismiss plaintiffs' Sherman Act claim. The Court rejected plaintiffs' circumstantial evidence that defendants conspired to set prices for guitars and

guitar amplifiers as insufficient to show that defendants' conduct was the product of an agreement. While acknowledging that plaintiffs are "not required to allege direct evidence of conspiratorial meetings," the Court said that "here, where discovery concerning possible agreements has already taken place, the complaint should contain factual allegations of those agreements. Unless the factual allegations are adequate now, there is no reasonable expectation they will ever be adequate to support a claim." ER 3-4.

The Court dismissed plaintiffs' Sherman Act claim with prejudice, and directed the clerk "to enter judgment as to this one claim only so that Plaintiffs, if they wish, may take an immediate appeal." ER 9.

V. STATEMENT OF FACTS

A. The Defendants

Retail sales of guitars and guitar amplifiers exceeded $1.667 billion in the U.S. in 2007. ER 38. Guitar Center, the dominant retailer of guitars and guitar amplifiers, accounted for over 30% of these sales. *Id*. In 2008, Guitar Center had 315 retail stores—eight times the number of stores of its closest competitor, Sam Ash. ER 45-55. Guitar Center consistently ranks as the nation's retail sales leader in *The Music Trades* annual report of the Retail Top 200. ER 55.

Guitar Center is also the primary channel of retail sales for the five manufacturer defendants—Fender, Gibson, Yamaha, Hoshino and KMC. ER 54-

55. These manufacturers ranked among the largest manufacturers and distributors of guitars and guitar amplifiers between 2004 and 2008. ER 57-58.

NAMM is the chief trade association for the music products industry. ER 71. Guitar Center and the manufacturer defendants were among the most influential members of NAMM because of their dominant market power. Their high-level employees and officers served as board members and they provided significant financial support to the organization. ER 77-79.

B. Guitar Center Coerces Manufacturers into Implementing MAPs

Starting in the late 1990s and early 2000s, internet-based retailers and "big box" mass merchant retailers like WalMart and Costco began selling musical instruments and related products. ER 39, 59-60. Because of their wholesale purchasing power, economy of scale, and relatively low overhead, these new competitors were able to sell guitars and guitar amplifiers at lower prices than traditional brick-and-mortar retailers that exclusively sold music products, like Guitar Center. *Id*. Retail prices for guitars and guitar amplifiers declined as a result. Between 1997 and 2004, guitar prices dropped from an average of $652 to $310, and amplifier prices dropped from $630 to $291. ER 77-79.

In response to competitive threat from internet and big box retailers, Guitar Center used its dominant market power to coerce manufacturers into adopting "minimum advertised price policies" or "MAPs" that set the minimum price at

which retailers could advertise guitars and guitar amplifiers in all forms of communications, including print and media advertisements, in-store signage or price tags, in response to "call for price quotes," and over the internet. In exchange, Guitar Center agreed to purchase large volumes of the manufacturers' product stock, and threatened to stop carrying the manufacturers' products if they did not agree to enforce their MAPs. ER 56-57, 61-65. Guitar Center corporate personnel have acknowledged to store managers that Guitar Center dictated the MAPs for guitars and guitar amplifiers to manufacturers, including Gibson. ER 53, 56-57.

Guitar Center also negotiated specific MAP pricing arrangements with manufacturers, forcing other retail distributors to implement and enforce the same MAP agreements. The MAP agreements provided a unique benefit to Guitar Center because, due to its market share and volume purchasing power, Guitar Center received volume wholesale price advantages from the manufacturing defendants that were not available to other, smaller retailers. Thus, Guitar Center enjoyed better profit margins under the MAP agreements than other retailers. Guitar manufacturers had little choice but to accommodate Guitar Center's demands because they need access to Guitar Center's extensive retail customer base. ER 55-56.

C. The Manufacturer Defendants Agree to Implement MAPs

Some music product manufacturers had MAPs in place in the late 1990s and early 2000s, but the MAPs varied in the types of products they included and the forms of advertising they restricted. They were also inconsistently enforced. ER 59.

The manufacturer defendants historically did not require MAPs for their guitars and guitar amplifiers. But they changed their practices abruptly when Guitar Center insisted that they adopt and enforce comprehensive MAPs. Starting in 2004, they collectively changed their business practices and began to implement comprehensive MAPs. The MAPs covered all or virtually all of the guitars and guitar amplifiers in their production lines. They prevented discounting by setting the minimum price that retailers could communicate to the public, and included strict enforcement provisions, such as loss of dealer authorization, to ensure compliance. ER 58, 61-62, 76-77. By establishing the minimum price that could be communicated to customers, the MAP price for the defendants' guitar and guitar amplifiers became the "street" or actual price for these products in every retail venue. *Id*.

For example, between 2004 and 2007, Fender modified its MAP policy to: (a) expand MAP pricing to include guitars and guitar amplifiers; (b) adjust MSRPs and discounts in order to increase MAP prices; (c) extend the types of

communications covered by the MAP; and (d) condition dealer authorization and cooperative advertising funds upon strict compliance with the MAP policy and its provisions. ER 61-62. During the same time period, the other manufacturer defendants announced in retailer communications and trade press and at NAMM events that they too had revised or expanded their MAPs in similar ways. ER 62, 68. *Music Trades* reported of the 2004 NAMM summer show that "A number of exhibitors also announced higher MAP prices in a bid to shore up dealer margins." ER 68.

D. NAMM Arranges and Encourages Defendants' Exchange of Information and Collusive Fixing of Minimum Retail Prices

Between 2005 and 2007, NAMM organized various meetings and programs for its members at which competitors discussed strategies for raising retail prices. ER 65-72. At these meetings, NAMM's members exchanged information about prices, margins, MAPs, and enforcing MAPs. *Id*. NAMM actively promoted the use of the MAPs as a means of reducing retail price competition, protecting wholesale pricing margins for NAMM's manufacturer members, and increasing retail prices for NAMM's retail members. ER 41, 65-66, 71-72. NAMM president Joe Lamond even distributed a series of talking points on MAPs to NAMM board members, which included representatives of the manufacturer defendants, to ensure they were all "on the same page" when discussing MAPs with manufacturers and retailers at the shows. ER 67.

