

No. 12-56674

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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In re: MUSICAL INSTRUMENTS AND EQUIPMENT ANTITRUST  
LITIGATION,

JOSHUA RAMSEY, *et al.*,  
Plaintiff-Appellants,

v.

NATIONAL ASSOCIATION OF MUSIC MERCHANTS, INC., *et al.*,  
Defendant-Appellees.

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Appeal from the United States District Court for the Southern District of California  
Case No. 3:09-md-02121

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee Guitar Center, Inc. states that it is a wholly owned subsidiary of Guitar Center Holdings, Inc., and that no publicly held corporation owns 10% or more of the stock of Guitar Center Holdings, Inc.

Dated: March 28, 2013

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee Yamaha Corporation of America is a wholly owned subsidiary of Yamaha Corporation. No other entity owns more than 10% of its stock.

Dated: March 28, 2013

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees Fender Musical Instruments Corporation and Kaman Music Corp. (now known as KMC Music, Inc.) state as follows:

1. KMC Music, Inc. is wholly-owned by Fender Musical Instruments Corporation; and
2. Fender Musical Instruments Corporation has no parent corporation and no publicly-held company owns 10% or more of its stock.

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee National Association of Music Merchants, Inc. (“NAMM”) states that it does not have a parent corporation and no publicly held corporation owns more than 10% of NAMM.

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee Gibson Guitar Corp. d/b/a Gibson U.S.A. states that it has no parent corporation and no publicly-held company owns 10% or more of its stock.

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee, Hoshino (U.S.A.), Inc., is a wholly owned subsidiary of Hoshino Gakki Co. Ltd. No other entity owns more than 10% of its stock.

Dated: March 28, 2013

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## JURISDICTION

Plaintiffs filed class action claims alleging violations of the Sherman Act, 15 U.S.C. § 1, California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.*, California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and the Massachusetts Consumer Protection Act, Mass. Gen. Law ch. 93A, §§ 2 *et seq.* See Excerpts of Record ("ER") 81-86 (¶¶ 163-92). The district court had jurisdiction under 28 U.S.C. § 1331 and the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). ER 43 (¶ 19). On August 20, 2012, the district court issued an order dismissing Plaintiffs' Sherman Act claim and "certifying [the] issue for appeal" pursuant to Federal Rule of Civil Procedure 54(b). ER 1-9. The court entered judgment the following day, ER 403 (Dkt. Entry 199), and Plaintiffs filed a timely notice of appeal on September 10, 2012. See ER 89-91; 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

Defendants subsequently filed a motion pursuant to Federal Rule of Civil Procedure 59(e), requesting that the Court also dismiss Plaintiffs' state-law claims, ER 404 (Dkt. Entry 206), and notified this Court of the motion, Letter to Ninth Circuit, ECF No. 5. The district court denied the motion. ER 404 (Dkt. Entry 207).

## **STATEMENT OF ISSUES**

1. Whether the district court properly dismissed Plaintiffs' Sherman Act claim for failure to state a claim.

## **STATEMENT OF THE CASE**

On December 9, 2009, the United States Judicial Panel on Multidistrict Litigation ordered centralization of various suits in the Southern District of California. ER 336-38. After the appointment of lead counsel for Plaintiffs, Plaintiffs filed a Consolidated Class Action Complaint ("CCAC") on July 16, 2010. Supplemental Excerpts of Record ("SER") 33-80. The CCAC alleged that Fender Musical Instruments Corp., Gibson Guitar Corp., Hoshino (U.S.A.), Inc., Kaman Music Corp. (n/k/a KMC Music, Inc.), Roland Corporation U.S., Yamaha Corporation of America, Guitar Center, Inc., and National Association of Music Merchants, Inc. ("NAMM") (collectively "Defendants") violated the antitrust laws by conspiring at NAMM trade shows to implement and enforce minimum advertised price ("MAP") policies. Defendants moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6). ER 391 (Dkt. Entry 83).

After holding a hearing, the district court granted the motions to dismiss with leave to amend. SER 15-27. The district court's order instructed Plaintiffs that, to successfully amend, they would have to make allegations of evidentiary fact to support an inference that Defendants reached an agreement. SER 21-22.

The district court instructed Plaintiffs that they would have to “plead enough of the MAPs’ terms to show how they restrained competition.” SER 24. The court also explained that Plaintiffs would need to clarify NAMM’s supposed role, which was not “particularly well alleged.” SER 22. The district court granted Plaintiffs limited discovery. ER 35-36.

Plaintiffs then filed the First Amended Consolidated Class Action Complaint, ER 3969 (Dkt. Entry 136), obtained documents and interrogatory responses, and conducted eight depositions of Defendants’ current and former employees. With the benefit of that discovery, Plaintiffs filed the Second Amended Consolidated Class Action Complaint (“Complaint”), ER 37-88. Defendants jointly moved to dismiss the Complaint, pointing out that it failed to rectify the deficiencies the district court identified in the CCAC. ER 401 (Dkt. Entries 181, 181-1). After holding argument, the district court dismissed Plaintiffs’ Sherman Act claim and entered judgment for Defendants pursuant to Rule 54(b). ER 1-9; ER 403 (Dkt. Entry 199). This appeal ensued.

## **INTRODUCTION**

The Supreme Court held in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), that an antitrust plaintiff must plead more than allegations of parallel conduct by competitors and conclusory allegations that they conspired together. Allegations that competitors behaved in similar ways and were aware of each

other's strategies describe only "conscious parallelism," which "is 'not in itself unlawful.'" *Id.* at 553-54 (citation omitted). To escape dismissal, plaintiffs must allege *evidentiary facts*, not just labels or conclusions, that make their entitlement to relief plausible by supporting a "reasonable inference" that the defendants reached an unlawful agreement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008).

The district court correctly recognized that Plaintiffs here have not satisfied that burden, and indeed that Plaintiffs' own allegations defeat the inferences they ask this Court to draw. Plaintiffs attempt to allege a conspiracy among five musical instrument manufacturers or distributors (the "manufacturer Defendants"), a trade association (NAMM), and the largest musical instrument retailer, Guitar Center, to impose and enforce MAP policies. This sort of allegation is called a "hub-and-spoke" conspiracy, because it is like a wheel in which a powerful retailer (the hub) has separate relationships (the spokes) with various manufacturers. Plaintiffs' problem has always been that independent business relationships between a retailer and different manufacturers are perfectly lawful, appropriate, and inevitable. A "hub-and-spoke" fact pattern only becomes an unlawful

horizontal agreement among competitors *if the wheel has a rim*. In other words, Plaintiffs have to allege evidentiary facts sufficient to create a reasonable inference that the manufacturer Defendants reached an agreement *with each other*. See, e.g., *Twombly*, 550 U.S. at 555-56; *Kendall*, 518 F.3d at 1048; *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010).

Plaintiffs have never been able to plead any evidentiary facts to support their conclusory allegation of an agreement among the manufacturer Defendants, and they have never been able to articulate how or why NAMM would have participated in such an agreement. Plaintiffs allege that Guitar Center saw its retail margins under pressure from discount prices at big box stores and on the internet, and responded by using its supposed market power to coerce each of the manufacturer Defendants into implementing MAP policies. But that is not a conspiracy among the manufacturer Defendants. Indeed, those allegations explain exactly why all of the manufacturers might have adopted MAP policies during this period, in their own business interests, without any agreement at all.

Plaintiffs have tried to close that gap in various ways. At first they alleged that the manufacturer Defendants had private meetings at trade association (NAMM) events to reach an unlawful agreement. The district court even gave Plaintiffs rare pleadings-stage discovery to further develop those allegations. Plaintiffs came up with nothing. Then they changed their focus to arguing that a

conspiratorial agreement can be inferred from allegedly parallel adoption of MAP policies by the manufacturer Defendants, together with supposed “plus factors” suggesting those decisions were conspiratorial rather than independent. But the district court correctly recognized that Plaintiffs’ supposed “plus factors” are not really plus factors at all. All of them are perfectly consistent with (indeed, better explained by) the perfectly lawful explanation of events *that Plaintiffs themselves have pled*.

Plaintiffs’ brief on appeal tries to recharacterize both the allegations below and the district court proceedings. Plaintiffs turn *their own* original focus on “private meetings” at NAMM events into an error by the district court by suggesting that the court required them to produce “direct evidence” of a conspiracy and gave them inadequate discovery. In reality, the district court agreed with Plaintiffs that they did not need to produce direct evidence and generously gave Plaintiffs discovery in order to pursue *their own theory*. Plaintiffs also fail to come to grips with the role they alleged Guitar Center played in the supposed conspiracy—which completely undermines the “plus factors” that they argue make an inference of conspiracy plausible.

Finally, Plaintiffs also ignore their own allegations establishing that MAP policies were implemented and enforced by manufacturers across the entire music

industry long before this alleged conspiracy (limited to guitars and amplifiers) supposedly began in 2004.

In the end, none of Plaintiffs' theories is supported by allegations of evidentiary facts sufficient to raise an inference of conspiracy among all of the manufacturer Defendants, Guitar Center, and NAMM. The district court, relying on *Twombly* and *Kendall*, properly dismissed the Complaint for failure to state a claim.

### **STATEMENT OF FACTS**

Five of the Defendants (Fender, Gibson, Hoshino, Kaman, and Yamaha) are manufacturers or distributors of musical instruments, including the guitars and guitar amplifiers that are at issue in this case. ER 38-39 (¶ 4). The manufacturer Defendants sell their products in a variety of ways, including through defendant Guitar Center, the largest musical retailer in the United States. ER 38 (¶ 3). Defendant NAMM is the leading trade association in the music industry and sponsors trade shows attended by many thousands of industry participants and press. ER 45 (¶ 36), 60-61 (¶¶ 91-92). Plaintiffs are consumers who bought "high-end" guitars and guitar amplifiers at Guitar Center stores. ER 43-45 (¶¶ 21-35), 48 (¶ 48), 51-52 (¶ 58). This case concerns an alleged conspiracy to adopt, implement and enforce MAP policies conceived at some unidentified time between 2004 and 2007. ER 81 (¶ 164) (alleging conspiracy "[b]eginning on or about January 1,

2004”); Appellants’ Opening Brief (“Br.”) at 40 (arguing that conspiratorial changes were implemented over “a 3-year period.”).

