

MDL 2121

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

OCT -7 2009

BEFORE THE JUDICIAL PANEL ON

FILED
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MULTIDISTRICT LITIGATION

In re:

MUSICAL INSTRUMENTS ANTITRUST
LITIGATION

MDL Docket No. _____

**PLAINTIFF DAVID GIAMBUSO'S MOTION FOR TRANSFER
AND COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. § 1407**

PLEADING NO. 1

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Counsel for Plaintiff David Giambusso

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Movant David Giambusso (“Movant”), by his undersigned counsel, respectfully requests that the Judicial Panel on Multidistrict Litigation (the “Panel”) issue an order pursuant to 28 U.S.C. § 1407 for transfer and coordination or consolidation in the United States District Court for the Southern District of California for pretrial proceedings of all pending and later filed antitrust actions relating to a conspiracy to fix prices of musical instrument products, including acoustic and electric guitars, violins, amplifiers and strings (“Fretted Instruments).

1. To date, Movant is aware of seven (7) related antitrust actions have been filed alleging a conspiracy to fix prices in the market for Fretted Instruments in violation of Section 1 of the Sherman Act.

2. Movant is the Plaintiff in the first-filed action, entitled *Giambusso v. National Association of Music Merchants, Inc., et al.* (filed September 11, 2009).¹ The *Giambusso* action is assigned to the Honorable Larry A. Burns, presiding in the Southern District of California. After the filing of Movant’s action, six (6) virtually identical actions were filed on: September 22 (*Hale*), September 25 (*O’Leary*), September 30 (*Giles, Teller, Collins*), and October 1 (*Keel*).²

2. The Actions proposed for transfer and consolidation are based on the same operative facts and therefore “involve one or more common questions of fact” as required by 28 U.S.C. § 1407(a). Common questions of fact are: (a) whether defendants conspired and/or engaged in concerted actions in restraint of trade; (b) whether defendants intentionally and unlawfully engaged in a scheme to control Fretted Instrument pricing, including by unlawfully exchanging sensitive pricing information; (c) whether defendants’ unlawful conduct caused named plaintiff and the members of the class to pay more for Fretted Instruments than they

¹ See, Appendix of Exhibits In Support of Plaintiff David Giambusso’s Motion for Transfer and Consolidation or Coordination under 28 U.S.C. § 1407 (“Appendix”), Exhibit A.

² The complaints in *Hale* (C.D.Cal.), *O’Leary* (C.D.Cal.), *Giles* (S.D.Cal.), *Teller* (N.D.Ill.), *Collins* (S.D.Cal.) and *Keel* (S.D.Cal.), are attached to the Appendix at Exhibits B-G, respectively.

otherwise would have paid; (d) the duration and extent of the combination or conspiracy; (e) whether defendants and their co-conspirators were participants in the combination or conspiracy; (f) whether the alleged combination or conspiracy violated Section 1 of the Sherman Act; (g) the effect of the combination or conspiracy upon prices of Fretted Instruments sold in the United States during the class period; (h) whether the named plaintiffs and the class members are entitled to declaratory, equitable and/or injunctive relief; (i) whether the named plaintiffs and the class members have been damaged and the appropriate measure of such damages; (j) whether defendants engaged in agreements, contracts, combinations and conspiracies which had the purpose and/or effect of unreasonably restraining competition and limiting purchasers' access to competing and lower priced Fretted Instruments; and (g) whether defendants' unreasonable anti-competitive contracts, contribution and conspiracies have caused the named plaintiffs and the class members to suffer injury to their business or property. As a consequence, transfer of the Actions for coordination will prevent duplication of discovery, eliminate the possibility of conflicting pretrial rulings, and conserve judicial resources.

3. The Southern District of California is the appropriate forum for the coordination or consolidation of the Actions. Four (4) of the seven (7) actions are pending in the Southern District of California, where a key defendant – the National Association of Music Merchants, Inc. (the apparent “hub” of the information exchange conspiracy) is located. Critical witnesses and documents are located in the Southern District of California. Finally, the Southern District of California is convenient, easily accessible, and in close proximity to another defendant common to all actions – Guitar City, Inc. which is located in Southern California.

WHEREFORE, Movant respectfully requests that the Panel issue an Order transferring the actions listed in the accompanying schedule, and all tag-along actions, to the Honorable

Larry Alan Burns in the United States District Court for the Southern District of California for coordinated or consolidated pretrial proceedings.

Dated: October 2, 2009

Respectfully submitted,

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In re:

MUSICAL INSTRUMENTS ANTITRUST
LITIGATION

MDL Docket No. _____

**PLAINTIFF DAVID GIAMBUSO'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR TRANSFER AND COORDINATION OR
CONSOLIDATION UNDER 28 U.S.C. § 1407**

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Counsel for Plaintiff David Giambusso

Pursuant to 28 U.S.C § 1407 and Rule 7.2 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation (hereinafter “the Panel”), Movant David Giambusso (“Movant”) respectfully submits this memorandum in support of the accompanying Motion for Transfer and Consolidation or Coordination of each of the actions identified in the accompanying Schedule of Actions (the “Actions”) in the Southern District of California for Pretrial Proceedings.

FACTUAL BACKGROUND

To date, Movant is aware of seven (7) antitrust class actions alleging a conspiracy to maintain, implement and/or enforce Minimum Advertised Pricing (“MAP”) policies, with the effect of fixing prices in the market for musical instrument products such as acoustic and electric guitars, violins, amplifiers and strings (“Fretted Instruments”) in violation of Section 1 of the Sherman Act. Generally, all actions allege that the National Association of Music Merchants, Inc. (“NAMM”), a trade association, facilitated restraints of trade by enabling and encouraging the exchange of competitively sensitive price information among competitors involving Fretted Instruments.

The first action was filed by Movant on September 11, 2009 in the Southern District of California. *See*, Appendix of Exhibits in Support of Plaintiff David Giambusso’s Motion for Transfer and Consolidation or Coordination Under 28 U.S.C. § 1407 (“Appendix”), Exh. A. This action is assigned to the Honorable Larry Alan Burns.

Of the seven actions that similarly allege conspiracy to fix prices in the market for Fretted Instruments in violation of Section 1 of the Sherman Act, four (4) actions are pending in the

Southern District of California.¹ Two actions are pending in the Central District of California, and one is pending in the Northern District of Illinois.²

The Actions involve common allegations of fact and law. Each alleges that NAMM's conduct facilitated the implementation of collusive strategies among competitors that allowed them to conspire, fix, raise, maintain or stabilize prices for Fretted Instruments over the same time period. Furthermore, based on essentially identical facts, the Actions assert antitrust claims under the Sherman Act, and seek similar relief. Thus, the Actions should be consolidated, coordinated and transferred to a single judicial district to prevent duplicative discovery and motion practice, avoid inconsistent rulings, and conserve the resources of the courts and the litigants.

Movant respectfully submits that the United States District Court for the Southern District of California is the appropriate forum for coordination and consolidation of the Actions. Four of the seven actions are pending in the Southern District of California, where a key defendant – the National Association of Music Merchants, Inc. (the apparent “hub” of the information exchange conspiracy) is located. Critical witnesses and documents are located in the Southern District of California. Finally, the Southern District of California is convenient, easily accessible, and in close proximity to another defendant common to all actions – Guitar City, Inc. which is located in Southern California.

¹ In addition to the case filed by Plaintiff David Giambusso, the other cases pending in the Southern District of California are: *Giles v. Guitar Center, Inc., et al.*, Case No. 09-CV-2146-BEN (POR) (S.D.Cal. Sept. 30, 2009), Appendix, Exh. E; *Collins v. Guitar Center, Inc., et al.*, Case No. 09-CV-2151-JAH (S.D.Cal. Sept. 20, 2009), Appendix, Exh. F; and *Keel v. Guitar Center, Inc., et al.*, Case No. 09-CV-2156-BTM (S.D.Cal. Sept. 30, 2009).

² *Hale v. Guitar Center, Inc., et al.*, Case No. 09-CV-6897-GW (PJWx) (C.D. Cal. Sept. 22, 2009), Appendix, Exh. B.; *O'Leary v. Guitar Center, Inc., et al.*, Case No. 09-CV-7015-GAF (Ex) (C.D. Cal. Sept. 25, 2009), Appendix, Exh. C; *Teller v. Guitar Center, Inc.*, Case No. 1:09-CV-6104 (N.D. Ill. Sept. 30, 2009), Appendix, Exh. D.

ARGUMENT

I. The Actions Should Be Transferred and Consolidated or Coordinated For Pretrial Proceedings

Each of the Actions should be transferred and consolidated or coordinated for pretrial proceedings pursuant to 28 U.S.C. § 1407(a), which permits transfer and consolidation or coordination of cases: (1) that “involve[e] one or more common questions of fact;” (2) where transfer will further “the convenience of parties and witnesses;” and (3) where transfer “will promote the just and efficient conduct of [the] actions.” 28 U.S.C. § 1407(a); *See In re Cutter Labs., Inc. “Braunwald-Cutter” Aortic Heart Valve Products Liability Litigation*, 465 F. Supp. 1295, 1296 (J.P.M.L. 1979). Transfer of the Actions to the Southern District of California will satisfy each of these objectives.

A. Transfer Is Appropriate Because The Actions Involve One or More Common Questions of Fact and Law

Each of the Actions allege that Defendants conspired to fix, maintain or stabilize prices for Fretted Instruments in violation of the Sherman Act. The Panel consistently holds that cases involving overlapping factual and legal issues are particularly appropriate for transfer. *See In re Urethane Antitrust Litig.*, 333 F. Supp. 2d 1379-81 (J.P.M.L. 2004) (transferring related antitrust cases under § 1407 because, among other things, the cases “involved common questions of fact”); *In re Beef Indus. Antitrust Litig.*, 419 F. Supp. 720, 721 (J.P.M.L. 1976) (common factual issues concerning alleged antitrust conspiracy necessitated transfer); *In re Hawaiian Hotel Room Rate Antitrust Litig.*, 438 F. Supp. 935, 936 (J.P.M.L. 1977) (“As is often true in multidistrict antitrust litigation, the private actions raise common questions of fact concerning the existence, scope and effect of the alleged conspiracy.”). The Actions share common issues of fact and law, and therefore, should be transferred to one District.

B. Transfer and Consolidation or Coordination for Pretrial Proceedings Will Further the Convenience of Parties and Witnesses

Transfer and consolidation or coordination for pretrial proceedings of the Actions will also serve “the convenience of the parties and witnesses” in accordance with the second requirement of §1407(a). Plaintiffs’ nearly identical allegations will require duplicative discovery and pretrial proceedings unless the Actions are consolidated or coordinated for pretrial purposes in one District. In each case, the parties will seek discovery of the same body of documents.

For instance, each plaintiff will seek to prove whether Defendants conspired and/or engaged in a concerted action to control price and potential competitors from the relevant market and the duration and extent of the conspiracy. Plaintiffs will also seek to depose the same individuals. There is no reason to require the parties to respond to multiple motions and discovery requests or to require the parties and to otherwise duplicate effort in multiple federal forums. Transfer and consolidation or coordination will solve these problems because it will permit the transferee judge to formulate a single, unified pretrial program that minimizes the inconvenience and overall expense for all parties and witnesses. *See In re Uranium Indus. Antitrust Litig.*, 458 F. Supp. 1223, 1229 (J.P.M.L. 1978).

C. Transfer and Consolidation or Coordination for Pretrial Proceedings Will Promote the Just and Efficient Conduct of The Actions

Transfer and consolidation or coordination of the Actions for pretrial proceedings will also “promote the just and efficient conduct of [the] actions” in accordance with the third requirement of § 1407(a). The Actions will likely involve the same pretrial issues, such as those concerning the nature and scope of discovery and concerning the sufficiency of plaintiffs’ allegations. If each judicial district were forced to resolve these issues in separate pretrial proceedings, scarce judicial resources would be wasted needlessly. Moreover, there would be a

substantial likelihood that such duplicative proceedings might result in inconsistent rulings, especially regarding the important issue of class certification. Transfer and consolidation or coordination will avoid all these problems. *See In re A.H. Robins Co. "Dalkon Shield" IUD Prods. Liab. Litig.*, 406 F. Supp. 540, 542 (J.P.M.L. 1975) (transfer necessary to prevent duplication of discovery and eliminate the possibility of conflicting pretrial rulings); *In re Hawaiian Hotel Room Rate Antitrust Litig.*, 438 F. Supp. at 936 (consolidation of five actions was necessary "in order to prevent duplication of discovery, eliminate the possibility of inconsistent pretrial rulings, and streamline the rest of the pretrial proceedings as well"); *In re Commercial Money Ctr., Inc. Equip. Lease Litig.*, 229 F. Supp. 2d 1379, 1380 (J.P.M.L. 2002) (consolidation of cases filed nationwide would prevent inconsistent rulings).

II. The Actions Should Be Transferred To The Southern District of California

It is noteworthy that the first-filed action is pending in the Southern District of California. The Panel has frequently opted to consolidate cases before the court that manages the litigation's first complaint. *See, e.g., In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 1998 U.S. Dist. LEXIS 17039 at 2 (J.P.M.L. Aug. 12, 1998) (stating that transfer to Arizona was appropriate because, *inter alia*, "the first-filed action [was] pending there"); *In re Baldwin-United Corp. Litigation*, 341 F. Supp. 771, 773 (J.P.M.L. 1984) (ordering transfer to New York, where the "first-filed and most advanced actions" were pending); *In re Hotel Telephone Charge Antitrust Litigation*, 341 F. Supp. 771, 773 (J.P.M.L. 1972) (stating that the most suitable transferee district was "where the first action was filed").

Here, in addition to the pendency of the first-filed action, three (3) additional related actions are pending in the Southern District of California. The Panel has recognized a preference for a forum in which the greatest number of related cases are pending. *In re Oxycontin Antitrust*

Litig., 314 F. Supp. 2d 1388, 1390 (J.P.M.L. 2004); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 196 F. Supp. 2d 1375, 1376 (J.P.M.L. 2002); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab.*, 844 F. Supp. 1553, 1554 (J.P.M.L. 1994) (transferring twenty-nine actions to District of Minnesota where the greatest number of actions were pending); *In re Folding Carton Antitrust Litig.*, 415 F. Supp. 384, 386 (J.P.M.L. 1976). Here, no other district has more pending actions than the Southern District of California.

A. The Southern District of California Is The Venue Where A Critical Defendant Is Located

The MDL Panel typically considers the nexus between the evidence and the witnesses pertaining to the related actions and the location of the MDL proceeding. *See In re Parcel Tanker Shipping Servs. Antitrust Litigation*, 296 F. Supp. 2d 1370, 1371 (J.P.M.L. 2003) (favoring transfer to Connecticut because “one defendant is located there and documents and witnesses will likely be found there); *In re Carbon Black*, 277 F. Supp. 2d 1380, 1381 (J.P.M.L. 2003) (consolidating eight actions in the district where one defendant had its principal place of business). Defendant NAMM has its principal place of business in Carlsbad, California, which is located in the Southern District of California.

NAMM - the trade association that acted as the “hub” of the information exchange conspiracy - is located in the Southern District of California, and the most critical witnesses and documents will therefore be located within that District.

B. The Southern District of California Has The Required Experience And Resources To Adjudicate Complex Antitrust Actions.

In deciding where a consolidated action should be transferred, the MDL Panel considers the docket of the potential forums. *In re Nifedipine Antitrust Litigation*, 266 F. Supp. 2d 1382, 1382-83 (J.P.M.L. 2003) (transferee court’s docket is “well suited” to receive the consolidated cases); *In re Pressure Sensitive Labelstock Antitrust Litigation*, 290 F. Supp. 2d 1374, 1376

(J.P.M.L. 2003) (transferee court “enjoys general docket conditions permitting the Panel to effect Section 1407 assignment to a court with the present resources to devote to the pretrial matters that this docket is likely to require”); *In re Parcel Tanker Shipping Servs. Antitrust Litigation*, 296 F. Supp. 2d 1370, 1371 (J.P.M.L. 2003) (transferee court “has a relatively favorable caseload for accepting this assignment”). When the potential transferee district’s docket is congested, it may be overwhelmed by additional complex litigation and therefore transfer to such a forum may result in judicial inefficiency and unfairness to the parties.

There are currently only four MDL cases in the Southern District of California. *See*, www.jpml.uscourts.gov/Resources/resources.html (*Distribution of Pending MDL Dockets*, September 10, 2009). In contrast, the Central District of California has thirteen (13) pending MDL cases and the Northern District of Illinois (Eastern Division) has twenty (20) pending MDL cases. *Id.*

C. The Southern District of California Is A Well-Suited And Convenient Forum For The Actions

The MDL Panel also considers the convenience of the parties and their counsel in choosing an appropriate transferee district. *See In re Publication Paper*, MDL Docket No. 1631, Transfer Order (dated Nov. 12, 2004) (“We observe that this district is a geographically convenient location, given the location of the principal defendants and potential defendants and witnesses...”); *In re Air Fare Litigation*, 322 F. Supp. 1013, 1015 (J.P.M.L. 1971) (choosing a particular transferee district because it was “more convenient for counsel, and thus less expensive for their clients”). This factor also favors the consolidation of the Actions in the Southern District of California. As previously stated, the principal defendant is NAMM, with critical witnesses and documents in the Southern District. Moreover, the other defendant common to all actions - Guitar Center, Inc. - is located in nearby Los Angeles County.


CONCLUSION

For the foregoing reasons, Movant respectfully requests that the seven pending "Musical Instruments Antitrust" actions be transferred and coordinated and/or consolidated in the Southern District of California, under 28 U.S.C. § 1407, and that all related later-filed actions be transferred thereto as tag-along actions.

Dated: October 2, 2009

Respectfully submitted,

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**BEFORE THE JUDICIAL PANEL ON
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In re:

MUSICAL INSTRUMENTS ANTITRUST
LITIGATION

MDL Docket No. _____

**SCHEDULE OF ACTIONS IN SUPPORT OF PLAINTIFF DAVID GIAMBUSSO'S
MOTION FOR TRANSFER AND COORDINATION
OR CONSOLIDATION UNDER 28 U.S.C. §1407**

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SCHEDULE OF ACTIONS			
Case Name	Court	Civil Action No.	Judge
Plaintiff: David Giambusso Defendants: National Association of Music Merchants, Inc.; Guitar Center, Inc.; and Fender Musical Instruments Corp.	S.D. California	3:09-cv-2002	Larry Alan Burns
Plaintiff: Colby Giles Defendants: Guitar Center, Inc. and National Association of Music Merchants, Inc.	S.D. California	3:09-cv-2146	Roger T. Benitez
Plaintiff: Rory W. Collins Defendants: Guitar Center, Inc., and National Association of Music Merchants, Inc.	S.D. California	3:09-cv-2151	John A. Houston
Plaintiff: David Keel Defendants: Guitar Center, Inc. and National Association of Music Merchants Inc.	S.D. California	3:09-cv-2156	Barry Ted Moskowitz
Plaintiff: Allen Hale Defendants: Guitar Center, Inc. and National Association of Music Merchants, Inc.	C.D. California (Western Div.)	2:09-cv-6897	George H. Wu

Plaintiff: Mark O'Leary Defendants: Guitar Center, Inc. and National Association of Music Merchants, Inc.	C.D. California (Western Div.)	2:09-cv-7015	Gary A. Feess
Plaintiff: Alex Teller Defendants: Guitar Center, Inc.	N.D. Illinois (Eastern Div.)	1:09-cv-6104	George M. Marovich

Dated: October 2, 2009

Respectfully submitted,

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THE DISTRICT COURT
OF SACRAMENTO

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**BEFORE THE JUDICIAL PANEL ON
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In re:

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LITIGATION

MDL Docket No. _____

CERTIFICATE OF SERVICE

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I, Sheila M. Brown, do hereby declare as follows:

I am employed by Wexler Wallace LLP, 455 Capitol Mall Suite 231, Sacramento, California, 95814. I am over the age of eighteen years and not a party to this action. On October 2, 2009, I served the following documents:

1. **PLAINTIFF DAVID GIAMBUSSO'S MOTION FOR TRANSFER AND COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. § 1407;**
2. **PLAINTIFF DAVID GIAMBUSSO'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TRANSFER AND COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. § 1407;**
3. **SCHEDULE OF ACTIONS IN SUPPORT OF PLAINTIFF DAVID GIAMBUSSO'S MOTION FOR TRANSFER AND COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. § 1407;**
4. **APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFF DAVID GIAMBUSSO'S MOTION FOR TRANSFER AND COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. § 1407; and**
5. **CERTIFICATE OF SERVICE.**

on:

SEE ATTACHED SERVICE LIST

X by placing the documents listed above for collection and mailing following the firm's ordinary business practices in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Sacramento, California addressed as set forth on the attached service list, which included the clerks of the courts affected by the Motion for Transfer and Coordination or Consolidation.

I further certify and declare that I caused the above documents to be served by federal express upon:

Jeffrey N. Lüthi
Clerk of the Panel
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Washington, D.C. 20002-8004

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, executed this 2nd day of October, 2009, in Sacramento, California.


Sheila M. Brown

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CLERKS OF THE DISTRICT COURTS

Clerk of the Court United States District Court Southern District of California 880 Front Street, Room 4290 San Diego, CA 92101-8900	Clerk of the Court United States District Court Central District of California, Western Division Roybal Federal Bldg. 255 East Temple Street Los Angeles, CA 90012
Clerk of the Court United States District Court Northern District of Illinois, Eastern Division Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	

OCT -7 2009

FILED
CLERK'S OFFICE

**BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

In re:

MUSICAL INSTRUMENTS ANTITRUST
LITIGATION

MDL Docket No. _____

**APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFF DAVID GIAMBUSO'S
MOTION FOR TRANSFER AND COORDINATION OR CONSOLIDATION
UNDER 28 U.S.C. § 1407**

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EXHIBIT	COMPLAINT	DATED FILED
A	<i>David Giambusso v. National Association of Music Merchants, Inc.; Guitar Center, Inc.; and Fender Musical Instruments Corp.</i>	9/11/09
B	<i>Allen Hale v. Guitar Center, Inc. and National Association of Music Merchants, Inc.</i>	9/22/09
C	<i>Mark O'Leary v. Guitar Center, Inc. and National Association of Music Merchants, Inc.</i>	9/25/09
D	<i>Alex Teller v. Guitar Center, Inc.</i>	9/30/09
E	<i>Colby Giles v. Guitar Center, Inc. and National Association of Music Merchants, Inc.</i>	9/30/09
F	<i>Rory W. Collins v. Guitar Center, Inc. and National Association of Music Merchants, Inc.</i>	9/30/09
G	<i>David Keel v. Guitar Center, Inc. and National Association of Music Merchants, Inc.</i>	10/1/09

Dated: October 2, 2009

Respectfully submitted,

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JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

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EXHIBIT A

COPY

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14 **UNITED STATES DISTRICT COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 **DAVID GIAMBUSSO**, individually and on
17 behalf of all others similarly situated,

18 Plaintiff,

19 v.

20
21 **NATIONAL ASSOCIATION OF MUSIC**
22 **MERCHANTS, INC.; GUITAR CENTER,**
INC.; and FENDER MUSICAL
23 **INSTRUMENTS CORP.,**

24 Defendants.

Case No. **09 CV 2002 LAB**

JMA

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

BY FAX

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2009 SEP 11 PM 3:04
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY

1 Plaintiff, David Giambusso, for his Class Action Complaint against Defendants, upon
2 personal knowledge as to facts pertaining to himself and upon information and belief as to all
3 other matters, states as follows:

4 **NATURE OF ACTION**

5 1. Plaintiff, a consumer and a direct purchaser of a guitar from one of the defendants
6 herein, brings this action on his own behalf and on behalf of a class of purchasers of fretted
7 musical instrument products such as acoustic and electric guitars, violins, amplifiers and strings
8 (“Fretted Instrument Products”) between January 1, 2005 and December 31, 2007.

9 2. In March 2009, the Federal Trade Commission (“FTC”) issued a cease and desist
10 order to the National Association of Music Merchandising (“NAMM”) and at the same time
11 settled the FTC’s charges that NAMM had “permitted and encouraged” acts constituting
12 violations of Section 5 of the FTC Act among its members and that the acts and practices of
13 NAMM “constitute unfair methods of competition in or affecting commerce in violation of
14 Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. § 45.” The FTC also
15 alleged that absent appropriate relief “such acts and practices, or the effects thereof will continue
16 or recur . . .”

17 3. Specifically, the FTC, after an investigation, alleged that between 2005 and 2007,
18 NAMM organized various meetings and programs for its members, such as defendants herein, at
19 which competing retailers of musical instruments were permitted and encouraged to exchange
20 competitively sensitive information, strategies for implementing minimum advertised pricing and
21 restrictions of retail price competition.

22 4. The FTC alleged that the “challenged conduct served no legitimate business
23 purpose and resulted in no significant efficiency benefits.”

24 5. According to the FTC’s press release announcing NAMM’s settlement of “FTC
25 Charges of Illegally Restraining Competitions” “the FTC’s proposed consent order is designed to
26 remedy NAMM’s anticompetitive conduct.” The Commission’s vote to accept the complaint and
27 the consent order was 4-0.

28 6. In the competition-restrained market created by defendants’ conduct, plaintiff and

1 the Class purchased Fretted Instrument Products at artificially inflated prices.

2 7. NAMM's conduct and that of other defendants named herein, all of whom are
3 members of NAMM, are *pre se* illegal under Section 1 of the Sherman Act. The conduct of
4 defendants, and each of them, unreasonably restrained trade in the relevant market(s) (defined
5 below), causing substantial anti-competitive effects and inflated prices to consumers.

6 8. The conduct and scheme was specifically intended to protect NAMM members
7 from price competition by either securing higher price levels, and thereby restricting retail price
8 competition, or by eliminating price discounting entirely.

9 9. Absent defendants' anti-competitive conduct, plaintiff and the other Class
10 members would have paid lower prices for the Fretted Instrument Products they purchased
11 during the Class Period. Plaintiff seeks damages and equitable relief under Sections 1 and 2 of
12 the Sherman Antitrust Act.

13 JURISDICTION AND VENUE

14 10. The Court has jurisdiction over the claims relating to violations of the Sherman
15 Antitrust Act of 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. § 15. Jurisdiction is also proper
16 under 28 U.S.C. § 1332(d)(2).

17 11. Venue is proper in this judicial district under 15 U.S.C. § 22 and 28 U.S.C. §
18 1391. Several defendants transact business within this district; many of the acts and events
19 giving rise to this action occurred within this district; and defendant NAMM is headquartered in
20 this district.

21 PARTIES

22 12. Plaintiff David Giambusso is a resident of Brooklyn, New York. In or about
23 September 2007, Plaintiff purchased a guitar from Guitar Center.

24 13. Defendant National Association of Music Merchants, Inc. ("NAMM") is a New
25 York corporation with its principal place of business located at 5790 Armada Drive, Carlsbad,
26 California 92008.

27 14. NAMM is a trade association comprised of more than 9,000 members, including
28 defendants, that include manufacturers, distributors, and dealers of musical instruments and

1 related products. Most United States manufacturers, distributors, and dealers of musical
2 instruments are members of NAMM. NAMM is controlled by its members, including
3 defendants herein.

4 15. Defendant Guitar Center, Inc. ("Guitar Center") is a Delaware corporation with its
5 principal place of business at 5795 Lindero Canyon Road, Westlake Village, California and is a
6 retail seller of Fretted Instrument Products. Guitar Center is a member of NAMM.

7 16. Fender Music Instruments Corporation ("Fender") maintains its principal place of
8 business at 8860 East Chaparral Road, Suite 100, Scottsdale, Arizona. Fender manufactures and
9 sells Fretted Instrument Products, and produces the highest-selling guitar in the United States by
10 a large margin. According to information in a legal brief submitted on behalf of Fender in a
11 recent trademark proceeding, the market share of Fender's three top selling models each year
12 exceeds the market share of the entire product line of most of Fender's largest competitors.
13 Fender is a member of NAMM, and is its largest exhibitor.

14 17. Plaintiffs is informed and believes and thereon alleges that as to all transactions
15 relevant herein, each defendant was an agent of one or more defendants named herein and, as
16 such, was acting within the purpose, course and scope of such agency. Plaintiff is further
17 informed and believes that each defendant aided and abetted, and acted in concert with and/or
18 conspired with each and every defendant to commit the acts complained of herein and to engage
19 in a course of conduct in the business practices complained of herein.

20 18. Various individuals, partnerships, corporations and associations not named as
21 defendants in this Complaint have participated as co-conspirators in the violations of law alleged
22 herein and have performed acts and made statements in furtherance thereof. The identity of all
23 co-conspirators is unknown at this time and will require discovery.

24 TRADE AND COMMERCE

25 19. Defendants are involved in interstate trade and commerce, and the activities of
26 defendants as alleged in this action have substantially and adversely affect interstate commerce.
27 In the conduct of their business, defendants directly or indirectly, has used and uses the means
28 and instrumentalities of interstate commerce in furtherance of the acts and communications

1 alleged herein, including but not limited to, the United States postal system, the nationwide
2 system, through and by means of which a substantial amount of the nation's communications,
3 information exchanges, and transportation take place.

4 **SUBSTANTIVE ALLEGATIONS**

5 **A. The Fretted Instrument Product Market Is Part Of The Larger**
6 **Musical Instrument Market Dominated By Defendants**

7 20. According to data maintained by The Music Trades – the only industry trade
8 publication - in the past six years, the ten largest music product suppliers have increased their
9 market share from approximately 42% to 2002 to 50% in 2008.

10 21. “Music product” companies are generally understood to include companies which
11 manufacture, supply or sell at retail musical instruments, accessories and products for amplifying
12 and recording music.

13 22. According to The Music Trades, there are distinct product categories within the
14 music product markets, including the fretted instrument product category, (consisting of acoustic
15 and electric guitars, instrument amplifiers and strings), and pianos, consisting of acoustic and
16 digital pianos, percussion products consisting of drums, cymbals and mallets. Within the Fretted
17 Instrument Product market, guitars are by far the most popular music instruments.

18 23. In 2008, the Fretted Instruments Product category retail dollar sales volume was
19 \$1.55 billion of an approximately \$7 billion dollar per year music instrument market.

20 24. According to a national Gallop poll commissioned by NAMM (and conducted
21 regularly since 1978) specialized music retail stores, such as those operated by defendants,
22 remain the consumer's first choice for buying music products. 57% of poll respondents
23 preferred to purchase at specialized music stores versus 23% who express a preference for
24 internet purchases and only 15% expressing a preference for mass market retailers such as Best
25 Buy, Costco, Wal-Mart or Toys-R-Us. The mass market retailers' stock mainly lower-end
26 guitars in the \$250 or less range.

27 25. The guitar and accessories product market is recognized as a distinct product
28 market in the industry and has its own trade association, the Guitar and Accessories Marketing
Association (“GAMA”).

1 26. Published figures from NAMM and The Music Trades reports that from 1998 to
2 2007 acoustic guitar sales grew to 1.35 million units from 611,00 and sales of electric guitars
3 grew from 543,000 to 1.5 million units during the same period.

4 27. According to a Music Trades report published in 2008, the music industry had
5 gross margin of 30% versus approximately 22% gross margins for consumer electronics.
6 Despite the large gross margins, the industry has been consolidating rather than attracting new
7 entrants. Even mass market retailers have decided not to compete with defendants herein on the
8 same scale and scope.

9 28. Confirming the barriers to entry into the music product retail market, one NAMM
10 member observed (as reported in the March 1, 2008 issue of The Music Trades): “To generate
11 reasonable sales volume, you need a lot of SKUs. I am not sure they [Best Buy, then attempting
12 to enter the music retailing market] will be able to achieve the kind of volume they’re hoping for
13 in just 2500 square feet of space.” In a published report in 2008, Morningstar’s retail analyst,
14 Brady Lemos, was quoted on the retailing music business as taking “up a lot of real estate.”
15 According to Guitar Center’s published reports its average large store selling space is 8,000-
16 80,000 square feet and stocks approximately 4,500 SKUs. By contrast Best Buy has decided to
17 enter the market in only a very limited way 91,250 square foot store within a store stocking only
18 approximately 1000 SKUs. Thus, new entrants to the market must make large investments in
19 inventory and retail selling space.

20 **B. Guitar Center’s Dominance And Power In The Industry**

21 29. Guitar Center has grown through acquisitions. In June 1999, Guitar Center
22 bought “Musicians Friend” a leading catalogue and instrument retailer with nine retail stores. In
23 April 2001, Guitar Center acquired American Music Group and its 12 retail stores, two mail-
24 order catalogues and music accessory distributor. In 2002, Guitar Center acquired M&M Music
25 and Southwestern retailer of musical instruments to schools. In mid 2005, Guitar Center bought
26 Music & Arts Center and its 80 locations. In 2006, Guitar Center acquired four Hermes Music
27 stores in Texas. In February 2007, Guitar Center acquired the Woodwind and The Brasswind
28 out of bankruptcy. As of the end of 2008, Guitar Center’s annual sales of \$1.55 billion were to

1 the musical instruments annual sales of \$7 billion.

2 30. Guitar Center is the only national chain and is viewed as dominant in the retail
3 market with 295 stores and the industry's largest mail order operation and sales of \$2.0 billion,
4 GCI is nearly 5 times the size of its nearest competitor by 2007 according to Music Trades.
5 From 1997 to 2007, its market share has grown from 6.1% to 26.6%.

6 31. Guitar Center dwarfs its next largest competitor. Sam Ash Music Corporation is
7 the number two musical instrument retailer in the United States and operates 45 stores in
8 California, New York and Texas and nine other states. In 2002, Sam Ash acquired the top nine
9 stores of the Mars Music Chain.

10 32. According to independent retailers, Guitar Center wields enormous power in the
11 industry. In an interview in Musical Merchandise Review, April 2007 issue, Alan Levin of
12 Chuck Levin's Washington Music Center said:

13 The biggest concern is Guitar Center. They are many
14 manufacturers' biggest customers and changes are being made. . .
15 to suit them alone."

16 33. One NAMM member observed (as reported in the March 1, 2008 issue of Music
17 Trades) "Guitar Center has too much leverage. . ."

18 34. Guitar Center, is, according to its own publicly filed financial reports in 2007, the
19 largest customer of many of its suppliers and thus each manufacturer depends on GCI for
20 substantial portion of its sales of guitars and in Fender's case for a large share of its profits.

21 35. The musical instrument product market is characterized by significant barriers to
22 entry which enhanced Guitar Center's dominance and influence and allowed defendants to
23 exercise and maintain control over prices of fretted instruments.

24 36. The retail value of entire U.S. market for music and audio products in 2008, as
25 estimated by the Music Industry Census conducted by Music Trades, was \$7.1 billion.