Guitar Center and the manufacturer defendants consistently attended and participated in NAMM events, including representatives of the manufacturer defendants who had responsibility for adopting MAP policies and setting prices for guitars and guitar amplifiers. ER 66. Many of these individuals participated in NAMM trade shows for years and worked for multiple defendants. For example, Jay Wanamaker was a vice president of Yamaha until 2000 when he became a vice president of Guitar Center. Michael Doyle worked for Fender before becoming the director of purchasing for guitars and amplifiers at Guitar Center, and Keith Brawley was employed by Fender before becoming a vice president at Guitar Center. *Id*. NAMM's two annual trade shows are not open to the general public and, in fact, are touted by NAMM as indispensable "trade only" events where company presidents and key corporate decision makers meet with their competitors and counterparts to discuss issues of concern to the industry. ER 66. Only individuals with a pre-printed NAMM event badge, which are not available or distributed to the general public, could attend the NAMM trade shows. *Id*.

NAMM prominently featured MAPs at its semi-annual shows. At the 2005 summer show, for example, NAMM hosted a discussion entitled "Does the Industry Need a MAP makeover?" *The Music Trades* reported that an association of thirteen greater Los Angeles musical instrument retailers called Music for

Everyone presented a "voluntary MAP formula/guideline" which was urged and "recommended for general use" by music product retailers. ER 68.

NAMM hosted another panel discussion on MAPs at the 2006 winter show. The panel included several industry leaders, including Tom Sumner, vice president and general manager of Yamaha's pro-audio and combo division, and Robert Lee, KMC sales manager. Sumner discussed Yamaha's efforts to enforce its MAPs against recalcitrant retailers who used creative means to try to get around Yamaha's MAP pricing and strict advertising prohibitions. ER 68-69. During the panel, Sumner and Lee said that absent MAPs "prices would rapidly migrate down to 10% over cost," and that current MAP pricing guidelines should be revised "upwards to give retailers a better profit margin." They also said that MAPs are "only as effective as [their] enforcement." *Id.*

NAMM hosted another session at the winter show that featured Music for Everyone's presentation of two MAP pricing formula schedules "designed for all instruments and all combo and audio products." ER 69. The formulas outlined minimum profits based on retail costs:

> Proposed MAP Formula
> Recommended Minimum Profit Formulas for A & B Discounts
>
> Retail [$1-$149] x.05 x.2.00 = MAP (0% off retail)*
> Retail [$150-$249] x 0.5 x. 1.90 = MAP (5% off retail)*
> Retail [$240-$299] x 0.5 x 1.85 = MAP (7.5% off retail)*
> Retail [$300-$349] x 0.5 x 1.80 = MAP (10% off retail)**
> Retail [$350-$399] x 0.5 x. 1.75 = MAP (12.5% off retail)**

Retail [$400-$449] x. 0.5 x. 1.70 = MAP (15% off retail)*
Retail [$450-$499] x 0.5 x 1.65 = MAP (17.5% off retail)*
Retail [$500 and up] x 0.5 x. 1.60 = MAP (20% off retail)*
Retail [$500-$599] x 0.5 x. 1.55 = MAP (22.5% off retail)**

* Formula A
** Formula B

Id. NAMM and Music for Everyone encouraged manufacturers to adopt market-wide MAP policies that capped permitted discounts at 20% as in Formula A, and urged that no MAP price should be lower than the prices in the Formula B schedule—which "are the minimum the brick-and-mortar full service music instrument retailers require to survive, and hopefully thrive." *Id*.

At its 2006 summer show, NAMM sponsored a roundtable discussion on MAPs, profitability and competition. The discussion featured NAMM president Joe Lamond, Yamaha's Tom Sumner, and Fender Chairman and CEO Bill Mendelo, among others. ER 69-70. In its preview materials, NAMM described this discussion as a "two-hour session [in which] suppliers and retailers of all sizes will be able to share views about critical issues affecting profitability, including MAP pricing … and the entrance of mass consumer merchandisers into the industry." *Id.* The panel discussed MAP prices that were set too low and methods manufacturers and retailers could use to protect industry profit margins. *Id*.

NAMM continued to promote the use of MAPs and MAP pricing at the 2007 winter show. At least one NAMM roundtable discussion focused on profit margins and MAP pricing. ER 70.

NAMM board members, following the pro-MAP "talking points" prepared by president Joe Lamond, reiterated NAMM's support of MAPs in industry discussions held outside of NAMM. As part of a roundtable discussion of dealers conducted by *Music Trades* in February 2007, George Hines, a member of NAMM's board from 2003 to 2005, said that the industry's "great challenge" was to get "all distribution channels [independents, national chains, mass merchants and internet providers] working together for the health of the industry." ER 70. Hines said that MAPs could keep the industry profitable as long as retailers and suppliers understood each other's needs in setting the best MAP pricing. He added that allowing market forces to control the industry would "not necessarily be for the better" and that what was needed was a "joint effort" to keep independents as the "heart and soul" of the industry with "manufacturer support." *Id*.

NAMM also sponsored a series of non-public and "invitation only" summits to facilitate discussions about MAPs. ER 71. At these summits, representatives of Guitar Center, the manufacturer defendants, and other NAMM members exchanged cost and pricing information, and discussed strategies for implementing, revising and enforcing MAPs. *Id*. NAMM's Fifth Global Economic Summit in

2004 was an invitation-only meeting that brought key industry leaders, media, and advisors together "to explore emerging markets, reinforce global relationships and share different visions on the path to long-term, sustainable industry growth." Fender, Yamaha and KMC provided financial support for the Summit. *Id*.