Manufacturers across many industries, including the music products industry, implemented MAP policies over the past twenty-plus years in response to the emergence of discount catalog and internet retailers, in order to protect the investment that brick and mortar retailers make in their stores and personnel and to encourage retailers to stock and promote the manufacturers’ products. Plaintiffs themselves allege that, by 1999, “numerous leading manufacturers had adopted MAPs.” ER 59 (¶ 87). According to the Complaint, *The Music Trades*, a leading industry publication, reported on the January 2001 NAMM trade show and in particular on the increased use of MAP policies at that time by manufacturers of all types of musical instruments:

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

ER 60 (¶ 91). The Complaint similarly refers to an article appearing in *The Music Trades* following the January 2002 NAMM trade show which stated: “Manufacturers have acknowledged the retail concern with profitability by instituting minimum advertised price, or MAP policies. In fact, mention of MAP

pricing was included in just about every new product presentation.” ER 61 (¶ 92). Again, the article discussed the musical instrument industry generally—referring to “every new product,” not merely guitars and guitar amplifiers.

Five years after the 2002 trade show discussed in *The Music Trades*, the FTC began an investigation focused on the music products industry generally (not limited to guitars and guitar amplifiers). NAMM, some of the manufacturer Defendants, Guitar Center and others not part of this litigation all produced a substantial volume of documents to the FTC. On March 4, 2009, the FTC concluded its investigation, announcing that it had resolved allegations directed only at NAMM through a consent order agreed to only by NAMM. NAMM did not admit any liability and the FTC did not allege that NAMM (or anyone else) entered into any illegal agreement or conspiracy, let alone the one Plaintiffs allege in this matter. Indeed, the FTC complaint filed contemporaneously with the consent order does not allege that NAMM (or anyone else) conspired or in any way violated § 1 of the Sherman Act. It alleged only a violation by NAMM of § 5 of the FTC Act, 15 U.S.C. § 45, which does not require any proof of unlawful agreement or conspiracy. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

After the FTC’s announcement, multiple putative class actions were filed against NAMM, Guitar Center, some of the manufacturer Defendants, and other

industry participants. The cases were centralized by the JPML in the United States District Court for the Southern District of California.

***Consolidated Class Action Complaint***

Plaintiffs filed their CCAC, claiming, among other things, a conspiracy “[b]eginning on or about January 1, 2004” in violation of § 1 of the Sherman Act to fix prices of “new, high-quality fretted instruments and guitar amplifiers” through strict enforcement of MAP policies. SER 66 (¶ 135), 34 (¶ 1) (footnote omitted). Putative class counsel sought to represent a class of consumers who had purchased those products from defendant Guitar Center. The CCAC included a broader group of defendants than the current operative complaint, and also alleged a broader conspiracy that was not limited to guitars and amplifiers.

The CCAC placed Guitar Center at the center of the conspiracy.<sup>1</sup> It alleged that Guitar Center “was able to and did use its dominant position in the market to enforce the conspiracy by threatening manufacturers that were lax in their own enforcement of the MAPPs.” SER 35 (¶ 5). According to the CCAC, Guitar Center “strong armed” the manufacturers and “dictated” MAP policies, so the manufacturers “had little choice but to accommodate Guitar Center’s demands.” SER 47 (¶¶ 60, 61). In response to Defendants’ motion to dismiss, Plaintiffs made

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<sup>1</sup> If Guitar Center were not alleged to be a conspirator, the consumers that putative class counsel hope to represent would lack standing to enforce the Sherman Act as indirect purchasers under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

clear that the CCAC was an attempt to allege “a ‘hub-and-spoke’ retail price maintenance conspiracy, with Guitar Center at its center.” SER 31; *see also* ER 227-28.

At the same time, the CCAC alleged that the “conspiracy was developed and implemented through NAMM,” SER 35 (¶ 5), because NAMM “facilitated discussions” about MAPs, SER 53 (¶ 84). Opposing Defendants’ motion to dismiss the CCAC, Plaintiffs asserted that: “Defendants participated in *private meetings* arranged by NAMM, where they exchanged *competitively-sensitive* information about costs, prices and margins, and discussed MAPPs.” SER 29 (emphasis added). They reiterated that “NAMM organized *private meetings* and programs at semi-annual trade shows and invitation-only global summits,” and that “NAMM used these private meetings to enable Guitar Center, the Manufacturer Defendants, and other NAMM members to exchange cost and pricing information, and to discuss MAPPs and ways to restrict retail price competition.” SER 31 (emphasis added); *see also* SER 32 (“NAMM’s role in the alleged conspiracy was to sponsor and arrange for *private meetings* for competing retailers of musical instruments and other NAMM members to exchange information on *competitively-sensitive* subjects—including prices, margins, MAPPs and their enforcement.” (emphasis added)).

*District Court Order Dismissing the CCAC*

The district court concluded that the CCAC failed “to allege evidentiary facts sufficient to show the existence of a conspiracy sufficient to affect competition.” SER 21. The court noted that Plaintiffs clarified at the hearing that they “intended to allege a hub and spoke conspiracy,” but agreed with Defendants that the CCAC did not adequately allege an agreement among the manufacturer Defendants. *Id.* It also held that the allegations against NAMM were not well-defined. SER 22. The court recognized that a “horizontal agreement (among manufacturers) may be shown by direct or circumstantial facts, but if the latter are pleaded, Plaintiffs must also plead facts tending to exclude the possibility of simple parallel action without an agreement.” SER 21-22. The district court observed that “Plaintiffs frankly admit they lack the information to plead specific facts in good faith, and seek discovery so they can learn who attended the meetings they have generally identified, what was said, and what was agreed.” SER 22. The district court held that in any amended complaint Plaintiffs would have to “plead enough of the MAPs’ terms to show how they restrained competition.” SER 24.

The court also observed that remarks at open panel discussions at NAMM trade shows cannot reasonably constitute the terms of an illegal agreement “in these circumstances.” *See* SER 26. As the court explained, “the complaint can’t

reasonably be construed as alleging the conspiracy was consummated during panel discussions.” *Id.*

The court gave Plaintiffs limited discovery to pursue their theory. It permitted discovery about “who attended or participated in meetings alleged in the amended consolidated complaint and what was said or agreed to there.” SER 27. In accordance with Plaintiffs’ own theory, the court explained that 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.” *Id.* The court also made clear that Plaintiffs should not rely upon allegations about “what manufacturers in general did” but instead should plead facts about what each manufacturer’s agents or representatives did. SER 23.

***Plaintiffs Receive Documents and Interrogatory Responses and Take Depositions***

Plaintiffs filed an amended complaint one month later. *See* ER 396 (Dkt. Entry 136). Plaintiffs then served document requests and interrogatories on each Defendant. Each Defendant responded to the interrogatories, searched through tens of thousands of documents, including those from the files of senior executives and decision-makers, and produced documents responsive to Plaintiffs’ requests and consistent with the court-ordered scope of discovery. Once the Defendants’ document productions were complete, Plaintiffs took the depositions of eight individuals—NAMM’s CEO and seven employees or former employees of the

manufacturer Defendants and Guitar Center who attended NAMM events and had responsibilities related to MAP policies during the four-year time period from 2004-2007.

Plaintiffs filed two motions to compel additional discovery. First, Plaintiffs sought the production of each manufacturer Defendant's written MAP policies, regardless of whether the MAP policies had ever been discussed at a private meeting during a NAMM event. Second, Plaintiffs sought permission to ask deposition questions regarding open speeches and panel discussions at NAMM events where MAP policies were discussed. The Magistrate Judge supervising discovery denied both of the motions because Plaintiffs sought discovery that exceeded the scope of the limited discovery permitted by the district court's order. ER 16-23, 14-15.

Plaintiffs objected to the Magistrate Judge's orders. At the hearing, Plaintiffs made clear that they were seeking additional discovery to provide context or "circumstantial evidence" supporting their allegation that a conspiracy was hatched in "private meetings" at NAMM events. SER 4, 5. Plaintiffs also continued to seek copies of the manufacturer Defendants' MAP policies. During argument, Plaintiffs' counsel represented that Plaintiffs already had the MAP policies of three defendants (Fender, Yamaha, and Kaman) and said that she expected that Plaintiffs' amended complaint would be able to "show that there are

similar enforcement provisions and similar restrictions over time, which again I think is critical to our allegations in the case.” SER 6.

The district court made clear that Plaintiffs had been given free rein to take discovery about MAP policies so long as they were connected to alleged meetings or communications between Defendants, but that MAP policies, by themselves, could not provide the basis for Plaintiffs’ theory of conspiracy. SER 12, 13-14. As the district court explained in a written order overruling Plaintiffs’ objections:

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. The court further explained that Plaintiffs were not entitled to “extensive discovery” prior to pleading plausible allegations. *Id.*

### ***Second Amended Consolidated Class Action Complaint***

With the benefit of the limited discovery, Plaintiffs filed the Second Amended Consolidated Class Action Complaint, which is now the operative Complaint. The Complaint alleges that the Defendants violated Section 1 of the Sherman Act by entering into an unlawful conspiracy beginning on or about January 1, 2004. ER 81 (¶ 164).

The Complaint again attempts to allege a “hub-and-spoke” conspiracy with Guitar Center (the retailer) at the center. According to the Complaint, Guitar Center—the “dominant” retailer—used its market power to force the manufacturer Defendants into adopting, implementing, and enhancing MAPs during an extended four-year time period from 2004-2007. ER 55-56 (¶ 74), ER 59-60 (¶ 88). The Complaint also continues to quote the same articles from *The Music Trades* regarding the “new and more restrictive” MAP policies announced by manufacturers at NAMM trade shows in 2001-2002, *i.e.*, years before the alleged inception of the claimed conspiracy. ER 60-61 (¶¶ 89-92) (citation omitted).