26 37. In 2008, according to Musical Merchandise Review issue of July 2009, 171
27 outlets selling fretted instrument closed.
28

1 **C. During The Class Period, NAMM Was The Industry's Vehicle To**
2 **Control Prices In The United States Fretted Instrument Product Market**

3 38. Most U.S. manufacturers, distributors, and dealers of musical instructions are
4 members of NAMM. As the FTC observed in its March 4, 2009 press release entitled *National*
5 *Association of Music Merchants Settles FTC Charges of Illegally Restraining Competition*,
6 “NAMM serves the economic interests of its members by, among other things, promoting
7 consumer demand for musical instructions, lobbying the government, offering seminars, and
8 organizing trade shows. In the United States, NAMM sponsors two major trade shows each
9 year, where manufacturers introduce new products and meet with dealers and competing
10 manufacturers, distributors and retailers of musical instruments meet and discuss issues of
11 concern to the industry.” See, <http://www.ftc.gov/opa/2009/03/namm.shtm>.

12 39. Between 2005 and 2007, NAMM organized various meetings and programs for its
13 members at which competing retailers of musical instrument were permitted and encouraged to
14 exchange information and discuss strategies for implementing minimum advertised price
15 policies, the restriction of retail price competition, and the need for higher retail prices.

16 40. Representatives of NAMM determined the scope of information exchange and
17 discussion by selecting moderator and setting the agenda for these programs.

18 41. At these NAMM-sponsored events, NAMM members discussed the adoption,
19 implementation, and enforcement of minimum advertised price policies; the details and workings
20 of such policies; appropriate and optimal retail price and margins; and other competitively
21 sensitive issues.

22 42. According to the FTC's complaint, “at meetings and programs sponsored by
23 NAMM, competing retailers of musical instruments and other NAMM discussed strategies for
24 raising retail prices and exchanged information on competitively sensitive subjects such as –
25 prices, margins, minimum advertised price policies and their enforcement.”

26 43. According to the FTC, similar discussions were held among manufacturers.

27 44. NAMM shows are considered an indispensable resource by music product
28 retailers. In a February 2007 interview a member was quoted in *Musical Merchandise Review*:

 Many years ago, the importance of attending a NAMM show may
 not have seemed important, today it is absolutely necessary.

1 Owners and key personnel should be at NAMM. . . the education
2 seminars are priceless. The interaction with the industry people
and colleagues is also priceless.

3 45. The conduct of the defendants was the cause of supra competitive price levels for
4 products in the Fretted Instrument Product market. Music Merchandise Review, issue date
5 October 2008, reported that Anthem Music Group's head D. Kilkenny observed "over the past
6 several years instrument prices seem to be increasing at a greater rate than that of inflation . . ."
7 According to The Music Trades "Annual Census of The Music Industries" published in 2009, in
8 2006, the average price of guitar was \$309 by 2007 the average price was \$350 and by 2008 the
9 average price was \$372. Thus, the defendants were able to increase aggregate sales from
10 \$1,022,861.00 in 2006 to \$1,151,290.00 despite a 10% decline in unit sales.

11 46. The FTC has alleged that no significant pro-competitive benefit was derived from
12 the challenged conduct. After analyzing the type of information involved, the level of detail, the
13 absence of procedural safeguards, and overall market conditions, the FTC concluded that the
14 exchange of information engineered by NAMM lacked a pro-competitive justification.

15 47. The FTC has ordered NAMM to cease and desist from:

16 (a) Entering into, adhering to, enforcing, urging, encouraging, advocating,
17 suggesting, assisting or otherwise facilitating any Musical Product Manufacturer or Musical
18 Product Dealer to enter into, adhere to or enforce any combination, conspiracy, agreement or
19 understanding between or among any Musical Product Manufacturers or Musical Product
20 Dealers relating to:

21 (i) the retail price of any Musical Product;
22 (ii) any term, condition or requirement upon which any Musical
23 Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other
24 Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price
25 Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised
26 Price Policies or Resale Price Maintenance Policies; or

27 (iii) the refusal to do business, or the reduction of business, with
28 particular Musical Product Manufacturers or Musical Product Dealers.

1 (b) urging, encouraging, advocating, suggesting, coordinating, participating
2 in, or facilitating in any manner the exchange of information between or among Musical Product
3 Manufacturers or Musical Product Dealers relating to:

- 4 (i) the retail price of Musical Products; or
5 (ii) any term, condition or requirement upon which any Musical
6 Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other
7 Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price
8 Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised
9 Price Policies or Resale Price Maintenance Policies.

10 **D. Anticompetitive Effects Of Defendants' Unlawful Conduct**

11 48. The MAP policies imposed and enforced by defendants here went well beyond
12 typical cooperative advertising programs where manufacturers place restraints on the prices
13 dealers may advertise in advertisements funded in whole or in part by the manufacturer.

14 49. The MAP policies inflicted on music retailers by NAMM and manufacturers are
15 anticompetitive. According to a Wall Street Journal Report dated October 23, 2008, Bradley
16 Reed, sales manager for Musician's Advocate, Inc. said "it [his company] had very little choice
17 but to honor manufacturer's policies on advertised prices because otherwise it risks having its
18 supplies cut off or being delisted as an authorized distributor."

19 50. Defendants' practices have had the following anticompetitive effects, among
20 others, in the relevant market:

21 (a) Competition in the relevant market has been unreasonably restrained,
22 suppressed, and, in some cases, destroyed;

23 (b) Potential competitors have been restrained from entering into the relevant
24 market and have been prevented from competing effectively against defendants;

25 (c) Purchasers of musical instruments have been denied the benefits of
26 competition in a free and open market and have been forced to pay artificially high instrument
27 prices;

1 (d) Upon information and belief, defendants have enjoyed, and will continue
2 to enjoy, ultra competitive profits to the detriment of competitors and purchasers of musical
3 instruments.

4 51. The aforementioned anticompetitive effects of defendants conduct on competition
5 in the relevant market outweigh any conceivable pro-competitive benefits.

6 **E. Market Power**

7 52. As of those claims for which proof of market power is required (*i.e.*, those for
8 which the rule of “per se” illegality does not apply), the relevant product market in this case is
9 retail sales of products in the fretted instruments product category which includes guitars
10 amplifiers and accessories for same.

11 53. The relevant geographic market in this case is the United States of America.

12 54. As small but significant non transitory price increase in fretted instrument product
13 category would not result in a loss of sales within this product market to sales in other music
14 product categories.

15 55. By virtue of their power to control prices and exclude competition in the relevant
16 markets(s), defendants’ at all relevant times possessed market power in the relevant market(s).
17 Moreover, at all relevant times defendants possessed dominant shares of the market(s) for retail
18 sales of musical instruments generally fretted instruments in particular.

19 56. Likewise, defendants at all relevant times possessed substantial market power in
20 the market(s) for its products, due, in part, to the high level of product differentiation in the
21 industry. Specifically, defendants: (a) sold their musical instruments at prices substantially in
22 excess of marginal costs, (b) enjoyed high profits margins thereon, (c) sold such products
23 substantially in excess of the competitive price, and (d) enjoyed substantial barriers to market
24 entry and growth.

25 57. Defendants exchanged competitively sensitive information that had the purpose,
26 tendency and capacity to facilitate price coordination among competitors.

27 58. There is substantial concentration among the firms that manufacture the products
28 in the relevant market(s).

1 59. Defendants together imposed and enforced minimum retail price maintenance and
2 minimum advertised price policies which were contrary to manufacturers' economic interests
3 because each manufacturer rational economic goal was to increase sales volume rather than
4 terminate retailers.

5 **F. Market Effects Of Defendants' Conduct**

6 60. The overall effect of defendant's anti-competitive, exclusive scheme has been to
7 substantially foreclose and impair competition (and the threat of such competition) from lower-
8 priced musical instruments. As alleged above, had defendants not improperly foreclosed or
9 stifled actual or potential competitors from competing in markets for the musical instruments,
10 other actual or potential rival manufacturers would have achieved much greater sales than they
11 actually did (or threatened to do), given the cheaper prices that they charged (or could have
12 charged upon entry), and would have posed a far great competitive threat to defendants.
13 Additionally, absent defendants exclusionary conduct, barriers to entry of the markets would
14 have been lower, which: (a) would have made it easier for existing or new competitors to enter
15 or expand their positions in the market for the musical instruments, and (b) would have caused
16 existing or potential competitors to be attracted to the musical instrument market because of the
17 supra-competitive prices that defendants was charging. As a result, absent defendants'
18 misconduct, defendants would have rationally perceived that there was a greater threat of
19 potential competition in each of the relevant markets if defendants did not reduce its supra-
20 competitive prices.

21 61. The presence of unfettered competition from actual or potential competitors,
22 which were selling lower-priced musical instruments, would have forced defendants to lower the
23 prices for its musical instruments in order to remain competitive and/or to counter a perceived
24 threat of additional entry.

25 62. As a result of defendants' conduct, independent retailers could not compete with
26 nationwide and/or multiregional claims because the retailers could not price-compete.
27 Accordingly, retailers such as Guitar Center were able to raise prices above and beyond what
28 they would be under competitive conditions.

1 63. During the relevant period, plaintiff and the other members of the Class purchased
2 musical instruments directly from defendants. As a result of defendants alleged illegal conduct,
3 members of the Class were compelled to pay, and did pay, artificially inflated prices for the
4 musical instruments they purchased. Plaintiff would have been able to, *inter alia*, purchase less-
5 expensive musical instruments had potential competitors been able to engage in unfettered
6 competition. The prices that Plaintiff and the other Class members paid for musical instruments
7 during the Class Period were substantially greater than the prices that Plaintiff and the Class
8 members would have paid absent the illegal conduct alleged herein because: (1) the prices of all
9 musical instruments were artificially inflated by defendants illegal conduct; and (2) Class
10 members were deprived of the opportunity to purchase musical instruments at substantially lower
11 prices. Thus, Plaintiff and the Class have, as a consequence, sustained substantial damages in
12 the form of overcharges.

13 **CLASS ACTION ALLEGATIONS**

14 64. Plaintiff brings this action pursuant to Rule 23(a) and (b)(3) of the Federal Rules
15 of Civil Procedure on behalf of the following Class:

16 All individuals and persons who purchased one or more Fretted
17 Instrument Products from any of the defendants from January 1,
2005 through December 2007 (“Class Period”).

18 Excluded from the Class are the defendants, their co-conspirators, their respective parents,
19 subsidiaries and affiliates, any judge or magistrate presiding over this action and members of
20 their families, as well as any governmental entities.

21 65. Plaintiff does not know the exact size of the Class since such information is
22 exclusively in the control of defendants. Plaintiff believes that there are thousands of Class
23 members, and that they are sufficiently numerous and geographically dispersed throughout the
24 United States so that joinder of all Class members is impracticable.

25 66. Plaintiff’s claims are typical of the claims of the members of the Class because
26 Plaintiff and all Class members were damaged by the same wrongful conduct of defendants and
27 their co-conspirators as alleged in this Complaint.

28 67. Plaintiff will fairly and adequately protect the interests of the Class. The interests

1 of Plaintiff coincide with and are not antagonistic to, those of the Class. In addition, Plaintiff is
2 represented by counsel who are experienced and competent in the prosecution of complex class
3 action and antitrust litigation.

4 68. There are questions of law and fact common to the members of the Class, and
5 those common questions predominate over any questions which may affect only individual
6 members of the Class, because defendants have acted on grounds generally applicable to the
7 entire class. Among the predominant questions of law and fact common to the Class are:

8 (a) Whether defendants conspired and/or engaged in concerted action or
9 unilateral action in restraint of trade;

10 (b) Whether defendants intentionally and unlawfully engaged in a scheme to
11 control price and potential competitors from the relevant market;

12 (c) Whether defendants' unlawful conduct caused Plaintiff and the Class
13 members to pay more for Fretted Instrument Products than they otherwise would have paid;

14 (d) The duration and extent of the combination or conspiracy alleged herein;

15 (e) Whether defendants and their co-conspirators were participants in the
16 combination or conspiracy alleged herein;

17 (f) Whether the alleged combination or conspiracy violated Section 1 of the
18 Sherman Act;

19 (g) The effect of the combination or conspiracy upon the prices of Fretted
20 Instrument Products sold in the United States during the Class Period;

21 (h) Whether plaintiff and members of the Class are entitled to declaratory,
22 equitable and/or injunctive relief;

23 (i) Whether plaintiff and the Class have been damaged and the appropriate
24 measure of such damages;

25 (j) Whether defendants engaged in agreements, contracts, combinations and
26 conspiracies which had the purpose and/or effect of unreasonably restraining competition and
27 limiting purchasers' access to competing and lower priced Fretted Instrument Products; and

28 (g) Whether defendants unreasonably anti-competitive contracts, contribution

1 and conspiracies have caused plaintiff and other class members to suffer injury to their business
2 or property.

3 69. Class action treatment is a superior method for the fair and efficient adjudication
4 of the controversy, in that, among other things, such treatment will permit a large number of
5 similarly situated persons to prosecute their common claims in a single forum simultaneously,
6 efficiently, and without the unnecessary duplication of evidence, effort, and expense that
7 numerous individual actions would engender. The benefits of proceeding through the class
8 mechanism, including providing injured persons or entities with a method for obtaining redress
9 for claims that might not be practicable to pursue individually, substantially outweigh any
10 difficulties that may arise in management of this class action. There are no difficulties likely to
11 be encountered in the management of this class action that would preclude its maintenance as a
12 class action and no superior alternative exists for the fair and efficient adjudication of this
13 controversy on behalf of plaintiff and the members of the Class.

14 **FIRST CLAIM FOR RELIEF**

15 **(Violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1)**

16 70. Plaintiff incorporates by reference all the above allegations as if fully set forth
17 herein.

18 71. Beginning in 2005, the exact date being unknown to plaintiff and exclusively
19 within the knowledge of defendants and their coconspirators entered into a continuing contract,
20 combination or conspiracy to unreasonably restrain trade and commerce in violation of Section 1
21 of the Sherman Antitrust Act (15 U.S.C. § 1) by artificially reducing or eliminating competition
22 in the United States.

23 72. In particular, defendants combined and conspired to raise, fix, maintain or
24 stabilize the prices of Fretted Instrument Products sold in the United States.

25 73. As a result of defendants' unlawful conduct, prices for Fretted Instrument
26 Products were raised, fixed, maintained and stabilized in the United States.

27 74. The contract, combination or conspiracy among defendants consisted of a
28 continuing agreement, understanding, and/or concerted action among defendants and their co-

1 conspirators.

2 75. For purposes of formulating and effectuating their contract, combination or
3 conspiracy, defendants and their co-conspirators did those things they contracted, combined, or
4 conspired to do, including but not limited to:

5 (a) participating in meetings and conversations to discuss the prices and
6 supply of Fretted Instrument Products;

7 (b) communicating in writing and orally to fix target prices, floor prices, and
8 price margins for Fretted Instrument Products;

9 (c) exchanging competitively sensitive information among each other to
10 facilitate their conspiracy, including minimum advertised pricing, strategies for raising retail
11 prices, restricting retail price competition;

12 (d) agreeing to manipulate prices and supply of Fretted Instrument Products
13 sold in the United States in a manner that deprived direct purchasers of free and open
14 competition; and

15 (e) selling Fretted Instrument Products to customers in the United States at
16 noncompetitive prices.

17 76. As a result of defendants' unlawful conduct, plaintiff and the other members of
18 the Class were injured in their businesses and/or property in that they paid more for Fretted
19 Instrument Products than they otherwise would have paid in the absence of defendants' unlawful
20 conduct.

21 **SECOND CLAIM FOR RELIEF**

22 **(Against All Defendants for Violation of 15 U.S.C. § 1 -Agreements Restraining Trade)**

23 77. Plaintiff hereby incorporates each preceding and succeeding paragraph as though
24 fully set forth herein.

25 78. Defendants through their actions described above constituting agreements, and
26 their enforcement, contracts, combinations and conspiracies that substantially, unreasonably, and
27 unduly restrain trade in the relevant market(s), and harmed Plaintiff and the Class thereby.

28 79. The relevant product market is Fretted Instrument Products and the relevant

1 geographic market is the United States.

2 80. The action alleged covers a sufficiently substantial percentage of relevant
3 market(s) to harm competition.

4 81. The actions of the defendants directly and/or through NAMM constitute concerted
5 action.

6 82. NAMM is *per se* liable for the creation, maintenance, and enforcement of the
7 agreements under a “quick look” and/or rule of reason standard.

8 83. Alternatively, NAMM is liable for the creation, maintenance, and enforcement of
9 the agreements under a “quick look” and/or rule of reason standard.

10 84. There is no legitimate, pro-competitive business justification for defendants’
11 conduct, or any of them, that outweighs their harmful effect.

12 85. Plaintiff and members of the Class were injured in their business or property by
13 the collusion and conspiracy alleged above which facilitates, enabled, and assisted or further
14 defendants’ substantial foreclosure and exclusion of competition in the relevant markets.
15 Without limiting the generality of the foregoing, plaintiff and the other members of the Class
16 have been forced to pay higher prices for musical instruments than they would have paid in the
17 absence of defendants’ unlawful conduct.

18 **THIRD CLAIM FOR RELIEF**

19 **(Against Defendants Namm and Guitar Center for**
20 **Violation of the Sherman Antitrust Act, 15 U.S.C. § 2 - Attempted Monopolization)**

21 86. Plaintiff hereby incorporates each preceding and succeeding paragraph as though
22 fully set forth herein.

23 87. Guitar Center has conspired with NAMM to control prices and exclude or destroy
24 competition in the relevant markets and engaged in other acts with the specific interest to achieve
25 monopoly power in the relevant product market.

26 88. Guitar Center possesses, and has demonstrated, a dangerous probability of
27 achieving monopoly power in the relevant market. Guitar Center continues to dominate this
28 market through the unlawful conduct described above, to the detriment of plaintiff and the Class.

1 89. As a direct and proximate result of Guitar Center's monopolistic conduct,
 2 competition in the relevant market has been unreasonably restrained and injured, and plaintiff
 3 and the members of the Class have paid supra competitive prices for musical instruments. As a
 4 result of defendant's unlawful conduct, plaintiff and members of the Class have suffered and will
 5 continue to suffer damages.

6 **FOURTH CLAIM FOR RELIEF**

7 **(Against All Defendants for Violation of California's Unfair Competition Law)**

8 90. Plaintiff incorporates by reference all the above allegations as if fully set forth
 9 herein.

10 91. Defendants' acts and practices, as described herein, constitute unlawful, unfair or
 11 fraudulent business practices in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*

12 92. The utility of defendants' conduct and practices in restricting competition in the
 13 musical instruments market is significantly outweighed by the gravity of the harm they impose
 14 on plaintiff and the Class. Defendants' acts and practices are oppressive, unscrupulous or
 15 substantially injurious to consumers.

16 93. The above-described unfair, unlawful and fraudulent business practices conducted
 17 by defendants present a threat and likelihood of harm and deception to members of the class in
 18 that defendant has systematically perpetrated and continues to perpetrate the unfair, unlawful and
 19 fraudulent conduct upon them.

20 94. Defendants' acts and practices constitute unlawful business practices in violation
 21 of the Sherman Antitrust Act, Sections 1 and 2, as described herein.

22 95. Plaintiff and the Class have suffered harm as a proximate result of the wrongful
 23 conduct of the defendants alleged herein, and therefore bring this claim for restitution and
 24 disgorgement. Plaintiff and the class have suffered injury in fact and have lost money as a result
 25 of defendants' acts and practices, described herein, in that they have paid artificially high prices
 26 for musical instruments due to defendants' unlawful agreement, combination or conspiracy.
 27
 28

1 96. In paying the prices they paid for musical instruments, plaintiff and members of
2 the class relied upon defendants to fairly and lawfully charge retail prices that were unaffected
3 by any restraint of trade.

4 97. Pursuant to Business and Professions Code §§17200 and 17203, plaintiff, on
5 behalf of himself and the class, seek an order of this Court: enjoining the defendants from
6 continuing to engage in the practices described herein. Plaintiff and the class are further entitled
7 to, and pray for, restitution of all monies owed to them, subject to proof, as a result of
8 defendants' unfair, unlawful and fraudulent practices, along with disgorgement of profits, plus
9 interest and attorneys' fees and costs pursuant to, *inter alia*, Code of Civil Procedure §1021.5.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, plaintiff prays that:

12 A. The Court determines that this action may be maintained as a class action
13 pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure with respect to the
14 claims for damages, and declaring plaintiff as the representative of the Class and his counsel as
15 counsel for the Class;

16 B. The Court declares the conduct alleged herein to be unlawful in violation of the
17 federal antitrust laws and the common law of unjust enrichment;

18 C. Plaintiff and each member of the Class recover punitive and treble damages to the
19 extent such are provided by the law;

20 D. Plaintiff and each member of the Class recover the amounts by which the
21 defendants have been unjustly enriched in accordance with state law;

22 E. Defendants be enjoined from continuing the illegal activities alleged herein;

23 F. Plaintiff and the Class recover their costs of suit, including reasonable attorneys'
24 fees and expenses as provided by law; and

25
26 ///

27 ///

28 ///

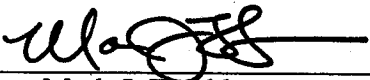
1 G. Plaintiff and the Class be granted such other, further, and different relief as the
2 nature of the case may require or as may be determined to be just, equitable and proper by this
3 Court.

4 **DEMAND FOR JURY TRIAL**

5 Plaintiff hereby demands a trial by jury on all claims so triable.

6 Dated: September 11, 2009

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7
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22 *behalf of the proposed Class*

EXHIBIT B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALLEN HALE, individually and on
~~behalf of~~ all others similarly situated,

Plaintiff,

v.

GUITAR CENTER, INC. and
NATIONAL ASSOCIATION OF
MUSIC MERCHANTS, INC.

Defendants.

No. **CV09-6897 GW PJWx**
CLASS ACTION COMPLAINT
DEMAND FOR JURY TRIAL

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CENTRAL DIST. OF CALIF.
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1 Plaintiff, Allen Hale, for his Class Action Complaint against Defendants, upon
2 personal knowledge as to facts pertaining to himself and upon information and belief
3 as to all other matters, state as follows:

4 I. NATURE OF ACTION

5 1. Plaintiff, a consumer and a direct purchaser of a guitar from Guitar
6 Center, Inc., one of the defendants herein, brings this action on his own behalf and
7 on behalf of a class of purchasers of fretted musical instrument products such as
8 acoustic and electric guitars, violins, amplifiers and strings ("FI Products") between
9 January 1, 2005 and December 31, 2007.

10 2. Plaintiff seeks damages from Defendants under Section 1 of the
11 Sherman Antitrust Act, 15 U.S.C. § 1. As detailed below, Plaintiff alleges that
12 Guitar Center, a dominant, multi-brand retailer and a member of the National
13 Association of Music Merchants ("NAMM"), together with NAMM and its
14 members, conspired to maintain, implement and/or enforce Minimum Advertised
15 Pricing ("MAP") policies that had the purpose and effect of fixing prices, securing
16 higher price levels, restricting retail price competition and eliminating price
17 discounting altogether in the FI market.

18 3. Specifically, from at least 2005-2007, and earlier, NAMM organized
19 meetings and programs where competing fretted instrument ("FI") retailers,
20 including Guitar Center, were permitted and encouraged to discuss and agree
21 regarding the restriction of retail price competition, strategies for the adoption,
22 implementation, and enforcement of minimum advertised price policies, and
23 appropriate and optimal retail prices and margins. In effect, NAMM facilitated
24 resale price maintenance ("RPM") agreements between and among its members.
25 (Hereinafter, MAP and RPM are used interchangeably).
26
27
28

1 4. The NAMM meetings led to agreements between Guitar Center, other
2 leading FI retailers, and FI Product manufacturers to impose RPM scheme designed
3 to raise and maintain retail prices for FI products.

4 5. Defendants' conduct unreasonably restrained trade in the relevant
5 market(s) (defined below), causing substantial anti-competitive effects and inflated
6 prices to consumers, in violation of § 1 of the Sherman Act.

7 6. NAMM's conduct and that of other defendants named herein, all of
8 whom are members of NAMM, are illegal under Section 1 of the Sherman Act. The
9 conduct of defendants, and each of them unreasonably restrained trade in the relevant
10 market(s) (defined below), causing substantial anti-competitive effects and inflated
11 prices to consumers.

12 7. Absent defendants' anti-competitive conduct, plaintiff and the other
13 Class members would have paid lower prices for the Fretted Instrument Products
14 they purchased during the Class Period. Plaintiffs thus seek damages and equitable
15 relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26, for
16 violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

17 II. JURISDICTION AND VENUE

18 8. The Court has jurisdiction over the claims relating to violations of the
19 Sherman Antitrust Act of 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. § 15.
20 Jurisdiction is also proper under 28 U.S.C. § 1332(d)(2).

21 9. Venue is proper in this judicial district under 15 U.S.C. § 22 and 28
22 U.S.C. § 1391. Defendants transact business within this district, many of the acts
23 and events giving rise to this action occurred within this district; and defendant
24 Guitar Center is headquartered in this district.

25 III. PARTIES

26 10. Plaintiff Allen Hale is a resident of Des Moines, Iowa. In or about June
27 2006, Plaintiff purchased a guitar from Guitar Center.
28

1 11. Defendant Guitar Center, Inc. ("Guitar Center") is a Delaware
2 corporation with its principal place of business at 5795 Lindero Canyon Road,
3 Westlake Village, California and is a retail seller of Fretted Instrument Products.
4 Guitar Center is a member of NAMM. Guitar Center has grown aggressively through
5 acquisitions. As of the end of 2008, Guitar Center's annual sales of \$1.55 billion
6 were more than one-fifth of the annual sales of all musical instruments of \$7 billion.
7 Guitar Center is the only national chain and is viewed as dominant in the retail
8 market with 295 stores and the industry's largest mail order operation. Guitar Center
9 was nearly five times the size of its nearest competitor by 2007. From 1997 to 2007,
10 its market share grew from 6.1% to 26.6%.

11 12. Guitar Center is, according to its own publicly filed financial reports in
12 2007, the largest customer of many of its suppliers and thus each manufacturer
13 depends on Guitar Center for substantial portion of its sales of guitars.

14 13. Defendant National Association of Music Merchants, Inc. ("NAMM")
15 is a New York corporation with its principal place of business location at 5790
16 Armada Drive, Carlsbad, California 92008.

17 14. NAMM is a trade association comprised of more than 9,000 members,
18 including defendants, that includes manufacturers, distributors, and dealers of
19 musical instruments and related products. Most United States manufacturers,
20 distributors, and dealers of musical instruments are members of NAMM. NAMM is
21 controlled by its members, including defendants herein.

22 15. The musical instrument product market is characterized by significant
23 barriers to entry which enhanced Guitar Center's dominance and influence and
24 allowed defendants to exercise and maintain control over prices of fretted
25 instruments.

26 16. Plaintiff is informed and believes and thereon alleges that as to all
27 transaction relevant herein, each defendant was an agent of one or more defendants
28

1 named herein and, as such, was acting within the purpose, course and scope of such
2 agency. Plaintiff is further informed and believes that each defendant aided and
3 abetted, and acted in concert with and/or conspired with each and every defendant to
4 commit the acts complained of herein and to engage in a course of conduct in the
5 business practices complained of herein.

6 17. Various individuals, partnerships, corporations and associations not
7 named as defendants in this Complaint have participated as co-conspirators in the
8 violations of law alleged herein and have performed acts and made statements in
9 furtherance thereof. The identity of all co-conspirators is unknown at this time and
10 will require discovery.

11 IV. INTERSTATE TRADE AND COMMERCE

12 18. The activities of Defendants, as described in this Complaint, were
13 within the flow of, and substantially affected, interstate commerce.

14 19. During the time period covered by this Complaint, Defendant Guitar
15 Center and members of Defendant NAMM sold and distributed FI Products
16 throughout the United States.

17 20. Defendant Guitar Center and members of Defendant NAMM have sold
18 and shipped substantial quantities of FI Products in a continuous and uninterrupted
19 flow of interstate commerce to customers located in states other than the states in
20 which the Defendants and NAMM's members produced FI Products.

21 V. SUBSTANTIVE ALLEGATIONS

22 A. **During the Class Period, NAMM was the Industry's Vehicle to Control** 23 **Prices in the United States Fretted Instrument Product Market**

24 21. Most U.S. manufacturers, distributors, and dealers of musical
25 instruments are members of NAMM. As the FTC observed in its March 4, 2009
26 press release entitled *National Association of Music Merchants Settles FTC Charges*
27 *of Illegally Restraining Competition*, "NAMM serves the economic interests of its
28

1 members by, among other things, promoting consumer demand for musical
2 instructions, lobbying the government, offering seminars, and organizing trade
3 shows. In the United States, NAMM sponsors two major trade shows each year,
4 where manufacturers introduce new products and meet with dealers and competing
5 manufacturers, distributors and retailers of musical instruments meet and discuss
6 issues of concern to the industry.” See <http://www.ftc.gov/opa/2009/03/namm.shtm>.

7 22. On information and belief, from the late 1990s to at least 2007,
8 Defendants worked to facilitate uniform agreement both as to the implementation
9 and enforcement of MAP as well as pricing. The purpose of facilitating agreement
10 both as to MAP policies and pricing was because Guitar Center, as well as other
11 retailer members of NAMM, were concerned about increased competition by mass
12 merchants, such as Wal-Mart and Costco, as well as internet retailers.¹

13 23. NAMM held biannual trade shows and conventions. NAMM shows are
14 considered an indispensable resource by music product retailers. In a February 2007
15 interview a member was quoted in Musical Merchandise Review:

16 Many years ago, the importance of attending a NAMM
17 show may not have seemed important, today it is
18 absolutely necessary. Owners and key personnel should be
19 at NAMM . . . the education seminars are priceless. The
20 interaction with the industry people and colleagues is also
21 priceless.

22 24. In the late 1990s or early 2000s, at a NAMM show, “a high-profile
23 retailer delivered a stinging address, lamenting the fact that manufacturers sat by idly
24 as price wars raged and retail profits plummeted.”² This address coincided with the
25 adoption of MAP policies by leading musical instrument manufacturers, which
26 commenced in 1999 and continued thereafter.³

27 ¹ “Exhibitors Speak: candid comments on business, the NAMM show, dealers
28 and what to expect in 2006,” Music Trades (March 1, 2006); “Justified Optimism or
rose-colored glasses?” Music Trades (March 1, 2006). See also FTC Complaint, ¶ 4.

² “Do MAP policies work?” Music Trades (August 1, 2001).

³ FTC Complaint, ¶ 4.

1 25. By the early 2000s, several major music retail chains, including Guitar
2 Center, were expressing a heightened concern for margin and profit protection.

3 26. According to independent retailers, Guitar Center wields enormous
4 power in the industry. In an interview in Musical Merchandise Review, April 2007
5 issue, Alan Levin of Chuck Levin's Washington Music Center said:

6 The biggest concern is Guitar Center. They are many
7 manufacturers' biggest customers and changes are being
made . . . to suit them alone.

8 Similarly, One NAMM member observed: "Guitar Center has too much
9 leverage. . ."⁴

10 27. Thus, when Guitar Center and NAMM encouraged and required the
11 implementation of MAP pricing, manufacturers did so for fear of losing Guitar
12 Center as a customer.

13 28. In fact, a major shift in retail opinion regarding the effectiveness of
14 MAP policies to protect profits occurred between 2000 and 2001. A poll conducted
15 by Music Trades magazine revealed that:

16 Last year [2000] when we polled leading m.i. dealers about
17 the value of minimum advertised price (MAP) policies,
18 only 31% said they had a positive effect on gross margins,
19 while 9% said that MAP had no effect at all on selling prices,
20 while 60% said that MAP actually decreased margins.
When asked the same question this year [2001], retailers
21 expressed a major change of heart. 51% said that MAP
22 policies had improved their gross margins during the past
23 12 months, and only 44% deemed the policies ineffectual.⁵

24 29. Music Trades concluded that the 20-point shift in opinion was due to the
25 fact that "the biggest benefit of MAP policies has been to rid the internet of loss-
26 leader pricing." Music Trades explained:

27 As a result [of the MAP policies], these days when you
28 type the name of a popular product into a search engine,
you'll get a screen full of results offering the same MAP
regulated price. As our poll indicates, brick-and-mortar
retailers obviously appreciate the fact that they don't have

⁴ As reported in the March 1, 2008 issue of Music Trades.

⁵ "Do MAP policies work?" Music Trades (August 1, 2001).

1 to deal with a legion of customers coming into the store
2 brandishing a computer print out and demanding, 'Why
3 can't you beat this price?'"⁶

3 30. In addition to reducing competition from internet retailers, Music
4 Trades also credited MAP policies with a more "sane approach to industry pricing,"
5 stating that "retail margins appear to have stabilized."⁷

6 31. Thus, MAP policies were a hot topic at the January 2001 NAMM trade
7 show. Music Trades reported that retailers' then-current gross margins of 27% to
8 32% were far lower than they had been in the 1990s, and that both large and small
9 retailers "have jointly concluded that they simply can't afford to give up any more
10 gross margin points."⁸

11 32. In response to this joint retailer pressure, at the January 2001 NAMM
12 show, "manufacturers seemed to be doing more than paying lip service to retail
13 profit concerns" by rolling out new and more restrictive MAP policies. However, on
14 information and belief, the manufacturers realized and agreed that the MAP policies
15 were not designed to increase services at the retailers but merely to protect their
16 profit margins. In fact, manufacturers allegedly "were fulsome in their criticisms of
17 the industry's retail network," stating, *inter alia*: "They don't do any marketing,"
18 and "Their stores are staffed with minimum wage idiots."⁹

19 33. Thus, the result of the January 2001 NAMM show, and the discussion
20 facilitated by NAMM at that show, was that manufacturers realized that they could
21 no longer rely on brilliant engineering and design, but instead agreed to implement
22 "[a] distribution scheme that enables retailers to make a respectable gross
23 margin...."¹⁰

24
25 ⁶ "Do MAP policies work?" Music Trades (August 1, 2001).

26 ⁷ "Do MAP policies work?" Music Trades (August 1, 2001).

27 ⁸ "Brick and Mortar Gets New Respect," Music Trades (March 1, 2001)

28 ⁹ "Brick and Mortar Gets New Respect," Music Trades (March 1, 2001)

¹⁰ "Brick and Mortar Gets New Respect," Music Trades (March 1, 2001)

1 34. At the January 2002 NAMM Show, NAMM continued to facilitate
2 discussion among its members on the optimal use of MAP policies. As a result,
3 manufacturers “acknowledged the retail concern with profitability by instituting
4 minimum advertised price, or MAP policies. In fact, mention of MAP pricing was
5 routinely included in just about every new product presentation.”¹¹

6 35. At these shows, on information and belief, NAMM encouraged dealers
7 to and dealers agreed to and did outline their MAP policies. But the dealers did not
8 do so in conjunction with requests for retailer advertising, in-store displays, better
9 product demonstrations or knowledgeable store staff. Rather, the MAP policies were
10 agreed to at the behest of Defendants and rolled out at the NAMM shows with the
11 retailer profitability in mind.