NAMM held its Sixth Global Summit in 2007 in Carlsbad, California. *The Music and Sound Retailer* reported that the attendees "primarily consisted of supplier decision makers as well as retailers." ER 71. Fender, Yamaha and KMC again provided financial support for the Summit. Guitar Center's CEO, Marty Albertson, addressed the assembly at the Summit. *Id*.

E. Defendants' Anti-Competitive Conduct Resulted in Increased Retail Prices That Fell Again When the FTC Announced Its Investigation

After falling for several years, the average unit prices of guitars and guitar amplifiers started to rise in 2005. As the chart below shows, the demand for guitars increased steadily from 1997 to 2004, but the increase in demand did not translate to higher prices. Instead, the estimated average retail sales price of guitars decreased, falling steadily from 1997 to 2001 and then plummeting from $529 in 2001 to $310 in 2004. After the manufacturer defendants implemented their MAPs, retail prices began to rise, even though demand did not increase. ER 77-79.

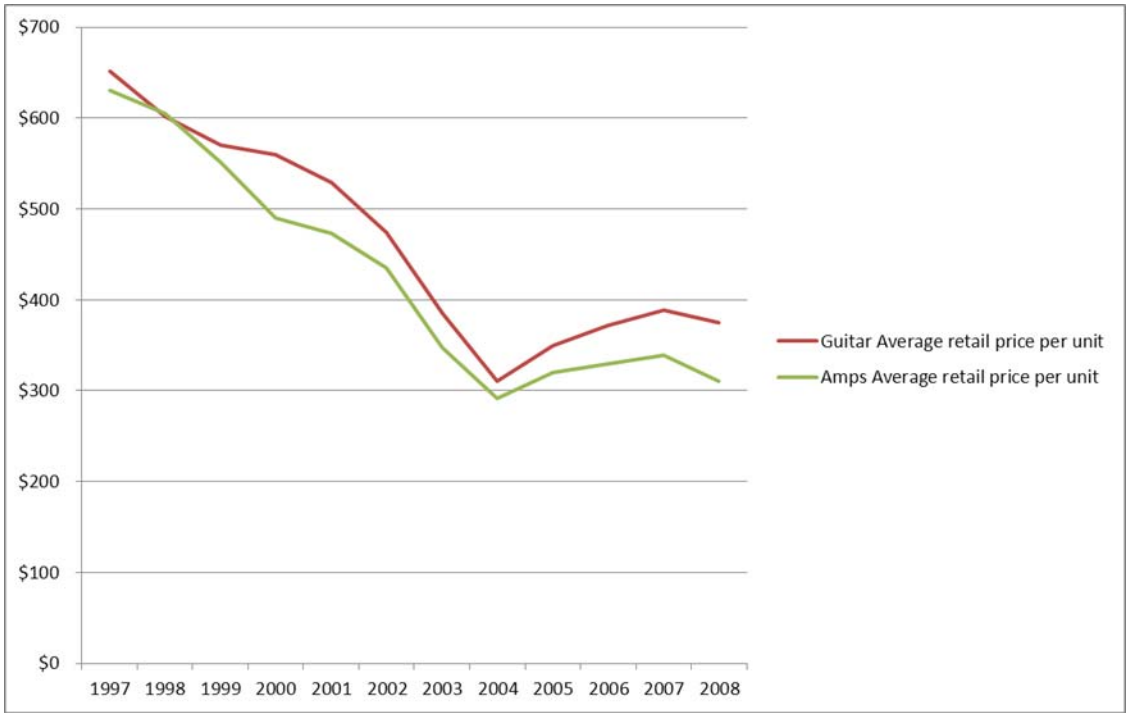
Year	Electric and acoustic guitars sold	% change year over year	Average retail price per unit	% change year over year
1997	1,090,329	-0.33%	$652	0.93%
1998	1,153,915	5.83%	$602	-7.67%
1999	1,337,347	15.90%	$570	-5.32%
2000	1,648,595	23.30%	$560	-1.75%
2001	1,742,498	5.70%	$529	-5.52%
2002	1,942,625	11.49%	$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%

Guitar amplifiers followed a similar pattern. From 1997 to 2003 the number of units sold increased gradually, peaked in 2004, and began to fall. Retail prices steadily decreased until 2004 and then began to rise. Prices dropped again when the FTC announced its investigation. ER 78-79.

Year	Guitar amplifiers sold	% change year over year	Average retail price per unit	% change year over year
1997	574,250	0.34%	$630	-4.00%
1998	562,760	-2.00%	$605	-8.93%
1999	635,900	13.00%	$551	-11.07%
2000	749,500	17.86%	$490	-3.47%
2001	764,496	2.00%	$473	3.56%

2002	825,120	7.93%	$435	-7.93%
2003	974,000	18.04%	$348	-20.02%
2004	1,279,300	31.34%	$291	-16.38%
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%

This graph shows the fluctuations in the retail price for guitars and guitar amplifiers:



In short, the price of guitars and guitar amplifiers dropped steadily and in tandem, then began to climb when the alleged unlawful conduct occurred, only to drop again when the FTC initiated its investigation.

VI. SUMMARY OF PLAINTIFFS' ARGUMENT

The District Court dismissed plaintiffs' Sherman Act claim because plaintiffs could not, after a period of highly circumscribed discovery, plead direct evidence that defendants held private meetings at which they agreed to fix retail prices of guitars and guitar amplifiers. ER 2-9. But "it is not necessary for a plaintiff to show an explicit agreement among defendants in support of a Sherman Act conspiracy." *Movie 1 & 2 v. United Artists Communications, Inc.*, 909 F.2d 1245, 1251-52 (9th Cir. 1990). And unlawful antitrust agreements can be struck in any type of forum. *See, e.g.*, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432, 446-47 (9th Cir. 1990). The type of allegations the District Court required—details about private meetings and what was discussed—are rarely available to plaintiffs at the pleading stage, or even later in the case after full discovery. *See, e.g.*, *Oltz v. St. Peter's Comm. Hosp.*, 861 F.2d 1440, 1450-51 (9th Cir. 1988); *see also Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012) ("conspiracies are rarely evidenced by explicit agreements").