The Complaint alleges that the manufacturer Defendants capitulated to “Guitar Center’s pressure and coercion” by “collectively chang[ing] their business practices, and beg[inning] to implement, modify or strengthen their pricing policies to require dealer adherence to MAPs and MAP pricing” during the period from 2004 to 2007. ER 61 (¶ 95). The Complaint also states that the manufacturer Defendants “knew or were aware” that they were each “pressured by Guitar Center” to make these changes to their MAP policies. ER 63 (¶ 102); *see also* ER 63-64 (¶ 103). It states that “each Manufacturing Defendant implemented, revised, or enhanced its MAP policy, relatively close in time with, and in a substantially similar way as, the other Manufacturer Defendants.” ER 63-64 (¶ 103). Despite Plaintiffs’ prior acknowledgment that they had copies of MAP policies from at

least three of the manufacturer Defendants, they alleged no evidentiary facts concerning “similar enforcement provisions and similar restrictions over time,” which Plaintiffs’ counsel said would be forthcoming and which was “critical to [their] allegations in the case.” SER 6.

The Complaint claims that NAMM “facilitated” the conspiracy and provided an “opportunity” for competitors to meet. ER 65-66 (¶¶ 110-11). The Complaint, however, does not plead evidentiary facts concerning a single meeting at NAMM (or elsewhere) between or among any of the Defendants at which they are alleged to have reached an agreement concerning MAP terms. Instead, it generally describes open panel and round-table discussions, as well as discussions at invitation-only summits allegedly hosted or organized by NAMM. *See* ER 68-71 (¶¶ 118-29). The Complaint also purports to summarize—albeit erroneously (*see infra* at 53-54)—the FTC allegations and consent order against NAMM. ER 72-76 (¶¶ 132-44).

The Complaint includes tables (ER 178 (¶ 150), 79 (¶ 153)) that Plaintiffs claim show that the “efforts of Defendants to adopt, implement and enforce MAPs during the Class Period paid off in the form of higher retail prices.” ER 77 (¶ 149). The Complaint omits a footnote that had appeared in the CCAC that acknowledged that 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.” SER 49 n.2. In other words, the tables are not limited to the products alleged to be the subject of the claimed conspiracy (“high-end” guitars and guitar amplifiers manufactured by the five manufacturer Defendants).

***District Court Order Dismissing the Sherman Act Claim***

Defendants jointly moved to dismiss. ER 401 (Dkt. Entry 181). After holding a hearing, the district court granted Defendants’ motion to dismiss the Sherman Act claim. The district court again agreed with Plaintiffs that they were not required to allege “direct evidence” of conspiratorial meetings. ER 4. But, following *Twombly* and *Kendall*, the court required Plaintiffs to allege evidentiary facts supporting an inference of an actual agreement, rather than merely alleging “parallel conduct” or that Defendants had “the opportunity to agree.” *Id.* Since Plaintiffs had conceded at the hearing that they could not identify any direct evidence of an agreement, the court considered Plaintiffs’ theory based on circumstantial evidence: “their allegations of parallel conduct, combined with several ‘plus factors.’” *Id.*

According to the district court, Plaintiffs claimed four plus factors: (1) “the MAP policies were similar and adopted around the same time”; (2) “the MAP policies were against manufacturers’ individual self-interest and would succeed only if all manufacturers participated”; (3) “manufacturers’ key decision-makers met at summits or trade shows”; and (4) “trade show announcements and open

discussions were designed to signal, announce, and police compliance.” ER 5. The court concluded that Plaintiffs’ plus factors “are not as helpful as Plaintiffs argue.” ER 6.

1. The district court observed that Plaintiffs did “very little” to support with actual evidentiary facts their bare assertions that the terms or timing of adoption of MAP policies were suspiciously similar. ER 7. Instead, they simply alleged conclusions: that “MAP policies ‘were implemented within a relatively short period of time’ and ‘contained substantially similar terms, advertising restrictions and enforcement provisions.’” *Id.* (quoting ER 39-40 (¶ 8)). The court “accept[ed], *arguendo*” Plaintiffs’ argument that they were not required to plead specific terms or time periods, but held that Plaintiffs’ statements that the MAP terms were “substantially similar” and the time period was “relatively short” were conclusory opinions, not evidentiary facts. *Id.*

The district court also observed that, even if Plaintiffs had alleged evidentiary facts supporting their conclusion that the MAP policies were similar, the similarity “could just as easily be attributable to a similar business model or similar business conditions.” *Id.* Likewise, adoption of MAP policies near the same time “is consistent with a response to the same market conditions.” *Id.* Plaintiffs’ claimed “plus factor” therefore *at most* would support an inference of

consciously parallel conduct, which the Supreme Court emphasized was legal in *Twombly*. *Id.* “This ‘plus factor’ is therefore not really a ‘plus factor’ at all.” *Id.*

2. The court also rejected Plaintiffs’ assertion that the MAP policies were against the manufacturer Defendants’ individual self-interests. ER 6. The court explained that Plaintiffs’ own allegations implied that adopting MAP policies was “in each of [the manufacturer Defendants’] individual self-interests.” ER 6-7.

3. The court rejected Plaintiffs’ assertion that Defendants’ presence at NAMM trade show meetings, even NAMM events in which MAP policies may have been announced or discussed, constituted a plus factor suggestive of an unlawful conspiracy. ER 7. Such allegations asserted only that Defendants had the “opportunity” to communicate or meet to reach agreements—which is always true of trade shows and other public industry meetings. *Id.*

4. The court rejected Plaintiffs’ claim that trade show announcements and discussions about MAPs constituted a plus factor. ER 6. The court noted that “the presence of numerous uninvolved observers at such meetings tends to dispel any specter of illegality.” *Id.* at 4. With respect to an email from NAMM president Joe Lamond cited by Plaintiffs, the court explained that “[t]he email in question simply outlines Lamond’s ‘talking points’ and gives a draft script for a presentation at NAMM’s large trade show, among which was the issue of MAP pricing,” a

presentation that was “delivered to a large, general audience.” *Id.* The court again concluded that “this isn’t a ‘plus factor’ at all.” *Id.*

Finally, the district court recognized that “the complaint itself expresses no real certainty whether Defendants entered into a conspiracy or agreement.” ER 8. Instead, Plaintiffs pleaded only that manufacturers “knew or expected” that other manufacturers would engage in parallel action. *Id.* The district court again held that “[p]arallel action, even conscious parallel action, is not illegal.” *Id.*

Because Plaintiffs failed to sufficiently allege evidentiary facts to support the conspiracy claims, the district court concluded that no further analysis of Defendants’ arguments for dismissal was necessary. ER 9. The district court dismissed the Sherman Act claim with prejudice. *Id.* It then entered partial judgment pursuant to Federal Rule of Civil Procedure 54(b) to afford Plaintiffs the opportunity to immediately appeal. *Id.*

### **SUMMARY OF THE ARGUMENT**

Plaintiffs have been given three complaints and unusual pleadings-stage discovery to allege evidentiary facts supporting their theory. The district court correctly recognized that despite those opportunities Plaintiffs still have not met the basic pleading burden articulated by the Supreme Court in *Twombly*, and interpreted by this Court in *Kendall*.

Plaintiffs allege that the manufacturer Defendants “knew or were aware” that they were all facing similar market challenges, and similar “pressure” from Guitar Center, and responded in “substantially similar” ways. As the district court recognized, allegations like these are insufficient as a matter of law. Such bare allegations do not show parallel conduct. Even if they did, “conscious parallelism” is common and perfectly lawful, even when it represents common (but independent) acquiescence to demands coming from the same important customer.

To state a plausible antitrust claim, Plaintiffs must allege evidentiary facts supporting a reasonable inference that the manufacturer Defendants *reached a conspiratorial agreement*. *Twombly*, 550 U.S. at 555-56; *Kendall*, 518 F.3d at 1048. Despite having had the benefit of discovery, Plaintiffs did not (and could not) identify a single meeting or communication between or among any specific representatives of the manufacturer Defendants at which they agreed to MAP terms. Instead, Plaintiffs argue that they have met that burden by alleging parallel conduct coupled with facts that are claimed to be suspicious and inconsistent with independent decision-making (“plus factors”). The district court correctly recognized that the allegations to which Plaintiffs point “are not really ‘plus factors’ at all,” and certainly are not sufficiently grounded in allegations of evidentiary fact to raise an inference of agreement beyond the speculative level. Plaintiffs’ allegations that the Defendants adopted MAP policies that were

“substantially similar” and “within a relatively short period of time” are mere conclusions and characterizations that do not even allege parallel conduct—particularly when the “relatively short period of time” alleged in the Complaint, by Plaintiffs’ own account, covers at least three years and perhaps even a decade, and Plaintiffs fail to allege with any specificity the allegedly “substantially similar” terms of the MAP policies they have obtained.

Nor do the Complaint’s vague allegations about discussions at NAMM events support Plaintiffs’ allegations of a conspiracy among Defendants. The FTC’s complaint does not allege any agreement, much less among one or all of these Defendants, and does not support any inference that one occurred. And the fact that the manufacturer Defendants shared a common interest in enforcement of MAP policies is unremarkable, and provides no basis for inferring a conspiracy.

Stepping back from the trees to the forest, the district court also properly recognized that facts that might be suspicious, and therefore “plus factors,” in some cases and some contexts simply are not suspicious here—because of the background context *that Plaintiffs themselves have pled*. Plaintiffs’ own Complaint alleges that the manufacturer Defendants, like other manufacturers not alleged to have conspired, all had strong business reasons to adopt MAP policies independently and without any agreement between them. Those reasons included (but were not limited to) independent “pressure” and “coercion” on each of them

from Guitar Center that Plaintiffs allege was well-nigh irresistible. The Supreme Court made clear in *Twombly* that parallel actions that might otherwise be suspicious may not be, in light of “obvious alternative explanation[s],” including similarly situated firms having common reactions to market stimuli. 550 U.S. at 567. If there ever were a case for applying that principle it is this one—where Plaintiffs have supplied the obvious alternative explanation themselves.