12 36. For example, at the Summer 2004 NAMM show, “[a] number of
13 exhibitors also announced higher MAP prices in a bid to shore up dealer margins. As
14 one supplier noted, ‘The truth is, there isn’t a lot of difference between our products
15 and our competitors. If we’re going to get dealer support, we’ve got to make these
16 guys money.’”¹²

17 37. Similarly, at the NAMM show in summer 2005, Peavey Electronics
18 (among others) outlined its MAP policy, reiterating “Peavey’s commitment to dealer
19 profitability.”¹³

20 38. But NAMM did not only encourage individual dealers or retailers to
21 discuss and agree how to restrict price competition. In fact, it facilitated joint
22 discussions by all members of NAMM. At NAMM’s biannual trade shows and

23 ¹¹ “Blue skies ahead? Expectations were low, but Christmas sales came in strong,
24 and retailers flocked to Anaheim, making for a high energy show ... Does this mean
25 the recession is over and industry growth is back on track?; NAMM in Anaheim
2002.” Music Trades (March 1, 2002).

26 ¹² “NAMM’s grand finale in Nashville: strong buying, product shortages,
27 exuberant entertainment, and confidence in the second half made the last NAMM
28 show in Nashville one to remember; Nashville NAMM Report 2004,” Music Trades
(September 1, 2004).

¹³ “Peavey 40th anniversary dealer meeting,” Music Trades (September 1, 2005).

1 conventions, NAMM hosted "NAMM Show University Sessions." These sessions
2 were designed to facilitate discussion and education on a wide variety of music
3 industry topics, including price competition and restrictions to competition.

4 39. At the January 2006 trade show, NAMM hosted several sessions
5 regarding MAP policies.

6 40. For example, NAMM facilitated a panel discussion regarding MAP
7 policies. On a panel comprised of industry heavy-hitters, such as the Vice President
8 and General Manager of Yamaha's Pro-Audio and Combo division, sales managers
9 from Kaman Music Corp. and Avedis Zildjian, and several retailers, the suppliers
10 were "unanimous, offering a guardedly positive assessment of MAP policies."¹⁴

11 41. At this panel, there was just one lone voice that supported competition
12 on prices. Bryan Junk of massmusic.net asked the Panel and the audience, "We're
13 supposed to compete, aren't we?" According to one industry report of the Panel
14 session:

15 Whether or not you agree with him, Bryan Junk, an internet
16 retailer, deserves credit for staring down an auditorium
17 packed with independent retailers and stating that MAP
18 should be scrapped. To audible boos, he declared,
19 'Consumers like low prices, and we try to give them what
20 they want. Why shouldn't we be able to grow our business
21 by offering the lowest possible prices without interference
22 from the manufacturers?'

23 42. However, Mr. Junk's view was not the consensus. In fact, the Panel
24 discussed that, absent MAP, "prices would rapidly migrate down to 10% over
25 cost...." The Panel even advocated revising the current MAP pricing "upwards to
26 give retailers a better profit margin."

27 43. The Panel also discussed how to enforce the MAP policies, agreeing
28 that "MAP is only as effective as its enforcement...." The Panel thus discussed how
to enforce MAP, particularly with the proliferation of Internet sites.

¹⁴ "MAP policies on trial: Do they help? Do they hurt? Is there a better way?"
Music Trades (March 1, 2006).

1 44. NAMM also released a report based on comments it compiled from the
2 January 2006 trade show participants and attendees. NAMM released the following
3 poll results, in which it provided the answers:¹⁵

4 What do independent retailers view as a threat to their
5 business and profitability? On a 1 to 5 scale, with 5 being
6 extremely concerned, rate the following issues. (Report is
average of responses.)

7 3.4 The expanded presence of music products in mass
merchants, like Wal-Mart and Costco.

8 3.2 Competition from internet and catalog merchants.

9 * * *

10 2.5 MAP pricing policies that set margins too low.

11 45. NAMM hosted another session entitled, "Does the Industry Need A
12 MAP makeover?" At this session, Music for Everyone ("MFE"), a California
13 retailers association, presented a "voluntary MAP formula/guideline" which it
14 "recommended for general use..."¹⁶

15 46. MFE published, and presented at the January 2006 NAMM trade show
16 with NAMM's participation and consent, the following two pricing formulas based
17 on retail cost and which were "designed for all instruments and all combo and audio
18 products"¹⁷:

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

21 * * *

22 Retail [\$1-\$149] x 0.5 x 2.00 = MAP (0% off retail) *
23 Retail [\$150-\$249] x 0.5 x 1.90 = MAP (5% off retail) *
24 Retail [\$250-\$299] x 0.5 x 1.85 = MAP (7.5% off retail) *

25 ¹⁵ "Justified Optimism or rose-colored glasses?" Music Trades (March 1, 2006).

26 ¹⁶ "Marketplace realities demand new approach to MAP policies: with fixed costs
the same on all merchandise, a sliding pricing scale makes sense," Music Trades
(November 1, 2005).

27 ¹⁷ "Marketplace realities demand new approach to MAP policies: with fixed costs
28 the same on all merchandise, a sliding pricing scale makes sense," Music Trades
(November 1, 2005).

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- Retail [\$300-\$349] x 0.5 x 1.80 = MAP (10% off retail) **
- ** Retail [\$350-\$399] x 0.5 x 1.75 = MAP (12.5% off retail)
- Retail [\$400-\$449] x 0.5 x 1.70 = MAP (15% off retail) *
- Retail [\$450-\$499] x 0.5 x 1.65 = MAP (17.5% off retail) *
- Retail [\$500 and up] x 0.5 x 1.60 = MAP (20% off retail) *
- ** Retail [\$550-\$599] x 0.5 x 1.55 = MAP (22.5% off retail)
- ** Retail [\$600 and up] x 0.5 x 1.50 = MAP (25% off retail)

* Formula A
** Formula B

47. MFE explained that the formulas were designed to permit “[f]ormula discounts from retail start[ing] at zero” and to provide a “much higher” profit percentage for lower-priced products.”¹⁸

48. MFE even went so far at the NAMM show to encourage manufacturers to adopt the MAP pricing reflected in Formula A, capping permitted discounts at 20% and stating that Formula A “is likely to be ... accepted widely.” Nonetheless, MFE stated that no MAP pricing should be lower than that reflected in Formula B, stating “the formula B profits are the minimum that brick-and-mortar full service music instrument retailers require to survive, and hopefully thrive.”¹⁹

49. At the 2006 Summer NAMM Show, NAMM again held an industry panel discussion, comprised of the NAMM president, a vice president of Yamaha, and the Chairman and CEO of Fender Musical Instruments, among others.²⁰ NAMM touted this roundtable as follows: “In the two-hour session suppliers and retailers of all sizes will be able to share views about critical issues affecting profitability,

¹⁸ “Marketplace realities demand new approach to MAP policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense,” Music Trades (November 1, 2005).

¹⁹ “Marketplace realities demand new approach to MAP policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense,” Music Trades (November 1, 2005).

²⁰ “Austin goes all out for NAMM: Austin got high marks as a fabulous trade show venue, but attendance levels barely made a passing grade. Nevertheless, the industry still seems committed to a summer show. The only question, where to have it; Part 2; Company overview,” Music Trades (September 1, 2006).

1 including MAP pricing, Interact sales tax, and the entrance of mass consumer
2 merchandisers into the industry.”²¹ Among the topics facilitated at this meeting were
3 MAP prices that were set too low and profit margins.²²

4 50. NAMM continued to facilitate industry discussions of MAP pricing at
5 its 2007 Winter show. One roundtable discussion focused on, *inter alia*, increasing
6 profit margins and MAP pricing.²³

7 51. Thus, NAMM organized meetings and programs for its members at
8 which competing retailers of musical instruments, as well as manufacturers of those
9 instruments, were permitted and encouraged to exchange information and discuss
10 strategies for implementing minimum advertised price policies, the restriction of
11 retail price competition, and the need for higher retail prices.

12 52. Representatives of NAMM determined the scope of information
13 exchange and discussion by selecting moderator and setting the agenda for these
14 programs.

15 53. At these NAMM-sponsored events, NAMM members discussed the
16 adoption, implementation, and enforcement of minimum advertised price policies;
17 the details and workings of such policies; appropriate and optimal retail price and
18 margins; and other competitively sensitive issues.

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22 ²¹ “Get ready for a memorable show as the world’s live music capital hosts
23 NAMM; NAMM PREVIEW: Summer Session In Austin,” Music Trades (July 1,
2006).

24 ²² “Austin goes all out for NAMM: Austin got high marks as a fabulous trade
25 show venue, but attendance levels barely made a passing grade. Nevertheless, the
26 industry still seems committed to a summer show. The only question, where to have
27 it; Part 2; Company overview,” Music Trades (September 1, 2006).

28 ²³ “Why going to NAMM is a total no-brainer: new products, smart people, and
tons of educational sessions add up to the single biggest business opportunity of the
year. If you’re serious, there’s only one thing to do: Show Up!; NAMM 2007
PREVIEW; Calendar,” Music Trades (January 1, 2007).

1 **B. No Legitimate Business Reason for MAP Policies, Price Restrictions and**
2 **Restrictions on Discounting**

3 54. Relative to Guitar Center and other retail members of NAMM, internet
4 based retailers are small companies that compete in the relatively new trade channel
5 known variously as “electronic commerce,” “e commerce,” “e tailing,” “internet
6 retail,” etc. Internet retailers of FI products are highly efficient competitors because,
7 among other reasons, their operating expenses are low. This allows them to compete
8 vigorously on price, both with other internet retailers and with retailers in other trade
9 channels, such as Guitar Center (which operates through “brick and mortar” stores as
10 well as on the internet). Thus, when allowed to compete freely, internet retailers’
11 price competition enhances consumer welfare by bringing down prices.

12 55. By the 2000s, NAMM and its members recognized that the increased
13 popularity of “e-commerce,” with its associated increase in price competition, posed
14 a substantial threat to NAMM’s members’ sales and profits. Thus, NAMM, whose
15 retail members are generally considered “traditional” brick-and-mortar retailers
16 because they primarily sells products through their physical store locations,
17 considered ways to thwart internet retailer competitors.

18 56. NAMM’s, and its members’, response to internet retailing was both
19 predictable and anticompetitive. As recognized at an FTC 2002 public workshop,
20 entitled “Possible Anticompetitive Efforts to Restrict Competition on the Internet,”
21 one expert explained:

22 The promise of the world of electronic commerce is to
23 create an environment where consumers can freely shop
24 between various competitive alternatives. **By reducing
25 transaction costs and improving transparency, the
26 Internet offers the potential of dramatically improving
27 competition in various retail markets.**

28 * * *

**[But] as new market forces arise, . . . “traditional”
competitors often respond to the threat by trying to
create barriers to thwart those new entrants.**

1 See David A. Balto, Testimony Before the FTC, Office of Policy Planning, Public
2 Workshop on E-Commerce, at 1-2 (October 10, 2002) (emphasis added).

3 57. Just as the experts predicted, NAMM encouraged its members to devise
4 an illegal plan to combat internet retailers by exacting agreements from the
5 manufacturers of FI products being sold through Guitar Center and NAMM
6 members' stores (or that desired to sell products at their stores) to require, on penalty
7 of termination and as a condition of doing business with them, that the manufacturer
8 ensure that its other retailers refrain from discounting.

9 58. NAMM facilitated the discussion of, and sought and obtained the
10 agreement of its manufacturer members, to impose and enforce MAP policies solely
11 for Guitar Center and its retail members' benefit and not for any legitimate pro-
12 competitive reason.

13 **C. The FTC Action**

14 59. In March 2009, the Federal Trade Commission ("FTC") issued a cease
15 and desist order to NAMM and at the same time settled the FTC's charges that
16 NAMM had "permitted and encouraged" acts constituting violations of Section 5 of
17 the FTC Act among its members and that the acts and practices of NAMM
18 "constitute unfair methods of competition in or affecting commerce in violation of
19 Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. § 45." The
20 FTC also alleged that absent appropriate relief "such acts and practices, or the effects
21 thereof will continue or recur . . ."

22 60. Specifically, the FTC, after an investigation, alleged that between 2005
23 and 2007, NAMM organized various meetings and programs for its members, such
24 as defendants herein, at which competing retailers of musical instruments were
25 permitted and encouraged to exchange competitively sensitive information, strategies
26 for implementing minimum advertised pricing and restrictions of retail price
27 competition.

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1 61. The FTC alleged that the “challenged conduct served no legitimate
2 business purpose and resulted in no significant efficiency benefits.”

3 62. According to the FTC’s press release announcing NAMM’s settlement
4 of “FTC Charges of Illegally Restraining Competitions” “the FTC’s proposed
5 consent order is designed to remedy NAMM’s anti-competitive conduct.” The
6 Commission’s vote to accept the complaint and the consent order was 4-0.

7 63. According the FTC’s complaint, “at meetings and programs sponsored
8 by NAMM, competing retailers of musical instruments and other NAMM discussed
9 strategies for raising retail prices and exchanged information on competitively
10 sensitive subjects such as prices, margins, minimum advertised price policies and
11 their enforcement.”

12 According to the FTC, similar discussions were held
13 among manufacturers.

14 64. The conduct of the defendants was the cause of *supra* competitive price
15 levels for products in the Fretted Instrument product market. Music Merchandise
16 Review, issue date October 2008, reported that Anthem Music Group’s head
17 D. Kilkenny observed “over the past several years instrument prices seem to be
18 increasing at a greater rate than that of inflation . . .” According to The Music
19 Trades “Annual Census of The Music Industries” published in 2009, in 2006, the
20 average price of a guitar was \$309, by 2007 the average price was \$350 and by 2008
21 the average price was \$372. Thus, the defendants were able to increase aggregate
22 sales from \$1,022,861.00 in 2006 to \$1,151,290.00 despite a 10% decline in unit
23 sales.

24 65. The FTC has alleged that no significant pro-competitive benefit was
25 derived from the challenged conduct. After analyzing the type of information
26 involved, the level of detail, the absence of procedural safeguards, and overall
27 market conditions, the FTC concluded that the exchange of information engineered
28 by NAMM lacked a pro-competitive justification.

1 66. The FTC has ordered NAMM to cease and desist from:

2 (a) Entering into, adhering to, enforcing, urging, encouraging,
3 advocating, suggesting, assisting or otherwise facilitating any Musical Product
4 Manufacturer or Musical Product Dealer to enter into, adhere to or enforce any
5 combination, conspiracy, agreement or understanding between or among any
6 Musical Product Manufacturers of Musical Product Dealers relating to:

7 (i) the retail price of any Musical Product;

8 (ii) any term, condition or requirement upon which any
9 Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal,
10 with any other Musical Product Manufacturer or Musical Product Dealer, including,
11 but not limited to, Price Terms, margins, profits, or pricing policies, including but
12 not limited to Minimum Advertised Price Policies or Resale Price Maintenance
13 Policies; or

14 (iii) the refusal to do business, or the reduction of business,
15 with particular Musical Product Manufacturers or Musical Product Dealers.

16 (b) Urging, encouraging, advocating, suggesting, coordinating,
17 participating in, or facilitating in any manner the exchange of information between or
18 among Musical Product Manufacturers or Musical Product Dealers relating to:

19 (i) the retail price of Musical Products; or

20 (ii) any term, condition or requirement upon which any
21 Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal,
22 with any other Musical Product Manufacturer or Musical Product Dealer, including
23 but not limited to, Price Terms, margins, profits, or pricing policies, including but
24 not limited to Minimum Advertised Price Policies or Resale Price Maintenance
25 Policies.
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1 **D. Anti-competitive Effects Of Defendants' Unlawful Conduct**

2 67. The MAP policies imposed and enforced by defendants here went well
3 beyond typical cooperative advertising programs where manufacturers place
4 restraints on the prices dealers may advertise in advertisements funded in whole or in
5 part by the manufacturer.

6 68. The MAP policies inflicted on music retailers by NAMM and
7 manufacturers are anti-competitive. According to a WALL STREET JOURNAL Report
8 dated October 23, 2008, Bradley Reed, sales manager for Musician's Advocate, Inc.
9 said "it [his company] had very little choice but to honor manufacturer's policies on
10 advertised prices because otherwise it risks having its supplies cut off or being
11 delisted as an authorized distributor."

12 69. In large part, NAMM's concerted efforts were successful. Despite that
13 fact that NAMM and its members expressed their fear at the January 2001 NAMM
14 trade show that the then-current gross margins of 27% to 32% would be chipped
15 away even further by price competition, a Music Trades report published in 2008
16 provided that the music industry had gross margins of 30% versus approximately
17 22% gross margins for consumer electronics.

18 70. Defendants' practices have had the following anti-competitive effects,
19 among others, in the relevant market:

20 (a) Competition in the relevant market has been unreasonably
21 restrained, suppressed, and, in some cases, destroyed;

22 (b) Potential competitors have been restrained from entering into the
23 relevant market and have been prevented from competing effectively against
24 defendants;

25 (c) Purchasers of musical instruments have been denied the benefits
26 of competition in a free and open market and have been forced to pay artificially
27 high instrument prices;

28

1 (d) Upon information and belief, defendants have enjoyed and will
2 continue to enjoy, ultra competitive profits to the detriment of competitors and
3 purchasers of musical instruments.

4 71. The aforementioned anti-competitive effects of defendants conduct on
5 competition in the relevant market outweigh any conceivable pro-competitive
6 benefits.

7 **E. Relevant Market**

8 72. The relevant product market in this case is retail sales of products in the
9 fretted instruments product category which includes guitars amplifiers and
10 accessories for same.

11 73. The relevant geographic market in this case is the United States of
12 America.

13 74. By virtue of their power to control prices and exclude competition in the
14 relevant market(s), defendants' at all relevant times possessed market power in the
15 relevant market(s). Moreover, at all relevant times defendants possessed dominant
16 shares of the market(s) for retail sales of musical instruments generally fretted
17 instruments in particular.

18 75. Likewise, defendants at all relevant times possessed substantial market
19 power in the market(s) for its products, due, in part, to the high level of product
20 differentiation in the industry. Specifically, defendants: (a) sold their musical
21 instruments at prices substantially in excess of marginal costs, (b) enjoyed high
22 profits margins thereon, (c) sold such products substantially in excess of the
23 competitive price, and (d) enjoyed substantial barriers to market entry and growth.

24 76. Defendants exchanged competitively sensitive information that had the
25 purpose, tendency and capacity to facilitate price coordination among competitors.

26 77. There is substantial concentration among the firms that manufacture the
27 products in the relevant market(s).

1 78. Defendants together imposed and enforced minimum retail price
2 maintenance and minimum advertised price policies which were contrary to
3 manufacturers' economic interests because each manufacturer rational economic
4 goal was to increase sales volume rather than terminate retailers.

5 **F. Market Effects of Defendants' Conduct**

6 79. The overall effect of defendant's anti-competitive, exclusive scheme has
7 been to substantially foreclose and impair competition (and the threat of such
8 competition) from lower-priced musical instruments. As alleged above, had
9 defendants not improperly foreclosed or stifled actual or potential competitors from
10 competing in markets for the musical instruments, other actual or potential rival
11 manufacturers would have achieved much greater sales than they actually did (or
12 threatened to do), given the cheaper prices that they charged (or could have charged
13 upon entry), and would have posed a far great competitive threat to defendants.
14 Additionally, absent defendants exclusionary conduct, barriers to entry of the
15 markets would have been lower, which: (a) would have made it easier for existing or
16 new competitors to enter or expand their positions in the market for the musical
17 instruments, and (b) would have caused existing or potential competitors to be
18 attracted to the musical instrument market because of the supra-competitive prices
19 that defendants was charging. As a result, absent defendants' misconduct,
20 defendants would have rationally perceived that there was a greater threat of
21 potential competition in each of the relevant markets if defendants did not reduce its
22 supra-competitive prices.

23 80. The presence of unfettered competition from actual or potential
24 competitors, which were selling lower-priced musical instruments, would have
25 forced defendants to lower the prices for its musical instruments in order to remain
26 competitive and/or to counter a perceived threat of additional entry.

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1 81. As a result of defendants' conduct, independent retailers could not
2 compete with nationwide and/or multiregional claims because the retailers could not
3 price-compete. Accordingly, retailers such as Guitar Center were able to raise prices
4 above and beyond what they would be under competitive conditions.

5 82. During the relevant period, plaintiff and the other members of the Class
6 purchased musical instruments directly from defendants. As a result of defendants
7 alleged illegal conduct, members of the Class were compelled to pay, and did pay,
8 artificially inflated prices for the musical instruments they purchased. Plaintiff
9 would have been able to, *inter alia*, purchase less-expensive musical instruments had
10 potential competitors been able to engage in unfettered competition. The prices that
11 Plaintiff and the other Class members paid for musical instruments during the Class
12 Period were substantially greater than the prices that Plaintiff and the Class members
13 would have paid absent the illegal conduct alleged herein because: (1) the prices of
14 all musical instruments were artificially inflated by defendants illegal conduct; and
15 (2) Class members were deprived of the opportunity to purchase musical instruments
16 at substantially lower prices. Thus, Plaintiff and the Class have, as a consequence,
17 sustained substantial damages in the form of overcharges.

18 VI. CLASS ACTION ALLEGATIONS

19 83. Plaintiff brings this action pursuant to Rule 23(a) and (b)(3) of the
20 Federal Rules of Civil Procedure on behalf of the following Class:

21 All individuals and persons who purchased one or more
22 Fretted Instrument Products from any of the defendants
23 from January 1, 2005 through December 2007 ("Class
Period").

24 Excluded from the Class are the defendants, their co-conspirators, their respective
25 parents, subsidiaries and affiliates, any judge or magistrate presiding over this action
26 and members of their families, as well as any governmental entities.

27 84. Plaintiff does not know the exact size of the Class since such
28 information is exclusively in the control of defendants. Plaintiff believes that there

1 are thousands of Class members, and that they are sufficiently numerous and
2 geographically dispersed throughout the United States so that joinder of all Class
3 members is impracticable.

4 85. Plaintiff's claims are typical of the claims of the members of the Class
5 because Plaintiff and all Class members were damaged by the same wrongful
6 conduct of defendants and their co-conspirators as alleged in this Complaint.

7 86. Plaintiff will fairly and adequately protect the interests of the Class.
8 The interests of Plaintiff coincide with and are not antagonistic to, those of the Class.
9 In addition, Plaintiff is represented by counsel who are experienced and competent in
10 the prosecution of complex class action and antitrust litigation.

11 87. There are questions of law and fact common to the members of the
12 Class, and those common questions predominate over any questions which may
13 affect only individual members of the Class, because defendants have acted on
14 grounds generally applicable to the entire class. Among the predominant questions
15 of law and fact common to the Class are:

16 a. whether Defendants engaged in agreements, contracts,
17 combinations, and conspiracies, which had the purpose and/or effect of unreasonably
18 restraining competition and limiting purchaser access to competing and lower-priced
19 FI Products;

20 b. whether Defendants' unreasonably restrained trade;

21 c. whether Defendants' anti-competitive contracts, combinations,
22 and conspiracies have caused Plaintiffs and the other members of the Class or
23 Subclasses to suffer antitrust injury in the nature of overcharges;

24 d. whether Defendants' unlawful conduct caused Plaintiffs and other
25 Class or Subclass members to pay more for the FI Products than they otherwise
26 would have paid;

27 e. the appropriate Class- or Subclass-wide measure of damages; and
28

1 f. whether Defendants' anti-competitive conduct is continuing, thus
2 entitling the Class or Subclasses to injunctive relief to promote unrestrained trade
3 and free and fair competition.

4 88. Class action treatment is a superior method for the fair and efficient
5 adjudication of the controversy, in that, among other things, such treatment will
6 permit a large number of similarly situated persons to prosecute their common
7 claims in a single forum simultaneously, efficiently, and without the unnecessary
8 duplication of evidence, effort, and expense that numerous individual actions would
9 engender. The benefits of proceeding through the class mechanism, including
10 providing injured persons or entities with a method for obtaining redress for claims
11 that might not be practicable to pursue individually, substantially outweigh any
12 difficulties that may arise in management of this class action. There are no
13 difficulties likely to be encountered in the management of this class action that
14 would preclude its maintenance as a class action and no superior alternative exists
15 for the fair and efficient adjudication of this controversy on behalf of plaintiff and
16 the members of the Class.

17 **VII. TOLLING OF THE STATUTE OF LIMITATIONS, FRAUDULENT**
18 **CONCEALMENT, AND EQUITABLE TOLLING**

19 89. Plaintiff did not discover and could not have discovered through the
20 exercise of reasonable diligence the existence of the claims sued upon herein until
21 the FTC issued a press release in March 2009.

22 90. Any applicable statutes of limitation have been tolled by Defendants'
23 affirmative acts of fraudulent concealment and continuing misrepresentations.

24 91. Because of the self-concealing nature of Defendants' actions and their
25 affirmative acts of concealment, Plaintiffs and the Class or Subclasses assert the
26 tolling of any applicable statutes of limitations affecting the claims raised herein.

27 92. Defendants continued to engage in the deceptive practice, and
28 consequently, unwary consumers were injured on a daily basis by Defendants'

1 unlawful conduct. Therefore, Plaintiffs and the Class or Subclasses submit that each
2 instance that Defendants engaged in the conduct complained of herein and each
3 instance that a member of the Class or Subclass purchased a FI Product constitutes
4 part of a continuing violation and operates to toll the statutes of limitation in this
5 action.

6 93. Defendants are estopped from relying on any statute of limitations
7 defense because of its unfair or deceptive conduct.

8 94. Defendants' conduct was and is, by its nature, self-concealing. Still,
9 Defendants, through a series of affirmative acts or omissions, suppressed the
10 dissemination of truthful information regarding their illegal conduct, and have
11 actively foreclosed Plaintiffs and the Class or Subclasses from learning of their
12 illegal, anti-competitive, unfair and/or deceptive acts.

13 95. By reason of the foregoing, the claims of Plaintiffs and the Class or
14 Subclasses are timely under any applicable statute of limitations, pursuant to the
15 discovery rule, the equitable tolling doctrine, and fraudulent concealment.

16 **FIRST CLAIM FOR RELIEF**

17 **(VIOLATION OF SECTION 1 OF THE SHERMAN ANTITRUST ACT, 15**
18 **U.S.C. § 1)**

19 96. Plaintiff incorporates by reference all the above allegations as if fully
20 set forth herein.

21 97. Beginning in 2005, the exact date being unknown to plaintiff and
22 exclusively within the knowledge of defendants and their co-conspirators entered
23 into a continuing contract, combination or conspiracy to unreasonably restrain trade
24 and commerce in violation of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1)
25 by artificially reducing or eliminating competition in the United States.

26 98. In particular, defendants combined and conspired to raise, fix, maintain
27 or stabilize the prices of Fretted Instrument Products sold in the United States.

28

1 99. As a result of defendants' unlawful conduct, prices for Fretted
2 Instrument Products were raised, fixed, maintained and stabilized in the United
3 States.

4 100. The contract, combination or conspiracy among defendants consisted of
5 a continuing agreement, understanding, and/or concerted action among defendants
6 and their co-conspirators.

7 101. For purposes of formulating and effectuating their contract, combination
8 or conspiracy, defendants and their co-conspirators did those things they contracted,
9 combined, or conspired to do, including but not limited to:

10 a. participating in meetings and conversations to discuss the prices
11 and supply of Fretted Instrument Products;

12 b. communicating in writing and orally to fix target prices, floor
13 prices, and price margins for Fretted Instrument Products;

14 c. exchanging competitively sensitive information among each other
15 to facilitate their conspiracy, including minimum advertised pricing, strategies for
16 raising retail prices, restricting retail price competition;

17 d. agreeing to manipulate prices and supply of Fretted Instrument
18 Products sold in the United States in a manner that deprived direct purchasers of free
19 and open competition; and

20 e. selling Fretted Instrument Products to customers in the United
21 States at non-competitive prices.

22 102. As a result of defendants' unlawful conduct, plaintiff and the other
23 members of the Class were injured in their businesses and/or property in that they
24 paid more for Fretted Instrument Products than they otherwise would have paid in
25 the absence of defendants' unlawful conduct.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, plaintiff prays that:

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A. The Court determine that this action may be maintained as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure with respect to the claims for damages, and declaring plaintiff as the representative of the Class and his counsel as counsel for the Class;

B. The Court declares the conduct alleged herein to be unlawful in violation of the federal antitrust laws and the common law of unjust enrichment;

C. Plaintiff and each member of the Class recover punitive and treble damages to the extent such are provided by the law;

D. Plaintiff and each member of the Class recover the amounts by which the defendants have been unjustly enriched in accordance with state law;

E. Defendants be enjoined from continuing the illegal activities alleged herein;

F. Plaintiff and the Class recover their costs of suit, including reasonable attorneys' fees and expenses as provided by law; and

G. Plaintiff and the Class be granted such other, further, and different relief as the nature of the case may require or as may be determined to be just, equitable and proper by this Court.


DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all claims so triable.

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DATED: September 22, 2009

HAGENS BERMAN SOBOL SHAPIRO LLP

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK O'LEARY, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

GUITAR CENTER, INC. and
NATIONAL ASSOCIATION OF
MUSIC MERCHANTS, INC.

Defendants.

09-7015 GAF (EX)

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

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1 Plaintiff, Mark O'Leary, by his undersigned attorneys, individually and on
2 behalf of all others similarly situated, files this class action complaint against the
3 defendants named herein for treble damages and other relief under the antitrust laws
4 of the United States and, alleges as follows based upon personal knowledge with
5 respect to his own acts, and upon the investigation of counsel, information and
6 belief, and publicly available information with respect to all other matters:

7 **NATURE OF ACTION**

8 1. This antitrust class action is brought on behalf of plaintiff and a class of
9 purchasers of fretted musical instrument products such as acoustic and electric
10 guitars, violins, amplifiers and strings ("FI Products") between January 1, 2005 and
11 December 31, 2007 (the "Class Period"). Plaintiff alleges that Guitar Center, a
12 dominant, multi-brand retailer and a member of the National Association of Music
13 Merchants ("NAMM"), together with NAMM and its members, conspired to
14 maintain, implement and/or enforce Minimum Advertised Pricing ("MAP") policies
15 that had the purpose and effect of fixing prices, securing higher price levels,
16 restricting retail price competition and eliminating price discounting.

17 2. Specifically, from at least 2005-2007, NAMM organized meetings and
18 programs where competing fretted instrument ("FI") retailers, including Guitar
19 Center, were permitted and encouraged to discuss and agree upon restrictions of
20 retail price competition, strategies for the adoption, implementation, and
21 enforcement of minimum advertised price policies, and appropriate and optimal
22 retail prices and margins. In effect, NAMM facilitated resale price maintenance
23 ("RPM") agreements between and among its members. (Hereinafter, MAP and RPM
24 are used interchangeably). The NAMM meetings led to agreements between Guitar
25 Center, other leading FI retailers, and manufacturers of FI Products to impose a RPM
26 scheme designed to raise and maintain retail prices for FI Products.

1 JURISDICTION AND VENUE

2 3. The Court has jurisdiction over the claims relating to violations of the
3 Sherman Antitrust Act pursuant to 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. § 15.
4 Jurisdiction is also proper under 28 U.S.C. § 1332(d)(2).

5 4. Venue is proper in this judicial district under 15 U.S.C. § 22 and 28
6 U.S.C. § 1391. Defendants transact business within this district, many of the acts
7 and events giving rise to this action occurred within this district; and defendant
8 Guitar Center is headquartered in this district.

9 PARTIES

10 5. Plaintiff Mark O'Leary is a resident of De Soto, Iowa. During the Class
11 Period, plaintiff purchased FI Products from Guitar Center.

12 6. Defendant Guitar Center, Inc. ("Guitar Center") is a Delaware
13 corporation with its principal place of business at 5795 Lindero Canyon Road,
14 Westlake Village, California and is a retail seller of FI Products. Guitar Center is a
15 member of NAMM. Guitar Center has grown aggressively through acquisitions. As
16 of the end of 2008, Guitar Center's annual sales of \$1.55 billion were more than one-
17 fifth of the annual sales of all musical instruments of \$7 billion. Guitar Center is the
18 only national chain and is viewed as dominant in the retail market with 295 stores
19 and the industry's largest mail order operation. Guitar Center was nearly five times
20 the size of its nearest competitor by 2007. From 1997 to 2007, its market share grew
21 from 6.1% to 26.6%.

22 7. Guitar Center is, according to its own publicly filed financial reports in
23 2007, the largest customer of many of its suppliers and thus each manufacturer
24 depends on Guitar Center for a substantial portion of its sales.

25 8. Defendant National Association of Music Merchants, Inc. is a New
26 York corporation with its principal place of business location at 5790 Armada Drive,
27 Carlsbad, California 92008.
28

1 9. NAMM is a trade association comprised of more than 9,000 members,
2 including defendant Guitar Center, that includes manufacturers, distributors, and
3 dealers of musical instruments and related products. Most United States
4 manufacturers, distributors, and dealers of musical instruments are members of
5 NAMM. NAMM is controlled by its members, including defendant Guitar Center.

6 CO-CONSPIRATORS

7 10. Various individuals, partnerships, corporations and associations not
8 named as defendants in this Complaint have participated as co-conspirators in the
9 violations of law alleged herein and have performed acts and made statements in
10 furtherance thereof. The identity of all co-conspirators is unknown at this time and
11 will require discovery.

12 CLASS ACTION ALLEGATIONS

13 11. Plaintiff brings this action pursuant to Rule 23(a) and (b)(3) of the
14 Federal Rules of Civil Procedure on behalf of the following class:

15 All individuals and persons who purchased Fretted
16 Instrument Products from any of the defendants and their
17 co-conspirators during the period January 1, 2005 through
December 2007.

18 Excluded from the class are the defendants, their co-conspirators, their respective
19 parents, subsidiaries and affiliates, any judge or magistrate presiding over this action
20 and members of their families, as well as any governmental entities.

21 12. Plaintiff does not know the exact size of the class since such
22 information is exclusively in the control of defendants. Plaintiff believes that there
23 are thousands of class members, and that they are sufficiently numerous and
24 geographically dispersed throughout the United States so that joinder of all class
25 members is impracticable.

26 13. Plaintiff's claims are typical of the claims of the members of the class
27 because plaintiff and all class members were damaged by the same wrongful conduct
28 of defendants and their co-conspirators as alleged in this Complaint.

1 14. Plaintiff will fairly and adequately protect the interests of the class. The
2 interests of plaintiff coincide with and are not antagonistic to, those of the class. In
3 addition, plaintiff is represented by counsel who are experienced and competent in
4 the prosecution of complex class action and antitrust litigation.

5 15. There are questions of law and fact common to the members of the
6 class, and those common questions predominate over any questions which may
7 affect only individual members of the class, because defendants have acted on
8 grounds generally applicable to the entire class. Among the predominant questions
9 of law and fact common to the class are:

10 a. whether defendants engaged in agreements, contracts,
11 combinations, and conspiracies, which had the purpose and/or effect of unreasonably
12 restraining competition and limiting purchaser access to competing and lower-priced
13 FI Products;

14 b. whether defendants unreasonably restrained trade;

15 c. whether defendants' anti-competitive contracts, combinations,
16 and conspiracies have caused plaintiff and the other members of the class to suffer
17 antitrust injury in the nature of overcharges;

18 d. whether defendants' unlawful conduct caused plaintiff and other
19 class members to pay more for FI Products than they otherwise would have paid;

20 e. the appropriate class-wide measure of damages; and

21 f. whether defendants' anti-competitive conduct is continuing, thus
22 entitling the class to injunctive relief to promote unrestrained trade and free and fair
23 competition.