Plaintiffs may successfully state a claim for a Sherman Act violation by pleading circumstantial evidence that plausibly suggests an agreement to fix prices. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The *Twombly* standard is satisfied if the complaint places allegations of parallel conduct in "a

context that raises a suggestion of a preceding agreement." *Id.* at 557. Considering the allegations as a whole,[6] and accepting all well-pleaded factual allegations as true,[7] the complaint need only "raise a right to relief above the speculative level." *Id.* at 555.

Plaintiffs' complaint satisfies this standard. In addition to parallel conduct, plaintiffs allege additional circumstances that other courts have found to satisfy *Twombly*'s "something more" standard. Plaintiffs allege that the manufacturer defendants' collective adoption of comprehensive MAPs for their guitars and guitar amplifiers was an abrupt change in industry practices, and that the MAPs all contained substantially similar terms. Acting alone, none of the defendants could have increased retail prices. It took the collective action of five of the leading manufacturers to increase the minimum retail price, or "street price" of guitars and guitar amplifiers. Plaintiffs allege that the defendants were all strongly motivated to fix prices because of the increasing threat from internet and big box retailers, whose low overhead and wholesale purchasing power allowed them to sell products at lower prices.

Plaintiffs also allege that NAMM played a significant role in the conspiracy, adopting the promotion of MAPs as part of its mission and arranging meetings at

[6] *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

[7] *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

which top executives from the manufacturer defendants shared cost and pricing information and led panel discussions about the importance of implementing MAPs. Plaintiffs' allegations are further bolstered by the FTC's investigation into price fixing in the musical instruments market, and the details of the settlement with NAMM of charges that NAMM encouraged its members to exchange competitively sensitive information that facilitated price collusion among competitors.

And finally, plaintiffs allege that retail prices of guitars and guitar amplifiers—which had been steadily decreasing over the previous seven years due to declining demand—increased when the manufacturer defendants implemented their MAPs, only to decrease again after the FTC announced the resolution of its charges against NAMM.

These detailed allegations are entitled to a presumption of truth. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Each on its own provides a context for defendants' parallel conduct that raises "a suggestion of a preceding agreement." *Twombly*, 550 U.S. at 557. Together, they "nudge" plaintiffs' claims "across the line from conceivable to plausible." *Id.* at 557, 570. Because plaintiffs' allegations satisfy *Twombly*'s pleading requirements, the District Court's dismissal of the Sherman Act claim should be reversed and the case remanded for further proceedings.

VII. ARGUMENT

A. Standard of Review

In reviewing a decision dismissing a claim as a matter of law pursuant to Rule 12(b)(6), this Court reviews each conclusion of the District Court *de novo*. *See Rowe v. Educational Credit Management Corp.*, 559 F.3d 1028, 1029 (9th Cir. 2009). The Court must accept all facts as true and draw all reasonable inferences in plaintiffs' favor. *See ASW v. Oregon*, 424 F.3d 970, 974 (9th Cir. 2005).

B. Standard for Pleading a Violation of Section 1 of the Sherman Act

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court addressed the pleading standard for a claim under section 1 of the Sherman Act, which precludes "restraints [of trade] effected by a contract, combination, or conspiracy." 550 U.S. 544, 553 (2007) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984)). The Court held that the complaint must provide more than allegations of parallel conduct standing alone or a formulaic recitation of the cause of action. *Id.* at 555, 557. Instead, the complaint must include factual allegations that provide a plausible basis for inferring an agreement that restrains competition. *Id.* at 556, 570. Plaintiffs do not have to plead direct evidence of defendants' agreement or facts that can only be interpreted as evidence of an agreement to satisfy this standard. Plaintiffs only have to plead circumstantial evidence that suggests an agreement to restrain trade. *See id*.

1. Plaintiffs Satisfy Their Burden by Pleading Circumstantial Evidence of a Section 1 Violation

In *Twombly*, the Supreme Court reaffirmed the basic principle that under Federal Rule of Civil Procedure 8(a)(2), "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (second alteration in original) (quoting *Twombly*, 550 U.S. at 555). The Court emphasized that successfully pleading an antitrust claim does "not require heightened factual pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A complaint asserts a plausible claim for relief when it places allegations of parallel conduct in "a context that raises a suggestion of a preceding agreement." *Id.* at 557.

To satisfy this standard, plaintiffs only have to plead sufficient facts to "raise a right to relief above the speculative level." *Id*. at 555; *see also Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) ("the court will ask itself *could* these things have happened, not *did* they happen"). In other words, in addition to parallel conduct, plaintiffs must plead enough "factual enhancement" to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 557, 570. "To conduct this analysis, a court should first identify factual allegations that are entitled to a presumption of truth—that is, those allegations that are more than just legal conclusions." *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 444

(6th Cir. 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Then, the court must "consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." *Iqbal*, 556 U.S. at 681.

In deciding whether a complaint states a plausible claim, a court must look to the complaint as a whole and not independently scrutinize its component parts. *See West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 98 (3d Cir. 2010); *see also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." (alteration in original, citation omitted)); *In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008) ("While viewing each of these factual allegations in isolation may lead one to the conclusion drawn by the defendants, *i.e.*, that there is a legitimate business justification for each of the acts, a view of the complaint as a whole, which this Court must take, and accepting all of the factual allegations as true, does support a plausible inference of a conspiracy or agreement made illegal under § 1 of the Sherman Act."). Context is particularly important in antitrust litigation where "motive and intent play leading roles," and "the proof is largely in the hands of the alleged conspirators." *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962); *see also In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1183 (N.D. Cal. 2009).