Plaintiffs’ remaining arguments on appeal are unfair to the district court’s opinion and mischaracterize the proceedings below. The district court did not demand “direct evidence” of a conspiracy or specificity in the allegations beyond what *Twombly* and *Kendall* require. Nor did it hold that a conspiracy necessarily requires a “private meeting,” or improperly constrain discovery. The court was not required to give Plaintiffs any discovery; the fact that it did give Plaintiffs discovery but limited it to the theory pleaded by Plaintiffs is not an abuse of discretion. The court recognized that a plausible allegation of conspiracy would be sufficient, and did not require allegations that would exclude all other explanations. The court fully entertained Plaintiffs’ argument that a conspiracy should be inferred from purely circumstantial “plus factors”—the court properly, and correctly, rejected those arguments on the merits.

## STANDARD OF REVIEW

This Court reviews the dismissal of a complaint under Rule 12(b)(6) *de novo*. *Kendall*, 518 F.3d at 1046. Plaintiffs have not appealed from the district court's order denying additional discovery, *see* Br. at 2 (statement of issues), but if the issue were properly before this Court the district court's decision to grant, deny, or limit discovery would be reviewed only for abuse of discretion. *E.g.*, *Nev. Dep't of Corr. v. Greene*, 648 F.3d 1014, 1018 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1823 (2012).

## ARGUMENT

### **I. THE DISTRICT COURT PROPERLY CONCLUDED THAT PLAINTIFFS FAILED TO ALLEGE EVIDENTIARY FACTS RAISING ANY RIGHT TO RELIEF BEYOND A SPECULATIVE LEVEL**

In order to survive a motion to dismiss, a plaintiff must allege *evidentiary facts* that, if true, would “raise a right to relief above the speculative level” and “raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Twombly*, 550 U.S. at 555-56. In antitrust cases, “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice.” *Id.* at 556. Allegations that competitors adopted similar policies around the same time “must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.” *Id.* at 557. When evaluating whether a plaintiff has pled evidentiary facts “plausibly suggesting (not

merely consistent with) agreement,” a court may consider “common economic experience,” “history,” and “obvious alternative explanation[s],” *id.* at 557, 565, 567, as well as “judicial experience and common sense,” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.” *Kendall*, 518 F.3d at 1049. The plaintiff’s ultimate burden is to “plead[] factual content that allows the court to draw the *reasonable inference* that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (emphasis added).

The district court correctly held that Plaintiffs utterly failed to satisfy that burden. The lack of specific evidentiary facts in the Complaint reflected the simple reality that even after receiving discovery Plaintiffs have never been able to plead evidentiary facts concerning an agreement between Defendants about MAP terms. For example, Plaintiffs deposed a Gibson representative and received documents from the files of Gibson’s CEO, president, and others, but could not allege that any specific person who represented Gibson attended any NAMM event—whether open or closed, private or public—at which a MAP policy was even discussed.

As a result, the allegations of agreement are wholly conclusory generalizations that do not plausibly suggest an illegal conspiracy, particularly in

light of the discovery conducted. The Complaint simply states that the manufacturer Defendants generally “knew or were aware” of each other’s actions and of the fact that each of them was being “pressured by Guitar Center” to implement MAP policies. *E.g.*, ER 63 (¶¶ 101-02). Allegations like these are insufficient as a matter of law. As the district court recognized, ER 8, “‘conscious parallelism,’ ... is ‘not in itself unlawful,’” *Twombly*, 550 U.S. at 553-54 (citation omitted), and it makes no difference whether that parallel action was allegedly procured by pressure from a common, dominant customer.

The district court also correctly recognized that the “plus factors” that Plaintiffs point to as supporting an inference of conspiratorial agreement “are not as helpful as Plaintiffs argue,” “do very little to make the claim more plausible,” and indeed often are “not really ... ‘plus factor[s]’ after all.” ER 6-7. Plaintiffs’ allegations are far too conclusory to support any inference of conspiracy. And just as in *Twombly*, there is an “obvious alternative explanation” for the facts alleged, 550 U.S. at 568, *provided here by Plaintiffs themselves*.

The Complaint affirmatively alleges that “[s]tarting in the early 2000s ... the retail music industry was threatened by new, internet-based retailers and the entry of ‘big box’ retailers,” ER 59 (¶ 88), that manufacturers responded by adopting MAP policies as early as 1999, ER 59 (¶ 87), that “Guitar Center used its dominant market power” to coerce manufacturers into implementing and enforcing MAPs,

ER 61 (¶ 93), and that the manufacturers “responded to Guitar Center’s pressure and coercion” because they “believed that they could not afford to lose access to Guitar Center’s stores, and fore[saw] the impact decreasing retail sales could have on their wholesale profit margins,” *id.* (¶ 95). Plaintiffs go so far as to allege that the MAP policies announced in 2001 were “new and more restrictive,” “more expansive” and that they “prohibit phone or email price quotes below MAP price, all in a bid to give brick and mortar stores an incentive to lay in inventory.” ER 60 (¶ 91) (citation omitted). All of this is alleged to have occurred *before the supposed conspiracy began*. Plaintiffs themselves have pled a “context” in which “parallel conduct ... could just as well be independent action” rather than conspiracy. *Twombly*, 550 U.S. at 557. They have alleged no real evidentiary facts that make their allegations of conspiratorial agreement anything more than wishful speculation. Indeed, Plaintiffs have not even alleged parallel conduct in more than conclusory terms. And they have demonstrated, after multiple attempts and even discovery, that they simply cannot do better. Against that backdrop, the district correctly held that the Complaint must be dismissed with prejudice.

**A. As The District Court Held, Plaintiffs’ Complaint At Most Alleges Consciously Parallel Conduct And Therefore Does Not Satisfy *Twombly* And *Kendall***

Plaintiffs’ theory of the case is that Defendants entered into a hub-and-spoke conspiracy with Guitar Center as the hub and the manufacturer Defendants as the

spokes, with NAMM somehow “facilitating” the agreement. As a matter of law, however, an allegation that a hub procured similar agreements from spokes is not enough to make Plaintiffs’ claim viable. Plaintiffs must establish a horizontal agreement among the manufacturers to put a rim on the wheel. *See, e.g., Kotteakas v. United States*, 328 U.S. 750, 755 (1946); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435-36 (6th Cir. 2008) (The plaintiffs’ “Section 1 claim fails as a matter of law” because they presented “only a rimless theory.”); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04 (4th Cir. 2002) (allegations that Microsoft had similar agreements with each of two of its customers failed to state a claim because the plaintiff did not allege a “rim” to the wheel, *i.e.*, a conspiracy among the customers; the Supreme Court was “clear” in *Kotteakos* that “a wheel without a rim is not a single conspiracy”); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420 (5th Cir. 2010) (affirming dismissal where there was no allegation of “an agreement among retailers” to implement the retail price maintenance policy; “there is no wheel and therefore no hub-and-spoke conspiracy, and that allegation was therefore properly dismissed”).

Plaintiffs attempt to evade that obligation by suggesting that an agreement may be inferred from evidence of parallel action undertaken with awareness of what competitors are doing—or that such awareness somehow substitutes for the requirement of unlawful agreement. Plaintiffs are incorrect. The district court

correctly recognized that Plaintiffs' factual allegations *at most* describe only conscious parallelism, which is not an antitrust conspiracy as a matter of law.

**1. Plaintiffs' Allegations That The Manufacturer Defendants Knowingly Adopted "Substantially Similar" MAP Policies At Most Establish Consciously Parallel Conduct**

Plaintiffs' primary allegations are that each of the manufacturer Defendants adopted "substantially similar" MAP policies and "knew or were aware" that the other manufacturers were doing the same, for similar reasons. The Complaint alleges that Fender "modified and strengthened" its MAP policy between 2004 and 2007, and then states in conclusory manner that the other manufacturer Defendants "also implemented, modified or expanded their MAPs beginning in or about 2004 and continuing through approximately 2007, so that the MAPs of each Manufacturing Defendant contained substantially similar terms and advertising restrictions." ER 61-62 (¶¶ 96-97). The Complaint alleges that the manufacturer Defendants "knew or were aware" of each other's adoption and enforcement of MAP policies, of "the impact that retail price discounting by internet or 'big box' retailers had on each other's margins," and of the fact that each of them "was pressured by Guitar Center to implement, revise, and/or expand the provision of its MAP to ensure continued access to Guitar Center's retail network." ER 63 (¶¶ 100-02).

The district court correctly recognized that Plaintiffs’ allegation of parallel behavior—*i.e.*, that the Defendants’ MAP policies became ““substantially similar”” within a “relatively short period of time”—is conclusory, ambiguous, and subjective. ER 7. Against that backdrop, Plaintiffs have not even alleged the threshold element of parallelism to support their theory. *See Meat Price Investigators Ass’n v. Iowa Beef Processors, Inc. (In re Beef Indus. Antitrust Litig.)*, 907 F.2d 510, 514 (5th Cir. 1990) (“[w]hen an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to provide a § 1 claim, *he must first demonstrate that the defendants’ actions were parallel.*”) (emphasis added); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 54 (3d Cir. 2007) (same). Dismissal of their Complaint could be affirmed on that basis alone.