24 16. Class action treatment is a superior method for the fair and efficient
25 adjudication of the controversy, in that, among other things, such treatment will
26 permit a large number of similarly situated persons to prosecute their common
27 claims in a single forum simultaneously, efficiently, and without the unnecessary
28

1 duplication of evidence, effort, and expense that numerous individual actions would
2 engender. The benefits of proceeding through the class mechanism, including
3 providing injured persons or entities with a method for obtaining redress for claims
4 that might not be practicable to pursue individually, substantially outweigh any
5 difficulties that may arise in management of this class action. There are no
6 difficulties likely to be encountered in the management of this class action that
7 would preclude its maintenance as a class action and no superior alternative exists
8 for the fair and efficient adjudication of this controversy on behalf of plaintiff and
9 the members of the class.

10 **INTERSTATE TRADE AND COMMERCE**

11 17. The activities of defendants, as described in this Complaint, were within
12 the flow of, and substantially affected, interstate commerce.

13 18. During the time period covered by this Complaint, Guitar Center and
14 members of defendant NAMM sold and distributed FI Products through the means of
15 interstate commerce in a continuous and uninterrupted flow to customers located
16 throughout the United States. Plaintiff and other members of the class located
17 throughout the United States purchased FI Products directly from defendants and
18 their co-conspirators, who received millions of dollars from such interstate trade and
19 commerce.

20 19. Among other unreasonable restraints on interstate trade and commerce,
21 defendants' combination and conspiracy artificially raised the price of FI Products
22 and deprived plaintiff and the class of the benefits of free and open competition in
23 the market for FI Products throughout the United States.

24 **SUBSTANTIVE ALLEGATIONS**

25 20. Most U.S. manufacturers, distributors, and dealers of musical
26 instruments are members of NAMM. As the Federal Trade Commission ("FTC")
27 observed in its March 4, 2009 press release entitled *National Association of Music*
28

1 *Merchants Settles FTC Charges of Illegally Restraining Competition*, "NAMM
2 serves the economic interests of its members by, among other things, promoting
3 consumer demand for musical instruments, lobbying the government, offering
4 seminars, and organizing trade shows. In the United States, NAMM sponsors two
5 major trade shows each year, where manufacturers introduce new products and meet
6 with dealers and competing manufacturers, distributors and retailers of musical
7 instruments meet and discuss issues of concern to the industry." See
8 <http://www.ftc.gov/opa/2009/03/namm.shtml>.

9 21. On information and belief, from the late 1990s to at least 2007,
10 defendants and their co-conspirators worked to facilitate uniform agreement both as
11 to the implementation and enforcement of MAP as well as pricing. The purpose of
12 facilitating agreement both as to MAP policies and pricing was because Guitar
13 Center, as well as other retailer members of NAMM, were concerned about
14 increased competition by mass merchants, such as Wal-Mart and Costco, as well as
15 internet retailers.¹

16 22. NAMM held biannual trade shows and conventions. NAMM shows are
17 considered an indispensable resource by music product retailers. In a February 2007
18 interview, a member was quoted in Musical Merchandise Review:

19 Many years ago, the importance of attending a NAMM
20 show may not have seemed important, today it is
21 absolutely necessary. Owners and key personnel should be
22 at NAMM . . . the education seminars are priceless. The
23 interaction with the industry people and colleagues is also
24 priceless.

25 23. In the late 1990s or early 2000s, at a NAMM show, "a high-profile
26 retailer delivered a stinging address, lamenting the fact that manufacturers sat by idly
27 as price wars raged and retail profits plummeted."² This address coincided with the

28 ¹ "Exhibitors Speak: candid comments on business, the NAMM show, dealers
and what to expect in 2006," Music Trades (March 1, 2006); "Justified Optimism or
rose-colored glasses?" Music Trades (March 1, 2006). See also FTC Complaint, ¶ 4.

² "Do MAP policies work?" Music Trades (August 1, 2001).

1 adoption of MAP policies by leading musical instrument manufacturers, which
2 commenced in 1999 and continued thereafter.³

3 24. By the early 2000s, several major music retail chains, including Guitar
4 Center, were expressing a heightened concern for margin and profit protection.

5 25. According to independent retailers, Guitar Center wields enormous
6 power in the industry. In an interview in Musical Merchandise Review, April 2007
7 issue, Alan Levin of Chuck Levin's Washington Music Center said:

8 The biggest concern is Guitar Center. They are many
9 manufacturers' biggest customers and changes are being
made . . . to suit them alone.

10 Similarly, one NAMM member observed: "Guitar Center has too much
11 leverage. . ."⁴

12 26. Thus, when Guitar Center and NAMM encouraged and required the
13 implementation of MAP pricing, manufacturers did so for fear of losing Guitar
14 Center as a customer.

15 27. In fact, a major shift in retail opinion regarding the effectiveness of
16 MAP policies to protect profits occurred between 2000 and 2001. A poll conducted
17 by Music Trades magazine revealed that:

18 Last year [2000] when we polled leading m.i. dealers about
19 the value of minimum advertised price (MAP) policies,
20 only 31% said they had a positive effect on gross margins,
21 60% said that MAP had no effect at all on selling prices,
22 while 9% said the programs actually decreased margins.
When asked the same question this year [2001], retailers
expressed a major change of heart. 51% said that MAP
policies had improved their gross margins during the past
12 months, and only 44% deemed the policies ineffectual.⁵

23 28. Music Trades concluded that the 20-point shift in opinion was due to the
24 fact that "the biggest benefit of MAP policies has been to rid the internet of loss-
25 leader pricing." Music Trades explained:

26 ³ FTC Complaint, ¶ 4.

27 ⁴ As reported in the March 1, 2008 issue of Music Trades.

28 ⁵ "Do MAP policies work?" Music Trades (August 1, 2001).

1 As a result [of the MAP policies], these days when you
2 type the name of a popular product into a search engine,
3 you'll get a screen full of results offering the same MAP
4 regulated price. As our poll indicates, brick-and-mortar
5 retailers obviously appreciate the fact that they don't have
6 to deal with a legion of customers coming into the store
7 brandishing a computer print out and demanding, 'Why
8 can't you beat this price?'⁶

9 29. In addition to reducing competition from internet retailers, Music
10 Trades also credited MAP policies with a more "sane approach to industry pricing,"
11 stating that "retail margins appear to have stabilized."⁷

12 30. Thus, MAP policies were a hot topic at the January 2001 NAMM trade
13 show. Music Trades reported that retailers' then-current gross margins of 27% to
14 32% were far lower than they had been in the 1990s, and that both large and small
15 retailers "have jointly concluded that they simply can't afford to give up any more
16 gross margin points."⁸

17 31. In response to this joint retailer pressure, at the January 2001 NAMM
18 show, "manufacturers seemed to be doing more than paying lip service to retail
19 profit concerns" by rolling out new and more restrictive MAP policies. However, on
20 information and belief, the manufacturers realized and agreed that the MAP policies
21 were not designed to increase services at the retailers but merely to protect their
22 profit margins. In fact, manufacturers allegedly "were fulsome in their criticisms of
23 the industry's retail network," stating, *inter alia*: "'They don't do any marketing,'"
24 and "'Their stores are staffed with minimum wage idiots.'"⁹

25 32. Thus, the result of the January 2001 NAMM show, and the discussion
26 facilitated by NAMM at that show, was that manufacturers realized that they could
27 no longer rely on brilliant engineering and design, but instead agreed to implement
28

⁶ "Do MAP policies work?" Music Trades (August 1, 2001).

⁷ "Do MAP policies work?" Music Trades (August 1, 2001).

⁸ "Brick and Mortar Gets New Respect," Music Trades (March 1, 2001)

⁹ "Brick and Mortar Gets New Respect," Music Trades (March 1, 2001)

1 "[a] distribution scheme that enables retailers to make a respectable gross
2 margin...."¹⁰

3 33. At the January 2002 NAMM Show, NAMM continued to facilitate
4 discussion among its members on the optimal use of MAP policies. As a result,
5 manufacturers "acknowledged the retail concern with profitability by instituting
6 minimum advertised price, or MAP policies. In fact, mention of MAP pricing was
7 routinely included in just about every new product presentation."¹¹

8 34. At these shows, on information and belief, NAMM encouraged dealers
9 to and dealers agreed to and did outline their MAP policies. But the dealers did not
10 do so in conjunction with requests for retailer advertising, in-store displays, better
11 product demonstrations or knowledgeable store staff. Rather, the MAP policies were
12 agreed to at the behest of defendants and their co-conspirators and rolled out at the
13 NAMM shows with the retailer profitability in mind.

14 35. For example, at the Summer 2004 NAMM show, "[a] number of
15 exhibitors also announced higher MAP prices in a bid to shore up dealer margins. As
16 one supplier noted, 'The truth is, there isn't a lot of difference between our products
17 and our competitors. If we're going to get dealer support, we've got to make these
18 guys money.'¹²

19 36. Similarly, at the NAMM show in summer 2005, Peavey Electronics
20 (among others) outlined its MAP policy, reiterating "Peavey's commitment to dealer
21 profitability."¹³

22 ¹⁰ "Brick and Mortar Gets New Respect," Music Trades (March 1, 2001)

23 ¹¹ "Blue skies ahead? Expectations were low, but Christmas sales came in strong,
24 and retailers flocked to Anaheim, making for a high energy show ... Does this mean
25 the recession is over and industry growth is back on track?; NAMM in Anaheim
2002." Music Trades (March 1, 2002).

26 ¹² "NAMM's grand finale in Nashville; strong buying, product shortages,
27 exuberant entertainment, and confidence in the second half made the last NAMM
show in Nashville one to remember; Nashville NAMM Report 2004," Music Trades
(September 1, 2004).

28 ¹³ "Peavey 40th anniversary dealer meeting," Music Trades (September 1, 2005).

1 37. But NAMM did not only encourage individual dealers or retailers to
2 discuss and agree how to restrict price competition. In fact, it facilitated joint
3 discussions by all members of NAMM. At NAMM's biannual trade shows and
4 conventions, NAMM hosted "NAMM Show University Sessions." These sessions
5 were designed to facilitate discussion and education on a wide variety of music
6 industry topics, including price competition and restrictions to competition.

7 38. At the January 2006 trade show, NAMM hosted several sessions
8 regarding MAP policies.

9 39. For example, NAMM facilitated a panel discussion regarding MAP
10 policies. On a panel comprised of industry heavy-hitters, such as the Vice President
11 and General Manager of Yamaha's Pro-Audio and Combo division, sales managers
12 from Kaman Music Corp. and Avedis Zildjian, and several retailers, the suppliers
13 were "unanimous, offering a guardedly positive assessment of MAP policies."¹⁴

14 40. At this panel, there was just one lone voice that supported competition
15 on prices. Bryan Junk of massmusic.net asked the Panel and the audience, "We're
16 supposed to compete, aren't we?" According to one industry report of the Panel
17 session:

18 Whether or not you agree with him, Bryan Junk, an internet
19 retailer, deserves credit for staring down an auditorium
20 packed with independent retailers and stating that MAP
21 should be scrapped. To audible boos, he declared,
22 'Consumers like low prices, and we try to give them what
23 they want. Why shouldn't we be able to grow our business
24 by offering the lowest possible prices without interference
25 from the manufacturers?'

26 41. However, Mr. Junk's view was not the consensus. In fact, the Panel
27 discussed that, absent MAP, "prices would rapidly migrate down to 10% over
28 cost...." The Panel even advocated revising the current MAP pricing "upwards to
give retailers a better profit margin."

¹⁴ "MAP policies on trial: Do they help? Do they hurt? Is there a better way?"
Music Trades (March 1, 2006).

1 42. The Panel also discussed how to enforce the MAP policies, agreeing
2 that "MAP is only as effective as its enforcement...." The Panel thus discussed how
3 to enforce MAP, particularly with the proliferation of internet sites.

4 43. NAMM also released a report based on comments it compiled from the
5 January 2006 trade show participants and attendees. NAMM released the following
6 poll results, in which it provided the answers:¹⁵

7 What do independent retailers view as a threat to their
8 business and profitability? On a 1 to 5 scale, with 5 being
9 extremely concerned, rate the following issues. (Report is
10 average of responses.)

11 3.4 The expanded presence of music products in mass
12 merchants, like Wal-Mart and Costco.

13 3.2 Competition from internet and catalog merchants.

14 * * *

15 2.5 MAP pricing policies that set margins too low.

16 44. NAMM hosted another session entitled, "Does the Industry Need A
17 MAP makeover?" At this session, Music for Everyone ("MFE"), a California
18 retailers association, presented a "voluntary MAP formula/guideline" which it
19 "recommended for general use...."¹⁶

20 45. MFE published, and presented at the January 2006 NAMM trade show
21 with NAMM's participation and consent, the following two pricing formulas based
22 on retail cost and which were "designed for all instruments and all combo and audio
23 products"¹⁷:

24 Proposed MAP Formula
25 Recommended Minimum Profit Formulas for A & B
26 Discounts

27 ¹⁵ "Justified Optimism or rose-colored glasses?" Music Trades (March 1, 2006).

28 ¹⁶ "Marketplace realities demand new approach to MAP policies: with fixed costs
the same on all merchandise, a sliding pricing scale makes sense," Music Trades
(November 1, 2005).

¹⁷ "Marketplace realities demand new approach to MAP policies: with fixed costs
the same on all merchandise, a sliding pricing scale makes sense," Music Trades
(November 1, 2005).

* * *

- Retail [\$1-\$149] x 0.5 x 2.00 = MAP (0% off retail) *
- Retail [\$150-\$249] x 0.5 x 1.90 = MAP (5% off retail) *
- Retail [\$250-\$299] x 0.5 x 1.85 = MAP (7.5% off retail) *
- Retail [\$300-\$349] x 0.5 x 1.80 = MAP (10% off retail) **
- Retail [\$350-\$399] x 0.5 x 1.75 = MAP (12.5% off retail) **
- Retail [\$400-\$449] x 0.5 x 1.70 = MAP (15% off retail) *
- Retail [\$450-\$499] x 0.5 x 1.65 = MAP (17.5% off retail) *
- Retail [\$500 and up] x 0.5 x 1.60 = MAP (20% off retail) *
- Retail [\$550-\$599] x 0.5 x 1.55 = MAP (22.5% off retail) **
- Retail [\$600 and up] x 0.5 x 1.50 = MAP (25% off retail) **

* Formula A
** Formula B

46. MFE explained that the formulas were designed to permit “[f]ormula discounts from retail start[ing] at zero” and to provide a “much higher” profit percentage for lower-priced products.”¹⁸

47. MFE even went so far at the NAMM show to encourage manufacturers to adopt the MAP pricing reflected in Formula A, capping permitted discounts at 20% and stating that Formula A “is likely to be ... accepted widely.” Nonetheless, MFE stated that no MAP pricing should be lower than that reflected in Formula B, stating “the formula B profits are the minimum that brick-and-mortar full service music instrument retailers require to survive, and hopefully thrive.”¹⁹

48. At the 2006 Summer NAMM Show, NAMM again held an industry panel discussion, comprised of the NAMM president, a vice president of Yamaha, and the Chairman and CEO of Fender Musical Instruments, among others.²⁰ NAMM

¹⁸ “Marketplace realities demand new approach to MAP policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense,” Music Trades (November 1, 2005).

¹⁹ “Marketplace realities demand new approach to MAP policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense,” Music Trades (November 1, 2005).

²⁰ “Austin goes all out for NAMM: Austin got high marks as a fabulous trade show venue, but attendance levels barely made a passing grade. Nevertheless, the industry still seems committed to a summer show. The only question, where to have it; Part 2; Company overview,” Music Trades (September 1, 2006).

1 touted this roundtable as follows: "In the two-hour session suppliers and retailers of
2 all sizes will be able to share views about critical issues affecting profitability,
3 including MAP pricing, internet sales tax, and the entrance of mass consumer
4 merchandisers into the industry."²¹ Among the topics facilitated at this meeting were
5 MAP prices that were set too low and profit margins.²²

6 49. NAMM continued to facilitate industry discussions of MAP pricing at
7 its 2007 Winter show. One roundtable discussion focused on, *inter alia*, increasing
8 profit margins and MAP pricing.²³

9 50. Thus, NAMM organized meetings and programs for its members at
10 which competing retailers of musical instruments, as well as manufacturers of those
11 instruments, were permitted and encouraged to exchange information and discuss
12 strategies for implementing minimum advertised price policies, the restriction of
13 retail price competition, and the need for higher retail prices.

14 51. Representatives of NAMM determined the scope of information
15 exchange and discussion by selecting moderators and setting the agenda for these
16 programs.

17 52. At these NAMM-sponsored events, NAMM members discussed the
18 adoption, implementation, and enforcement of minimum advertised price policies;
19 the details and workings of such policies; appropriate and optimal retail price and
20 margins; and other competitively sensitive issues.

21
22
23 ²¹ "Get ready for a memorable show as the world's live music capital hosts
NAMM; NAMM PREVIEW: Summer Session In Austin," Music Trades (July 1,
2006).

24 ²² "Austin goes all out for NAMM: Austin got high marks as a fabulous trade
25 show venue, but attendance levels barely made a passing grade. Nevertheless, the
industry still seems committed to a summer show. The only question, where to have
it; Part 2; Company overview," Music Trades (September 1, 2006).

26 ²³ "Why going to NAMM is a total no-brainer: new products, smart people, and
27 tons of educational sessions add up to the single biggest business opportunity of the
28 year. If you're serious, there's only one thing to do: Show Up!; NAMM 2007
PREVIEW; Calendar," Music Trades (January 1, 2007).

1 53. Relative to Guitar Center and other retail members of NAMM, internet
2 based retailers are small companies that compete in the relatively new trade channel
3 known variously as "electronic commerce," "e commerce," "e tailing," "internet
4 retail," etc. Internet retailers of FI Products are highly efficient competitors because,
5 among other reasons, their operating expenses are low. This allows them to compete
6 vigorously on price, both with other internet retailers and with retailers in other trade
7 channels, such as Guitar Center (which operates through "brick and mortar" stores as
8 well as on the internet). Thus, when allowed to compete freely, internet retailers'
9 price competition enhances consumer welfare by bringing down prices.

10 54. By the 2000s, NAMM and its members recognized that the increased
11 popularity of "e-commerce," with its associated increase in price competition, posed
12 a substantial threat to NAMM members' sales and profits. Thus, NAMM, whose
13 retail members are generally considered "traditional" brick-and-mortar retailers
14 because they primarily sells products through their physical store locations,
15 considered ways to thwart internet retailer competitors.

16 55. NAMM and its members' response to internet retailing was both
17 predictable and anticompetitive. As recognized at an FTC 2002 public workshop,
18 entitled "Possible Anticompetitive Efforts to Restrict Competition on the Internet,"
19 one expert explained:

20 The promise of the world of electronic commerce is to
21 create an environment where consumers can freely shop
22 between various competitive alternatives. **By reducing**
23 **transaction costs and improving transparency, the**
24 **Internet offers the potential of dramatically improving**
25 **competition in various retail markets.**

26 * * *

27 [But] as new market forces arise, . . . "traditional"
28 competitors often respond to the threat by trying to
 create barriers to thwart those new entrants.

 See David A. Balto, Testimony Before the FTC, Office of Policy Planning, Public
 Workshop on E-Commerce, at 1-2 (October 10, 2002) (emphasis added).

1 56. Just as the experts predicted, NAMM encouraged its members to devise
2 an illegal plan to combat internet retailers by exacting agreements from the
3 manufacturers of FI Products being sold through Guitar Center and NAMM
4 members' stores (or that desired to sell products at their stores) to require, on penalty
5 of termination and as a condition of doing business with them, that the manufacturer
6 ensure that its other retailers refrain from discounting.

7 57. NAMM facilitated the discussion of, and sought and obtained the
8 agreement of its manufacturer members, to impose and enforce MAP policies solely
9 for Guitar Center and its retail members' benefit and not for any legitimate pro-
10 competitive reason.

11 **The FTC Action**

12 58. In March 2009, the Federal Trade Commission ("FTC") issued a cease
13 and desist order to NAMM and at the same time settled the FTC's charges that
14 NAMM had "permitted and encouraged" acts constituting violations of Section 5 of
15 the FTC Act among its members and that the acts and practices of NAMM
16 "constitute unfair methods of competition in or affecting commerce in violation of
17 Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. § 45." The
18 FTC also alleged that absent appropriate relief "such acts and practices, or the effects
19 thereof will continue or recur . . ."

20 59. Specifically, the FTC, after an investigation, alleged that between 2005
21 and 2007, NAMM organized various meetings and programs for its members, at
22 which competing retailers of musical instruments were permitted and encouraged to
23 exchange competitively sensitive information, strategies for implementing minimum
24 advertised pricing and restrictions of retail price competition.

25 60. The FTC alleged that the "challenged conduct served no legitimate
26 business purpose and resulted in no significant efficiency benefits."
27
28

1 61. According to the FTC's press release announcing NAMM's settlement,
2 "the FTC's proposed consent order is designed to remedy NAMM's anti-competitive
3 conduct." The Commission's vote to accept the complaint and the consent order was
4 4-0.

5 62. The FTC has alleged that no significant pro-competitive benefit was
6 derived from the challenged conduct. After analyzing the type of information
7 involved, the level of detail, the absence of procedural safeguards, and overall
8 market conditions, the FTC concluded that the exchange of information engineered
9 by NAMM lacked a pro-competitive justification.

10 63. The FTC has ordered NAMM to cease and desist from:

11 (a) Entering into, adhering to, enforcing, urging, encouraging,
12 advocating, suggesting, assisting or otherwise facilitating any Musical Product
13 Manufacturer or Musical Product Dealer to enter into, adhere to or enforce any
14 combination, conspiracy, agreement or understanding between or among any
15 Musical Product Manufacturers of Musical Product Dealers relating to:
16 (i) the retail price of any Musical Product;
17 (ii) any term, condition or requirement upon which any
18 Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal,
19 with any other Musical Product Manufacturer or Musical Product Dealer, including,
20 but not limited to, Price Terms, margins, profits, or pricing policies, including but
21 not limited to Minimum Advertised Price Policies or Resale Price Maintenance
22 Policies; or

23 (iii) the refusal to do business, or the reduction of business,
24 with particular Musical Product Manufacturers or Musical Product Dealers.

25 (b) Urging, encouraging, advocating, suggesting, coordinating,
26 participating in, or facilitating in any manner the exchange of information between or
27 among Musical Product Manufacturers or Musical Product Dealers relating to:
28

1 (i) the retail price of Musical Products; or
2 (ii) any term, condition or requirement upon which any
3 Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal,
4 with any other Musical Product Manufacturer or Musical Product Dealer, including
5 but not limited to, Price Terms, margins, profits, or pricing policies, including but
6 not limited to Minimum Advertised Price Policies or Resale Price Maintenance
7 Policies.

8 **ANTI-COMPETITIVE EFFECTS OF DEFENDANTS'**
9 **UNLAWFUL CONDUCT**

10 64. The unlawful contract, combination or conspiracy alleged above had,
11 *inter alia*, the following effects:

12 a. Prices charged by defendants and their co-conspirators to plaintiff
13 and the members of the class for FI Products were maintained at artificially high and
14 noncompetitive levels; and

15 b. Plaintiff and other members of the class were required to pay
16 more for FI Products than they would have paid in a competitive marketplace,
17 unfettered by defendants' and their co-conspirators collusive and unlawful conduct.

18 65. During and throughout the Class Period, plaintiff and members of the
19 class directly purchased FI Products in the United States.

20 66. Plaintiff and the other class members paid more for FI Products that
21 they purchased than they would have paid under conditions of free and open
22 competition.

23 67. As a direct and proximate result of the illegal combination, contract or
24 conspiracy alleged herein, plaintiff and the members of the class were injured and
25 financially damaged in their businesses and property in amounts that are not
26 presently determinable.

27
28

1 **TOLLING OF THE STATUTE OF LIMITATIONS, FRAUDULENT**
2 **CONCEALMENT, AND EQUITABLE TOLLING**

3 68. Plaintiff did not discover and could not have discovered through the
4 exercise of reasonable diligence the existence of the claims sued upon herein until
5 the FTC issued a press release in March 2009.

6 69. Any applicable statutes of limitation have been tolled by defendants'
7 affirmative acts of fraudulent concealment and continuing misrepresentations.

8 70. Because of the self-concealing nature of defendants' actions and their
9 affirmative acts of concealment, plaintiff and the class assert the tolling of any
10 applicable statutes of limitations affecting the claims raised herein.

11 71. Defendants continued to engage in the deceptive practice, and
12 consequently, unwary consumers were injured on a daily basis by defendants'
13 unlawful conduct. Therefore, plaintiff and the class submit that each instance that
14 defendants engaged in the conduct complained of herein and each instance that a
15 member of the class purchased a FI Product constitutes part of a continuing violation
16 and operates to toll the statutes of limitation in this action.

17 72. Defendants are estopped from relying on any statute of limitations
18 defense because of its unfair or deceptive conduct.

19 73. Defendants' conduct was and is, by its nature, self-concealing. Still,
20 defendants, through a series of affirmative acts or omissions, suppressed the
21 dissemination of truthful information regarding their illegal conduct, and have
22 actively foreclosed plaintiff and the class from learning of their illegal,
23 anti-competitive, unfair and/or deceptive acts.

24 74. By reason of the foregoing, the claims of plaintiff and the class are
25 timely under any applicable statute of limitations, pursuant to the discovery rule, the
26 equitable tolling doctrine, and fraudulent concealment.

1 **FIRST CLAIM FOR RELIEF**

2 **(Violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1)**

3 75. Plaintiff incorporates by reference all the above allegations as if fully
4 set forth herein.

5 76. Beginning in 2005, the exact date being unknown to plaintiff,
6 defendants and their co-conspirators entered into a continuing contract, combination
7 or conspiracy to unreasonably restrain trade and commerce in violation of Section 1
8 of the Sherman Antitrust Act (15 U.S.C. § 1) by artificially reducing or eliminating
9 competition in the United States.

10 77. In particular, defendants and their co-conspirators combined and
11 conspired to raise, fix, maintain or stabilize the prices of FI Products sold in the
12 United States.

13 78. As a result of defendants' unlawful conduct, prices for FI Products were
14 raised, fixed, maintained and stabilized in the United States.

15 79. The contract, combination or conspiracy among defendants consisted of
16 a continuing agreement, understanding, and/or concerted action among defendants
17 and their co-conspirators.

18 80. For purposes of formulating and effectuating their contract, combination
19 or conspiracy, defendants and their co-conspirators did those things they contracted,
20 combined, or conspired to do, including but not limited to:

21 a. participating in meetings and conversations to discuss the prices
22 and supply of FI Products;

23 b. communicating in writing and orally to fix target prices, floor
24 prices, and price margins for FI Products;

25 c. exchanging competitively sensitive information among each other
26 to facilitate their conspiracy, including minimum advertised pricing, strategies for
27 raising retail prices, restricting retail price competition;

28

1 d. agreeing to manipulate prices and supply of FI Products sold in
2 the United States in a manner that deprived direct purchasers of free and open
3 competition; and

4 e. selling FI Products to customers in the United States at
5 non-competitive prices.

6 81. As a result of defendants' unlawful conduct, plaintiff and the other
7 members of the class were injured in their businesses and/or property in that they
8 paid more for FI Products than they otherwise would have paid in the absence of
9 defendants' unlawful conduct.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, plaintiff respectfully requests that:

12 A. The Court determine that this action may be maintained as a class action
13 under Rule 23 of the Federal Rules of Civil Procedure, that plaintiff be appointed
14 class representative, and that plaintiff's counsel be appointed as counsel for the class;
15

16 B. The contract, combination or conspiracy, and the acts done in
17 furtherance thereof by defendants and their co-conspirators, be adjudged to have
18 been in violation of Section 1 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1
19 and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26;
20

21 C. Plaintiff and the class recover compensatory damages, as provided by
22 law, determined to have been sustained by each of them, and that joint and several
23 judgments in favor of plaintiff and the class, respectively, be entered against
24 defendants, in an amount to be trebled in accordance with antitrust laws, and each of
25 them;
26
27
28

1 D. Plaintiff and the class recover their costs of this suit, including
2 reasonable attorneys' fees and expert fees, as provided by law;

3 E. Plaintiff and the class be awarded pre-judgment and post-judgment
4 interest at the highest legal rate to the extent provided by law; and
5

6 F. Defendants and all other persons acting or claiming to act on their
7 behalf be permanently enjoined and restrained from, in any manner, continuing,
8 maintaining or renewing the contract, combination or conspiracy alleged herein, or
9 from engaging in any other contract, combination or conspiracy having similar
10 purpose of effect; and
11

12 G. Plaintiff and the class be granted such other, further relief as the nature
13 of the case may require or as may seem just and proper to this Court under the
14 circumstances.
15
16

17 **DEMAND FOR JURY TRIAL**

18 Plaintiff hereby demands a trial by jury on all claims so triable.

19 DATED: September 25, 2009

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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ALEX TELLER, Individually, and on)
Behalf of All Others Similarly Situated,)

Plaintiffs,)

v.)

GUITAR CENTER, INC.,)

Defendant.)

Case No. 1:09-cv-6104

Judge

JURY TRIAL DEMANDED

Plaintiff, Alex Teller, for his Class Action Complaint against Defendants, upon personal knowledge as to facts pertaining to himself and upon information and belief as to all other matters, state as follows:

I. NATURE OF ACTION

1. Plaintiff, a consumer and a direct purchaser of a guitar from Guitar Center, Inc., one of the defendants herein, brings this action on his own behalf and on behalf of a class of purchasers of fretted musical instrument products such as acoustic and electric guitars, violins, amplifiers and strings ("FI Products") between January 1, 2005 and December 31, 2007.

2. Plaintiff seeks damages from Defendants under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. As detailed below, Plaintiff alleges that Guitar Center, a dominant, multi-brand retailer and a member of the National Association of Music Merchants ("NAMM"), together with NAMM and its members, conspired to maintain, implement and/or enforce Minimum Advertised Pricing ("MAP") policies that had the purpose and effect of fixing prices, securing higher price levels, restricting retail price competition and eliminating price discounting altogether in the FI market.

3. Specifically, from at least 2005-2007, and earlier, NAMM organized meetings and programs where competing fretted instrument ("FI") retailers, including Guitar Center, were permitted and encouraged to discuss and agree regarding the restriction of retail price

competition, strategies for the adoption, implementation, and enforcement of minimum advertised price policies, and appropriate and optimal retail prices and margins. In effect, NAMM facilitated resale price maintenance ("RPM") agreements between and among its members. (Hereinafter, MAP and RPM are used interchangeably).

4. The NAMM meetings led to agreements between Guitar Center, other leading FI retailers, and FI Product manufacturers to impose RPM scheme designed to raise and maintain retail prices for FI products.

5. Defendants' conduct unreasonably restrained trade in the relevant market(s) (defined below), causing substantial anti-competitive effects and inflated prices to consumers, in violation of § 1 of the Sherman Act.

6. NAMM's conduct and that of other defendants named herein, all of whom are members of NAMM, are illegal under Section 1 of the Sherman Act. The conduct of defendants and each of them unreasonably restrained trade in the relevant market(s) (defined below), causing substantial anti-competitive effects and inflated prices to consumers.

7. Absent defendants' anti-competitive conduct, plaintiff and the other Class members would have paid lower prices for the Fretted Instrument Products they purchased during the Class Period. Plaintiffs thus seek damages and equitable relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26, for violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

II. JURISDICTION AND VENUE

8. The Court has jurisdiction over the claims relating to violations of the Sherman Antitrust Act of 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. § 15. Jurisdiction is also proper under 28 U.S.C. § 1332(d)(2).

9. Venue is proper in this judicial district under 15 U.S.C. § 22 and 28 U.S.C. § 1391. Defendants transact business within this district, many of the acts and events giving rise to this action occurred within this district.

III. PARTIES

10. Plaintiff Alex Teller is a resident of Chicago, Illinois. On or about June 2, 2007, Plaintiff purchased an amplifier from Guitar Center.

11. Defendant Guitar Center, Inc. ("Guitar Center") is a Delaware corporation with its principal place of business at 5795 Lindero Canyon Road, Westlake Village, California and is a retail seller of Fretted Instrument Products. Guitar Center is a member of NAMM. Guitar Center has grown aggressively through acquisitions. As of the end of 2008, Guitar Center's annual sales of \$1.55 billion were more than one-fifth of the annual sales of all musical instruments of \$7 billion. Guitar Center is the only national chain and is viewed as dominant in the retail market with 295 stores and the industry's largest mail order operation. Guitar Center was nearly five times the size of its nearest competitor by 2007. From 1997 to 2007, its market share grew from 6.1% to 26.6%.

12. Guitar Center is, according to its own publicly filed financial reports in 2007, the largest customer of many of its suppliers and thus each manufacturer depends on Guitar Center for substantial portion of its sales of guitars.

13. Defendant National Association of Music Merchants, Inc. ("NAMM") is a New York corporation with its principal place of business location at 5790 Armada Drive, Carlsbad, California 92008.

14. NAMM is a trade association comprised of more than 9,000 members, including defendants, that includes manufacturers, distributors, and dealers of musical instruments and related products. Most United States manufacturers, distributors, and dealers of musical

instruments are members of NAMM. NAMM is controlled by its members, including defendants herein.

15. The musical instrument product market is characterized by significant barriers to entry which enhanced Guitar Center's dominance and influence and allowed defendants to exercise and maintain control over prices of fretted instruments.

16. Plaintiff is informed and believes and thereon alleges that as to all transaction relevant herein, each defendant was an agent of one or more defendants named herein and, as such, was acting within the purpose, course and scope of such agency. Plaintiff is further informed and believes that each defendant aided and abetted, and acted in concert with and/or conspired with each and every defendant to commit the acts complained of herein and to engage in a course of conduct in the business practices complained of herein.

17. Various individuals, partnerships, corporations and associations not named as defendants in this Complaint have participated as co-conspirators in the violations of law alleged herein and have performed acts and made statements in furtherance thereof. The identity of all co-conspirators is unknown at this time and will require discovery.

IV. INTERSTATE TRADE AND COMMERCE

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

19. During the time period covered by this Complaint, Defendant Guitar Center and members of Defendant NAMM sold and distributed FI Products throughout the United States.

20. Defendant Guitar Center and members of Defendant NAMM have sold and shipped substantial quantities of FI Products in a continuous and uninterrupted flow of interstate commerce to customers located in states other than the states in which the Defendants and NAMM's members produced FI Products.