The allegations must also be construed in the light most favorable to the plaintiffs. *See Erickson*, 551 U.S. at 94 ("[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint"). This is true regardless of whether the court believes the plaintiff will ultimately be able to substantiate his allegations or prevail on the merits of the case. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

2. Plaintiffs Do Not Have to Plead Direct Evidence of Defendants' Agreement

The District Court dismissed plaintiffs' Sherman Act claim because plaintiffs did not, after a period of discovery limited to "private meetings," allege through direct evidence the defendants' agreement to fix retail prices. ER 2-9. In the District Court's view, plaintiffs had the opportunity to request documents and question deponents about private meetings at which the defendants agreed to fix the prices and failed to come up with a smoking gun or a confession. ER 4. But conspiracies, by their very nature, are "rarely susceptible of direct proof." *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 671 (9th Cir. 1980); *see also Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012) ("conspiracies are rarely evidenced by explicit agreements"); *Movie 1 & 2 v.*

United Artists Communications, Inc., 909 F.2d 1245, 1251-52 (9th Cir. 1990) ("[I]t is not necessary for a plaintiff to show an explicit agreement among defendants in support of a Sherman Act conspiracy…."); *Oltz v. St. Peter's Comm. Hosp.*, 861 F.2d 1440, 1450-51 (9th Cir. 1988) (observing that direct evidence of conspiracy in antitrust cases is "rare"); *In re Graphics Processing Antitrust Litig*., 540 F. Supp. 2d 1085, 1096 (N.D. Cal. 2007) ("[D]irect allegations of conspiracy are not always possible given the secret nature of conspiracies. Nor are direct allegations necessary.").

While a conspiracy can be shown by direct evidence—such as emails among the co-conspirators evincing their agreement, or the testimony of a whistleblower—that type of evidence is hard to come by. Courts recognize that "[c]onspiracies are often tacit or unwritten in an effort to escape detection, thus necessitating resort to circumstantial evidence to suggest that an agreement took place." *Robertson v. Sea Pines Real Estate Co., Inc.*, 679 F.3d 278, 289-90 (4th Cir. 2012); *see also In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) ("Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy."); *In re Graphics Processing Antitrust Litig*., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (plaintiffs need not plead "specific back-room meetings between specific actors at which specific decisions were made"). Even at later stages of the litigation, when

plaintiffs must prove their case after full discovery, plaintiffs can rely on "direct **or circumstantial** evidence that reasonably tends to prove that the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 767 (1984) (emphasis added); *see also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) ("[M]ost cases are constructed out of tissue of [ambiguous] statements and other circumstantial evidence, since an outright confession [of conspiracy] will ordinarily obviate the need for a trial.").

3. The Agreement Does Not Have to Be Struck In a Private Meeting

The District Court disregarded all of plaintiffs' allegations about the defendants' attendance at NAMM events and the statements made at those events. The Court acknowledged that the meetings were invitation-only, but characterized them as "large meetings attended by numerous other people, including press representatives" and held that "the presence of numerous uninvolved observers at such meetings tends to dispel any specter of illegality." ER 4. Setting aside the Court's acceptance of factual assertions made by defendants in their motions to dismiss, the Court's focus on private meetings does not take into account the variety of ways in which an agreement can be made, including through more informal channels like a series of private oral communications or even public statements. *See, e.g., In re Petroleum Products*, 906 F.2d 432, 446-47 (9th Cir.

1990) (denying summary judgment where the plaintiffs provided evidence that defendants made public announcements of price increases to quickly inform competitors, who they hoped would restore their prices in response).

In *In re TFT-LCD (Flat Panel) Antitrust Litigation*, the plaintiffs alleged that one defendant's CEO gave a keynote address at an event urging other manufacturers to limit production, and other defendants then stated that they were raising prices and restricting production. 586 F. Supp. 2d 1109, 1116 (N.D. Cal. 2008). The court noted that "[c]ourts have held that a conspiracy to fix prices can be inferred from an invitation, followed by responsive assurances and conduct." *Id.*[8] The District Court excluded the possibility that defendants could have formed an agreement in restraint of trade through communications at panel discussions and other activities carried out openly at NAMM conferences. The District Court premised its conclusion on an erroneous view of the law. *See, e.g.*, *U.S. v. Container Corp. of America*, 393 U.S. 333, 335 (1969) ("Here all that was present was a request by each defendant of its competitor for information as to the most recent price charged or quoted, whenever it needed such information and whenever

[8] *See also* Richard A. Posner, Antitrust Law 2-3 (The University of Chicago Press, 2d ed. 2001) ("Whether there is a conspiracy in the conventional sense of an agreement hashed out in secret hotel meetings or clandestine phone conversations or reflected in elaborate bid-rotation schemes is less important than whether the market price has been jacked above the competitive level by collusion …. There may be no overt communications, negotiations, or express agreements among colluding firms, though they may signal to each other in various indirect ways and thereby achieve a meeting of the minds.").

it was not available from another source. Each defendant on receiving that request usually furnished the data with the expectation that it would be furnished reciprocal information when it wanted it. That concerted action is of course sufficient to establish the combination or conspiracy, the initial ingredient of a violation of § 1 of the Sherman Act."); *Interstate Circuit v. U.S.*, 306 U.S. 208, 221-22 (1939) (sustaining an injunction where the evidence of conspiracy was a joint letter sent by a dominant movie theater to a group of distributors informing them that they each had to fix the minimum price of second run theaters at a certain level if they wanted to license first run films to it; even though the distributors did not explicitly agree to fix prices, the Court inferred their agreement from the "substantial unanimity" of the distributors' actions, among other things).

4. Plaintiffs' Allegations Do Not Have to Rule Out Other Contrary Theories

The District Court held that plaintiffs' allegations "must exclude mere parallel action without any agreement or conspiracy." ER 2. At summary judgment, "a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently." *Twombly*, 550 U.S. at 554. At the pleading stage, however, plaintiffs only have to allege facts from which the court can infer a plausible claim. *Id.* at 570. They do not have to convince the court that it is **probable** that the defendants agreed to fix prices. *Id.*

at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage …."); *Iqbal*, 556 U.S. at 678 (same).