Regardless, Plaintiffs’ allegations at most amount to nothing more than classic consciously parallel conduct, and it is settled that ““conscious parallelism”” is ““not in itself unlawful.”” *Twombly*, 550 U.S. at 553-54 (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)) (citing *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)); *see also Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300-01 (11th Cir. 2003). In a market where firms ““recognize[e] their shared economic interests and their interdependence with respect to price and output decisions,”” consciously

parallel conduct reflects lawful independent decisions by firms in an effort to maximize their profits. *Williamson Oil Co.*, 346 F.3d at 1299 (quoting *Brooke Grp.*, 509 U.S. at 227). It does not imply a conspiratorial agreement among firms because it is “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Twombly*, 550 U.S. at 554. “A statement of parallel conduct, even conduct consciously undertaken” is not enough to defeat a motion to dismiss. *Id.* at 557. Instead, a plaintiff must allege a “further circumstance pointing toward a meeting of the minds.” *Id.*

In *Twombly*, the Supreme Court held that the complaint in that case must be dismissed despite allegations of parallel conduct undertaken with conscious awareness, and consideration, of what competitors would likely do. *Id.* at 568-70. Plaintiffs saw a conspiracy in the fact that the incumbent local exchange carriers all declined to open competitive operations in each other’s geographical territories. The Supreme Court emphasized that geographical monopolies had been the history of that industry, that the ILECs “surely knew the adage about him who lived by the sword,” and that “a natural explanation for the noncompetition alleged is that the [ILECs] were sitting tight, expecting their neighbors to do the same thing.” *Id.* at 568-69. The Supreme Court viewed that alternative explanation of events—classic conscious parallelism—as a reason to conclude that an actual conspiracy was

*implausible*. Likewise, in *Kendall*, this Court explained that “merely charging, adopting or following the fees set by a Consortium is insufficient as a matter of law,” despite the fact that the banks were all aware that their competitors were paying the same fees. 518 F.3d at 1048.

The district court here recognized that “the complaint itself expresses no real certainty whether Defendants entered into a conspiracy or agreement, or whether they merely knew or expected that other Defendants would engage in parallel action.” ER 8. Disregarding the purely conclusory allegations, the Complaint alleges only lawful conscious parallelism. That is not a conspiracy.

**2. Plaintiffs’ Allegations That The Manufacturers Responded To “Coercion” From Guitar Center Do Not Establish Any Unlawful Agreement**

Plaintiffs also allege that the manufacturers each “knew or were aware” that each of them “was pressured by Guitar Center,” ER 63 (¶ 102), and that they “responded to Guitar Center’s pressure and coercion” by “collectively chang[ing] their business practices.” ER 61 (¶ 95). Those allegations are insufficient; at most, they describe nothing more than lawful conscious parallelism.

There is nothing conspiratorial or improper about manufacturers unilaterally deciding to heed similar demands made by a common, important customer. Courts have recognized since *Monsanto* that it is in a manufacturer’s independent business interest to keep important customers happy, and that such self-interest generally

defeats any inference of conspiracy. *See, e.g., Monsanto*, 465 U.S. at 763-64; *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151, 1156-58 (9th Cir. 1988); *Garment Dist., Inc. v. Belk Stores Servs., Inc.*, 799 F.2d 905, 909 (4th Cir. 1986); *Cleveland v. Viacom Inc.*, 73 F. App'x 736, 740-41 (5th Cir. 2003). It is settled law, therefore, that raising a plausible inference of conspiracy in a hub-and-spoke situation requires allegations of evidentiary fact suggesting that the manufacturers actually communicated and agreed—or at a minimum allegations that the hub passed messages between the spokes and assured them that all of the others would join, and that agreement would not otherwise have been in the spokes' own individual business interests. *See, e.g., Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 932, 935-36 (7th Cir. 2000) (toy manufacturers agreed to demands that the FTC had found were against their individual self-interest “*on the condition that their competitors would do the same*”); *id.* at 932 (Toys “R” Us “communicated the message ‘I’ll stop if they stop’ from manufacturer to competing manufacturer.”).

Plaintiffs have not alleged facts supporting any inferences of that nature. They do not allege, even in conclusory fashion, that Guitar Center passed messages between the manufacturer Defendants or assured them that the others had agreed to enforce particular MAP policies. And Plaintiffs affirmatively allege that each manufacturer had independent economic incentives to enforce MAP policies, including but not limited to the importance of pleasing Guitar Center so that it

would continue to purchase large volumes of the manufacturer's products. ER 55-56 (¶ 74), 61 (¶¶ 94-95) (manufacturers "believed they could not afford to lose access to Guitar Center's stores"), 63 (¶ 102).

This case is therefore similar to *Howard Hess Dental Laboratories Inc. v. Dentsply Int'l, Inc.*, in which the plaintiffs alleged a hub-and-spoke conspiracy in which Dentsply (the hub) induced its dealers (the spokes) not to carry its rivals' products. 602 F.3d 237, 244 (3d Cir. 2010). Like the Plaintiffs here, the *Dentsply* plaintiffs asked the court to infer an agreement from allegations that the spokes all acquiesced in Dentsply's demands; that each knew the others were doing so; that Dentsply was the "dominant player" in the market; and that the spokes had an economic incentive to further that market structure. *Id.* at 255. The Third Circuit rejected that argument, explaining that "simply because each Dealer, on its own, might have been economically motivated to exert efforts to keep Dentsply's business and charge the elevated prices Dentsply imposed does not give rise to a plausible inference of an agreement among the Dealers themselves." *Id.* The allegations did "not offer even a gossamer inference of any degree of coordination among the Dealers," but instead did "no more than intimate 'merely parallel conduct that could just as well be independent action.'" *Id.* at 256 (quoting *Twombly*, 550 U.S. at 557); *see also, e.g., In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 327 (3d Cir. 2010) (horizontal agreement among insurers could not be

inferred “from the mere fact that each insurer entered into a similar contingent commission agreement with the broker”).

Plaintiffs represent *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), as a case in which the “evidence of conspiracy was a joint letter sent by a dominant movie theatre to a group of distributors.” Br. at 38. But the Supreme Court pointed to other evidence of a conspiracy among the distributors, including that they conspicuously failed to call as witnesses “any official who, in the normal course of business, would have knowledge of the existence or non-existence of such an agreement among the distributors,” the fact that the demand “involved a radical departure from the previous business practices in the industry,” and perhaps most importantly the fact that the distributors *did not* all accept the theatre chain’s demands as stated but instead rejected those demands—with suspicious uniformity—in particular geographic locales. *Interstate Circuit*, 306 U.S. at 221-222. The Supreme Court explained that it was “unable to find in the record any persuasive explanation, other than agreed concert of action,” for the “singular unanimity of action on the part of the distributors by which the proposals were carried into effect as written in four Texas cities *but not in a fifth or in the Rio Grande Valley*.” *Id.* at 223 (emphasis added); see Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1426 (2012) (explaining that *Interstate Circuit* demands a close

reading and can “mislead the unwary”). *Interstate Circuit* does not support Plaintiffs’ suggestion that mere conscious parallelism in response to demands made by a dominant customer gives rise to an inference of conspiracy.

**B. Plaintiffs’ Claimed “Plus Factors” Do Not Raise A Suggestion Of Previous Agreement**

In the district court, Plaintiffs claimed that they had adequately alleged a conspiracy by alleging parallel conduct and several plus factors. The district court properly recognized that Plaintiffs’ Complaint does not even allege genuinely parallel conduct in more than conclusory fashion, and that certainly none of Plaintiffs’ claimed plus factors supports a “reasonable inference,” *Iqbal*, 556 U.S. at 678, that any parallel conduct was the result of a previous agreement between the manufacturers, ER 5-8.

**1. Plaintiffs’ Assertion That The Manufacturers Adopted And Enforced MAP Policies With “Substantially Similar” Terms “Relatively Close In Time” Does Not Suggest A Conspiracy**

Plaintiffs argue that a horizontal agreement may be inferred from allegations that the manufacturer Defendants adopted MAP policies with “substantially similar” terms “relatively close in time.” *E.g.*, ER 63-64 (¶ 103); Br. at 41. The Supreme Court recognized in *Twombly* 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 556 n.4 (citation omitted). But cases that

have treated changes in policies as a “plus factor” have relied on specific allegations establishing that radical changes were adopted in parallel, in a time-frame that was short enough to be truly suspicious. Plaintiffs’ allegations do not meet this standard for at least four reasons.

*First*, as discussed earlier (*supra* at 19-20), the district court properly recognized that “substantially similar” and “relatively close in time” are subjective conclusions, not evidentiary facts. Instead of alleging dates, the months, or even the year when each of the Defendants adopted the allegedly conspiratorial MAP policies, the Complaint offers only the vague and conclusory allegation that the Defendants’ implemented their MAP policies “within a relatively short period of time.” ER 39-40 (¶ 8). As the district court properly found, this bare statement is not an allegation of evidentiary fact (ER 7); it is the very kind of “labels and conclusion” that *Twombly* deems insufficient. 550 U.S. at 555.

The Complaint’s allegations regarding the supposed “substantial similarity” of the MAP terms are equally barren. The Complaint alleges that Fender “modified and strengthened” its MAP policy between 2004 and 2007 and vaguely describes Fender’s policy, and then states in conclusory manner that the other manufacturer Defendants “also implemented, modified or expanded their MAPs beginning in or about 2004 and continuing through approximately 2007, so that the MAPs of each Manufacturing Defendant contained substantially similar terms and

advertising revisions.” ER 61-62 (¶¶ 96-97). But, as the district court properly recognized, the term “substantially similar” is a subjective conclusion, not an evidentiary fact. ER 7. Plaintiffs admitted to the district court that they had in their possession actual MAP policies of at least three Defendants, and yet—despite an explicit warning from the district court—tellingly failed to plead the actual MAP terms in the operative Complaint, including the supposedly “similar enforcement provisions and similar restrictions over time,” which Plaintiffs’ counsel had said were “critical to [their] allegations in the case.” *Supra* at 14-15.

*Second*, the Complaint does not allege any “complex and historically unprecedented” departure from past practice. *Twombly*, 550 U.S. at 556 n.4 (citation omitted). To the contrary, the Complaint acknowledges that the manufacturer Defendants used MAP policies long before the alleged conspiracy, ER 39 (¶ 7), 59 (¶¶ 86-87), 60-61 (¶¶ 91-92), and it merely alleges that manufacturers “adopt[ed], revise[d], and increase[d] enforcement” of MAP policies. By contrast, *Standard Iron Works v. ArcelorMittal*, upon which Plaintiffs rely, alleged “drastically novel conduct.” 639 F. Supp. 2d 877, 900 (N.D. Ill. 2009); *see also In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 678-79, 683 (S.D.N.Y. 2012) (change to a “model heretofore unknown in the publishing industry” was sufficient); *In re Flat Glass Antitrust Litig.*, No. 08-mc-18, MDL No. 1942, 2009 U.S. Dist. LEXIS 10329, at \*14-15 (W.D. Pa. Feb. 11, 2009)

(defendants had “a history of varying surcharges by region of the country, but after June of 2002, Defendants did not vary their surcharges by region” (internal citation omitted)).