V. SUBSTANTIVE ALLEGATIONS

A. **During the Class Period, NAMM was the Industry's Vehicle to Control Prices in the United States Fretted Instrument Product Market**

21. Most U.S. manufacturers, distributors, and dealers of musical instruments are members of NAMM. As the FTC observed in its March 4, 2009 press release entitled *National Association of Music Merchants Settles FTC Charges of Illegally Restraining Competition*, "NAMM serves the economic interests of its members by, among other things, promoting consumer demand for musical instruments, lobbying the government, offering seminars, and organizing trade shows. In the United States, NAMM sponsors two major trade shows each year, where manufacturers introduce new products and meet with dealers and competing manufacturers, distributors and retailers of musical instruments meet and discuss issues of concern to the industry." See <http://www.ftc.gov/opa/2009/03/namm.shtm>.

22. On information and belief, from the late 1990s to at least 2007, Defendants worked to facilitate uniform agreement both as to the implementation and enforcement of MAP as well as pricing. The purpose of facilitating agreement both as to MAP policies and pricing was because Guitar Center, as well as other retailer members of NAMM, were concerned about increased competition by mass merchants, such as Wal-Mart and Costco, as well as internet retailers.¹

23. NAMM held biannual trade shows and conventions. NAMM shows are considered an indispensable resource by music product retailers. In a February 2007 interview a member was quoted in Musical Merchandise Review:

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

¹ "Exhibitors Speak: candid comments on business, the NAMM show, dealers and what to expect in 2006," Music Trades (March 1, 2006); "Justified Optimism or rose-colored glasses?" Music Trades (March 1, 2006). See also FTC Complaint, ¶ 4.

24. In the late 1990s or early 2000s, at a NAMM show, “a high-profile retailer delivered a stinging address, lamenting the fact that manufacturers sat by idly as price wars raged and retail profits plummeted.”² This address coincided with the adoption of MAP policies by leading musical instrument manufacturers, which commenced in 1999 and continued thereafter.³

25. By the early 2000s, several major music retail chains, including Guitar Center, were expressing a heightened concern for margin and profit protection.

26. According to independent retailers, Guitar Center wields enormous power in the industry. In an interview in *Musical Merchandise Review*, April 2007 issue, Alan Levin of Chuck Levin’s Washington Music Center said:

The biggest concern is Guitar Center. They are many manufacturers’ biggest customers and changes are being made . . . to suit them alone.

Similarly, One NAMM member observed: “Guitar Center has too much leverage. . .”⁴

27. Thus, when Guitar Center and NAMM encouraged and required the implementation of MAP pricing, manufacturers did so for fear of losing Guitar Center as a customer.

28. In fact, a major shift in retail opinion regarding the effectiveness of MAP policies to protect profits occurred between 2000 and 2001. A poll conducted by *Music Trades* magazine revealed that:

Last year [2000] when we polled leading m.i. dealers about the value of minimum advertised price (MAP) policies, only 31% said they had a positive effect on gross margins. 60% said that MAP had no effect at all on selling prices, while 9% said the programs actually decreased margins. When asked the same question this year [2001], retailers expressed a major change of heart. 51% said that MAP policies had improved their gross margins during the past 12 months, and only 44% deemed the policies ineffectual.⁵

² “Do MAP policies work?” *Music Trades* (August 1, 2001).

³ FTC Complaint, ¶ 4.

⁴ As reported in the March 1, 2008 issue of *Music Trades*.

⁵ “Do MAP policies work?” *Music Trades* (August 1, 2001).

29. Music Trades concluded that the 20-point shift in opinion was due to the fact that “the biggest benefit of MAP policies has been to rid the internet of loss-leader pricing.” Music Trades explained:

As a result [of the MAP policies], these days when you type the name of a popular product into a search engine, you’ll get a screen full of results offering the same MAP regulated price. As our poll indicates, brick-and-mortar retailers obviously appreciate the fact that they don’t have to deal with a legion of customers coming into the store brandishing a computer print-out and demanding, ‘Why can’t you beat this price?’⁶

30. In addition to reducing competition from internet retailers, Music Trades also credited MAP policies with a more “sane approach to industry pricing,” stating that “retail margins appear to have stabilized.”⁷

31. Thus, MAP policies were a hot topic at the January 2001 NAMM trade show. Music Trades reported that retailers’ then-current gross margins of 27% to 32% were far lower than they had been in the 1990s, and that both large and small retailers “have jointly concluded that they simply can’t afford to give up any more gross margin points.”⁸

32. In response to this joint retailer pressure, at the January 2001 NAMM show, “manufacturers seemed to be doing more than paying lip service to retail profit concerns” by rolling out new and more restrictive MAP policies. However, on information and belief, the manufacturers realized and agreed that the MAP policies were not designed to increase services at the retailers but merely to protect their profit margins. In fact, manufacturers allegedly “were fulsome in their criticisms of the industry’s retail network,” stating, *inter alia*: “They don’t do any marketing,” and “Their stores are staffed with minimum wage idiots.”⁹

⁶ “Do MAP policies work?” Music Trades (August 1, 2001).

⁷ “Do MAP policies work?” Music Trades (August 1, 2001).

⁸ “Brick and Mortar Gets New Respect,” Music Trades (March 1, 2001)

⁹ “Brick and Mortar Gets New Respect,” Music Trades (March 1, 2001)

33. Thus, the result of the January 2001 NAMM show, and the discussion facilitated by NAMM at that show, was that manufacturers realized that they could no longer rely on brilliant engineering and design, but instead agreed to implement “[a] distribution scheme that enables retailers to make a respectable gross margin....”¹⁰

34. At the January 2002 NAMM Show, NAMM continued to facilitate discussion among its members on the optimal use of MAP policies. As a result, manufacturers “acknowledged the retail concern with profitability by instituting minimum advertised price, or MAP policies. In fact, mention of MAP pricing was routinely included in just about every new product presentation.”¹¹

35. At these shows, on information and belief, NAMM encouraged dealers to and dealers agreed to and did outline their MAP policies. But the dealers did not do so in conjunction with requests for retailer advertising, in-store displays, better product demonstrations or knowledgeable store staff. Rather, the MAP policies were agreed to at the behest of Defendants and rolled out at the NAMM shows with the retailer profitability in mind.

36. For example, at the Summer, 2004 NAMM show, “[a] number of exhibitors also announced higher MAP prices in a bid to shore up dealer margins. As one supplier noted, ‘The truth is, there isn’t a lot of difference between our products and our competitors. If we’re going to get dealer support, we’ve got to make these guys money.’”¹²

37. Similarly, at the NAMM show in summer 2005, Peavey Electronics (among others) outlined its MAP policy, reiterating “Peavey’s commitment to dealer profitability.”¹³

¹⁰ “Brick and Mortar Gets New Respect,” Music Trades (March 1, 2001)

¹¹ “Blue skies ahead? Expectations were low, but Christmas sales came in strong, and retailers flocked to Anaheim, making for a high energy show ... Does this mean the recession is over and industry growth is back on track?; NAMM in Anaheim 2002.” Music Trades (March 1, 2002).

¹² “NAMM’s grand finale in Nashville: strong buying, product shortages, exuberant entertainment, and confidence in the second half made the last NAMM show in Nashville one to remember; Nashville NAMM Report 2004,” Music Trades (September 1, 2004).

¹³ “Peavey 40th anniversary dealer meeting,” Music Trades (September 1, 2005).

38. But NAMM did not only encourage individual dealers or retailers to discuss and agree how to restrict price competition. In fact, it facilitated joint discussions by all members of NAMM. At NAMM's biannual trade shows and conventions, NAMM hosted "NAMM Show University Sessions." These sessions were designed to facilitate discussion and education on a wide variety of music industry topics, including price competition and restrictions to competition.

39. At the January 2006 trade show, NAMM hosted several sessions regarding MAP policies.

40. For example, NAMM facilitated a panel discussion regarding MAP policies. On a panel comprised of industry heavy-hitters, such as the Vice President and General Manager of Yamaha's Pro-Audio and Combo division, sales managers from Kaman Music Corp. and Avedis Zildjian, and several retailers, the suppliers were "unanimous, offering a guardedly positive assessment of MAP policies."¹⁴

41. At this panel, there was just one lone voice that supported competition on prices. Bryan Junk of massmusic.net asked the Panel and the audience, "We're supposed to compete, aren't we?" According to one industry report of the Panel session:

Whether or not you agree with him, Bryan Junk, an internet retailer, deserves credit for staring down an auditorium packed with independent retailers and stating that MAP should be scrapped. To audible boos, he declared, "Consumers like low prices, and we try to give them what they want. Why shouldn't we be able to grow our business by offering the lowest possible prices without interference from the manufacturers?"

42. However, Mr. Junk's view was not the consensus. In fact, the Panel discussed that, absent MAP, "prices would rapidly migrate down to 10% over cost...." The Panel even advocated revising the current MAP pricing "upwards to give retailers a better profit margin."

¹⁴ "MAP policies on trial: Do they help? Do they hurt? Is there a better way?" Music Trades (March 1, 2006).

43. The Panel also discussed how to enforce the MAP policies, agreeing that "MAP is only as effective as its enforcement...." The Panel thus discussed how to enforce MAP, particularly with the proliferation of Internet sites.

44. NAMM also released a report based on comments it compiled from the January 2006 trade show participants and attendees. NAMM released the following poll results, in which it provided the answers:¹⁵

What do independent retailers view as a threat to their business and profitability? On a 1 to 5 scale, with 5 being extremely concerned, rate the following issues. (Report is average of responses.)

- 3.4 The expanded presence of music products in mass merchants, like Wal-Mart and Costco.
- 3.2 Competition from internet and catalog merchants.
- * * *
- 2.5 MAP pricing policies that set margins too low.

45. NAMM hosted another session entitled, "Does the Industry Need a MAP makeover?" At this session, Music for Everyone ("MFE"), a California retailers association, presented a "voluntary MAP formula/guideline" which it "recommended for general use...."¹⁶

46. MFE published, and presented at the January 2006 NAMM trade show with NAMM's participation and consent, the following two pricing formulas based on retail cost and which were "designed for all instruments and all combo and audio products"¹⁷:

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

* * *

Retail [\$1-\$149] x 0.5 x 2.00 = MAP (0% off retail) *
Retail [\$150-\$249] x 0.5 x 1.90 = MAP (5% off retail) *

¹⁵ "Justified Optimism or rose-colored glasses?" Music Trades (March 1, 2006).

¹⁶ "Marketplace realities demand new approach to MAP policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense," Music Trades (November 1, 2005).

¹⁷ "Marketplace realities demand new approach to MAP policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense," Music Trades (November 1, 2005).

Retail [\$250-\$299] x 0.5 x 1.85 = MAP (7.5% off retail) *
Retail [\$300-\$349] x 0.5 x 1.80 = MAP (10% off retail) **
Retail [\$350-\$399] x 0.5 x 1.75 = MAP (12.5% off retail) **
Retail [\$400-\$449] x 0.5 x 1.70 = MAP (15% off retail) *
Retail [\$450-\$499] x 0.5 x 1.65 = MAP (17.5% off retail) *
Retail [\$500 and up] x 0.5 x 1.60 = MAP (20% off retail) *
Retail [\$550-\$599] x 0.5 x 1.55 = MAP (22.5% off retail) **
Retail [\$600 and up] x 0.5 x 1.50 = MAP (25% off retail) **

* Formula A

** Formula B

47. MFE explained that the formulas were designed to permit “[f]ormula discounts from retail start[ing] at zero” and to provide a “much higher” profit percentage for lower-priced products.”¹⁸

48. MFE even went so far at the NAMM show to encourage manufacturers to adopt the MAP pricing reflected in Formula A, capping permitted discounts at 20% and stating that Formula A “is likely to be ... accepted widely.” Nonetheless, MFE stated that no MAP pricing should be lower than that reflected in Formula B, stating “the formula B profits are the minimum that brick-and-mortar full service music instrument retailers require to survive, and hopefully thrive.”¹⁹

49. At the 2006 Summer NAMM Show, NAMM again held an industry panel discussion, comprised of the NAMM president, a vice president of Yamaha, and the Chairman and CEO of Fender Musical Instruments, among others.²⁰ NAMM touted this roundtable as follows: “In the two-hour session suppliers and retailers of all sizes will be able to share views about critical issues affecting profitability, including MAP pricing, Interact sales tax, and the

¹⁸ “Marketplace realities demand new approach to MAP policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense,” Music Trades (November 1, 2005).

¹⁹ “Marketplace realities demand new approach to MAP policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense,” Music Trades (November 1, 2005).

²⁰ “Austin goes all out for NAMM: Austin got high marks as a fabulous trade show venue, but attendance levels barely made a passing grade. Nevertheless, the industry still seems committed to a summer show. The only question, where to have it; Part 2; Company overview,” Music Trades (September 1, 2006).

entrance of mass consumer merchandisers into the industry.”²¹ Among the topics facilitated at this meeting were MAP prices that were set too low and profit margins.²²

50. NAMM continued to facilitate industry discussions of MAP pricing at its 2007 Winter show. One roundtable discussion focused on, *inter alia*, increasing profit margins and MAP pricing.²³

51. Thus, NAMM organized meetings and programs for its members at which competing retailers of musical instruments, as well as manufacturers of those instruments, were permitted and encouraged to exchange information and discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices.

52. Representatives of NAMM determined the scope of information exchange and discussion by selecting moderator and setting the agenda for these programs.

53. At these NAMM-sponsored events, NAMM members discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail price and margins; and other competitively sensitive issues.

B. No Legitimate Business Reason for MAP Policies, Price Restrictions and Restrictions on Discounting

54. Relative to Guitar Center and other retail members of NAMM, internet based retailers are small companies that compete in the relatively new trade channel known variously as “electronic commerce,” “e commerce,” “e tailing,” “internet retail,” etc. Internet retailers of

²¹ “Get ready for a memorable show as the world’s live music capital hosts NAMM; NAMM PREVIEW: Summer Session In Austin,” Music Trades (July 1, 2006).

²² “Austin goes all out for NAMM: Austin got high marks as a fabulous trade show venue, but attendance levels barely made a passing grade. Nevertheless, the industry still seems committed to a summer show. The only question, where to have it; Part 2; Company overview,” Music Trades (September 1, 2006).

²³ “Why going to NAMM is a total no-brainer: new products, smart people, and tons of educational sessions add up to the single biggest business opportunity of the year. If you’re serious, there’s only one thing to do: Show Up!; NAMM 2007 PREVIEW; Calendar,” Music Trades (January 1, 2007).

FI products are highly efficient competitors because, among other reasons, their operating expenses are low. This allows them to compete vigorously on price, both with other internet retailers and with retailers in other trade channels, such as Guitar Center (which operates through “brick and mortar” stores as well as on the internet). Thus, when allowed to compete freely, internet retailers’ price competition enhances consumer welfare by bringing down prices.

55. By the 2000s, NAMM and its members recognized that the increased popularity of “e-commerce,” with its associated increase in price competition, posed a substantial threat to NAMM’s members’ sales and profits. Thus, NAMM, whose retail members are generally considered “traditional” brick-and-mortar retailers because they primarily sells products through their physical store locations, considered ways to thwart internet retailer competitors.

56. NAMM’s, and its members’, response to internet retailing was both predictable and anticompetitive. As recognized at an FTC 2002 public workshop, entitled “Possible Anticompetitive Efforts to Restrict Competition on the Internet,” one expert explained:

The promise of the world of electronic commerce is to create an environment where consumers can freely shop between various competitive alternatives. By reducing transaction costs and improving transparency, the Internet offers the potential of dramatically improving competition in various retail markets.

* * *

[But] as new market forces arise, . . . “traditional” competitors often respond to the threat by trying to create barriers to thwart those new entrants.

See David A. Balto, Testimony Before the FTC, Office of Policy Planning, Public Workshop on E-Commerce, at 1-2 (October 10, 2002) (emphasis added).

57. Just as the experts predicted, NAMM encouraged its members to devise an illegal plan to combat internet retailers by exacting agreements from the manufacturers of FI products being sold through Guitar Center and NAMM members’ stores (or that desired to sell products at their stores) to require, on penalty of termination and as a condition of doing business with them, that the manufacturer ensure that its other retailers refrain from discounting.

58. NAMM facilitated the discussion of, and sought and obtained the agreement of its manufacturer members, to impose and enforce MAP policies solely for Guitar Center and its retail members' benefit and not for any legitimate pro-competitive reason.

C. The FTC Action

59. In March 2009, the Federal Trade Commission ("FTC") issued a cease and desist order to NAMM and at the same time settled the FTC's charges that NAMM had "permitted and encouraged" acts constituting violations of Section 5 of the FTC Act among its members and that the acts and practices of NAMM "constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. § 45." The FTC also alleged that absent appropriate relief "such acts and practices, or the effects thereof will continue or recur..."

60. Specifically, the FTC, after an investigation, alleged that between 2005 and 2007, NAMM organized various meetings and programs for its members, such as defendants herein, at which competing retailers of musical instruments were permitted and encouraged to exchange competitively sensitive information, strategies for implementing minimum advertised pricing and restrictions of retail price competition.

61. The FTC alleged that the "challenged conduct served no legitimate business purpose and resulted in no significant efficiency benefits."

62. According to the FTC's press release announcing NAMM's settlement of "FTC Charges of Illegally Restraining Competitions" "the FTC's proposed consent order is designed to remedy NAMM's anti-competitive conduct." The Commission's vote to accept the complaint and the consent order was 4-0.

63. According the FTC's complaint, "at meetings and programs sponsored by NAMM, competing retailers of musical instruments and other NAMM discussed strategies for

raising retail prices and exchanged information on competitively sensitive subjects such as prices, margins, minimum advertised price policies and their enforcement.”

According to the FTC, similar discussions were held among manufacturers.

64. The conduct of the defendants was the cause of *supra* competitive price levels for products in the Fretted Instrument product market. Music Merchandise Review, issue date October 2008, reported that Anthem Music Group’s head D. Kilkenny observed “over the past several years instrument prices seem to be increasing at a greater rate than that of inflation...” According to The Music Trades “Annual Census of The Music Industries” published in 2009, in 2006, the average price of a guitar was \$309, by 2007 the average price was \$350 and by 2008 the average price was \$372. Thus, the defendants were able to increase aggregate sales from \$1,022,861.00 in 2006 to \$1,151,290.00 despite a 10% decline in unit sales.

65. The FTC has alleged that no significant pro-competitive benefit was derived from the challenged conduct. After analyzing the type of information involved, the level of detail, the absence of procedural safeguards, and overall market conditions, the FTC concluded that the exchange of information engineered by NAMM lacked a pro-competitive justification.

66. The FTC has ordered NAMM to cease and desist from:

(a) Entering into, adhering to, enforcing, urging, encouraging, advocating, suggesting, assisting or otherwise facilitating any Musical Product Manufacturer or Musical Product Dealer to enter into, adhere to or enforce any combination, conspiracy, agreement or understanding between or among any Musical Product Manufacturers or Musical Product Dealers relating to:

- (i) the retail price of any Musical Product;
- (ii) any term, condition or requirement upon which any Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price

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

(iii) the refusal to do business, or the reduction of business, with particular Musical Product Manufacturers or Musical Product Dealers.

(b) Urging, encouraging, advocating, suggesting, coordinating, participating in, or facilitating in any manner the exchange of information between or among Musical Product Manufacturers or Musical Product Dealers relating to:

(i) the retail price of Musical Products; or

(ii) any term, condition or requirement upon which any Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical Product Manufacturer or Musical Product Dealer, including but not limited to, Price Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised Price Policies or Resale Price Maintenance Policies.

D. Anti-competitive Effects of Defendants' Unlawful Conduct

67. The MAP policies imposed and enforced by defendants here went well beyond typical cooperative advertising programs where manufacturers place restraints on the prices dealers may advertise in advertisements funded in whole or in part by the manufacturer.

68. The MAP policies inflicted on music retailers by NAMM and manufacturers are anti-competitive. According to a WALL STREET JOURNAL Report dated October 23, 2008, Bradley Reed, sales manager for Musician's Advocate, Inc. said "it [his company] had very little choice but to honor manufacturer's policies on advertised prices because otherwise it risks having its supplies cut off or being de-listed as an authorized distributor."

69. In large part, NAMM's concerted efforts were successful. Despite that fact that NAMM and its members expressed their fear at the January 2001 NAMM trade show that the then-current gross margins of 27% to 32% would be chipped away even further by price

competition, a Music Trades report published in 2008 provided that the music industry had gross margins of 30% versus approximately 22% gross margins for consumer electronics.

70. Defendants' practices have had the following anti-competitive effects, among others, in the relevant market:

(a) Competition in the relevant market has been unreasonably restrained, suppressed, and, in some cases, destroyed;

(b) Potential competitors have been restrained from entering into the relevant market and have been prevented from competing effectively against defendants;

(c) Purchasers of musical instruments have been denied the benefits of competition in a free and open market and have been forced to pay artificially high instrument prices;

(d) Upon information and belief, defendants have enjoyed and will continue to enjoy, ultra competitive profits to the detriment of competitors and purchasers of musical instruments.

71. The aforementioned anti-competitive effects of defendants conduct on competition in the relevant market outweigh any conceivable pro-competitive benefits.

E. Relevant Market

72. The relevant product market in this case is retail sales of products in the fretted instruments product category which includes guitars amplifiers and accessories for same.

73. The relevant geographic market in this case is the United States of America.

74. By virtue of their power to control prices and exclude competition in the relevant market(s), defendants' at all relevant times possessed market power in the relevant market(s). Moreover, at all relevant times defendants possessed dominant shares of the market(s) for retail sales of musical instruments generally fretted instruments in particular.

75. Likewise, defendants at all relevant times possessed substantial market power in the market(s) for its products, due, in part, to the high level of product differentiation in the

industry. Specifically, defendants: (a) sold their musical instruments at prices substantially in excess of marginal costs, (b) enjoyed high profits margins thereon, (c) sold such products substantially in excess of the competitive price, and (d) enjoyed substantial barriers to market entry and growth.

76. Defendants exchanged competitively sensitive information that had the purpose, tendency and capacity to facilitate price coordination among competitors.

77. There is substantial concentration among the firms that manufacture the products in the relevant market(s).

78. Defendants together imposed and enforced minimum retail price maintenance and minimum advertised price policies which were contrary to manufacturers' economic interests because each manufacturer rational economic goal was to increase sales volume rather than terminate retailers.

F. Market Effects of Defendants' Conduct

79. The overall effect of defendant's anti-competitive, exclusive scheme has been to substantially foreclose and impair competition (and the threat of such competition) from lower-priced musical instruments. As alleged above, had defendants not improperly foreclosed or stifled actual or potential competitors from competing in markets for the musical instruments, other actual or potential rival manufacturers would have achieved much greater sales than they actually did (or threatened to do), given the cheaper prices that they charged (or could have charged upon entry), and would have posed a far great competitive threat to defendants. Additionally, absent defendants exclusionary conduct, barriers to entry of the markets would have been lower, which: (a) would have made it easier for existing or new competitors to enter or expand their positions in the market for the musical instruments, and (b) would have caused existing or potential competitors to be attracted to the musical instrument market because of the supra-competitive prices that defendants was charging. As a result, absent defendants' misconduct, defendants would have rationally perceived that there was a greater threat of

potential competition in each of the relevant markets if defendants did not reduce its supra-competitive prices.

80. The presence of unfettered competition from actual or potential competitors, which were selling lower-priced musical instruments, would have forced defendants to lower the prices for its musical instruments in order to remain competitive and/or to counter a perceived threat of additional entry.

81. As a result of defendants' conduct, independent retailers could not compete with nationwide and/or multiregional claims because the retailers could not price-compete. Accordingly, retailers such as Guitar Center were able to raise prices above and beyond what they would be under competitive conditions.

82. During the relevant period, plaintiff and the other members of the Class purchased musical instruments directly from defendants. As a result of defendants alleged illegal conduct, members of the Class were compelled to pay, and did pay, artificially inflated prices for the musical instruments they purchased. Plaintiff would have been able to, *inter alia*, purchase less-expensive musical instruments had potential competitors been able to engage in unfettered competition. The prices that Plaintiff and the other Class members paid for musical instruments during the Class Period were substantially greater than the prices that Plaintiff and the Class members would have paid absent the illegal conduct alleged herein because: (1) the prices of all musical instruments were artificially inflated by defendants illegal conduct; and (2) Class members were deprived of the opportunity to purchase musical instruments at substantially lower prices. Thus, Plaintiff and the Class have, as a consequence, sustained substantial damages in the form of overcharges.

VI. CLASS ACTION ALLEGATIONS

83. Plaintiff brings this action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the following Class:

All individuals and persons who purchased one or more Fretted Instrument Products from any of the defendants from January 1, 2005 through December, 2007 ("Class Period").

Excluded from the Class are the defendants, their co-conspirators, their respective parents, subsidiaries and affiliates, any judge or magistrate presiding over this action and members of their families, as well as any governmental entities.

84. Plaintiff does not know the exact size of the Class since such information is exclusively in the control of defendants. Plaintiff believes that there are thousands of Class members, and that they are sufficiently numerous and geographically dispersed throughout the United States so that joinder of all Class members is impracticable.

85. Plaintiff's claims are typical of the claims of the members of the Class because Plaintiff and all Class members were damaged by the same wrongful conduct of defendants and their co-conspirators as alleged in this Complaint.

86. Plaintiff will fairly and adequately protect the interests of the Class. The interests of Plaintiff coincide with and are not antagonistic to, those of the Class. In addition, Plaintiff is represented by counsel who are experienced and competent in the prosecution of complex class action and antitrust litigation.

87. There are questions of law and fact common to the members of the Class, and those common questions predominate over any questions which may affect only individual members of the Class, because defendants have acted on grounds generally applicable to the entire class. Among the predominant questions of law and fact common to the Class are:

- a. whether Defendants engaged in agreements, contracts, combinations, and conspiracies, which had the purpose and/or effect of unreasonably restraining competition and limiting purchaser access to competing and lower-priced FI Products;
- b. whether Defendants' unreasonably restrained trade;

c. whether Defendants' anti-competitive contracts, combinations, and conspiracies have caused Plaintiffs and the other members of the Class or Subclasses to suffer antitrust injury in the nature of overcharges;

d. whether Defendants' unlawful conduct caused Plaintiffs and other Class or Subclass members to pay more for the FI Products than they otherwise would have paid;

e. the appropriate Class- or Subclass-wide measure of damages; and

f. whether Defendants' anti-competitive conduct is continuing, thus entitling the Class or Subclasses to injunctive relief to promote unrestrained trade and free and fair competition.

88. Class action treatment is a superior method for the fair and efficient adjudication of the controversy, in that, among other things, such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism, including providing injured persons or entities with a method for obtaining redress for claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in management of this class action. There are no difficulties likely to be encountered in the management of this class action that would preclude its maintenance as a class action and no superior alternative exists for the fair and efficient adjudication of this controversy on behalf of plaintiff and the members of the Class.

VII. TOLLING OF THE STATUTE OF LIMITATIONS, FRAUDULENT CONCEALMENT, AND EQUITABLE TOLLING

89. Plaintiff did not discover and could not have discovered through the exercise of reasonable diligence the existence of the claims sued upon herein until the FTC issued a press release in March 2009.

90. Any applicable statutes of limitation have been tolled by Defendants' affirmative acts of fraudulent concealment and continuing misrepresentations.

91. Because of the self-concealing nature of Defendants' actions and their affirmative acts of concealment, Plaintiffs and the Class or Subclasses assert the tolling of any applicable statutes of limitations affecting the claims raised herein.

92. Defendants continued to engage in the deceptive practice, and consequently, unwary consumers were injured on a daily basis by Defendants' unlawful conduct. Therefore, Plaintiffs and the Class or Subclasses submit that each instance that Defendants engaged in the conduct complained of herein and each instance that a member of the Class or Subclass purchased a FI Product constitutes part of a continuing violation and operates to toll the statutes of limitation in this action.

93. Defendants are estopped from relying on any statute of limitations defense because of its unfair or deceptive conduct.

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

95. By reason of the foregoing, the claims of Plaintiffs and the Class or Subclasses are timely under any applicable statute of limitations, pursuant to the discovery rule, the equitable tolling doctrine, and fraudulent concealment.

FIRST CLAIM FOR RELIEF

(VIOLATION OF SEC. 1 OF THE SHERMAN ANTITRUST ACT, 15 U.S.C. § 1)

96. Plaintiff incorporates by reference all the above allegations as if fully set forth herein.

97. Beginning in 2005, the exact date being unknown to plaintiff and exclusively within the knowledge of defendants and their co-conspirators entered into a continuing contract,

combination or conspiracy to unreasonably restrain trade and commerce in violation of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1) by artificially reducing or eliminating competition in the United States.

98. In particular, defendants combined and conspired to raise, fix, maintain or stabilize the prices of Fretted Instrument Products sold in the United States.

99. As a result of defendants' unlawful conduct, prices for Fretted Instrument Products were raised, fixed, maintained and stabilized in the United States.

100. The contract, combination or conspiracy among defendants consisted of a continuing agreement, understanding, and/or concerted action among defendants and their co-conspirators.

101. For purposes of formulating and effectuating their contract, combination or conspiracy, defendants and their co-conspirators did those things they contracted, combined, or conspired to do, including but not limited to:

a. participating in meetings and conversations to discuss the prices and supply of Fretted Instrument Products;

b. communicating in writing and orally to fix target prices, floor prices, and price margins for Fretted Instrument Products;

c. exchanging competitively sensitive information among each other to facilitate their conspiracy, including minimum advertised pricing, strategies for raising retail prices, restricting retail price competition;

d. agreeing to manipulate prices and supply of Fretted Instrument Products sold in the United States in a manner that deprived direct purchasers of free and open competition; and

e. selling Fretted Instrument Products to customers in the United States at non-competitive prices.

102. As a result of defendants' unlawful conduct, plaintiff and the other members of the Class were injured in their businesses and/or property in that they paid more for Fretted

Instrument Products than they otherwise would have paid in the absence of defendants' unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

A. The Court determine that this action may be maintained as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure with respect to the claims for damages, and declaring plaintiff as the representative of the Class and his counsel as counsel for the Class;

B. The Court declares the conduct alleged herein to be unlawful in violation of the federal antitrust laws and the common law of unjust enrichment;

C. Plaintiff and each member of the Class recover punitive and treble damages to the extent such are provided by the law;

D. Plaintiff and each member of the Class recover the amounts by which the defendants have been unjustly enriched in accordance with state law;

E. Defendants be enjoined from continuing the illegal activities alleged herein;

F. Plaintiff and the Class recover their costs of suit, including reasonable attorneys' fees and expenses as provided by law; and

G. Plaintiff and the Class be granted such other, further, and different relief as the nature of the case may require or as may be determined to be just, equitable and proper by this Court.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all claims so triable.

DATED: September 30, 2009

STEPHAN ZOURAS, LLP

By: /s/ Ryan F. Stephan
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EXHIBIT E

ORIGINAL

FILED

2009 SEP 30 PM 2: 55

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SOUTHERN DISTRICT OF CALIFORNIA**

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8
9
10 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 COLBY GILES, Individually and on Behalf of)
All Others Similarly Situated,)
12 Plaintiff,)
13 vs.)
14 GUITAR CENTER, INC. and NATIONAL)
ASSOCIATION OF MUSIC MERCHANTS,)
15 INC.,)
16 Defendants.

No.

'09 CV 2146 BEN POR

CLASS ACTION

**COMPLAINT FOR VIOLATION OF §1 OF
THE SHERMAN ACT**

DEMAND FOR JURY TRIAL

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CP

1 Plaintiff Colby Giles, a purchaser of two guitars and assorted accessories from Guitar Center
2 during the Class Period, brings this action individually and on behalf of a Class consisting of all
3 persons and entities that purchased an acoustic or electric guitar, drum sets, keyboard, mixer,
4 amplifier or related accessory ("Music Products") directly from a defendant or a co-conspirator.
5 Plaintiff makes the allegations in this Complaint on information and belief, except as to the
6 allegations pertaining to plaintiff, which is based on personal knowledge.

7 NATURE OF ACTION

8 1. On, March 4, 2009, the FTC announced defendant National Association of Music
9 Merchants ("NAMM"), a musical industry trade association, entered into a consent order settling
10 charges that NAMM violated federal antitrust law by enabling and encouraging the exchange of
11 competitively sensitive price information among its members.

12 2. During the Class Period, Guitar Center, NAMM and NAMM's members conspired,
13 combined and contracted to fix, maintain, stabilize and set minimum agreed-upon resale prices in the
14 Music Products market. As a result of this unlawful conduct, plaintiff and the Class paid
15 supracompetitive prices for these products and have suffered injury to their business and/or property.

16 3. NAMM encouraged, facilitated and coordinated the exchange of competitively
17 sensitive information between its members. In the late 1990s, NAMM's retail members, including
18 defendant Guitar Center, saw their profit margins being cut away by new entrants into the Music
19 Products industry.

20 4. In order to protect their market share, NAMM and its retail members entered into an
21 agreement and conspiracy to influence NAMM's manufacturing members to set minimum advertised
22 prices ("MAP") for Music Products. Because of Guitar Center and other NAMM retail members'
23 purchasing power, the manufacturers had no choice but to accept the imposition of MAP policies.

24 5. Soon thereafter, in the late 1990s and early 2000s, manufacturers realized MAP
25 policies were an effective means of controlling prices at supracompetitive levels. Manufacturers
26 then became involved in the NAMM-facilitated discussions and came to agreements and were a part
27 of the conspiracy with retail members regarding the anticompetitive MAP policies.

28

1 6. These agreements had the purpose and effect of diminishing and/or eliminating
2 competition on price allowing Guitar Center and other NAMM members to obtain supracompetitive
3 profits and market share.

4 **JURISDICTION AND VENUE**

5 7. Plaintiff brings this action pursuant to §1 of the Sherman Act, 15 U.S.C. §1, and §§4
6 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, to recover treble damages and costs of suit,
7 including reasonable attorneys' fees, against defendants for the antitrust injuries sustained by
8 plaintiff and members of the Class.

9 8. Plaintiff also seeks injunctive relief against defendants to prevent them from further
10 violations of §1 of the Sherman Act, 15 U.S.C. §1, and pursuant to §16 of the Clayton Act, 15
11 U.S.C. §26.

12 9. Jurisdiction in this Court is proper under 28 U.S.C. §§1331 and 1337, and §§4(a) and
13 16 of the Clayton Act (15 U.S.C. §§15(a) and 26).

14 10. Venue is proper in this Judicial District pursuant to 15 U.S.C. §§15(a) and 22 and 28
15 U.S.C. §1391(b), (c) and (d) because during the Class Period, defendants resided, transacted
16 business, were found and/or had agents in this District, and a substantial portion of the affected
17 interstate trade and commerce described below has been carried out in this District.

18 11. This Court has personal jurisdiction over each defendant because, *inter alia*, each
19 defendant: (a) transacted business throughout the United States, including in this District; (b) sold
20 Music Products throughout the United States, including in this District; (c) had substantial contacts
21 with the United States, including in this District; and/or (d) was engaged in an illegal price-fixing
22 conspiracy and resale price maintenance scheme that was directed at and had the intended effect of
23 causing injury to persons residing in, located in or doing business throughout the United States,
24 including this District. Further jurisdictional contacts are alleged below.