Plaintiffs' allegations are sufficient even if they could support other contrary theories. *See Anderson News*, 680 F.3d at 184 ("Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible."). As the Second Circuit recently explained:

> The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion. … A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.

Id. at 185; *see also Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Often, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleading stage."); *Swanson*, 614 F.3d at 404 ("'Plausibility' in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not.").

C. Plaintiffs Allege Enough Factual Matter to Suggest Defendants Unlawfully Agreed to Fix Prices

Plaintiffs' allegations satisfy *Twombly*'s requirement that the factual allegations provide a plausible basis for inferring an agreement that restrains

competition. 550 U.S. at 556, 570. While the circumstantial evidence plaintiffs allege is not the direct, "smoking gun" evidence of private meetings that the District Court sought, it is the type of factual allegations that courts have found sufficient to state a claim for violation of section 1 of the Sherman Act. Plaintiffs' allegations place defendants' parallel conduct in "a context that raises a suggestion of a preceding agreement." *Twombly*, 550 U.S. at 557.

1. The Manufacturer Defendants Simultaneously Adopted and Enforced MAPs with Similar Terms

Plaintiffs allege that the manufacturer defendants distributed their guitars and guitar amplifiers for decades without using MAPs or otherwise restricting communications to consumers about retail prices for their products. ER 39, 61. Although some music product makers began using MAPs as a pricing tool in the late 1990s, the MAPs imposed only limited restrictions on the type of advertising, covered only some products, and were infrequently enforced. ER 59. Then, within a 3-year period coinciding with increased competition from internet and high volume retailers, the leading manufacturers all implemented comprehensive MAPs that covered all or virtually all of the guitars and guitar amplifiers in their production lines, set the minimum price that retailers could communicate to the public over the internet, in print or media advertising, in response to "call for price" promotions, and on in-store signage and pricing labels, and included strict

enforcement provisions, such as loss of dealer authorization, to ensure compliance. ER 58, 61-62, 76-77.

The abrupt change in defendants' practices is circumstantial evidence of defendants' agreement to fix the prices of guitars and guitar amplifiers. In *Twombly*, the Supreme Court noted that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason would support a plausible inference of conspiracy." 550 U.S. at 557 n.4 (internal quotation marks omitted); *see also Interstate Circuit*, 306 U.S. at 222 ("It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join …."); *In re Text Messaging*, 630 F.3d at 628 (finding that allegations of changes in pricing structures supported a plausible inference of conspiracy); *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 900 (N.D. Ill. 2009) (finding that parallel, novel conduct "suggests some sort of preceding agreement among the actors involved").

The defendants' use of MAPs with common terms is further evidence of their agreement to fix prices. Other courts and the FTC have found that allegations of competitors implementing these types of price restriction policies state a claim. *See NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 107

(1984) ("[A] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with … antitrust law."); *Babyage.com, Inc. v. Toys "R" Us, Inc.*, Nos. 05-6792 & 06-242, 2008 WL 2644207, at *3 (E.D. Pa. July 2, 2008) (finding that plaintiffs' allegations of concerted action among manufacturers and retailers of baby and juvenile products who entered into minimum retail price maintenance policies stated a plausible price-fixing conspiracy); *see also In the Matter of Sony Music Entertainment, Inc.*, No. C-3971, 2000 WL 1257796, at *1-2 (F.T.C., Aug. 30, 2000) (alleging that record distributors' implementation and enforcement of MAPs for music CDs "restrain[ed] trade unreasonably and hinder[ed] competition in the retail and wholesale markets for pre-recorded music").

2. NAMM Encouraged and Facilitated Defendants' Coordinated Action

Plaintiffs allege that NAMM, the industry trade association, encouraged defendants to coordinate their adoption and enforcement of MAPs. At NAMM events, top leaders of Guitar Center and the manufacturer defendants discussed the terms and enforcement of MAPs, wholesale and retail prices, and profit margins. ER 42, 47, 63, 66-70. NAMM participated in the illegal agreement by sponsoring discussions about the need for MAPs and the terms they should include. ER 65-72. NAMM's president distributed a series of "talking points" on MAPs to NAMM board members to "ensure" that they were "on the same page" when

discussing MAPs with manufacturers and retailers at NAMM's semi-annual trade show. ER 67. Promoting MAPs became part of NAMM's "mission," and NAMM events often featured speeches and panel discussions where representatives of the manufacturer defendants discussed their MAPs.[9] ER 67-72.

Courts infer agreements to restrain trade from allegations that defendants exchanged price information at trade association meetings. *See In re Text Messaging*, 630 F.3d at 628 ("Of note is the allegation in the complaint that the defendants belonged to a trade association and exchanged price information directly at association meetings"); *see also Haley Paint Co. v. E.I. Dupont De Nemours and Co.*, 804 F. Supp. 2d 419, 426 (D. Md. 2011) (holding that plaintiffs adequately stated claim in part based on allegations that defendants "belonged to, and attended, various titanium dioxide industry meetings and conferences at which they exchanged price information for titanium dioxide"); *In re Rail Freight Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 35 (D.D.C. 2008) (holding that although attending Association of American Railroads events may not on its own show an agreement to restrain trade, "such otherwise lawful behavior in conjunction with the other allegations of the complaint is probative of a conspiracy"); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419, at *5 (E.D. Pa. Aug. 3, 2007) (holding that the alleged confirmation of price-fixing

[9] NAMM board members participated in similar discussions at other trade events too. ER 70-71.

agreements at trade shows and industry events, in the context of other allegations, raised "a right to relief above the speculative level") (quoting *Twombly*, 550 U.S. at 555).