*Third*, the Complaint does not actually allege that the supposed change was “abrupt” or adopted by all of the manufacturer Defendants within a short timeframe. Without such temporal proximity, allegations of conspiracy lose any footing because adoption of similar practices over time instead of contemporaneously “refute[s] rather than support[s]’ allegations of conspiracy.” *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) (citation omitted); *see also In re LTL Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 U.S. Dist. LEXIS 14276, at \*66-67 (N.D. Ga. Jan. 29, 2009) (price changes over a four year period were “far too broad” to infer an agreement); *compare Standard Oil Co. (Cal.) v. Moore*, 251 F.2d 188, 209 (9th Cir. 1957) (rivals’ removal of their price signs *within a five-minute period* supported an inference of conspiracy).

In their brief to this Court, Plaintiffs state that in the late 1990s MAP policies were in limited use with only some products, and that a material change occurred during the period from 2004 to 2007 when the manufacturer Defendants implemented “comprehensive MAPs” that covered all guitars and amplifiers and included stricter enforcement provisions. Br. at 40-41, 52. As the district court

noted, however, the Complaint describes the manufacturer Defendants' adoption and implementation of MAP policies as occurring over an "extended period of time" instead of contemporaneously or even within the same year. ER 6. The Complaint refers to MAP policies being adopted and changed in the 1999-2002 period, claims that the manufacturer Defendants changed their business practices with respect to MAP policies in the "early 2000s," and quotes statements in *The Music Trades* discussing the use of MAPs from 2000 to 2002 across the entire industry. ER 39 (¶ 7), 59 (¶ 85), 59-61 (¶¶ 88-92). This wide-ranging time period is enlarged even further by the allegations elsewhere in the Complaint that the conspiracy was first manifested through the manufacturer Defendants' adoption and implementation of MAP policies "beginning in or about 2004" through "approximately 2007." ER 62 (¶ 97). Allegations suggesting that the manufacturer Defendants adopted MAP policies at different points along a continuum spanning nearly a decade directly "refute rather than support" allegations of conspiracy." *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d at 962 (citation omitted); *see also In re LTL Shipping Servs. Antitrust Litig.*, 2009 U.S. Dist. LEXIS 14276, at \*66-67.

By contrast, in *In re Text Messaging Antitrust Litigation*, upon which Plaintiffs rely (at 41), the Seventh Circuit found that the "simultaneous[]" change in prices constituted a plus factor because "[t]he change in the industry's pricing

structure was so rapid ... that it *could not have been accomplished* without agreement on the details of the new structure, the timing of its adoption, and the specific uniform price increase that would ensue on its adoption.” 630 F.3d 622, 628 (7th Cir. 2010) (emphasis added); *see also* Areeda & Hovenkamp, *supra*, ¶ 1425a (adverse inference is permissible “when the challenged action would simply not be possible without a traditional conspiracy”).

*Finally*, Plaintiffs themselves have alleged a perfectly lawful explanation for any similarity in the terms or the timing of when the manufacturer Defendants adopted MAP policies. Plaintiffs have alleged the market imperatives that drove the manufacturer Defendants toward implementing MAP policies, which would naturally produce similar terms. *See, e.g., Transhorn, Ltd. v. United Techs. Corp. (In re Elevator Antitrust Litig.)*, 502 F.3d 47, 51 (2d Cir. 2007) (“Similar contract terms can reflect similar bargaining power and commercial goals (not to mention boilerplate) ....”). And the district court recognized that “announcing MAP policies at around the same time is consistent with a response to the same market conditions.” ER 7.

Here, the relevant market conditions—according to Plaintiffs’ own Complaint—were that Guitar Center began pressuring each manufacturer to enforce MAP policies as a response to the rise of internet-based and “big box” retailers in the 1990s and early 2000s. ER 39-40 (¶¶ 6-8), 52-53 (¶ 62), 55-56

(¶ 74), 56-57 (¶ 76). The Complaint explains: “Facing aggressive competition from these new market entrants, beginning in or about 2004, Guitar Center used its dominant market power ... to conspire with and coerce the Manufacturing Defendants into agreeing to collectively adopt, implement and enforce MAPs for their products.” ER 61 (¶ 93). After making conclusory statements about a conspiracy, the Complaint candidly admits that the manufacturer Defendants acted “*in response* to this new competition from internet and mass merchant retailers and the decline of retail prices,” ER 39 (¶ 7) (emphasis added), and “to Guitar Center’s pressure and coercion,” ER 61 (¶ 95).

The Supreme Court explained in *Twombly* that ““independent responses to common stimuli”” are not a conspiracy and provide no basis for inferring a conspiracy. 550 U.S. at 556 n.4 (quoting 6 Areeda & Hovenkamp ¶ 1425, at 167-185). A persuasive “plus factor” is a bit of factual “context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.” *Id.* at 557. But Plaintiffs themselves have pled a “context” in which no horizontal conspiracy is necessary to explain why the manufacturer Defendants adopted MAP policies over the period from the 1990s to 2007. Exactly like in *Twombly*, “here we have an obvious alternative explanation” for any similarity, *id.* at 567, and Plaintiffs have not genuinely alleged evidentiary facts “plausibly suggesting (not merely consistent with) agreement,” *id.* at 557.

In that respect this case is similar to *Mayor & City Council of Baltimore v. Citigroup, Inc.*, Nos. 10-0722-cv(L), 10-0867-cv (CON), 2013 U.S. App. LEXIS 4591 (2d Cir. Mar. 5, 2013). There, the Second Circuit explained that the market for auction rate securities (“ARS”) began to fail, so “each defendant was faced with the same dilemma.” *Id.* at \*24. It could “[c]ontinu[e] to prop up the auctions with support bids [which] generated commissions for successful auctions; but if enough auctions failed, ARS would be seen as poor investments, the markets would dry up, and Defendants’ support purchases would turn into major liabilities.” *Id.* Each of the defendants “was well aware of these dynamics—the market as a whole was essentially holding its breath waiting for the inevitable death spiral of ARS auctions.” *Id.* at \*24-25. The court explained that “[i]n such an environment it is unsurprising, and expected, that once failures reached a critical mass, defendants would exit the market very quickly.” *Id.* at \*25. Here, the district court properly recognized that the Complaint alleges that all of the manufacturer Defendants faced the emergence of internet-based retailers, the rise of big-box retailers, and pressure from Guitar Center to adopt MAP policies beginning in the late 1990s, so the timing of these policies is “not really a ‘plus factor’ after all.” ER 7.

Moreover, MAP policies were a common response to market conditions by manufacturers of other instruments that Plaintiffs do not claim were part of the

alleged conspiracy. Plaintiffs initially alleged a conspiracy that embraced manufacturers of other fretted instruments, including banjos and mandolins. *See* SER 36 (¶ 7), SER 53 (¶ 84). And in the Complaint, Plaintiffs point to reports in *The Music Trades* that manufacturers of “popular product[s]” and “every new product” were using MAP policies in 2001 and 2002. *See* ER 60-61 (¶¶ 89-92). According to Plaintiffs’ own allegations, therefore, the adoption of MAP policies was a common industry-wide response to general market conditions that extended far more broadly than the conspiracy they now allege.

## **2. Plaintiffs’ Allegations That Defendants Participated In Trade Association Meetings Do Not Suggest A Conspiracy**

Plaintiffs also assert that Defendants’ participation in NAMM meetings is a plus factor that supports an inference of conspiracy. As noted, Plaintiffs do not and cannot allege that specific representatives of any Defendants communicated or had a meeting in which they reached any agreement concerning the terms of MAP policies. Instead, Plaintiffs rely on general allegations that Defendants attended the NAMM trade association events along with thousands of other people. Plaintiffs ignore that trade associations are lawful and serve important procompetitive purposes, and there is nothing nefarious about merely attending such events.<sup>2</sup> The

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<sup>2</sup> As the leading antitrust treatise explains: “[T]he effect of holding opportunity sufficient [to suggest a conspiracy] would be to discourage all trade associations, industry gatherings, or joint ventures. Thereby to imperil reasonable and procompetitive collaborations would be inconsistent both with the purposes of the

Supreme Court has made clear that courts cannot infer conspiracy from allegations that defendants attended trade shows or other association meetings. *See Twombly*, 550 U.S. at 567 n.12; *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563, 584 (1925); *see also Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 885-86 (9th Cir. 1982); *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010) (“[I]t was well-settled before *Twombly* that participation in trade organizations provides no indication of conspiracy.”). As the Court explained, “members of trade associations” do not become conspirators “merely because they gather and disseminate information ... bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses.” *Maple Flooring*, 268 U.S. at 584.<sup>3</sup>

In *Alvord-Polk, Inc. v. F. Schumacher & Co.*, for example, the Third Circuit considered allegations that wallpaper manufacturers conspired to impose policies designed to protect margins for brick-and-mortar retailers who maintained

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antitrust laws and with well-established Supreme Court permission for many kinds of collaboration among competitors. Mere conspiratorial opportunity is routinely and correctly held insufficient to support a conspiracy finding.” *Areeda & Hovenkamp, supra*, ¶ 1417b (footnote omitted).