25 **PARTIES**

26 12. Plaintiff Colby Giles is a California resident living in San Diego, California. During
27 the Class Period, Mr. Giles purchased two guitars from Guitar Center.

28

1 16. Plaintiff does not know the exact size of the proposed Class as that information is in
2 control of the defendants, but plaintiff believes there are at least thousands of Class members located
3 throughout the United States, making the Class so large and geographically diverse that joinder is
4 impracticable.

5 17. Defendants' anticompetitive conduct has imposed a common antitrust injury on
6 members of the Class.

7 18. Defendants have acted, and refused to act, on grounds generally applicable to the
8 Class, which makes final injunctive relief with respect to the Class as a whole appropriate.

9 19. Plaintiff is a member of the Class and plaintiff's claims are typical of other members
10 of the Class who likewise sustained antitrust injury and were damaged through defendants' actions.

11 20. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff
12 purchased Music Products from defendants and has a common and non-antagonistic interest in
13 recovering damages caused by defendants' anticompetitive conduct and in enjoining and deterring
14 future unlawful activity in the Music Product market.

15 21. Plaintiff has retained counsel experienced in antitrust and other complex class action
16 litigation.

17 22. Defendants' anticompetitive conduct has uniformly affected plaintiff and members of
18 the Class. Common questions of law and fact will predominate over individual questions of law and
19 fact. Among questions of law and fact common to the Class are the following:

20 (a) Whether defendants and others combined, conspired or contracted to fix or set
21 Music Products prices at artificially high levels;

22 (b) Whether defendants and others combined, conspired or contracted to impose
23 MAP policies on the industry;

24 (c) The dates and formation of this illegal combination, contract, conspiracy or
25 agreement;

26 (d) The identities of the participants in the illegal combination, contract,
27 conspiracy or agreement;

28 (e) The manner and means of the conspiracy;

1 (f) Whether, and to what extent, defendants' conduct violated §1 of the Sherman
2 Act;

3 (g) Whether, and to what extent, defendants and their co-conspirators fraudulently
4 concealed their illegal combination, contract, conspiracy and other antitrust violations;

5 (h) Whether Class members have suffered injury to their business and property as
6 a result of defendants' unlawful conduct, including the degree to which prices paid for by the Class
7 for Music Products were higher than those that would have been paid in a market free from illegal
8 combination, contract, conspiracy and other antitrust violations; and

9 (i) The appropriateness of injunctive relief to restrain future violations.

10 23. A class action is superior to other available methods for the fair and efficient
11 adjudication of this controversy. Class treatment will permit a large number of similarly situated
12 persons and entities to adjudicate their common claims in a single forum simultaneously, efficiently
13 and without duplication of effort and expense that numerous individual actions would engender.
14 Prosecution of separate actions by individual plaintiffs would create a risk of inconsistent or varying
15 adjudication. The proposed Class presents no difficulties of management that would preclude its
16 maintenance as a class action. No superior alternative exists for the fair and efficient adjudication of
17 this controversy.

18 INTERSTATE TRADE AND COMMERCE

19 24. Defendants and their co-conspirators sell Music Products in the United States.

20 25. During all or part of the Class Period, the conduct of defendants and their co-
21 conspirators has taken place in and/or substantially affected interstate trade and commerce of the
22 United States.

23 FACTUAL ALLEGATIONS

24 Background

25 26. Most United States manufacturers, distributors and dealers of Music Products are
26 members of NAMM. As the FTC stated in its complaint against NAMM:

27 NAMM serves the economic interests of its members, by *inter alia*, promoting
28 consumer demand for musical instruments, lobbying the government, offering
seminars, and organizing trade shows. In the United States, NAMM sponsors two

1 major trade shows each year, where manufacturers introduce new products and meet
2 with dealers. In addition, NAMM's trade shows provide competitors an opportunity
to meet and discuss issues of concern to the industry.

3 27. NAMM's biannual trade shows are considered an indispensable resource by Music
4 Product retailers. In a February 2007 interview, a member was quoted in Musical Merchandise
5 Review:

6 Many years ago, the importance of attending a NAMM show may not have
7 seemed important, today it is absolutely necessary. Owners and key personnel
should be at NAMM . . . the education seminars are priceless!

8 The interaction with the industry people and colleagues is also priceless.

9 28. According to independent retailers, Guitar Center wields enormous power in the
10 industry. In an interview in the April 2007 issue of Musical Merchandise Review, Alan Levin of
11 Chuck Levin's Washington Music Center said:

12 The biggest concern is Guitar Center. They are many manufacturers' biggest
13 customers and changes are being made . . . to suit them alone.

14 Similarly, one NAMM member observed: "Guitar Center has too much leverage . . ."

15 29. In a "virtual roundtable," retailer Frank Hayhurst of Zone Music responded to a
16 question about the "un-level" playing field between Guitar Center and independents saying, "[a]s big
17 as GC [Guitar Center] is, what's a little manufacturer to do? Not surprisingly, they do what GC
18 demands."

19 30. Relative to Guitar Center and most other retail members of NAMM, internet based
20 retailers are small companies. Internet retailers of Music Products are highly efficient competitors
21 because, among other reasons, their operating expenses are low. This allows them to compete
22 vigorously on price, both with other internet retailers and with retailers in other sales channels, such
23 as Guitar Center (which operates through "brick-and-mortar" stores as well as on the internet).
24 Thus, when allowed to compete freely, internet retailers' price competition enhances consumer
25 welfare by bringing down prices.

26 31. In the "virtual roundtable," retailer Frank Hayhurst of Zone Music stated "[t]he
27 internet has blown away selection and price as variables that make an m.i. [music industry] retailer
28 unique, and 'service' doesn't have the terrific 'value added' impact upon the customer that many of

1 us have attributed to it. If something breaks, they want to know if you'll replace it, not hear about
2 your repair department."

3 32. Guitar Center and other large merchants felt the pressure in the form of price
4 competition not only from the internet retailers, but the "big box" and wholesale retailers as well,
5 including stores such as Wal-Mart, Best Buy and Costco.

6 33. By the late 1990s, NAMM, Guitar Center and its members recognized that the
7 increased popularity of internet and big box retailers, with the associated increase in price
8 competition, posed a substantial threat to NAMM members' sales and profits. Thus, NAMM, whose
9 retail members are primarily brick-and-mortar retailers, considered ways to thwart internet retailer
10 competitors.

11 34. NAMM's and its members' response to internet retailing was both predictable and
12 anticompetitive. As recognized at an FTC 2002 public workshop, entitled "Possible Anticompetitive
13 Efforts to Restrict Competition on the Internet," one expert explained:

14 The promise of the world of electronic commerce is to create an environment
15 where consumers can freely shop between various competitive alternatives. By
16 reducing transaction costs and improving transparency, the Internet offers the
17 potential of dramatically improving competition in various retail markets.

18 * * *

19 [But] as new market forces arise, . . . "traditional" competitors often respond to the
20 threat by trying to create barriers to thwart those entrants."

21 **During the Class Period, NAMM Provided a Means for Suppliers
22 and Retailers To Control Prices for Music Products in the United States**

23 35. Commencing in 1999 and continuing thereafter, numerous leading Music Products
24 manufacturers in conjunction with and through NAMM and its dealer members adopted MAP
25 policies.

26 36. The purpose of facilitating agreement both as to MAP policies and pricing was
27 because Guitar Center, as well as other retailer members of NAMM, were concerned about increased
28 competition by mass merchants, such as Best Buy, Wal-Mart and Costco, as well as internet
retailers.

1 37. In the late 1990s or early 2000s, at a NAMM show, "a high-profile retailer delivered a
2 stinging address, lamenting the fact that manufacturers sat by idly as price wars raged and retail
3 profits plummeted." This address coincided with the adoption of MAP policies by leading Music
4 Product manufacturers, which commenced in 1999 and continued thereafter.

5 38. By the early 2000s, several major music retail chains, including Guitar Center,
6 expressed a heightened concern for margin and profit protection.

7 39. When NAMM, Guitar Center, and other retail members encouraged and required the
8 implementation of MAP pricing, manufacturers did so for fear of losing Guitar Center as a customer.

9 40. In fact, a major shift in retail opinion regarding the effectiveness of MAP policies to
10 protect profits occurred between 2000 and 2001. A poll conducted by Music Trades magazine
11 revealed that:

12 Last year [2000] when we polled leading m.i. [music industry] dealers about the
13 value of minimum advertised price (MAP) policies, only 31% said they had a
14 positive effect on gross margins. 60% responded that MAP had no effect at all on
15 selling prices, while 9% said the programs actually decreased margins. When asked
16 the same question this year [2001], retailers expressed a major change of heart. 51%
17 said that MAP policies had improved their gross margins during the past 12 months,
18 and only 44% deemed the policies in ineffectual.

19 41. Music Trades concluded that the 20-point shift in opinion was due to the fact that "the
20 biggest benefit of MAP policies has been to rid the internet of loss-leader pricing." Music Trades
21 explained:

22 As a result [of MAP policies], these days when you type the name of a popular
23 product into a search engine, you'll get a screen full of results offering the same
24 MAP regulated price. As our poll indicates, brick-and-mortar retailers obviously
25 appreciate the fact that they don't have to deal with a legion of customers coming
26 into the store brandishing a computer print out and demanding, "Why can't you beat
27 this price."

28 42. In addition to reducing competition from internet retailers, Music Trades also credited
MAP policies with a more "sane approach to industry pricing," stating that "retail margins appear to
have stabilized."

 43. Accordingly, MAP policies were a hot topic at the January 2001 NAMM trade show.
Music Trades reported that retailers' then-current gross margins of 28% to 32% were far lower than

1 they had been in the 1990s, and that both large and small retailers “have jointly concluded that they
2 simply can’t afford to give up any more gross margin points.”

3 44. In response to this joint retailer pressure, at the January 2001 NAMM show,
4 “manufacturers seemed to be doing more than paying lip service to retail profit concerns” by rolling
5 out new and more restrictive MAP policies. However, the manufacturers acknowledged that the
6 MAP policies were not designed to increase services at the retailers but merely to protect their profit
7 margins. In fact, manufacturers allegedly “[were] fulsome in their criticisms of the industry’s retail
8 network,” stating, *inter alia*: “They don’t do any marketing,” and “[t]heir stores are staffed with
9 minimum wage idiots.”

10 45. Thus, the discussion at the January 2001 NAMM show was driven by manufacturers’
11 realization that they could no longer rely on innovative engineering and design. Instead, to
12 artificially increase profits, manufacturers agreed to implement “[a] distribution scheme that enables
13 retailers to make a respectable gross margin”

14 46. At the January 2002 NAMM show, NAMM continued to facilitate discussion among
15 its members on the use of MAP policies. As a result, manufacturers “acknowledged the retail
16 concern with profitability by instituting minimum advertised price, or MAP policies. In fact,
17 mention of MAP pricing was routinely included in just about every new product presentation.”

18 47. At these shows, NAMM encouraged manufacturers to and manufacturers agreed to
19 and did outline their MAP policies. But the manufacturers did not do so in conjunction with requests
20 for retailer advertising, in-store displays, better product demonstrations or knowledgeable store staff.
21 Rather, the MAP policies were agreed to at the behest of defendants and rolled out at the NAMM
22 shows with retailer profitability in mind.

23 48. For example, at the summer 2004 NAMM show, “[a] number of exhibitors also
24 announced higher MAP prices in a bid to shore up dealer margins. As one supplier noted, ‘The truth
25 is, there isn’t a lot of difference between our products and our competitors. If we’re going to get
26 dealer support, we’ve got to make these guys money.’”

27 49. Similarly, at the NAMM show in summer 2005, manufacturer Peavey Electronics
28 (among others) outlined its MAP policy, reiterating “Peavey’s commitment to dealer profitability.”

1 50. But NAMM did not simply encourage individual manufacturers and dealers to
2 discuss and agree how to restrict price competition. In fact, it facilitated joint discussions by all
3 members of NAMM. At NAMM's biannual trade shows and conventions, NAMM hosted "NAMM
4 Show University Sessions." These sessions were designed to facilitate discussion and education on a
5 wide variety of music industry topics, including price competition and restrictions to competition.

6 51. At the January 2006 trade show, NAMM hosted several events regarding MAP
7 policies.

8 52. For example, NAMM facilitated a panel discussion regarding MAP policies. On a
9 panel comprised of industry heavy-hitters, including the Vice President and General Manager of
10 Yamaha's Pro-Audio and Combo division, sales managers from Avedis Zildjian and Kaman Music
11 Corp. and several other retailers, the suppliers were "unanimous, offering a guardedly positive
12 assessment of MAP policies."

13 53. At this panel, there was just one lone voice that supported competition on prices.
14 Bryan Junk of www.massmusic.net asked the Panel and the audience, "We're supposed to compete,
15 aren't we?" According to one industry report of the Panel session:

16 Whether or not you agree with him, Bryan Junk, an internet retailer, deserves credit
17 for staring down an auditorium packed with independent retailers and stating that
18 MAP should be scrapped. To audible boos, he declared, "Consumers like low prices,
19 and we try to give them what they want. Why shouldn't we be able to grow our
20 business by offering the lowest prices possible without interference from the
21 manufacturers?"

22 54. However, Mr. Junk's view was not the consensus. In fact, the panel discussed that,
23 absent MAP, "prices would rapidly migrate down to 10% over cost. . . ." The panel even advocated
24 revising the current MAP pricing "upwards to give retailers a better profit margin."

25 55. The panel also discussed how to enforce the MAP policies, particularly with the
26 proliferation of internet retailers, agreeing that "MAP is only as effective as its enforcement. . . ."

27 56. NAMM also released a report based on comments it compiled from January 2006
28 trade show participants and attendees. NAMM released the following poll results, with answers:

 What do independent retailers view as a threat to their business and profitability? On
 a 1 to 5 scale, with 5 being extremely concerned, rate the following issues. (Report is
 average of responses.)

1 3.4 The expanded presence of music products in mass merchants, like Wal-Mart
2 and Costco.

3 3.2 Competition from internet and catalog merchants.

4 * * *

5 2.5 MAP pricing policies that set margins too low.

6 57. NAMM hosted another session entitled, "Does The Industry Need A MAP
7 Makeover?" At this session, Music for Everyone ("MFE"), a California retailers association,
8 presented a "voluntary MAP formula/guideline" which it "recommended for general use"

9 58. MFE published and presented at the January 2006 NAMM trade show, with
10 NAMM's participation and consent, the following two pricing formulas based on retail cost which
11 were "designed for all instruments and all combo and audio products":

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

14 * * *

- 15 Retail [\$1-\$149] x 0.5 x 2.00 = MAP (0% off retail)*
16 Retail [\$150-\$249] x 0.5 x 1.90 = MAP (5% off retail)*
17 Retail [\$250-\$299] x 0.5 x 1.85 = MAP (7.5% off retail)*
18 Retail [\$300-\$349] x 0.5 x 1.80 = MAP (10% off retail)**
19 Retail [\$350-\$399] x 0.5 x 1.75 = MAP (12.5% off retail)**
20 Retail [\$400-\$449] x 0.5 x 1.70 = MAP (15% off retail)*
21 Retail [\$450-\$499] x 0.5 x 1.65 = MAP (17.5% off retail)*
22 Retail [\$500 and up] x 0.5 x 1.60 = MAP (20% off retail)*
23 Retail [\$550-\$599] x 0.5 x 1.55 = MAP (22.5% off retail)**
24 Retail [\$600 and up] x 0.5 x 1.50 = MAP (25% off retail)**

25 * Formula A
26 ** Formula B

27 59. MFE explained that the formulas were designed to permit "[f]ormula discounts from
28 retail start[ing] at zero" and to provide a "much higher" profit percentage for lower-priced products.

29 60. MFE even went so far at the NAMM show to encourage manufacturers to adopt the
30 MAP pricing reflected in Formula A, capping permitted discounts at 20% and stating that Formula A
31 "is likely to be . . . accepted widely." Nonetheless, MFE stated that no MAP pricing should be lower
32 than that reflected in Formula B, stating "the formula B profits are the minimum that brick-and-
33 mortar full service music instrument retailers require to survive, and hopefully thrive."

34

1 61. At the 2006 Summer NAMM show, NAMM again held an industry panel discussion,
2 comprised of the NAMM President, a Vice President of Yamaha and the Chairman and CEO of
3 Fender Musical Instruments, among others. NAMM touted this roundtable as follows: "In the two-
4 hour session suppliers and retailers of all sizes will be able to share views about critical issues
5 affecting profitability, including MAP pricing, Interact sales tax, and the entrance of mass consumer
6 merchandisers into the industry." Among other topics, MAP prices being set too low and
7 maintenance of profit margins were discussed.

8 62. NAMM continued to facilitate industry discussions of MAP pricing at its 2007 winter
9 show. One roundtable discussion focused on, *inter alia*, increasing profit margins and MAP pricing.

10 63. Thus, NAMM again organized meetings and programs for its members at which
11 competing retailers of Music Products, as well as manufacturers of those Music Products, were
12 permitted and encouraged to exchange information and discuss strategies for implementing MAP
13 policies, the restriction of retail competition and the need for higher retailer prices. Representatives
14 of NAMM determined the scope of information exchange and discussion by selecting the moderator
15 and setting the agenda for these programs.

16 64. At these NAMM-sponsored events, NAMM members discussed the adoption,
17 implementation and enforcement of MAP policies, the details and workings of such policies,
18 appropriate and optimal retail price and margins and other competitively sensitive issues.

19 65. The prevalence of MAP policies in the Music Products industry remained steady into
20 early 2008. In an article from the February 1, 2008 issue of Music Trades, retailer Mike Henry,
21 owner of Percussion Center stated:

22 When products are seen to be "Wal-Mart" cheap, it cheapens the industry. MAP
23 supports the public's perceived value of the products we're trying to sell
24 competitively and still make a living. I'm all for competition and the American way,
but if retailers can't make a profit, what's the point of being in business.

25 Later in the article, Mr. Henry continued:

26 In the long run, a manufacturer that doesn't enforce its MAP isn't going to hurt my
27 business, it's going to hurt their business because I'm going to stop buying from
28 them. I'm their customer; I'm paying their salaries by buying their products. If they
allow my competitors to sell their product at a price that doesn't give me a
reasonable margin, I can't buy it.

1 Mr. Henry went on to say that “[a] product’s MAP price should be based on its perceived retail
2 price.”

3 66. In the same article, Fred Bernardo of Fred’s Music & Barbecue Supply stated that
4 “[MAP policies] are too low. They don’t allow for the retailer to make an adequate profit. Also I
5 think MAP is illegal—or at least it was illegal. It’s price fixing, since everyone, especially online, has
6 the exact same ‘selling’ price on their shopping carts.” Mr. Henry and Mr. Bernardo’s statements
7 underscore the continuing recalcitrant attitude of NAMM retail members, the anticompetitive nature
8 of MAP policies and the stark lack of precompetitive justifications for MAP policies.

9 **The FTC Action**

10 67. On March 4, 2009, the Federal Trade Commission (“FTC”) issued a cease and desist
11 order to NAMM and at the same time settled the FTC’s charges that NAMM had “permitted and
12 encouraged” acts constituting violations of Section 5 of the FTC Act among its members and the acts
13 and practices of NAMM “constitute unfair methods of competition in or affecting commerce in
14 violation of Section 5 of the Federal Trade Commission Act, as amended 15 U.S. C. §45.” The FTC
15 also alleged that absent appropriate relief “[s]uch acts and practices, or the effects thereof will
16 continue or recur”

17 68. Specifically the FTC, after an investigation, alleged that between 2005 and 2007,
18 NAMM organized various meetings and programs for its members at which competing retailers of
19 Music Products were permitted and encouraged to exchange competitively sensitive information,
20 strategies for implementing minimum advertised pricing and restrictions of retail price competition.

21 69. The FTC alleged that the “challenged conduct served no legitimate business purpose
22 and resulted in no significant efficiency benefits.”

23 70. According to the FTC’s press release announcing NAMM’s settlement of “FTC
24 Charges of Illegally Restraining Competitions,” the FTC’s proposed consent order “is designed to
25 remedy NAMM’s anticompetitive conduct.” The Commission’s vote to accept the complaint and
26 the consent order was 4-0.

27 71. According to the FTC’s complaint, “[a]t these NAMM-sponsored events, competitors
28 discussed the adoption, implementation, and enforcement of minimum advertised price policies; the

1 details and workings of such policies; appropriate and optimal retail prices and margins; and other
2 competitively sensitive issues.”

3 72. The conduct of defendants was the cause of supracompetitive price levels for Music
4 Products. The October 2008 issue of Music Merchandise Review reported that Anthem Music
5 Group’s head David Kilkenny observed “[o]ver the past several years instrument prices seem to be
6 increasing at a greater rate than that of inflation” According to the Music Trades “Annual
7 Census of the Music Industries” published in 2009, in 2006 the average price of a guitar was
8 \$309.00, by 2007 the average price was \$350.00 and by 2008 the average price was \$372.00. Thus,
9 defendants were able to increase aggregate sales from \$1,022,861.00 in 2006 to \$1,151,290.00
10 despite a 10% decline in unit sales.

11 73. The FTC has alleged that no significant procompetitive benefit was derived from the
12 challenged conduct. After analyzing the type of information involved, the level of detail, the
13 absence of procedural safeguards and overall market conditions, the FTC concluded that exchange of
14 information engineered by NAMM lacked a procompetitive justification.

15 74. The FTC has ordered NAMM to cease and desist from:

16 (1) Urging, encouraging, advocating, suggesting, coordinating, participating in,
17 or facilitating in any manner the exchange of information between or among Musical
Product Manufacturers or Musical Product Dealers relating to:

18 (a) the retail price of Musical Products; or

19 (b) any term, condition or requirement upon which any Musical Product
20 Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other
21 Musical Product Manufacturer or Musical Product Dealer, including but not limited
to, Price Terms, margins, profits, or pricing policies, including but not limited to
Minimum Advertised Price Policies or Resale Price Maintenance Policies.

22 (2) Entering into, adhering to, enforcing, urging, encouraging, advocating,
23 suggesting, assisting or otherwise facilitating any Musical Product Manufacturer or
24 Musical Product Dealer to enter into, adhere to or enforce any combination,
conspiracy, agreement or understanding between or among any Musical Product
Manufacturers or Musical Product Dealers relating to:

25 (a) the retail price of any Musical Product;

26 (b) any term, condition or requirement upon which any Musical Product
27 Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other
28 Musical Product Manufacturer or Musical Product Dealer, including but not limited
to, Price Terms, margins, profits, or pricing policies, including but not limited to
Minimum Advertised Price Policies or Resale Price Maintenance Policies; or

1 (c) the refusal to do business, or the reduction of business, with particular
2 Musical Product Manufacturer^s or Musical Product Dealers.

3 **DEFENDANTS' ANTITRUST VIOLATIONS**

4 75. Beginning at least as early as January 1, 1999 and continuing until at least February,
5 1, 2008, the exact dates being unknown to plaintiff, defendants and their co-conspirators engaged in
6 a continuing agreement, understanding and conspiracy in restraint of trade to artificially raise, fix
7 maintain and/or stabilize the price for Music Products in the United States.

8 76. In formulating and implementing their unlawful contract, combination or conspiracy,
9 defendants and their co-conspirators engaged in anticompetitive activities, the purpose and effect of
10 which were to artificially raise, fix, maintain and/or stabilize the price of Music Products in the
11 United States. These activities include the following:

12 (a) Defendants participated in meetings and/or communications to discuss the
13 pricing of Music Products;

14 (b) Defendants agreed during those meetings and/or communications to force
15 suppliers to charge and/or advertise prices at specified levels and otherwise to increase and/or
16 maintain prices of Music Products in the United States; and

17 (c) Defendants then implemented, adhered to and oversaw the agreements they
18 reached.

19 77. Defendants and their co-conspirators engaged in the activities described above for the
20 purpose of effectuating the unlawful agreements described in this Complaint.

21 78. During the Class Period, plaintiff and members of the Class purchased Music
22 Products from defendants, their subsidiaries or affiliates, or their co-conspirators at inflated and
23 supracompetitive prices.

24 79. As a result of defendants' unlawful conduct, plaintiff and other members of the Class
25 have been injured in their business and property in that they have paid more for Music Products than
26 they would have paid in a competitive market.

27 80. The unlawful contract, combination or conspiracy has had the following effects,
28 among others:

1 (a) Price competition in the markets for Music Products has been artificially
2 restrained;

3 (b) Prices for Music Products sold by defendants have been raised, fixed,
4 maintained or stabilized at artificially high and supracompetitive prices; and

5 (c) Purchasers of Music Products from defendants have been deprived of the
6 benefits of free and open competition in the markets for Music Products.

7 81. Defendants' contract, combination or conspiracy constitutes an unreasonable restraint
8 on interstate trade and commerce in violation of §1 of the Sherman Act.

9 82. The aforementioned anticompetitive effects of defendants' conduct on competition in
10 the relevant market outweigh any conceivable procompetitive benefits.

11 **Relevant Market**

12 83. The relevant product market in this case is retail sales of Music Products which
13 includes acoustic or electric guitars, drum sets, keyboards, mixers, amplifiers and related accessories.

14 84. The relevant geographic market in this case is the United States of America.

15 85. By virtue of their power to control prices and exclude competition in the relevant
16 market, defendants at all relevant times possessed market power in the relevant market. Moreover,
17 at all relevant times defendants possessed dominant shares of the market for retail sales of Music
18 Products.

19 86. Likewise, defendants at all relevant times possessed substantial power in the market
20 for Music Products. Specifically, defendants: (a) sold their musical instruments and assorted
21 accessories at prices substantially in excess of marginal costs; (b) enjoyed high profits margins
22 thereon; and (c) sold such products substantially in excess of the competitive price.

23 87. Defendants exchanged competitively sensitive information that had the purpose,
24 tendency and capacity to facilitate price coordination among competitors.

25 88. There is substantial concentration among the firms that manufacture and sell the
26 products in the relevant market.

27

28

1 89. Together defendants imposed and enforced minimum retail price maintenance and
2 MAP policies which were contrary to manufacturers' economic interests because each
3 manufacturers' rational economic goal was to increase sales volume rather than terminate retailers.

4 **Market Effects of Defendants' Conduct**

5 90. The overall effect of defendants' anticompetitive, exclusive scheme has been to
6 substantially foreclose and impair competition (and the threat of such competition) from lower-
7 priced Music Products. As alleged above, had defendants not improperly foreclosed or stifled actual
8 or potential competitors from competing in markets for Music Products, other actual or potential
9 rival manufacturers would have achieved much greater sales than they actually did (or threatened to
10 do), given the cheaper prices that they charged (or could have charged upon entry), and would have
11 posed a far greater competitive threat to defendants. As a result, absent defendants' misconduct,
12 defendants would have rationally perceived that there was a greater threat of potential competition in
13 each of the relevant markets if defendants did not reduce its supracompetitive prices.

14 91. The presence of unfettered competition from actual or potential competitors, which
15 were selling lower-priced Music Products, would have forced defendants to lower the prices for its
16 Music Products in order to remain competitive and/or counter a perceived threat of additional entry.

17 92. As a result of defendants' conduct, independent retailers could not compete with
18 nationwide and/or multiregional claims because the retailers could not price-compete. Accordingly,
19 retailers such as Guitar Center were able to raise prices above and beyond what they would be under
20 competitive conditions.

21 93. During the Class Period, plaintiff and other members of the Class purchased Music
22 Products directly from defendants. As a result of defendants' alleged illegal conduct, members of
23 the Class were compelled to pay, and did pay, artificially inflated prices for the Music Products they
24 purchased. Plaintiff would have been able to, *inter alia*, purchase less-expensive Music Products
25 had potential competitors been able to engage in unfettered competition. The prices that plaintiff
26 and the other Class members paid for Music Products during the Class Period were substantially
27 greater than the prices that plaintiff and the Class members would have paid absent the illegal
28 conduct alleged herein because: (1) the prices of all Music Products were artificially inflated by

1 defendants' illegal conduct; and (2) Class members were deprived of the opportunity to purchase
2 Music Products at substantially lower prices. Thus, plaintiff and the Class have, as a consequence,
3 sustained substantial damages in the form of overcharges.

4 **Anticompetitive Effects of Defendants' Unlawful Conduct**

5 94. The MAP policies imposed and enforced by defendants here went well beyond
6 typical cooperative advertising programs where manufacturers place restraints on the prices dealers
7 may advertise in advertisements funded in whole or in part by the manufacturer.

8 95. The MAP policies imposed on manufacturers by music retailers and NAMM are
9 anticompetitive. According to a Wall Street Journal article, dated October 23, 2008, Bradley Reed,
10 sales manager for Musician's Advocate, Inc. said "it [his company] has very little choice but to
11 honor manufacturers' policies on advertised prices because otherwise it risks having its supplies cut
12 off or being delisted as an authorized distributor."

13 96. In large part, NAMM's concerted efforts were successful. Despite the fact that
14 NAMM and its members expressed their fear at the January 2001 NAMM trade show that the then-
15 current gross margins of 28% to 32% would be chipped away even further by price competition,
16 Music Trades report published in 2008 provided that the music industry maintained large gross
17 margins of 30% versus approximately 22% gross margins for the traditionally high-margin consumer
18 electronics industry.

19 97. Defendants' conduct caused actual antitrust damage to purchasers of Music Products
20 in the form of higher prices and diminished price competition.

21 98. The aforementioned anticompetitive effects of defendants' conduct on competition in
22 the relevant market outweigh any conceivable procompetitive benefits.

23 **FRAUDULENT CONCEALMENT IN FURTHERANCE OF THE CONSPIRACY**

24 99. Plaintiff had no knowledge of the anticompetitive conduct alleged in this Complaint,
25 or of any facts that might have led to its discovery in the exercise of reasonable diligence, prior to
26 the FTC's March 2009 press release detailing the consent order that it entered into with defendant
27 NAMM.

28

1 100. Defendants and their co-conspirators employed deceptive practices to conceal their
2 conspiracy.

3 101. As a result of defendants' fraudulent concealment of the conspiracy, plaintiff asserts
4 the tolling of the applicable statute of limitations affecting the causes of action by plaintiff and the
5 members of the Class.

6 **COUNT**

7 **VIOLATION OF §1 OF THE SHERMAN ACT**

8 102. Plaintiff incorporates and realleges each allegation set forth in the preceding
9 paragraphs of this Complaint.

10 103. Beginning at least as early as January 1, 1999 and continuing to February 1, 2008,
11 defendants and their co-conspirators, by and through their officers, directors, employees, agents or
12 other representatives, entered into a continuing agreement, understanding and conspiracy in restraint
13 of trade to artificially raise, fix, maintain and/or stabilize prices for Music Products in the United
14 States in violation of §1 of the Sherman Act, 15 U.S.C. §1.

15 104. Defendants' unlawful conduct resulted in artificially high prices charged by
16 defendants and their co-conspirators to plaintiff and the members of the Class for Music Products.

17 105. As a result of defendants' unlawful conduct, plaintiff and members of the Class have
18 paid and continue to pay more for Music Products than they would have paid in a competitive
19 marketplace.

20 106. Plaintiff seeks to recover for these overcharge damages.

21 107. As a direct and proximate result of defendants' scheme, plaintiff and members of the
22 Class have been injured and financially damaged in their respective businesses and property, in
23 amounts which are presently undetermined. Plaintiff's injuries consist of paying higher prices to
24 purchase Music Products than it would have paid absent defendants' conduct. Plaintiff's injuries are
25 the type the antitrust laws were designed to prevent and flow from defendants' unlawful conduct.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, plaintiff, individually and on behalf of all members of the Class, prays for a
28 judgment:

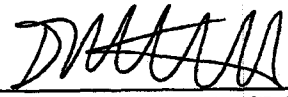
- 1 A. That the Court certify the Class pursuant to Federal Rules of Civil Procedure, Rule
- 2 23(b);
- 3 B. That the Court find that the combination and conspiracy and other illegal activities
- 4 alleged in this Complaint be adjudicated a *per se* violation of, or alternatively, a rule of reason
- 5 violation of §1 of the Sherman Act, 15 U.S.C. §1;
- 6 C. That plaintiff and the Class recover damages against each defendant, jointly and
- 7 severally, in an amount to be trebled in accordance with the antitrust laws pursuant to 15 U.S.C. §15;
- 8 D. That plaintiff and the Class be awarded their expenses and costs of suit, including
- 9 reasonable attorneys' fees, to the extent provided by law;
- 10 E. That this Court permanently enjoin unlawful activity by defendants in violation of the
- 11 antitrust laws; and
- 12 F. That plaintiff and the Class be awarded such additional relief as the Court may deem
- 13 proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury.

16 DATED: September 30, 2009

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EXHIBIT F

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BY *[Signature]* DEPUTY

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RORY W. COLLINS, individually and on
Behalf of all others similarly situated,

Plaintiff,

v.

GUITAR CENTER, INC., and
NATIONAL ASSOCIATION OF
MUSIC MERCHANTS, INC.,

Defendants.

'09 CV 2151 JAH — JMA
CLASS ACTION COMPLAINT
DEMAND FOR JURY TRIAL

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1 Plaintiff, Rory W. Collins (the "Plaintiff"), for his Class Action Complaint against
2 Defendants, upon personal knowledge as to facts pertaining to himself and upon information and
3 belief as to all other matters, state as follows:
4

5 I. NATURE OF ACTION

6 1. Plaintiff, a consumer and a direct purchaser of Martin Guitar strings ("Martin
7 Strings") from Guitar Center, Inc., one of the defendants herein, brings this action on his own
8 behalf and on behalf of a class of purchasers of fretted musical instrument products such as
9 acoustic and electric guitars, violins, amplifiers and strings ("FI Products") between January 1,
10 2005 and December 31, 2007.
11

12 2. Plaintiff seeks damages from Defendants under Section 1 of the Sherman Antitrust
13 Act, 15 U.S.C. § 1. As detailed below, Plaintiff alleges that Guitar Center, a dominant, multi-
14 brand retailer and a member of the National Association of Music Merchants ("NAMM"), together
15 with NAMM and its members, conspired to maintain, implement and/or enforce Minimum
16 Advertised Pricing ("MAP") policies that had the purpose and effect of fixing prices, securing
17 higher price levels, restricting retail price competition and eliminating price discounting altogether
18 in the Fretted Instrument ("FI") market.
19

20 3. Specifically, from at least 2005-2007, and earlier, NAMM organized meetings and
21 programs where competing FI retailers, including Guitar Center, were permitted and encouraged
22 to discuss and agree regarding the restriction of retail price competition, strategies for the
23 adoption, implementation, and enforcement of minimum advertised price policies, and appropriate
24 and optimal retail prices and margins. In effect, NAMM facilitated resale price maintenance
25 ("RPM") agreements between and among its members (hereinafter, MAP and RPM are used
26 interchangeably).
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III. PARTIES

10. Plaintiff Rory W. Collins is a resident of Indianapolis, Indiana. In or about the time period of 2005 - 2007, Plaintiff purchased several sets of Martin Strings from Guitar Center.