3. Plaintiffs' Allegations Concerning the FTC Investigation and Resulting Consent Decree With NAMM Raise a Plausible Inference of Agreement

The FTC's allegations were premised on an investigation involving the same key players, the same time period and the same subject matter, and are relevant, material evidentiary facts a court must consider when assessing the plausibility of a plaintiff's pleading. As one court explained, "government investigations … while not determinative standing alone as to the plausibility of Plaintiffs' claims of conspiracy, do bolster the plausibility analysis and heighten the Court's expectation that 'discovery will reveal evidence of illegal agreement.'" *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1009 (E.D. Mich. 2010) (quoting *Twombly*, 550 U.S. at 556); *see also Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 324-25 (2d Cir. 2010) (reversing the dismissal of the plaintiffs' complaint because investigations by the New York Attorney General and U.S. Department of Justice into the conduct alleged in the complaint were factors supporting the plausibility of the plaintiffs' Sherman Act claim); *Hyland v. Homeservices of America, Inc.*, No. 3:05-CV-612-R, 2007 WL 2407233, at *3

(W.D. Ky. Aug. 17, 2007) (finding that DOJ enforcement actions supported the plaintiffs' allegations that the defendants fixed prices in violation of section 1).

While "membership in an association does not render an association's members automatically liable for antitrust violations committed by the association,"[10] the manufacturer defendants were NAMM's most influential members and composed much of its board of directors. ER 67-68, 71. And the FTC's investigation focused on the collusive conduct of NAMM members at NAMM events, conduct that the FTC said NAMM encouraged. ER 72-76. The FTC subpoenaed records from the manufacturer defendants and Guitar Center in the course of its investigation, and alleged that "competitors discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail prices and margins; and other competitively-sensitive issues" at NAMM events. ER 72-73.

4. The Defendants Were Uniquely Motivated to Work Together to Increase Retail Prices

In *Poller v. Columbia Broadcasting Systems*, the Supreme Court held that "motive and intent play leading roles" in complex antitrust litigation. 368 U.S. at 473; *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986) (noting that the plaintiffs failed to show that the defendants had "any rational motive to conspire" in the context of summary judgment). Plaintiffs

[10] *Kendall*, 518 F.3d at 1048.

allege that all of the defendants were strongly motivated to conspire to stabilize the price of guitars and guitar amplifiers. Guitar Center's position as the dominant specialty music retailer was in jeopardy. It was facing increasing pressure from internet and big box retailers, whose competitive advantages (like wholesale purchasing power and low overhead) allowed them to sell their products at lower prices than traditional music retailers. ER 39, 41, 59-60, 71. The manufacturer defendants wanted to stabilize wholesale prices, strengthen profit margins, and increase retail prices to preserve their brand images. ER 64. NAMM wanted to remain relevant by protecting its biggest financial supporters against price competition from emerging internet-based and low-cost retailers and allow its members to maintain higher retail prices and profit margins. ER 65-68, 71-72.

Moreover, retail prices would not have increased if only one or two of the manufacturer defendants adopted MAPs. Because of the increased discounting and competition from internet retailers and big box stores, the manufacturer defendants would not have been able to sustain increases in retail prices for their guitars and guitar amplifiers market-wide unless they all implemented MAPs with similar terms at the same time. ER 40-41, 64. In *Interstate Circuit*, the Supreme Court sustained an injunction against movie distributors who agreed to set a minimum admission price that second-run theaters were required to charge to show the distributors' most popular movies in Texas. 306 U.S. at 217-18. The Court noted

that "[a]s is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors." *Id.* at 221. But it inferred an agreement to restrain competition from circumstantial evidence, including the fact that "[e]ach was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits." *Id.* at 222.[11]

5. Retail Prices for Guitars and Guitar Amplifiers Increased During a Period of Declining Demand and Dropped When the FTC Announced Its Investigation

Plaintiffs allege that, after years of sharp decline, the retail prices for guitars and guitar amplifiers increased when the manufacturer defendants implemented and enforced MAPs, despite reduced demand. ER 78-79. Retail prices for guitars and guitar amplifiers resumed their decline after the FTC announced its investigation. ER 78-80. Other courts have held that these types of allegations give rise to an inference of conspiratorial conduct. *See, e.g.*, *In re Flat Glass*

[11] *See also* William E. Kovacic, et al., *Plus Factors and Agreement in Antitrust Law*, 110 Mich. L. Rev. 393, 426 (2011) ("In general, if a subset of firms have sufficient market power in the aggregate and jointly engage in a dominant-firm conduct where no single firm has the market power to act unilaterally as a dominant firm, then there is a strong inference of a cartel ….").

Antitrust Litigation, 385 F.3d 350, 361-62 (3d Cir. 2004) (finding that increased prices at a time of declining demand supported an inference that the defendants conspired because "[n]ormally, reduced demand and excess supply are economic conditions that favor price cuts, rather than price increases"); *Haley Paint*, 804 F. Supp. 2d at 426 ("Of critical importance to the plausibility of [the] complaint is the fact that the various price increases implemented by Defendants occurred at a time when demand for titanium dioxide was dwindling, and manufacturing costs had decreased.").

6. Defendants Admitted Using and Enforcing MAPs to Increase Retail Prices

Plaintiffs alleged that two of the manufacturing defendants' top executives, Yamaha vice president Tom Sumner and KMC sales manager Robert Lee, admitted that defendants entered into MAPs because not doing so would have caused retail prices for guitars and guitar amplifiers to "rapidly migrate down to 10% over cost." ER 69. Yamaha's Sumner also said that MAPs were being strictly enforced against recalcitrant retailers who promoted or engaged in retail price discounting. ER 68.