<sup>3</sup> *See also, e.g., In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007) (“Attendance at industry trade shows and events is presumed legitimate and is not a basis from which to infer a conspiracy, without more.”); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1257 (W.D. Wash. 2009) (same); *In re Cal. Title Ins. Antitrust Litig.*, No. C 08-1341 JSW, 2009 U.S. Dist. LEXIS 43323, at \*18-19 (N.D. Cal. May 21, 2009) (same); *In re Late Fee & Over-Limit Litig.*, 528 F. Supp. 2d at 963-64 (same).

showrooms but were being undercut by discounters that sold over the phone. 37 F.3d 996, 1004-05 (3d Cir. 1994). The Third Circuit explained that it was “conceded that manufacturers discussed 800-number dealers, and actions they were taking concerning them, at conventions” organized by their trade association. *Id.* at 1005, 1013-14. But the court of appeals held that the plaintiffs could not infer a conspiracy from mere “communications on the 800-number subject” and “informational exchanges,” *even directly between competitors*, absent evidence that “those communications r[ose] to the level of an agreement.” *Id.* at 1013-14. That was particularly true since “keep[ing] the conventional retailers satisfied” was in every manufacturer’s *independent* business interests. *Id.* at 1014; *see also, e.g., Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1172 (7th Cir. 1990) (“Evidence that brokers were aware of other brokers’ policies regarding buyers’ brokers before enacting their own policy is nothing more than a restatement of conscious parallelism.”). This Court has similarly recognized that “[g]athering information about pricing and competition in the industry is standard fare for trade associations,” and that “[i]f we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action.” *7-UP Bottling Co. v. Archer Daniels Midland Co. (In re Citric Acid Litig.)*, 191 F.3d 1090, 1098 (9th Cir. 1999).

Plaintiffs attempt to obfuscate the shortcomings in their Complaint by pairing allegations that independent retailer groups like “Music For Everyone” advocated for MAPs and that NAMM staff had “talking points,” with allegations that manufacturer representatives participated on panels at which MAP issues were discussed. None of these allegations, individually or collectively, support any inference that the manufacturer Defendants reached any agreement with each other. Plaintiffs betray the weakness of their allegations by relying on *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 586 F. Supp. 2d 1109, 116 (N.D. Cal. 2008), a case in which—as Plaintiffs admit—“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.” Br. at 37. The district court that decided that case later explained that the plaintiffs had alleged “public statements about pricing as well as allegations that the defendants communicated with one another about pricing by telephone calls, e-mails and instant messages.” *In re Cal. Title Ins. Antitrust Litig.*, No. C 08-01341 JSW, 2009 U.S. Dist. LEXIS 103407, at \*15 (N.D. Cal. Nov. 6, 2009). Despite having the benefit of discovery, including document production and depositions, Plaintiffs were (and are) unable to allege that any such communications occurred between the manufacturer Defendants here. Similarly, *In re Text Messaging Antitrust Litigation* involved allegations of an exchange of pricing information at

small “leadership council” meetings outside of the trade association meetings, allegations that a stated purpose of the those meetings was to substitute “‘co-opetition’ for competition,” and allegations that after the meeting the defendants simultaneously increased prices by 33% in the face of falling costs. 630 F.3d at 628.

Plaintiffs’ claim is particularly weak because they make no effort to specifically tie particular changes in MAP policies to particular NAMM-sponsored discussions. The District Court for the Western District of Washington dismissed a complaint where the plaintiffs alleged an opportunity to conspire based upon trade show attendance but “ma[de] no attempt to compare the timing of the trade association meetings” to the conduct in question. *See In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1257 (W.D. Wash. 2009). Here, the manufacturers’ attendance at trade shows during a four-year span does not become a plus factor simply because they also allegedly changed their MAP policies in unspecified ways at unidentified times during those four years. Plaintiffs must allege more to tie the timing of trade association events to the alleged wrongful conduct in order to suggest a conspiracy. *See id.* at 1257. That is especially true where the Complaint also alleges that changes were made before the alleged conspiracy even began.

Finally, the allegations against NAMM itself, as a supposed conspirator, are conclusory and implausible. “A ‘complaint must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it.’” *In re Cal. Title Ins. Antitrust Litig.*, No. C 08-01341 JSW, 2009 U.S. Dist. LEXIS 43323, at \*27 (N.D. Cal. May 21, 2009) (citation omitted). The Complaint alleges that NAMM “facilitated” the conspiracy and provided the “opportunity” for the manufacturers to meet. ER 65-66 (¶¶ 110-11). As support, it describes only panel and round-table discussions and “invitation only” summits that the entire industry attended, and states that NAMM Board members had (undescribed) “talking points.” ER 67 (¶ 114), ER 68-71 (¶¶ 118-29). These allegations are conclusory and present nothing more than the type of industry meetings and exchange of information regarding industry dynamics that *Maple Flooring* rejected as evidence of a conspiracy. 268 U.S. at 564. There are no allegations that anyone from NAMM ever communicated with anyone from Guitar Center about MAP policies, let alone did so in furtherance of Guitar Center’s supposed efforts to coerce manufacturers to implement and enforce them. And Plaintiffs allege no evidentiary facts that could make plausible their conclusory assertion that a trade association with 9,000 members joined or facilitated a

conspiracy among five of those members, that the Complaint admits would have harmed many other members. ER 55-56 (¶ 74).

### **3. The Adoption Of MAP Policies Was In Each Manufacturer's Individual Self Interest**

Plaintiffs assert that Defendants' motivations are an additional plus factor. *See* Br. at 45-47. First, they argue the Defendants were “[u]niquely” and “strongly motivated to conspire to stabilize the price of guitars and guitar amplifiers.” *Id.* at 45-46. But “if ‘a motive to achieve higher prices’ were sufficient, every company in every industry could be accused of conspiracy because they all ‘would have such a motive.’” *In re Late Fee & Over-Limit Litig.*, 528 F. Supp. 2d at 964 (quoting *Jacob Blinder & Sons, Inc. v. Gerber Prods. Co. (In re Baby Food Antitrust Litig.)*, 166 F.3d 112, 133 (3d Cir. 1999)); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1069-70 (11th Cir. 2005) (“The simple presence of economic motive weighs little on the scale of probative value.”). The Supreme Court recognized in *Twombly* that the defendants had a “‘compelling common motivatio[n]’” to conspire but held that the complaint nonetheless failed to allege any plausible basis for inferring agreement. 550 U.S. at 550-51.

Second, Plaintiffs invoke *Interstate Circuit's* suggestion that the alleged conspirators risked “‘a substantial loss of the business and good will’” unless all participated, and contend that “retail prices would not have increased if only one or two of the manufacturer defendants adopted MAPs.” Br. at 46-47 (quoting

*Interstate Circuit*, 306 U.S. at 222). But business strategies are often interdependent in that sense. “That an agreement would benefit the defendants merely restates the presence of interdependence, which helps interpret their behavior but does not itself create a conspiracy.” *Areeda & Hovenkamp*, *supra*, ¶ 1414; *see also id.* ¶ 1434 (“Motivation is thus synonymous with interdependence and therefore adds nothing to it.”).

Plaintiffs do not contend that the manufacturer Defendants’ actions were against their individual self-interests. Instead, they allege the opposite. They say that *regardless of any agreement* with another manufacturer, each manufacturer would have been separately motivated to implement stronger MAP policies “[b]ecause the Manufacturer Defendants believed that they could not afford to lose access to Guitar Center’s stores.” ER 52-53 (¶ 62), 55-56 (¶¶ 73-74), 56-57 (¶ 76), 57 (¶¶ 77-78), 59-61 (¶¶ 88-95). They even allege that it was in the manufacturer Defendants’ self-interests *to preserve* Guitar Center’s position as a dominant retailer, because “maintaining higher retail prices assisted the Manufacturer Defendants in preserving their brand images.” ER 64 (¶ 105). And they allege substantial implementation of MAP policies prior to the start of the alleged conspiracy. *Supra* at 8-9, 16, 27-28, 40-41.

Plaintiffs *do not* plead evidentiary facts supporting an inference that average retail prices of guitars and amplifiers manufactured by Defendants increased,<sup>4</sup> but even if they had done so a mere price increase would be equally consistent with independent enforcement of MAP policies and would not support an inference of agreement.

#### **4. The FTC Complaint Does Not Support Plaintiffs' Conspiracy Allegations**

Plaintiffs rely heavily on the FTC's investigation and consent decree with NAMM to bolster the plausibility of their claims. Br. at 44. Plaintiffs mischaracterize what the FTC actually alleged and the import of NAMM's consent decree. Neither the FTC Complaint nor NAMM's consent decree alleges that anyone, let alone the Defendants here, conspired to adopt MAP policies or to engage in any other improper conduct. Thus, the FTC consent decree and related allegations do nothing to nudge Plaintiffs' conspiracy allegations from the possible to the plausible.

Plaintiffs do not (and cannot) claim that the FTC alleged NAMM was party to an *agreement*, or that it facilitated any agreement between anyone, much less the other Defendants here. Indeed, a complaint under § 5 of the FTC Act does not

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<sup>4</sup> Plaintiffs acknowledged in their initial complaint that the charts on pages 26 and 27 of their brief are "over-inclusive" because they "include[d] products outside of the relevant product market(s), such as low-cost imports." SER 49 n.2. These charts were made even more "over-inclusive" by Plaintiffs' narrowing of the relevant market in the Complaint.

require or imply any conspiracy that would violate the Sherman Act. *See Sperry & Hutchinson Co.*, 405 U.S. at 239-44.

Plaintiffs cite several cases that they claim support reliance on government investigations to “bolster the plausibility analysis.” Br. at 44 (quoting *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1009 (E.D. Mich. 2010)). Each of those cases involved ongoing criminal investigations into alleged conspiratorial price fixing under § 1 of the Sherman Act, and even in that context it is controversial to infer anything from an investigation.<sup>5</sup>

## **II. PLAINTIFFS’ ARGUMENTS FOR REVERSAL MISCHARACTERIZE THE DISTRICT COURT’S DECISION**

Plaintiffs’ brief on appeal unfairly attributes several errors to the district court that the court did not commit, and in fact specifically disclaimed.

### **A. The District Court Did Not Require Plaintiffs To Allege Direct Evidence Of Conspiracy**

Plaintiffs contend that the district court dismissed their claim because they did not allege “direct evidence” of an agreement. Br. at 34. Plaintiffs made the

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<sup>5</sup> *See, e.g., In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d at 1024 (“The investigation, however, carries no weight in pleading an antitrust conspiracy claim. It is unknown whether the investigation will result in indictments or nothing at all.”); *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-md-2143 RS, 2011 U.S. Dist. LEXIS 101763, at \*38 (N.D. Cal. Aug. 3, 2011) (ongoing DOJ investigation was “non-factor” (citation omitted)); *Superior Offshore Int’l, Inc. v. Bristow Grp., Inc.*, 738 F. Supp. 2d 505, 516-17 (D. Del. 2010) (initiation of DOJ investigation “d[id] not enhance plausibility of Plaintiff’s claim”).

same argument below, and the court specifically agreed with Plaintiffs “that they were not required to allege direct evidence of conspiratorial meetings.” ER 4.