11. Defendant Guitar Center, Inc. ("Guitar Center") is a Delaware corporation with its principal place of business at 5795 Lindero Canyon Road, Westlake Village, California, and is a retail seller of FI Products. Guitar Center is a member of NAMM. Guitar Center has grown aggressively through acquisitions. As of the end of 2008, Guitar Center's annual sales of \$1.55 billion were more than one-fifth of the annual sales of all musical instruments of \$7 billion. Guitar Center is the only national chain and is viewed as dominant in the retail market with 295 stores and the industry's largest mail order operation. Guitar Center was nearly five times the size of its nearest competitor by 2007. From 1997 to 2007, its market share grew from 6.1% to 26.6%.

12. Guitar Center is, according to its own publicly filed financial reports in 2007, the largest customer of many of its suppliers and thus each manufacturer depends on Guitar Center for substantial portion of its sales of guitars.

13. Defendant National Association of Music Merchants, Inc. ("NAMM") is a New York corporation with its principal place of business located at 5790 Armada Drive, Carlsbad, California 92008.

14. NAMM is a trade association comprised of more than 9,000 members, including defendants, that includes manufacturers, distributors, and dealers of musical instruments and related products. Most United States manufacturers, distributors, and dealers of musical instruments are members of NAMM. NAMM is controlled by its members, including defendants herein.

1 15. The musical instrument product market is characterized by significant barriers to
2 entry which enhances Guitar Center's dominance and influence and allowed defendants to
3 exercise and maintain control over prices of fretted instruments.
4

5 16. Plaintiff is informed and believes and thereon alleges that as to all transaction
6 relevant herein, each defendant was an agent of one or more defendants named herein and, as
7 such, was acting within the purpose, course and scope of such agency. Plaintiff is further
8 informed and believes that each defendant aided and abetted, and acted in concert with and/or
9 conspired with each and every defendant to commit the acts complained of herein and to engage in
10 a course of conduct in the business practices complained of herein.
11

12 17. Various individuals, partnerships, corporations and associations not named as
13 defendants in this Complaint have participated as co-conspirators in the violations of law alleged
14 herein and have performed acts and made statements in furtherance thereof. The identity of all co-
15 conspirators is unknown at this time and will require discovery.
16

17 **IV. INTERSTATE TRADE AND COMMERCE**

18 18. The activities of Defendants, as described in this Complaint, were within the flow
19 of, and substantially affected, interstate commerce.
20

21 19. During the time period covered by this Complaint, Defendant Guitar Center and
22 members of Defendant NAMM sold and distributed FI Products throughout the United States.

23 20. Defendant Guitar Center and members of Defendant NAMM have sold and shipped
24 substantial quantities of FI Products in a continuous and uninterrupted flow of interstate commerce
25 to customers located in states other than the states in which the Defendants and NAMM's
26 members produced FI Products.
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V. SUBSTANTIVE ALLEGATIONS

A. During the Class Period, NAMM was the Industry's Vehicle to Control Prices in the United States Fretted Instrument Product Market

21. Most U.S. manufacturers, distributors, and dealers of musical instructions are members of NAMM. As the FTC observed in its March 4, 2009 press release entitled *National Association of Music Merchants Settles FTC Charges of Illegally Restraining Competition*, "NAMM serves the economic interests of its members by, among other things, promoting consumer demand for musical instructions, lobbying the government, offering seminars, and organizing trade shows. In the United States, NAMM sponsors two major shows each year, where manufacturers introduce new products and meet with dealers and competing manufacturers, distributors and retailers of musical instruments meet and discuss issues of concern to the industry." See <http://www.ftc.gov/opa/2009/03/namm.shtm>.

22. On information and belief, from the late 1990s to at least 2007, Defendants worked to facilitate uniform agreements both as to the implementation and enforcement of MAP as well as pricing. The purpose of facilitating agreement both as to MAP policies and pricing was because Guitar Center, as well as other retailer members of NAMM, were concerned about increased competition by mass merchants, such as Wal-Mart and Costco, as well as interest retailers.¹

23. NAMM held biannual trade shows and conventions. NAMM shows are considered an indispensable resource by music product retailers. In a February 2007 interview a member was quoted in Musical Merchandise Review:

Many years ago, the importance of attending a NAMM show may not have seemed important, today it is absolutely necessary. Owners and key personnel should be at NAMM . . . the education

¹ "Exhibitors Speak: candid comments on business, the NAMM show, dealers and what to expect in 2006," Music Trades (March 1, 2006); "Justified Optimism or rose-colored glasses?" Music Trades (March 1, 2006). See also FTC Complaint, ¶ 4.

1 seminars are priceless. The interaction with the industry people and
2 colleagues is also priceless.

3 24. In the late 1990s or early 2000s, at a NAMM show, "a high-profile retailer
4 delivered a stinging address, lamenting the fact that manufacturers sat by idly as price wars raged
5 and retail profits plummeted."² This address coincided with the adoption of MAP policies by
6 leading musical instrument manufacturers, which commenced in 1999 and continued thereafter.³

7
8 25. By the early 2000s, several major music retail chains, including Guitar Center,
9 were expressing a heightened concern for margin and profit protection.

10 26. According to independent retailers, Guitar Center wields enormous power in the
11 industry. In an interview in Musical Merchandise Review, April 2007 issue, Alan Levin of Chuck
12 Levin's Washington Music Center said:

13
14 The biggest concern is Guitar Center. They are many
15 manufacturers' biggest customers and changes are being made . . . to
16 suit them alone.

17 Similarly, one NAMM member observed: "Guitar Center has too much leverage. . ."⁴

18 27. Thus, when Guitar Center and NAMM encouraged and required the
19 implementation of MAP pricing, manufacturers did so for fear of losing Guitar Center as a
20 customer.

21 28. In fact, a major shift in retail opinion regarding the effectiveness of MAP policies
22 to protect profits occurred between 2000 and 2001. A poll conducted by Music Trades magazine
23 revealed that:

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² "Do MAP policies work?" Music Trades (August 1, 2001).

27 ³ FTC Complaint, ¶ 4.

28 ⁴ As reported in the March 1, 2008 issue of Music Trades.

1 Last year [2000] when we polled leading m.i. dealers about the
2 value of minimum advertised price (MAP) policies, only 31% said
3 they had a positive effect on gross margins, 60% said that MAP had
4 no effect at all on selling prices, while 9% said the programs
5 actually decreased margins. When asked the same question this year
6 [2001], retailers expressed a major change of heart. 51% said that
7 MAP policies had improved their gross margins during the past 12
8 months, and only 44% deemed the policies ineffectual.⁵

9 29. Music Trades concluded that the 20-point shift in opinion was due to the fact that
10 "the biggest benefit of MAP policies has been to rid the internet of loss-leader pricing." Music
11 Trades explained:

12 As a result [of the MAP policies], these days when you type the
13 name of a popular product into a search engine, you'll get a screen
14 full of results offering the same MAP regulated price. As our poll
15 indicates, brick-and-mortar retailers obviously appreciate the fact
16 that they don't have to deal with a legion of customers coming into
17 the store brandishing a computer print out and demanding, 'Why
18 can't you beat this price?'⁶

19 30. In addition to reducing competition from internet retailers, Music Trades also
20 credited MAP policies with a more "sane approach to industry pricing," stating that "retail
21 margins appear to have stabilized."⁷

22 31. Thus, MAP policies were a hot topic at the January 2001 NAMM trade show.
23 Music Trades reported that retailers' then-current gross margins of 27% to 32% were far lower
24 than they had been in the 1990s, and that both large and small retailers "have jointly concluded
25 that they simply can't afford to give up any more gross margin points."⁸

26 ⁵ "Do MAP policies work?" Music Trades (August 1, 2001).

27 ⁶ "Do MAP policies work?" Music Trades (August 1, 2001).

28 ⁷ "Do MAP policies work?" Music Trades (August 1, 2001).

⁸ "Brick and Mortar Gets New Respect," Music Trades (March 1, 2001)

1 32. In response to this joint retailer pressure, at the January 2001 NAMM show,
2 “manufacturers seemed to be doing more than paying lip service to retail profit concerns” by
3 rolling out new and more restrictive MAP policies. However, on information and belief, the
4 manufacturers realized and agreed that the MAP policies were not designed to increase services at
5 the retailers but merely to protect their profit margins. In fact, manufacturers allegedly “were
6 fulsome in their criticisms of the industry’s retail network,” stating, *inter alia*: “They don’t do
7 any marketing,” and “Their stores are staffed with minimum wage idiots.”⁹
8

9
10 33. Thus, the result of the January 2001 NAMM show, and the discussion facilitated by
11 NAMM at that show, was that manufacturers realized that they could no longer rely on brilliant
12 engineering and design, but instead agreed to implement “[a] distribution scheme that enables
13 retailers to make a respectable gross margin. . .”¹⁰
14

15 34. At the January 2002 NAMM show, NAMM continued to facilitate discussion
16 among its members on the optimal use of MAP policies. As a result, manufacturers
17 “acknowledged the retail concern with profitability by instituting minimum advertised price, or
18 MAP policies. In fact, mention of MAP pricing was routinely included in just about every new
19 product presentation.”¹¹
20

21 35. At these shows, on information and belief, NAMM encouraged dealers to, and
22 dealers agreed to and did, outline their MAP policies. But the dealers did not do so in conjunction
23 with requests for retailer advertising, in-store displays, better product demonstrations or
24

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26 ⁹ “Brick and Mortar Gets New Respect,” *Music Trades* (March 1, 2001)

27 ¹⁰ “Brick and Mortar Gets New Respect,” *Music Trades* (March 1, 2001)

28 ¹¹ “Blue skies ahead? Expectations were low, but Christmas sales came in strong, and retailers flocked to Anaheim, making for a high energy show . . . Does this mean the recession is over and industry growth is back on track?; NAMM in Anaheim 2002.” *Music Trades* (March 1, 2002).

1 knowledgeable store staff. Rather, the MAP policies were agreed to at the behest of Defendants
2 and rolled out at the NAMM shows with the retailer profitability in mind.

3 36. For example, at the Summer 2004 NAMM show, “[a] number of exhibitors also
4 announced higher MAP prices in a bid to shore up dealer margins. As one supplier noted, ‘The
5 truth is, there isn’t a lot of difference between our products and our competitors. If we’re going to
6 get dealer support, we’ve got to make these guys money.’”¹²

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8 37. Similarly, at the NAMM show in summer 2005, Peavey Electronics (among others)
9 outlined its MAP policy, reiterating “Peavey’s commitment to dealer profitability.”¹³

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11 38. But NAMM did not only encourage individual dealers or retailers to discuss and
12 agree how to restrict price competition. In fact, it facilitated joint discussions by all members of
13 NAMM. At NAMM’s biannual trade shows and conventions, NAMM hosted “NAMM Show
14 University Sessions.” These sessions were designed to facilitate discussion and education on a
15 wide variety of music industry topics, including price competition and restrictions to competition.
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17 39. At the January 2006 trade show, NAMM hosted several sessions regarding MAP
18 policies.

19 40. For example, NAMM facilitated a panel discussion regarding MAP policies. On a
20 panel comprised of industry heavy-hitters, such as the Vice President and General Manager of
21 Yamaha’s Pro-Audio and Combo division, sales managers from Kaman Music Corp. and Avedis
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¹² “NAMM’s grand finale in Nashville: strong buying, product shortages, exuberant entertainment, and
27 confidence in the second half made the last NAMM show in Nashville one to remember; Nashville NAMM
28 Report 2004,” Music Trades (September 1, 2004).

¹³ “Peavey 40th anniversary dealer meeting,” Music Trades (September 1, 2005).

1 Zildjian, and several retailers, the suppliers were “unanimous, offering a guardedly positive
2 assessment of MAP policies.”¹⁴

3
4 41. At this panel, there was just one lone voice that supported competition on prices.
5 Bryan Junk of massmusic.net asked that Panel and the audience, “We’re supposed to compete,
6 aren’t we?” According to one industry report of the Panel session:

7 Whether or not you agree with him, Bryan Junk, an internet retailer,
8 deserves credit for staring down an auditorium packed with
9 independent retailers and stating that MAP should be scrapped. To
10 audible boos, he declared, ‘Consumers like low prices, and we try to
11 give them what they want. Why shouldn’t we be able to grow our
12 business by offering the lowest possible prices without interference
13 from the manufacturers?’

14 42. However, Mr. Junk’s view was not the consensus. In fact, the Panel discussed that,
15 absent MAP, “prices would rapidly migrate down to 10% over cost . . .” The Panel even
16 advocated revising the current MAP prices “upwards to give retailers a better profit margin.”

17 43. The Panel also discussed how to enforce the MAP policies, agreeing that “MAP is
18 only as effective as its enforcement . . .” The Panel thus discussed how to enforce MAP,
19 particularly with the proliferation of Internet sites.

20 44. NAMM also released a report based on comments it compiled from the January
21 2006 trade show participants and attendees. NAMM released the following poll results, in which
22 it provided the answers:¹⁵

23 What do independent retailers view as a threat to their business and
24 profitability? On a 1 to 5 scale, with 5 being extremely concerned,
25 rate the following issues. (Report is average of responses.)
26

27 ¹⁴ “MAP policies on trial: Do they help? Do they hurt? Is there a better way?” Music Trades (March 1,
28 2006).

¹⁵ “Justified Optimism or rose-colored glasses?” Music Trades (March 1, 2006).

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3.4 The expanded presence of music products in mass merchants, like Wal-Mart and Costco.

3.2 Competition from internet and catalog merchants.

* * *

2.5 MAP pricing policies that set margins too low.

45. NAMM hosted another session entitled, "Does the Industry Need a MAP makeover?" At this session, Music for Everyone ("MFE"), a California retailers association, presented a "voluntary MAP formula/guideline" which it "recommended for general use . . ."16

46. MFE published, and presented at the January 2006 NAMM trade show with NAMM's participation and consent, the following two pricing formulas based on retail cost and which were "designed for all instruments and all combo and audio products"17:

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

* * *

- Retail [\$1-\$149] x 0.5 x 2.00 = MAP (0% off retail)*
- Retail [\$150-\$249] x 0.5 x 1.90 = MAP (5% off retail)*
- Retail [\$250-\$299] x 0.5 x 1.85 = MAP (7.5% off retail)*
- Retail [\$300-\$349] x 0.5 x 1.80 = MAP (10% off retail)**
- Retail [\$350-\$399] x 0.5 x 1.75 = MAP (12.5% off retail)**
- Retail [\$400-\$449] x 0.5 x 1.70 = MAP (15% off retail)*
- Retail [\$450-\$499] x 0.5 x 1.65 = MAP (17.5% off retail)**
- Retail [\$500 and up] x 0.5 x 1.60 = MAP (20% off retail)*
- Retail [\$550-\$599] x 0.5 x 1.55 = MAP (22.5% off retail)**
- Retail [\$600 and up] x 0.5 x 1.50 = MAP (25% off retail)**

* Formula A
** Formula B

16 "Marketplace realities demand new approach to MAP policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense," Music Trades (November 1, 2005).

17 "Marketplace realities demand new approach to MAP policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense," Music Trades (November 1, 2005).

1
2 47. MFE explained that the formulas were designed to permit “[f]ormula discounts
3 from retail start[ing] at zero” and to provide a “much higher” profit percentage for lower-priced
4 products.”¹⁸

5 48. MFE even went so far at the NAMM show to encourage manufacturers to adopt the
6 MAP pricing reflected in Formula A, capping permitted discounts at 20% and stating that Formula
7 A “is likely to be . . . accepted widely.” Nonetheless, MFE stated that no MAP pricing should be
8 lower than that reflected in Formula B, stating “the formula B profits are the minimum that brick-
9 and-mortar full service music instrument retailers require to survive, and hopefully thrive.”¹⁹

10 49. At the 2006 Summer NAMM show, NAMM again held an industry panel
11 discussion, comprised of the NAMM president, a vice president of Yamaha, and the Chairman and
12 CEO of Fender Musical Instruments, among others.²⁰ NAMM touted this roundtable as follows:
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14 “In the two-hour session suppliers and retailers of all sizes will be able to share views about
15 critical issues affecting profitability, including MAP pricing, Internet sales tax, and the entrance of
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22 ¹⁸ “Marketplace realities demand new approach to MAP policies: with fixed costs the same on all
23 merchandise, a sliding pricing scale makes sense,” Music Trades (November 1, 2005).

24 ¹⁹ “Marketplace realities demand new approach to MAP policies: with fixed costs the same on all
25 merchandise, a sliding pricing scale makes sense,” Music Trades (November 1, 2005).

26 ²⁰ “Austin goes all out for NAMM: Austin got high marks as a fabulous trade show venue, but attendance
27 levels barely made a passing grade. Nevertheless, the industry still seems committed to a summer show.
28 The only question, were to have it; Part 2; Company review,” Music Trades (September 1, 2006).

1 mass consumer merchandisers into the industry.”²¹ Among the topics facilitated at this meeting
2 were MAP prices that were set too low and profit margins.²²

3 50. NAMM continued to facilitate industry discussions of MAP pricing at its 2007
4 Winter show. One roundtable discussion focused on, *inter alia*, increasing profit margins and
5 MAP pricing.²³

6 51. Thus, NAMM organized meetings and programs for its members at which
7 competing retailers of musical instruments, as well as manufacturers of those instruments, were
8 permitted and encouraged to exchange information and discuss strategies for implementing
9 minimum advertised price policies, the restriction of retail price competition, and the need for
10 higher retail prices.

11 52. Representatives of NAMM determined the scope of information exchange and
12 discussion by selecting moderator and setting the agenda for these programs.

13 53. At these NAMM-sponsored events, NAMM members discussed the adoption,
14 implementation, and enforcement of minimum advertised price policies; the details and workings
15 of such policies; appropriate and optimal retail price and margins; and other competitively
16 sensitive issues.

17 **B. No Legitimate Business Reason for MAP Policies, Price Restrictions and Restrictions**
18 **on Discounting**

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25 ²¹ “Get ready for a memorable show as the world’s live music capital hosts NAMM; NAMM PREVIEW:
26 Summer Session In Austin,” Music Trades (July 1, 2006).

27 ²² “Austin goes all out for NAMM: Austin got high marks as a fabulous trade show venue, but attendance
28 levels barely made a passing grade. Nevertheless, the industry still seems committed to a summer show.
The only question, where to have it; Part 2, Company overview,” Music Trades (September 1, 2006).

²³ “Why going to NAMM is a total no-brainer: new products, smart people, and tons of educational
sessions add up to the single biggest opportunity of the year. If you’re serious, there’s only one thing to do:
Show Up!; NAMM 2007 PREVIEW; Calendar,” Music Trades (January 1, 2007).

1 See David A. Balto, Testimony Before the FTC, Office of Policy Planning, Public
2 Workshop on E-Commerce, at 1-2 (October 10, 2002) (emphasis added).

3 57. Just as the experts predicted, NAMM encouraged its members to devise an illegal
4 plan to combat internet retailers by exacting agreements from the manufacturers of FI products
5 being sold through Guitar Center and NAMM members' stores (or that desired to sell products at
6 their stores) to require, on penalty of termination and as a condition of doing business with them,
7 that the manufacturer ensure that its other retailers refrain from discounting.

8
9 58. NAMM facilitated the discussion of, and sought and obtained the agreement of its
10 manufacturer members, to impose and enforce MAP policies solely for Guitar Center and its retail
11 members' benefit and not for any legitimate pro-competitive reason.

12
13 **C. The FTC Action**

14 59. In March 2009, the Federal Trade Commission ("FTC") issued a cease and desist
15 order to NAMM and at the same time settled the FTC's charges that NAMM had "permitted and
16 encouraged" acts constituting violations of Section 5 of the FTC Act among its members and that
17 the acts and practices of NAMM "constitute unfair methods of competition in or affecting
18 commerce in violation of Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C.
19 § 45." The FTC also alleged that absent appropriate relief "such acts and practices, or the effects
20 thereof will continue or recur . . ."

21
22 60. Specifically, the FTC, after an investigation, alleged that between 2005 and 2007,
23 NAMM organized various meetings and programs for its members, such as defendants herein, at
24 which competing retailers of musical instruments were permitted and encouraged to exchange
25 competitively sensitive information, strategies for implementing minimum advertised pricing and
26 restrictions of retail price competition.

1 61. The FTC alleged that the “challenged conduct served no legitimate business
2 purpose and resulted in no significant efficiency benefits.”

3 62. According to the FTC’s press release announcing NAMM’s settlement of “FTC
4 Charges of Illegally Restraining Competitions” “the FTC’s proposed consent order is designed to
5 remedy NAMM’s anti-competitive conduct.” The Commission’s vote to accept the complaint and
6 the consent order was 4-0.
7

8 63. According to the FTC’s complaint, “at meetings and programs sponsored by
9 NAMM, competing retailers of musical instruments and other NAMM discussed strategies for
10 raising retail prices and exchanged information on competitively sensitive subjects such as prices,
11 margins, minimum advertised price policies and their enforcement.”
12

13 According to the FTC, similar discussions were held among
14 manufacturers.

15 64. The conduct of the defendants was the cause of *supra* competitive price levels for
16 products in the Fretted Instrument product market. Music Merchandise Review, issue date
17 October 2008, reported that Anthem Music Group’s head D. Kilkenny observed “over the past
18 several years instrument prices seem to be increasing at a greater rate than that of inflation . . .”
19 According to The Music Trades “Annual Census of The Music Industries” published in 2009, in
20 2006, the average price of a guitar was \$309, by 2007 the average price was \$350 and by 2008 the
21 average price was \$372. Thus, the defendants were able to increase aggregate sales from
22 \$1,022,861.00 in 2006 to 41,151,290.00 despite a 10% decline in unit sales.
23

24 65. The FTC has alleged that no significant pro-competitive benefit was derived from
25 the challenged conduct. After analyzing the type of information involved, the level of detail, the
26 absence of procedural safeguards, and overall market conditions, the FTC concluded that the
27 exchange of information engineered by NAMM lacked a pro-competitive justification.
28

1 66. The FTC has ordered NAMM to cease and desist from:

2 (a) Entering into, adhering to, enforcing, urging, encouraging, advocating,
3 suggesting, assisting or otherwise facilitating any Musical Product Manufacturer or Musical
4 Product Dealer to enter into, adhere to or enforce any combination, conspiracy, agreement or
5 understanding between or among any Musical Product Manufacturers of Musical Product Dealers
6 relating to:

7 (i) the retail price of any Musical Product;

8 (ii) any term, condition or requirement upon which any Musical Product
9 Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical
10 Product Manufacturer or Musical Product Dealer, including, but not limited to, Price Terms,
11 margins, profits, or pricing policies, including but not limited to Minimum Advertised Price
12 Policies or Resale Price Maintenance Policies; or

13 (iii) the refusal to do business, or the reduction of business, with
14 particular Musical Product Manufacturers or Musical Product Dealers.
15

16 (b) Urging, encouraging, advocating, suggesting, coordinating, participating in,
17 or facilitating in any manner the exchange of information between or among Musical Product
18 Manufacturers or Musical Product dealers relating to:

19 (i) the retail price of Musical Products; or

20 (ii) any term, condition or requirement upon which any Musical Product
21 Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical
22 Product Manufacturer or Musical Product Dealer, including but not limited to, Price Terms,
23 margins, profits, or pricing policies, including but not limited to Minimum Advertised Price
24 Policies or Resale Price Maintenance Policies.
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1 **D. Anti-Competitive Effects of Defendants' Unlawful Conduct**

2 67. The MAP policies imposed and enforced by Defendants here went well beyond
3 typical cooperative advertising programs where manufacturers place restraints on the prices
4 dealers may advertise in advertisements funded in whole or in part by the manufacturer.
5

6 68. The MAP policies inflicted on music retailers by NAMM and manufacturers are
7 anti-competitive. According to a WALL STREET JOURNAL Report dated October 23, 2008, Bradley
8 Reed, sales manager for Musician's Advocate, Inc. said "it [his company] had very little choice
9 but to honor manufacturer's policies on advertised prices because otherwise it risks having its
10 supplies cut off or being delisted as an authorized distributor."
11

12 69. In large part, NAMM's concerted efforts were successful. Despite that fact that
13 NAMM and its members expressed their fear at the January 2001 NAMM trade show that the
14 then-current gross margins of 27% to 32% would be chipped away even further by price
15 competition, a Music Trades report published in 2008 provided that the music industry had gross
16 margins of 30% versus approximately 22% gross margins for consumer electronics.
17

18 70. Defendants' practices have had the following anti-competitive effects, among
19 others, in the relevant market:

20 (a) Competition in the relevant market has been unreasonably restrained,
21 suppressed, and, in some cases, destroyed;

22 (b) Potential competitors have been restrained from entering into the relevant
23 market and have been prevented from competing effectively against defendants;

24 (c) Purchasers of musical instruments have been denied the benefits of
25 competition in a free and open market and have been forced to pay artificially high instrument
26 prices;
27
28

1 (d) Upon information and belief, defendants have enjoyed and will continue to
2 enjoy, ultra competitive profits to the detriment of competitors and purchasers of musical
3 instruments.
4

5 71. The aforementioned anti-competitive effects of defendants conduct on competition
6 in the relevant market outweigh any conceivable pro-competitive benefits.

7 **E. Relevant Market**

8 72. The relevant product market in this case is retail sales of products in the fretted
9 instruments product category which includes guitars, amplifiers and accessories for the same.
10

11 73. The relevant geographic market in this case is the United States of America.

12 74. By virtue of their power to control prices and exclude competition in the relevant
13 market(s), Defendants at all relevant times possessed market power in the relevant market(s).
14 Moreover, at all relevant times Defendants possessed dominant shares of the market(s) for retail
15 sales of musical instruments generally fretted instruments in particular.
16

17 75. Likewise, Defendants at all relevant times possessed substantial market power in
18 the market(s) for their products, due, in part, to the high level of product differentiation in the
19 industry. Specifically, Defendants: (a) sold their musical instruments at prices substantially in
20 excess of marginal costs, (b) enjoyed high profits margins thereon, (c) sold such products
21 substantially in excess of the competitive price, and (d) enjoyed substantial barriers to market
22 entry and growth.
23

24 76. Defendants exchanged competitively sensitive information that had the purpose,
25 tendency and capacity to facilitate price coordination among competitors.
26

27 77. There is substantial concentration among the firms that manufacture the products in
28 the relevant market(s).

1 78. Defendants together imposed and enforced minimum retail price maintenance and
2 minimum advertised price policies which were contrary to manufacturers' economic interests
3 because each manufacturer rational economic goal was to increase sales volume rather than
4 terminate retailers.
5

6 **F. Market Effects of Defendants' Conduct**

7 79. The overall effect of Defendants' anti-competitive, exclusive scheme has been to
8 substantially foreclose and impair competition (and the threat of such competition) from lower-
9 priced musical instruments. As alleged above, had Defendants not improperly foreclosed or
10 stifled actual or potential competitors from competing in markets for the musical instruments,
11 other actual or potential rival manufacturers would have achieved much greater sales than they
12 actually did (or threatened to do), given the cheaper prices that they charged (or could have
13 charged upon entry), and would have posed a far greater competitive threat to Defendants.
14 Additionally, absent Defendants' exclusionary conduct, barriers to entry of the markets would
15 have been lower, which: (a) would have made it easier for existing or new competitors to enter or
16 expand their positions in the market for the musical instruments, and (b) would have caused
17 existing or potential competitors to be attracted to the musical instrument market because of the
18 supra-competitive prices that Defendants were charging. As a result, absent Defendants'
19 misconduct, Defendants would have rationally perceived that there was a greater threat of
20 potential competition in each of the relevant markets if Defendants did not reduce its supra-
21 competitive prices.
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25 80. The presence of unfettered competition from actual or potential competitors, which
26 were selling lower-priced musical instruments, would have forced Defendants to lower the prices
27
28

1 for its musical instruments in order to remain competitive and/or to counter a perceived threat of
2 additional entry.

3 81. As a result of Defendants' conduct, independent retailers could not compete with
4 nationwide and/or multiregional claims because the retailers could not price-compete.
5 Accordingly, retailers such as Guitar Center were able to raise prices above and beyond what they
6 would be under competitive conditions.

7
8 82. During the relevant period, Plaintiff and the other members of the Class purchased
9 musical instruments directly from Defendants. As a result of Defendants' alleged illegal conduct,
10 members of the Class were compelled to pay, and did pay, artificially inflated prices for the
11 musical instruments they purchased. Plaintiff would have been able to, *inter alia*, purchase less-
12 expensive musical instruments had potential competitors been able to engage in unfettered
13 competition. The prices that Plaintiff and the other Class members paid for musical instruments
14 during the Class Period were substantially greater than the prices that Plaintiff and the Class
15 members would have paid absent the illegal conduct alleged herein because: (1) the prices of all
16 musical instruments were artificially inflated by Defendants' illegal conduct; and (2) Class
17 members were deprived of the opportunity to purchase musical instruments at substantially lower
18 prices. Thus, Plaintiff and the Class have, as a consequence, sustained substantial damages in the
19 form of overcharges.
20
21
22

23 VI. CLASS ACTION ALLEGATIONS

24 83. Plaintiff brings this action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of
25 Civil Procedure on behalf of the following Class:

26
27 All individuals and persons who purchased one or more Fretted
28 Instrument Products from any of the defendants from January 1,
 2005 through December 2007 ("Class Period").

1 Excluded from the Class are the Defendants, their co-conspirators, their respective parents,
2 subsidiaries and affiliates, any judge or magistrate presiding over this action and members of their
3 families, as well as any governmental entities.
4

5 84. Plaintiff does not know the exact size of the Class since such information is
6 exclusively in the control of Defendants. Plaintiff believes that there are thousands of Class
7 members, and that they are sufficiently numerous and geographically dispersed throughout the
8 United States so that joinder of all Class members is impracticable.
9

10 85. Plaintiff's claims are typical of the claims of the members of the Class because
11 Plaintiff and all Class members were damaged by the same wrongful conduct of Defendants and
12 their co-conspirators as alleged in this Complaint.
13

14 86. Plaintiff will fairly and adequately protect the interests of the Class. The interests
15 of Plaintiff coincide with and are not antagonistic to, those of the Class. In addition, Plaintiff is
16 represented by counsel who are experienced and competent in the prosecution of complex class
17 action and antitrust litigation.
18

19 87. There are questions of law and fact common to the members of the Class, and those
20 common questions predominate over any questions that may affect only individual members of the
21 Class, because Defendants have acted on grounds generally applicable to the entire class. Among
22 the predominant questions of law and fact common to the Class are:

23 (a) whether Defendants engaged in agreements, contracts, combinations, and
24 conspiracies, which had the purpose and/or effect of unreasonably restraining competition and
25 limiting purchaser access to competing and lower-priced FI Products;

26 (b) whether Defendants unreasonably restrained trade;
27
28

1 (c) whether Defendants' anti-competitive contracts, combinations, and
2 conspiracies have caused Plaintiff and the other members of the Class or Subclasses to suffer
3 antitrust injury in the nature of overcharges;

4
5 (d) whether Defendants' unlawful conduct caused Plaintiff and the other
6 members of the Class or Subclasses to pay more for the FI Products than they otherwise would
7 have paid;

8 (e) the appropriate Class- or Subclass-wide measure of damages; and,

9
10 (f) whether Defendants' anti-competitive conduct is continuing, thus entitling
11 the Class or Subclasses to injunctive relief to promote unrestrained trade and free and fair
12 competition.

13 88. Class action treatment is a superior method for the fair and efficient adjudication of
14 the controversy, in that, among other things, such treatment will permit a large number of
15 similarly situated persons to prosecute their common claims in a single forum simultaneously,
16 efficiently, and without the unnecessary duplication of evidence, effort, and expense that
17 numerous individual actions would engender. The benefits of proceeding through the class
18 mechanism, including providing injured persons or entities with a method for obtaining redress for
19 claims that might not be practicable to pursue individually, substantially outweigh any difficulties
20 likely to be encountered in management of this class action. There are no difficulties likely to be
21 encountered in the management of this class action that would preclude its maintenance as a class
22 action and no superior alternative exists for the fair and efficient adjudication of this controversy
23 on behalf of Plaintiff and the members of the Class.
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1 **VII. TOLLING OF THE STATUTE OF LIMITATIONS, FRAUDULENT**
2 **CONCEALMENT, AND EQUITABLE TOLLING**

3 89. Plaintiff did not discover and could not have discovered through the exercise of
4 reasonable diligence the existence of the claims sued upon herein until the FTC issued a press
5 release in March 2009.

6 90. Any applicable statutes of limitation have been tolled by Defendants' affirmative
7 acts of fraudulent concealment and continuing misrepresentations.

8 91. Because of the self-concealing nature of Defendants' actions and their affirmative
9 acts of concealment, Plaintiff and the Class or Subclasses assert the tolling of any applicable
10 statutes of limitations affecting the claims raised herein.

11 92. Defendants continued to engage in the deceptive practice, and consequently,
12 unwary consumers were injured on a daily basis by Defendants' unlawful conduct. Therefore,
13 Plaintiff and the Class or Subclasses submit that each instance that Defendants engaged in the
14 conduct complained of herein and each instance that a member of the Class or Subclasses
15 purchased a FI Product constitutes part of a continuing violation and operates to toll the statutes of
16 limitation in this action.

17 93. Defendants are estopped from relying upon any statute of limitations defense
18 because of its unfair or deceptive conduct.

19 94. Defendants' conduct was and is, by its nature, self-concealing. Still, Defendants,
20 through a series of affirmative acts or omissions, suppressed the dissemination of truthful
21 information regarding their illegal conduct, and have actively foreclosed Plaintiff and the Class or
22 Subclasses from learning of their illegal, anti-competitive, unfair and/or deceptive acts.
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1 E. Plaintiff and the Class recover the costs of this suit, including reasonable attorney's
2 fees and expenses as provided by law; and,

3 F. Plaintiff and the Class be granted such other, further, and different relief as the
4 nature of the case may require or as may be determined to be just, equitable and proper by this
5 Court.
6

7 **DEMAND FOR JURY TRIAL**

8 Plaintiff hereby demands a trial by jury on all claims so triable.
9

10 DATED: September 28, 2009

11 PRICE WAICUKAUSKI & RILEY, LLC

12 By: 

13 Heather A. Barnes (263107)

14 William N. Riley (IN Bar No. 14941-49) (*pro hac vice* pending)

15 Joseph N. Williams (IN Bar No. 25874-49) (*pro hac vice* pending)

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EXHIBIT G

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SOUTHERN DISTRICT OF CALIFORNIA

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9 UNITED STATES DISTRICT COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 DAVID KEEL, on Behalf of Himself and on)
Behalf of All Others Similarly Situated,)

12 Plaintiff,)

13 vs.)

14 GUITAR CENTER, INC. and NATIONAL)
15 ASSOCIATION OF MUSIC MERCHANTS,)
16 INC.,)

17 Defendants.)

No. 09 CV 2156 / BTM POR

CLASS ACTION

COMPLAINT FOR VIOLATION OF §1 OF
THE SHERMAN ACT

DEMAND FOR JURY TRIAL

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GP

1 Plaintiff David Keel, a purchaser of three guitars from defendant Guitar Center, Inc. ("Guitar
2 Center"), brings this action on behalf of himself and on behalf of a Class consisting of all persons
3 and entities that purchased an acoustic or electric guitar, drum sets, keyboard, mixer, amplifier or
4 related accessory ("Music Products") directly from a defendant or a co-conspirator. Plaintiff makes
5 the allegations in this complaint on information and belief, except as to the allegations pertaining to
6 plaintiff, which are based on personal knowledge.