D. Unlike *Twombly* and *Kendall*, Plaintiffs Do Not Rest on Allegations of Parallel Conduct and Conclusory Statements

The District Court's dismissal of plaintiffs' complaint was driven by an erroneous view of the type of allegations that *Twombly* and *Kendall* require to raise

a reasonable inference that defendants entered into an unlawful agreement to fix retail prices of guitars and guitar amplifiers. The Seventh Circuit recently upheld a complaint that included circumstantial allegations that were very similar to plaintiffs' allegations. In *In re Text Messaging Antitrust Litigation*, the plaintiffs alleged that cellular phone service providers conspired to impose artificially high prices for text messaging services. 630 F.3d at 624. The plaintiffs pled "a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion." *Id*. at 627. Their allegations included dominance of the text messaging market, involvement in a trade association whose leadership encouraged unity within the industry, anomalous pricing behavior, and uniform changes in pricing structures. *Id.* at 627-28. The plaintiffs did not allege "the smoking gun in a price-fixing case: direct evidence." *Id*. at 628. The Seventh Circuit held that plaintiffs' allegations of contextual and circumstantial facts provided a "sufficiently plausible case of price fixing." *Id*. at 629.

Twombly does not require plaintiffs to plead direct evidence of private meetings at which the participants hammered out the details of the conspiracy. The Supreme Court remarked in a footnote that the complaint did not mention any "specific time, place, or person involved in the alleged conspiracies." 550 U.S. at 565 n.10. But the Court did not hold that plaintiffs have to provide this kind of detailed information with direct evidence of a privately-struck deal. Instead, the

Court emphasized that the plaintiffs must allege parallel conduct plus some additional circumstantial evidence—some "further circumstance pointing toward a meeting of the minds." *Id.* at 557. A plaintiff must allege "enough factual matter (taken as true) to **suggest** that an agreement was made." *Id.* at 556 (emphasis added). The allegations are sufficient if they include "enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. The Court affirmed dismissal of the complaint because the plaintiffs pled no evidentiary facts that suggested an agreement among the defendants. *Id.* at 564-65; *see also id.* at 565 n.11 (noting that the plaintiffs "proceed exclusively via allegations of parallel conduct").

Since *Twombly*, numerous courts have recognized that plaintiffs do not need to plead specifics about the times and locations where the agreement was made. *See, e.g.*, *Robertson*, 679 F.3d at 289 (rejecting the argument that *Twombly* requires plaintiffs to plead "factual detail such as the times and locations of the allegedly conspiratorial meetings"); *Starr*, 592 F.3d at 325 ("Defendants next argue that *Twombly* requires that a plaintiff identify the specific time, place, or person related to each conspiracy allegation. This is also incorrect."); *In re Fresh and Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1164 (D. Idaho 2011) (rejecting the argument that plaintiffs are required to plead "elaborately detailed who-what-where-when facts for every single act that [defendants] allegedly took to

implement the scheme" because "[that] level of factual detail … is more appropriately reserved for summary judgment").

This Court's decision in *Kendall* does not impose a higher pleading burden. In *Kendall*, the plaintiffs were a group of businesses that alleged MasterCard and Visa (referred to as the Consortiums) conspired with certain banks to set the fees charged to merchants for payment of credit card sales. 518 F.3d at 1044-45. The Court noted that the plaintiffs "do not allege any facts to support their theory that the Banks conspired or agreed with each other or with the Consortiums to restrain trade." *Id.* at 1048. The conclusory allegation that "the Banks 'knowingly, intentionally and actively participated in an individual capacity in the alleged scheme' to fix the interchange fee or the merchant discount fee" was not supported by any factual allegations. *Id.* The Court said that "merely charging, adopting or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act." *Id.*[12]

In *Kendall*, the Court noted that the plaintiffs had an opportunity to conduct discovery and still did not "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Id.* But it is evident from the discussion of the plaintiffs' allegations that the *Kendall* Court was looking for basic information about the participants and some context that showed the banks did not just go

[12] ER 148-166 is a copy of the *Kendall* complaint.

along with the fees set by Visa and MasterCard. The Court did not announce a more stringent pleading standard or hold that plaintiffs have to plead direct evidence of the defendants' agreement, even when they have engaged in some discovery.

Although not required, plaintiffs do allege the "who, what, where, and when" of defendants' agreement. The "who" are the seven defendants, the manufacturers, Guitar Center and NAMM. The "what" is an agreement to implement and enforce comprehensive MAPs to stabilize and increase retail prices of guitars and guitar amplifiers. The "where" and "when" are the NAMM trade shows and invitation-only meetings that occurred between 2005 and 2007. *See Fresh and Process Potatoes*, 834 F. Supp. 2d at 1163-64 ("[Plaintiffs'] complaint does answer the basic who-what-where-when question.… Because these basic questions are answered, and the [plaintiffs] have supplied additional factual detail regarding the activities of the group thereafter (albeit not on a defendant-by-defendant basis), the moving defendants have 'an idea of where to begin' in responding to the complaint.") (quoting *Kendall*, 518 F.3d at 1047); *In Re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 902-03 (N.D. Cal. 2008) (finding that the defendants' participation in trade organizations demonstrated "how and when Defendants had opportunities to exchange information or make agreements"). The District Court erred in holding that these

questions could only be answered with direct evidence that defendants entered into agreements at private meetings.

The District Court may have believed that allowing limited discovery into "private meetings" would alleviate the unfairness implicit in its decision that plaintiffs had to plead the particulars of the price fixing agreements. Because the Court believed the agreement could not plausibly have been reached through communications and activities carried on openly at NAMM meetings, however, the limited discovery was no substitute for the opportunity to take discovery into the full range of conduct at issue here. But the District Court was not required to choose between no discovery at all and unrestricted, wide-ranging discovery. The Court had a ready-made alternative that would have obviated the need for any further expenditure of resources on the part of defendants and given plaintiffs the evidence they needed to plead further details about the defendants' agreement. The District Court could simply have ordered defendants to turn over copies of the material they had already collected and furnished to the FTC.

VIII. CONCLUSION

Plaintiffs have alleged parallel conduct and additional factual circumstances that have "nudged" their claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Plaintiffs request that the Court reverse the District

Court's dismissal of plaintiffs' Sherman Act claim and remand the case for further proceedings.

IX. STATEMENT OF RELATED CASES

Plaintiffs are not aware of any related cases pending before this Court.

X. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,114 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on February 5, 2013.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Elizabeth C. Pritzker