The court nonetheless properly required that Plaintiffs allege *some* evidentiary facts, even if circumstantial, that would support a reasonable inference of conspiracy to send the case beyond the pleading stage. The court addressed Plaintiffs’ arguments that they had alleged sufficient circumstantial evidence—in the form of parallel conduct and plus factors—and rejected them because the allegations were insufficient, not because it thought there was anything improper about proving a conspiracy through circumstantial evidence. ER 4-8.

**B. The District Court Did Not Require Plaintiffs To Plead Specific Terms Or Time Periods Of The Alleged Conspiracy**

Plaintiffs argue that the district court erred by requiring them to plead specific terms or time periods of the alleged conspiracy. Br. at 49-53. Again, that charge mischaracterizes the district court’s reasoning. The district court did remind Plaintiffs of this Court’s caution, taken directly from *Twombly*, that a plausible antitrust complaint must “answer the basic questions: who, did what, to whom (or with whom), where, and when?” *Kendall*, 518 F.3d at 1048; *see also id.* at 1047 (quoting *Twombly* to the effect that “the complaint must allege facts such as a ‘specific time, place, or person involved in the alleged conspiracies’”); *Twombly*, 550 U.S. at 565 n.10 (noting that “the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies”). But the court

“accept[ed], *arguendo*” for the purpose of its decision that Plaintiffs are not required to plead specific terms or time periods. ER 7.

The court instead required merely that Plaintiffs allege something other than conclusory statements reflecting Plaintiffs’ “own judgments” that the MAPs were ““substantially similar”” and that the time periods in which the manufacturer defendants adopted them were “suspiciously short.” *Id.* Plaintiffs alleged “substantially similar” MAP policy terms without including evidentiary facts regarding the terms, and that those policies were adopted “within a relatively short period of time” without specifying any time period at all. The district court’s holding that those allegations are insufficient is a direct application of *Twombly*, which requires “more than labels and conclusions.” 550 U.S. at 555. Moreover, the district court’s discussion was in the context of addressing Plaintiffs’ argument that the terms of the MAP policies and the timing of their adoption are “plus factors” that make their claim more plausible. Plaintiffs’ own *opinions* do not make their claim more plausible.

In their brief to this Court, Plaintiffs claim that, although not required, they did allege facts about the “‘who, what, where, and when’ of defendants’ agreement.” Br. at 52. Their argument betrays how conclusory and devoid of real evidentiary content their allegations really are. Apparently the “who” is the Defendants; the “what” is a conspiracy to fix prices of guitars and guitar amplifiers

through MAP policies; and the “where” and “when” are trade association meetings between 2005 and 2007. *Id.* These statements do not point to allegations of any evidentiary facts that would make a conspiracy plausible. Instead, they are conclusory statements that major industry leaders conspired. If they were sufficient, the labels and conclusions that were rejected in *Twombly* and *Kendall* would have required those cases to be decided differently.

**C. The District Court Did Not Require That Plaintiffs Allege That Defendants Conspired At Private Meetings**

Plaintiffs contend that the district court erred by requiring them to allege that the Defendants conspired at private meetings. Br. at 36-38. That is also unfair. The district court specifically agreed with Plaintiffs that they could plead a conspiracy through circumstantial evidence other than attendance at private meetings. ER 4 (direct evidence of conspiratorial meetings is not required). Private meetings at NAMM events was *Plaintiffs’ own theory* at the outset of the case. *Supra* at 11. The court noted that Plaintiffs admitted that they had “come up empty-handed” in discovery and could not identify any private meetings or communications where agreements were reached, ER 4, but went on to consider Plaintiffs’ arguments that their allegations of parallel conduct and plus factors were sufficient. ER 4-8. The court also recognized that Plaintiffs’ own complaint could not be read as alleging any agreement reached in public. *Supra* at 12-13. And Plaintiffs have not alleged any specific invitation to collusion extended in a public

setting and accepted through subsequent reassurances and conduct by competitors, such as were held sufficient in the cases upon which they rely. *Supra* at 48-49 (discussing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d at 1115).

**D. The District Court Did Not Require Allegations That Rule Out Other Contrary Theories**

Plaintiffs pluck out of context the district court's statement that allegations "must exclude mere parallel action without any agreement or conspiracy," ER 2, and wrongly suggest that the court applied summary judgment standards, Br. at 38-39. The district court's opinion makes clear that it applied "the pleading standard set forth in [*Twombly*]." ER 2. That standard does not require allegations showing that a conspiracy is probable, but the district court correctly explained that it does require allegations that "suggest that an unlawful agreement was made," and therefore "'allegations of parallel conduct ... must be placed in a context that raises a suggestion of a preceding agreement.'" ER 3 (quoting *Twombly*, 550 U.S. at 557).

Plaintiffs are of course correct that at this stage allegations that support two plausible inferences could be sufficient. Br. at 39. But in deciding whether a proposed inference of conspiracy is plausible the court is entitled to consider "obvious alternative explanation[s]" for the facts pled. *Twombly*, 550 U.S. at 567. The district court did not err by recognizing that allegations that are at least equally

consistent with lawful parallel conduct are insufficient. That is the whole point of *Twombly*.

**E. Plaintiffs' Failure To Amplify Their Allegations Of Consciously Parallel Conduct After Discovery Further Justifies The District Court's Dismissal Of Their Claim**

Throughout their brief, Plaintiffs suggest that the district court did not give them *enough* discovery, even though they did not separately appeal the issue, *see* Br. at 2 (statement of issues). But they completely ignore that the Federal Rules of Civil Procedure do not give plaintiffs a right to *any* discovery before submitting a pleading that satisfies the requirements of Rule 8. *See* Fed. R. Civ. P. 8, 26. The Supreme Court has explained that a complaint must plausibly “show[] that the pleader is entitled to relief,” and it explicitly rejected the argument that “a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process.” *Twombly*, 550 U.S. at 555, 559 (quoting Fed. R. Civ. P. 8(a)(2)). The *dissent* in *Twombly* would have given the plaintiffs some form of limited discovery. *Id.* at 593-95 (Stevens, J., dissenting) (“giving the plaintiffs the opportunity to take depositions from Notebaert and at least one responsible executive representing each of the other defendants”).

In this case, the district court gave Plaintiffs more than was required—following what occurred in the district court in *Kendall*. There, the district court dismissed the complaint with leave to amend and “allowed [the plaintiffs] to

conduct discovery so they would have the facts they needed to plead an antitrust violation in their amended complaint.” 518 F.3d at 1046. But, just as in this case, “[e]ven after the depositions taken,” the Plaintiffs failed to “plead any evidentiary facts beyond parallel conduct to prove their allegation of a conspiracy.” *Id.* at 1048.

Regardless, the scope of discovery is reviewable only for abuse of discretion and Plaintiffs do not even contend on appeal that the district court abused its discretion. Nor could they. Plaintiffs ignore that the discovery the district court allowed was based on how they framed and argued the case. In the CCAC, they repeatedly asserted that the Defendants entered into agreements at “private meetings” at NAMM events and exchanged “competitively-sensitive information.” SER 29; *see also supra* at 11. But in the course of the motion to dismiss proceedings, Plaintiffs admitted that “they lack[ed] the information to plead specific facts in good faith, and [sought] discovery so they [could] learn who attended the meetings they have generally identified, what was said, and what was agreed.” *See* SER 22. That is what the court permitted Plaintiffs to do.

Plaintiffs complain that they were not given all the documents provided to the FTC and in particular did not receive copies of every MAP policy. That was not an abuse of discretion, especially when the FTC investigation covered more than the guitars and guitar amplifiers to which Plaintiffs limited their case. And

the reason Plaintiffs did not get copies of every MAP policy was that discovery was limited—per the district court’s order and negotiations between the parties—to communications within a tight time window around particular NAMM meetings at which Plaintiffs suspected a conspiracy might have been hatched. SER 8-14; ER 36. The district court held that, without some connection to a communication between the Defendants, the terms of particular MAP policies (policies that could reflect lawful, independent action) were beyond the limited scope of the discovery the court was willing to provide. SER 13-14; ER 11. The district court also correctly recognized that Plaintiffs were not entitled to “extensive discovery” prior to pleading any plausible allegation of an antitrust violation. ER 11. Conclusory speculation that MAP policies Plaintiffs have never seen are “substantially similar,” in order to obtain those policies in discovery, is not pleading a case; it is asking for a fishing license. The district court did not abuse its discretion in declining that request.

### **CONCLUSION**

None of Plaintiffs’ attempts to re-characterize the district court’s opinion are persuasive. The district court applied well-settled principles of antitrust law and gave Plaintiffs three opportunities to plead their case, plus discovery. Ultimately, Plaintiffs failed to adequately allege an *agreement* among the manufacturer Defendants. The district court properly concluded that Plaintiffs’ allegations that

the vendors engaged in parallel conduct at the behest of a dominant market participant do not state a violation of the Sherman Act. This Court should affirm the district court's order dismissing Plaintiffs' Sherman Act claim with prejudice.

Respectfully submitted,

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### **STATEMENT OF RELATED CASES**

I certify that pursuant to Ninth Circuit Rule 28-2.6, Appellees are not aware of any related case pending in this Court.

### **CERTIFICATE OF COMPLIANCE**

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, Appellees' Joint Response Brief is proportionately spaced, has a typeface of 14 point and contains 14,125 words, in accordance with Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 28-4, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Margaret M. Zwisler  
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### **CERTIFICATE OF SERVICE**

I, Margaret M. Zwisler, hereby certify that I electronically filed the foregoing Appellees' Joint Response Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 28, 2013.

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

s/ Margaret M. Zwisler  
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