7 NATURE OF ACTION

8 1. On March 4, 2009, the Federal Trade Commission ("FTC") announced defendant
9 National Association of Music Merchants, Inc. ("NAMM"), a musical industry trade association,
10 entered into a consent order settling charges that NAMM violated federal antitrust law by enabling
11 and encouraging the exchange of competitively sensitive price information among its members.

12 2. During the Class Period (as defined herein), Guitar Center, NAMM and NAMM's
13 members conspired, combined and contracted to fix, maintain, stabilize and set minimum agreed-
14 upon resale prices in the Music Products market. As a result of this unlawful conduct, plaintiff and
15 the Class paid supracompetitive prices for these products and have suffered injury to their business
16 and/or property.

17 3. NAMM encouraged, facilitated and coordinated the exchange of competitively
18 sensitive information between its members. In the late 1990s, NAMM's retail members, including
19 defendant Guitar Center, saw their profit margins being cut away by new entrants into the Music
20 Products industry.

21 4. In order to protect their market share, NAMM and its retail members entered into an
22 agreement and conspiracy to influence NAMM's manufacturing members to set minimum advertised
23 prices ("MAP") for Music Products. Because of Guitar Center and other NAMM retail members'
24 purchasing power, the manufacturers had no choice but to accept the imposition of MAP policies.

25 5. Soon thereafter, in the late 1990s and early 2000s, manufacturers realized MAP
26 policies were an effective means of controlling prices at supracompetitive levels. Manufacturers
27 then became involved in the NAMM-facilitated discussions and came to agreements and were a part
28 of the conspiracy with retail members regarding the anticompetitive MAP policies.

1 13. Defendant Guitar Center is a Delaware corporation headquartered in Westlake
2 Village, California. Guitar Center is the largest seller of Music Products in the United States with
3 annual sales in 2008 of \$1.55 billion in the \$7 billion Music Products industry. In 2007, Guitar
4 Center was nearly five times the size of its nearest competitor. From 1997 to 2007, its share of the
5 Music Products industry grew from 6.1% to 26.6%. Guitar Center claims to be the nation's top
6 retailer of guitars, amplifiers, drums, keyboards and pro-audio equipment, and operates more than
7 210 stores in about 40 states. Guitar Center is the largest customer of many of its suppliers and
8 manufacturers and thus, each manufacturer depends on Guitar Center for a substantial portion of its
9 sales of Music Products.

10 14. Defendant NAMM is a New York corporation headquartered in Carlsbad, California.
11 NAMM is a trade association composed of more than 9,000 members including manufacturers,
12 distributors and dealers ("dealers" is used interchangeably with "retailers" throughout the complaint)
13 of musical instruments and related products. Most United States manufacturers, distributors and
14 dealers of musical instruments are members of NAMM. NAMM is controlled by its members,
15 including Guitar Center. In the United States, NAMM sponsors two major trade shows each year,
16 where manufacturers introduce new products and meet with dealers. NAMM's trade shows provide
17 competitors an opportunity to meet and discuss issues of concern to the industry.

18 **CO-CONSPIRATORS**

19 15. Various other persons, firms, corporations and entities have participated with
20 defendants as unnamed co-conspirators in the violations and conspiracy alleged in this complaint. In
21 order to engage in the offenses alleged, these co-conspirators have performed acts and made
22 statements in furtherance of the defendants' antitrust violations.

23 **CLASS DEFINITION**

24 All persons or entities that purchased Music Products in the United States directly
25 from defendants or defendants' co-conspirators from January 1, 1999 to March 3,
26 2009 (the "Class Period"). Excluded from the Class are United States government
27 entities and instrumentalities of the United States government, defendants, their co-
28 conspirators and their respective parents, subsidiaries and affiliates.

16. Plaintiff does not know the exact size of the proposed Class as that information is in
control of the defendants, but plaintiff believes there are at least thousands of Class members located

1 throughout the United States, making the Class so large and geographically diverse that joinder is
2 impracticable.

3 17. Defendants' anticompetitive conduct has imposed a common antitrust injury on
4 members of the Class.

5 18. Defendants have acted, and refused to act, on grounds generally applicable to the
6 Class, which makes final injunctive relief with respect to the Class as a whole appropriate.

7 19. Plaintiff is a member of the Class and plaintiff's claim is typical of other members of
8 the Class who likewise sustained antitrust injury and were damaged through defendants' actions.

9 20. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff
10 purchased Music Products from defendants and has a common and non-antagonistic interest in
11 recovering damages caused by defendants' anticompetitive conduct and in enjoining and deterring
12 future unlawful activity in the Music Product market.

13 21. Plaintiff has retained counsel experienced in antitrust and other complex class action
14 litigation.

15 22. Defendants' anticompetitive conduct has uniformly affected plaintiff and members of
16 the Class. Common questions of law and fact will predominate over individual questions of law and
17 fact. Among questions of law and fact common to the Class are the following:

18 (a) Whether defendants and others combined, conspired or contracted to fix or set
19 Music Products prices at artificially high levels;

20 (b) Whether defendants and others combined, conspired or contracted to impose
21 MAP policies on the industry;

22 (c) The dates and formation of this illegal combination, contract, conspiracy or
23 agreement;

24 (d) The identities of the participants in the illegal combination, contract,
25 conspiracy or agreement;

26 (e) The manner and means of the conspiracy;

27 (f) Whether, and to what extent, defendants' conduct violated §1 of the Sherman
28 Act;

1 (g) Whether, and to what extent, defendants and their co-conspirators fraudulently
2 concealed their illegal combination, contract, conspiracy and other antitrust violations;

3 (h) Whether Class members have suffered injury to their business and property as
4 a result of defendants' unlawful conduct, including the degree to which prices paid for by the Class
5 for Music Products were higher than those that would have been paid in a market free from illegal
6 combination, contract, conspiracy and other antitrust violations; and

7 (i) The appropriateness of injunctive relief to restrain future violations.

8 23. A class action is superior to other available methods for the fair and efficient
9 adjudication of this controversy. Class treatment will permit a large number of similarly situated
10 persons and entities to adjudicate their common claims in a single forum simultaneously, efficiently
11 and without duplication of effort and expense that numerous individual actions would engender.
12 Prosecution of separate actions by individual plaintiff would create a risk of inconsistent or varying
13 adjudication. The proposed Class presents no difficulties of management that would preclude its
14 maintenance as a class action. No superior alternative exists for the fair and efficient adjudication of
15 this controversy.

16 INTERSTATE TRADE AND COMMERCE

17 24. Defendants and their co-conspirators sell Music Products in the United States.

18 25. During all or part of the Class Period, the conduct of defendants and their co-
19 conspirators has taken place in and/or substantially affected interstate trade and commerce of the
20 United States.

21 FACTUAL ALLEGATIONS

22 Background

23 26. Most United States manufacturers, distributors and dealers of Music Products are
24 members of NAMM. As the FTC stated in its complaint against NAMM:

25 NAMM serves the economic interests of its members, by *inter alia*, promoting
26 consumer demand for musical instruments, lobbying the government, offering
27 seminars, and organizing trade shows. In the United States, NAMM sponsors two
28 major trade shows each year, where manufacturers introduce new products and meet
with dealers. In addition, NAMM's trade shows provide competitors an opportunity
to meet and discuss issues of concern to the industry.

1 27. NAMM's biannual trade shows are considered an indispensable resource by Music
2 Product retailers. In a February 2007 interview, a member was quoted in Musical Merchandise
3 Review:

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

7 The interaction with the industry people and colleagues is also priceless.

8 28. According to independent retailers, Guitar Center wields enormous power in the
9 industry. In an interview in the April 2007 issue of Musical Merchandise Review, Alan Levin of
10 Chuck Levin's Washington Music Center said:

11 The biggest concern is Guitar Center. They are many manufacturers' biggest
12 customers and changes are being made . . . to suit them alone.

13 Similarly, one NAMM member observed: "Guitar Center has too much leverage"

14 29. In a "virtual roundtable," retailer Frank Hayhurst of Zone Music responded to a
15 question about the "un-level" playing field between Guitar Center and independents saying, "[a]s big
16 as GC [Guitar Center] is, what's a little manufacturer to do? Not surprisingly, they do what GC
17 demands."

18 30. Relative to Guitar Center and most other retail members of NAMM, internet based
19 retailers are small companies. Internet retailers of Music Products are highly efficient competitors
20 because, among other reasons, their operating expenses are low. This allows them to compete
21 vigorously on price, both with other internet retailers and with retailers in other sales channels, such
22 as Guitar Center (which operates through "brick-and-mortar" stores as well as on the internet). Thus,
23 when allowed to compete freely, internet retailers' price competition enhances consumer welfare by
24 bringing down prices.

25 31. In the "virtual roundtable," retailer Frank Hayhurst of Zone Music stated "[t]he
26 internet has blown away selection and price as variables that make an m.i. [music industry] retailer
27 unique, and 'service' doesn't have the terrific 'value added' impact upon the customer that many of us
28 have attributed to it. If something breaks, they want to know if you'll replace it, not hear about your
repair department."

1 32. Guitar Center and other large merchants felt the pressure in the form of price
2 competition not only from the internet retailers, but the "big box" and wholesale retailers as well,
3 including stores such as Wal-Mart, Best Buy and Costco.

4 33. By the late 1990s, NAMM, Guitar Center and its members recognized that the
5 increased popularity of internet and big box retailers, with the associated increase in price
6 competition, posed a substantial threat to NAMM members' sales and profits. Thus, NAMM, whose
7 retail members are primarily brick-and-mortar retailers, considered ways to thwart internet retailer
8 competitors.

9 34. NAMM's and its members' response to internet retailing was both predictable and
10 anticompetitive. As recognized at an FTC 2002 public workshop, entitled "Possible Anticompetitive
11 Efforts to Restrict Competition on the Internet," one expert explained:

12 The promise of the world of electronic commerce is to create an environment
13 where consumers can freely shop between various competitive alternatives. By
14 reducing transaction costs and improving transparency, the Internet offers the
15 potential of dramatically improving competition in various retail markets.

16 * * *

17 [But] as new market forces arise, . . . "traditional" competitors often respond to the
18 threat by trying to create barriers to thwart those entrants."

19 **During the Class Period, NAMM Provided a Means for Suppliers
20 and Retailers to Control Prices for Music Products in the United States**

21 35. Commencing in 1999 and continuing thereafter, numerous leading Music Products
22 manufacturers in conjunction with and through NAMM and its dealer members adopted MAP
23 policies.

24 36. The purpose of facilitating agreement both as to MAP policies and pricing was
25 because Guitar Center, as well as other retailer members of NAMM, were concerned about increased
26 competition by mass merchants, such as Best Buy, Wal-Mart and Costco, as well as internet
27 retailers.

28 37. In the late 1990s or early 2000s, at a NAMM show, "a high-profile retailer delivered a
stinging address, lamenting the fact that manufacturers sat by idly as price wars raged and retail

1 profits plummeted." This address coincided with the adoption of MAP policies by leading Music
2 Product manufacturers, which commenced in 1999 and continued thereafter.

3 38. By the early 2000s, several major music retail chains, including Guitar Center,
4 expressed a heightened concern for margin and profit protection.

5 39. When NAMM, Guitar Center, and other retail members encouraged and required the
6 implementation of MAP pricing, manufacturers did so for fear of losing Guitar Center as a customer.

7 40. In fact, a major shift in retail opinion regarding the effectiveness of MAP policies to
8 protect profits occurred between 2000 and 2001. A poll conducted by Music Trades magazine
9 revealed that:

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

14 41. Music Trades concluded that the 20-point shift in opinion was due to the fact that "the
15 biggest benefit of MAP policies has been to rid the internet of loss-leader pricing." Music Trades
16 explained:

17 As a result [of MAP policies], these days when you type the name of a popular
18 product into a search engine, you'll get a screen full of results offering the same MAP
19 regulated price. As our poll indicates, brick-and-mortar retailers obviously
20 appreciate the fact that they don't have to deal with a legion of customers coming into
the store brandishing a computer print out and demanding, "Why can't you beat this
price."

21 42. In addition to reducing competition from internet retailers, Music Trades also credited
22 MAP policies with a more "sane approach to industry pricing," stating that "retail margins appear to
23 have stabilized."

24 43. Accordingly, MAP policies were a hot topic at the January 2001 NAMM trade show.
25 Music Trades reported that retailers' then-current gross margins of 28% to 32% were far lower than
26 they had been in the 1990s, and that both large and small retailers "have jointly concluded that they
27 simply can't afford to give up any more gross margin points."
28

1 44. In response to this joint retailer pressure, at the January 2001 NAMM show,
2 "manufacturers seemed to be doing more than paying lip service to retail profit concerns" by rolling
3 out new and more restrictive MAP policies. However, the manufacturers acknowledged that the
4 MAP policies were not designed to increase services at the retailers but merely to protect their profit
5 margins. In fact, manufacturers allegedly "[were] fulsome in their criticisms of the industry's retail
6 network," stating, *inter alia*: "They don't do any marketing," and "[t]heir stores are staffed with
7 minimum wage idiots."

8 45. Thus, the discussion at the January 2001 NAMM show was driven by manufacturers'
9 realization that they could no longer rely on innovative engineering and design. Instead, to
10 artificially increase profits, manufacturers agreed to implement "[a] distribution scheme that enables
11 retailers to make a respectable gross margin"

12 46. At the January 2002 NAMM show, NAMM continued to facilitate discussion among
13 its members on the use of MAP policies. As a result, manufacturers "acknowledged the retail
14 concern with profitability by instituting minimum advertised price, or MAP policies. In fact,
15 mention of MAP pricing was routinely included in just about every new product presentation."

16 47. At these shows, NAMM encouraged manufacturers to and manufacturers agreed to
17 and did outline their MAP policies. But the manufacturers did not do so in conjunction with requests
18 for retailer advertising, in-store displays, better product demonstrations or knowledgeable store staff.
19 Rather, the MAP policies were agreed to at the behest of defendants and rolled out at the NAMM
20 shows with retailer profitability in mind.

21 48. For example, at the summer 2004 NAMM show, "[a] number of exhibitors also
22 announced higher MAP prices in a bid to shore up dealer margins. As one supplier noted, 'The truth
23 is, there isn't a lot of difference between our products and our competitors. If we're going to get
24 dealer support, we've got to make these guys money.'"

25 49. Similarly, at the NAMM show in summer 2005, manufacturer Peavey Electronics
26 (among others) outlined its MAP policy, reiterating "Peavey's commitment to dealer profitability."

27 50. But NAMM did not simply encourage individual manufacturers and dealers to
28 discuss and agree how to restrict price competition. In fact, it facilitated joint discussions by all

1 members of NAMM. At NAMM's biannual trade shows and conventions, NAMM hosted "NAMM
2 Show University Sessions." These sessions were designed to facilitate discussion and education on a
3 wide variety of music industry topics, including price competition and restrictions to competition.

4 51. At the January 2006 trade show, NAMM hosted several events regarding MAP
5 policies.

6 52. For example, NAMM facilitated a panel discussion regarding MAP policies. On a
7 panel comprised of industry heavy-hitters, including the Vice President and General Manager of
8 Yamaha's Pro-Audio and Combo division, sales managers from Avedis Zildjian and Kaman Music
9 Corp. and several other retailers, the suppliers were "unanimous, offering a guardedly positive
10 assessment of MAP policies."

11 53. At this panel, there was just one lone voice that supported competition on prices.
12 Bryan Junk of www.massmusic.net asked the Panel and the audience, "We're supposed to compete,
13 aren't we?" According to one industry report of the Panel session:

14 Whether or not you agree with him, Bryan Junk, an internet retailer, deserves credit
15 for staring down an auditorium packed with independent retailers and stating that
16 MAP should be scrapped. To audible boos, he declared, "Consumers like low prices,
17 and we try to give them what they want. Why shouldn't we be able to grow our
18 business by offering the lowest prices possible without interference from the
19 manufacturers?"

20 54. However, Mr. Junk's view was not the consensus. In fact, the panel discussed that,
21 absent MAP, "prices would rapidly migrate down to 10% over cost. . . ." The panel even advocated
22 revising the current MAP pricing "upwards to give retailers a better profit margin."

23 55. The panel also discussed how to enforce the MAP policies, particularly with the
24 proliferation of internet retailers, agreeing that "MAP is only as effective as its enforcement. . . ."

25 56. NAMM also released a report based on comments it compiled from January 2006
26 trade show participants and attendees. NAMM released the following poll results, with answers:

27 What do independent retailers view as a threat to their business and profitability? On
28 a 1 to 5 scale, with 5 being extremely concerned, rate the following issues. (Report is
average of responses.)

3.4 The expanded presence of music products in mass merchants, like Wal-Mart
and Costco.

3.2 Competition from internet and catalog merchants.

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* * *

2.5 MAP pricing policies that set margins too low.

57. NAMM hosted another session entitled, "Does The Industry Need A MAP Makeover?" At this session, Music for Everyone ("MFE"), a California retailers association, presented a "voluntary MAP formula/guideline" which it "recommended for general use"

58. MFE published and presented at the January 2006 NAMM trade show, with NAMM's participation and consent, the following two pricing formulas based on retail cost which were "designed for all instruments and all combo and audio products":

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

* * *

- Retail [\$1-\$149] x 0.5 x 2.00 = MAP (0% off retail)*
- Retail [\$150-\$249] x 0.5 x 1.90 = MAP (5% off retail)*
- Retail [\$250-\$299] x 0.5 x 1.85 = MAP (7.5% off retail)*
- Retail [\$300-\$349] x 0.5 x 1.80 = MAP (10% off retail)**
- Retail [\$350-\$399] x 0.5 x 1.75 = MAP (12.5% off retail)**
- Retail [\$400-\$449] x 0.5 x 1.70 = MAP (15% off retail)*
- Retail [\$450-\$499] x 0.5 x 1.65 = MAP (17.5% off retail)*
- Retail [\$500 and up] x 0.5 x 1.60 = MAP (20% off retail)*
- Retail [\$550-\$599] x 0.5 x 1.55 = MAP (22.5% off retail)**
- Retail [\$600 and up] x 0.5 x 1.50 = MAP (25% off retail)**

* Formula A
** Formula B

59. MFE explained that the formulas were designed to permit "[f]ormula discounts from retail start[ing] at zero" and to provide a "much higher" profit percentage for lower-priced products.

60. MFE even went so far at the NAMM show to encourage manufacturers to adopt the MAP pricing reflected in Formula A, capping permitted discounts at 20% and stating that Formula A "is likely to be . . . accepted widely." Nonetheless, MFE stated that no MAP pricing should be lower than that reflected in Formula B, stating "the formula B profits are the minimum that brick-and-mortar full service music instrument retailers require to survive, and hopefully thrive."

61. At the 2006 Summer NAMM show, NAMM again held an industry panel discussion, comprised of the NAMM President, a Vice President of Yamaha and the Chairman and CEO of Fender Musical Instruments, among others. NAMM touted this roundtable as follows: "In the two-

1 hour session suppliers and retailers of all sizes will be able to share views about critical issues
2 affecting profitability, including MAP pricing, Interact sales tax, and the entrance of mass consumer
3 merchandisers into the industry." Among other topics, MAP prices being set too low and
4 maintenance of profit margins were discussed.

5 62. NAMM continued to facilitate industry discussions of MAP pricing at its 2007 winter
6 show. One roundtable discussion focused on, *inter alia*, increasing profit margins and MAP pricing.

7 63. Thus, NAMM again organized meetings and programs for its members at which
8 competing retailers of Music Products, as well as manufacturers of those Music Products, were
9 permitted and encouraged to exchange information and discuss strategies for implementing MAP
10 policies, the restriction of retail competition and the need for higher retailer prices. Representatives
11 of NAMM determined the scope of information exchange and discussion by selecting the moderator
12 and setting the agenda for these programs.

13 64. At these NAMM-sponsored events, NAMM members discussed the adoption,
14 implementation and enforcement of MAP policies, the details and workings of such policies,
15 appropriate and optimal retail price and margins and other competitively sensitive issues.

16 65. The prevalence of MAP policies in the Music Products industry remained steady into
17 early 2008. In an article from the February 1, 2008 issue of Music Trades, retailer Mike Henry,
18 owner of Percussion Center stated:

19 When products are seen to be "Wal-Mart" cheap, it cheapens the industry. MAP
20 supports the public's perceived value of the products we're trying to sell
21 competitively and still make a living. I'm all for competition and the American way,
22 but if retailers can't make a profit, what's the point of being in business.

23 Later in the article, Mr. Henry continued:

24 In the long run, a manufacturer that doesn't enforce its MAP isn't going to hurt my
25 business, it's going to hurt their business because I'm going to stop buying from
26 them. I'm their customer; I'm paying their salaries by buying their products. If they
27 allow my competitors to sell their product at a price that doesn't give me a reasonable
28 margin, I can't buy it.

Mr. Henry went on to say that "[a] product's MAP price should be based on its perceived retail
price."

1 66. In the same article, Fred Bernardo of Fred's Music & Barbecue Supply stated that
2 "[MAP policies] are too low. They don't allow for the retailer to make an adequate profit. Also I
3 think MAP is illegal—or at least it was illegal. It's price fixing, since everyone, especially online, has
4 the exact same 'selling' price on their shopping carts." Mr. Henry and Mr. Bernardo's statements
5 underscore the continuing recalcitrant attitude of NAMM retail members, the anticompetitive nature
6 of MAP policies and the stark lack of precompetitive justifications for MAP policies.

7 **The FTC Action**

8 67. On March 4, 2009, the FTC issued a cease and desist order to NAMM and at the same
9 time settled the FTC's charges that NAMM had "permitted and encouraged" acts constituting
10 violations of Section 5 of the FTC Act among its members and the acts and practices of NAMM
11 "constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the
12 Federal Trade Commission Act, as amended 15 U.S. C. §45." The FTC also alleged that absent
13 appropriate relief "[s]uch acts and practices, or the effects thereof will continue or recur"

14 68. Specifically the FTC, after an investigation, alleged that between 2005 and 2007,
15 NAMM organized various meetings and programs for its members at which competing retailers of
16 Music Products were permitted and encouraged to exchange competitively sensitive information,
17 strategies for implementing minimum advertised pricing and restrictions of retail price competition.

18 69. The FTC alleged that the "challenged conduct served no legitimate business purpose
19 and resulted in no significant efficiency benefits."

20 70. According to the FTC's press release announcing NAMM's settlement of "FTC
21 Charges of Illegally Restraining Competitions," the FTC's proposed consent order "is designed to
22 remedy NAMM's anticompetitive conduct." The FTC's vote to accept the complaint and the consent
23 order was 4-0.

24 71. According to the FTC's complaint, "[a]t these NAMM-sponsored events, competitors
25 discussed the adoption, implementation, and enforcement of minimum advertised price policies; the
26 details and workings of such policies; appropriate and optimal retail prices and margins; and other
27 competitively sensitive issues."

28

1 72. The conduct of defendants was the cause of supracompetitive price levels for Music
2 Products. The October 2008 issue of Music Merchandise Review reported that Anthem Music
3 Group's head David Kilkenny observed "[o]ver the past several years instrument prices seem to be
4 increasing at a greater rate than that of inflation" According to the Music Trades "Annual
5 Census of the Music Industries" published in 2009, in 2006 the average price of a guitar was
6 \$309.00, by 2007 the average price was \$350.00 and by 2008 the average price was \$372.00. Thus,
7 defendants were able to increase aggregate sales from \$1,022,861.00 in 2006 to \$1,151,290.00
8 despite a 10% decline in unit sales.

9 73. The FTC has alleged that no significant procompetitive benefit was derived from the
10 challenged conduct. After analyzing the type of information involved, the level of detail, the
11 absence of procedural safeguards and overall market conditions, the FTC concluded that exchange of
12 information engineered by NAMM lacked a procompetitive justification.

13 74. The FTC has ordered NAMM to cease and desist from:

14 (1) Urging, encouraging, advocating, suggesting, coordinating, participating in,
15 or facilitating in any manner the exchange of information between or among Musical
16 Product Manufacturers or Musical Product Dealers relating to:

17 (a) the retail price of Musical Products; or

18 (b) any term, condition or requirement upon which any Musical Product
19 Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other
20 Musical Product Manufacturer or Musical Product Dealer, including but not limited
21 to, Price Terms, margins, profits, or pricing policies, including but not limited to
22 Minimum Advertised Price Policies or Resale Price Maintenance Policies.

23 (2) Entering into, adhering to, enforcing, urging, encouraging, advocating,
24 suggesting, assisting or otherwise facilitating any Musical Product Manufacturer or
25 Musical Product Dealer to enter into, adhere to or enforce any combination,
26 conspiracy, agreement or understanding between or among any Musical Product
27 Manufacturers or Musical Product Dealers relating to:

28 (a) the retail price of any Musical Product;

 (b) any term, condition or requirement upon which any Musical Product
Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other
Musical Product Manufacturer or Musical Product Dealer, including, but not limited
to, Price Terms, margins, profits, or pricing policies, including but not limited to
Minimum Advertised Price Policies or Resale Price Maintenance Policies; or

 (c) the refusal to do business, or the reduction of business, with particular
Musical Product Manufacturers or Musical Product Dealers.

1 **DEFENDANTS' ANTITRUST VIOLATIONS**

2 75. Beginning at least as early as January 1, 1999 and continuing until at least March 3,
3 2009, the exact dates being unknown to plaintiff, defendants and their co-conspirators engaged in a
4 continuing agreement, understanding and conspiracy in restraint of trade to artificially raise, fix
5 maintain and/or stabilize the price for Music Products in the United States.

6 76. In formulating and implementing their unlawful contract, combination or conspiracy,
7 defendants and their co-conspirators engaged in anticompetitive activities, the purpose and effect of
8 which were to artificially raise, fix, maintain and/or stabilize the price of Music Products in the
9 United States. These activities include the following:

10 (a) Defendants participated in meetings and/or communications to discuss the
11 pricing of Music Products;

12 (b) Defendants agreed during those meetings and/or communications to force
13 suppliers to charge and/or advertise prices at specified levels and otherwise to increase and/or
14 maintain prices of Music Products in the United States; and

15 (c) Defendants then implemented, adhered to and oversaw the agreements they
16 reached.

17 77. Defendants and their co-conspirators engaged in the activities described above for the
18 purpose of effectuating the unlawful agreements described in this complaint.

19 78. During the Class Period, plaintiff and members of the Class purchased Music
20 Products from defendants, their subsidiaries or affiliates, or their co-conspirators at inflated and
21 supracompetitive prices.

22 79. As a result of defendants' unlawful conduct, plaintiff and other members of the Class
23 have been injured in their business and property in that they have paid more for Music Products than
24 they would have paid in a competitive market.

25 80. The unlawful contract, combination or conspiracy has had the following effects,
26 among others:

27 (a) Price competition in the markets for Music Products has been artificially
28 restrained;

1 (b) Prices for Music Products sold by defendants have been raised, fixed,
2 maintained or stabilized at artificially high and supracompetitive prices; and

3 (c) Purchasers of Music Products from defendants have been deprived of the
4 benefits of free and open competition in the markets for Music Products.

5 81. Defendants' contract, combination or conspiracy constitutes an unreasonable restraint
6 on interstate trade and commerce in violation of §1 of the Sherman Act.

7 82. The aforementioned anticompetitive effects of defendants conduct on competition in
8 the relevant market outweigh any conceivable procompetitive benefits.

9 **Relevant Market**

10 83. The relevant product market in this case is retail sales of Music Products which
11 includes acoustic or electric guitars, drum sets, keyboards, mixers, amplifiers and related accessories.

12 84. The relevant geographic market in this case is the United States of America.

13 85. By virtue of their power to control prices and exclude competition in the relevant
14 market, defendants at all relevant times possessed market power in the relevant market. Moreover,
15 at all relevant times defendants possessed dominant shares of the market for retail sales of Music
16 Products.

17 86. Likewise, defendants at all relevant times possessed substantial power in the market
18 for Music Products. Specifically, defendants: (a) sold their musical instruments and assorted
19 accessories at prices substantially in excess of marginal costs; (b) enjoyed high profits margins
20 thereon; and (c) sold such products substantially in excess of the competitive price.

21 87. Defendants exchanged competitively sensitive information that had the purpose,
22 tendency and capacity to facilitate price coordination among competitors.

23 88. There is substantial concentration among the firms that manufacture the products in
24 the relevant market.

25 89. Defendants together imposed and enforced minimum retail price maintenance and
26 MAP policies which were contrary to manufacturers' economic interests because each
27 manufacturers' rational economic goal was to increase sales volume rather than terminate retailers.

28

1 **Market Effects of Defendants' Conduct**

2 90. The overall effect of defendants' anticompetitive, exclusive scheme has been to
3 substantially foreclose and impair competition (and the threat of such competition) from lower-
4 priced Music Products. As alleged above, had defendants not improperly foreclosed or stifled actual
5 or potential competitors from competing in markets for Music Products, other actual or potential
6 rival manufacturers would have achieved much greater sales than they actually did (or threatened to
7 do), given the cheaper prices that they charged (or could have charged upon entry), and would have
8 posed a far greater competitive threat to defendants. As a result, absent defendants' misconduct,
9 defendants would have rationally perceived that there was a greater threat of potential competition in
10 each of the relevant markets if defendants did not reduce its supracompetitive prices.

11 91. The presence of unfettered competition from actual or potential competitors, which
12 were selling lower-priced Music Products, would have forced defendants to lower the prices for its
13 Music Products in order to remain competitive and/or counter a perceived threat of additional entry.

14 92. As a result of defendants' conduct, independent retailers could not compete with
15 nationwide and/or multiregional claims because the retailers could not price-compete. Accordingly,
16 retailers such as Guitar Center were able to raise prices above and beyond what they would be under
17 competitive conditions.

18 93. During the Class Period, plaintiff and other members of the Class purchased Music
19 Products directly from defendants. As a result of defendants' alleged illegal conduct, members of the
20 Class were compelled to pay, and did pay, artificially inflated prices for the Music Products they
21 purchased. Plaintiff would have been able to, *inter alia*, purchase less-expensive Music Products
22 had potential competitors been able to engage in unfettered competition. The prices that plaintiff
23 and the other Class members paid for Music Products during the Class Period were substantially
24 greater than the prices that plaintiff and the Class members would have paid absent the illegal
25 conduct alleged herein because: (1) the prices of all Music Products were artificially inflated by
26 defendants' illegal conduct; and (2) Class members were deprived of the opportunity to purchase
27 Music Products at substantially lower prices. Thus, plaintiff and the Class have, as a consequence,
28 sustained substantial damages in the form of overcharges.

1 **Anticompetitive Effects of Defendants' Unlawful Conduct**

2 94. The MAP policies imposed and enforced by defendants here went well beyond
3 typical cooperative advertising programs where manufacturers place restraints on the prices dealers
4 may advertise in advertisements funded in whole or in part by the manufacturer.

5 95. The MAP policies imposed on manufacturers by music retailers and NAMM are
6 anticompetitive. According to a Wall Street Journal article, dated October 23, 2008, Bradley Reed,
7 sales manager for Musician's Advocate, Inc. said "it [his company] has very little choice but to honor
8 manufacturers' policies on advertised prices because otherwise it risks having its supplies cut off or
9 being delisted as an authorized distributor."

10 96. In large part, NAMM's concerted efforts were successful. Despite the fact that
11 NAMM and its members expressed their fear at the January 2001 NAMM trade show that the then-
12 current gross margins of 28% to 32% would be chipped away even further by price competition,
13 Music Trades report published in 2008 provided that the music industry maintained large gross
14 margins of 30% versus approximately 22% gross margins for the traditionally high-margin consumer
15 electronics industry.

16 97. Defendants' conduct caused actual antitrust damage to purchasers of Music Products
17 in the form of higher prices and diminished price competition.

18 98. The aforementioned anticompetitive effects of defendants' conduct on competition in
19 the relevant market outweigh any conceivable procompetitive benefits.

20 **FRAUDULENT CONCEALMENT IN FURTHERANCE OF THE CONSPIRACY**

21 99. Plaintiff had no knowledge of the anticompetitive conduct alleged in this Complaint,
22 or of any facts that might have led to its discovery in the exercise of reasonable diligence, prior to
23 the FTC's March 2009 press release detailing the consent order that it entered into with defendant
24 NAMM.

25 100. Defendants and their co-conspirators employed deceptive practices to conceal their
26 conspiracy.

27
28

1 B. That the Court find that the combination and conspiracy and other illegal activities
2 alleged in this complaint be adjudicated a *per se* violation of, or alternatively, a rule of reason
3 violation of §1 of the Sherman Act, 15 U.S.C. §1;

4 C. That plaintiff and the Class recover damages against each defendant, jointly and
5 severally, in an amount to be trebled in accordance with the antitrust laws pursuant to 15 U.S.C. §15;

6 D. That plaintiff and the Class be awarded their expenses and costs of suit, including
7 reasonable attorneys' fees, to the extent provided by law;

8 E. That this Court permanently enjoin unlawful activity by defendants in violation of the
9 antitrust laws; and


10 F. That plaintiff and the Class be awarded such additional relief as the Court may deem
11 proper.

12 **JURY DEMAND**

13 Plaintiff hereby demands a trial by jury.

14 DATED: October 1, 2009

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CIVIL COVER SHEET

ORIGINAL

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

David Keel

(b) County of Residence of First Listed Plaintiff Orange, CA (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Brian J. Robbins, Robbins Umeda LLP, 600 B Street, Suite 1900, San Diego, CA 92101 Telephone: (619) 525-3990

DEFENDANTS

Guitar Center, Inc. and National Association of Music Merchants, Inc.

County of Residence of First Listed Defendant

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

FILED 09 OCT -1 AM 10:43 09 CV 2156 BTM POR DEPUTY

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- PTF DEF Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business in This State, Incorporated and Principal Place of Business in Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from another district (specify), 6 Multidistrict Litigation, 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 15 U.S.C. S. 1

Brief description of cause: violation of the Sherman Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23, DEMAND \$, CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Larry Alan Burns, DOCKET NUMBER 09-cv-02002-LAB-JMA

DATE

10/01/2009

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # 5813 AMOUNT 350.00 APPLYING IFP JUDGE MAG. JUDGE

MS 10/01/09

Court Name: USDC California Southern
Division: 3
Receipt Number: CAS005813
Cashier ID: msweeney
Transaction Date: 10/01/2009
Payer Name: ROBBINS UMEDA LLP

CIVIL FILING FEE

For: DAVID KEEL V GUITAR CENTER
Case/Party: D-CAS-3-09-CV-002156-001
Amount: \$350.00

CHECK

Check/Money Order Num: 10582
Amt Tendered: \$350.00

Total Due: \$350.00
Total Tendered: \$350.00
Change Amt: \$0.00

There will be a fee of \$45.00
charged for any returned check.

