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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE: MUSICAL INSTRUMENTS AND EQUIPMENT ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS

CASE NO. 3:09-md-02121-LAB-POR
(and related cases)

MDL No. 2121

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

Date: May 21, 2012
Time: 12:00 P.M.
Place: Courtroom 9, 2nd Floor

The Hon. Larry A. Burns, District Judge

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Pursuant to the Court's order dated March 13, 2012 (Dkt. 180), defendants Fender Musical Instruments Corporation ("Fender"), Gibson Guitar Corp. ("Gibson"), Guitar Center, Inc. ("Guitar Center"), Hoshino (U.S.A.), Inc. ("Hoshino"), Kaman Music Corp. ("Kaman"), Yamaha Corporation of America ("Yamaha"), and National Association of Music Merchants, Inc. ("NAMM") (collectively "defendants"), respectfully submit this memorandum in support of their motion to dismiss plaintiffs' Second Amended Consolidated Class Action Complaint ("Second Amended Complaint"), filed February 22, 2012 (Dkt. 178).

INTRODUCTION

The Court's order dismissing plaintiffs' Consolidated Amended Class Action Complaint ("Consolidated Complaint") described, very clearly, the allegations that plaintiffs would have to make to state an antitrust conspiracy claim against defendants. Since the Second Amended Complaint contains none of the allegations, this Court should dismiss it.

The Court permitted plaintiffs to take limited discovery before attempting to re-plead their conspiracy claim because plaintiffs' counsel had "frankly admit[ted]" that plaintiffs did not have a sufficient factual basis to satisfy federal pleading standards. (Aug. 22, 2011 Order (Dkt. 133) at 8:12.) Plaintiffs have now had the benefit of that discovery, but their Second Amended Complaint does not cure the fatal defects that the Court identified in its dismissal order:

- The Court's order instructed plaintiffs that, to successfully amend, they would have to make specific allegations about the supposedly private meetings at NAMM trade shows that, plaintiffs claimed, were at the heart of the alleged conspiracy, including "who attended the meetings they have generally identified, what was said, and what was agreed." (*Id*. at 8:3-5, 8:13-14, 13:4-8.) The Second Amended Complaint does not identify a single private meeting during a NAMM trade show at which any defendant ever discussed minimum advertised price ("MAP") policies, much less one in which they allegedly entered into an unlawful agreement in restraint of trade;
- The Court's order held that plaintiffs would have to "plead enough of the MAPs' terms to show how they restrained competition." (*Id*. at 10:17-18.) The Second Amended Complaint fails to plead evidentiary facts that do so; indeed, plaintiffs' counsel conceded

on the record after the close of limited discovery that plaintiffs could not comply with the Court's directive on this issue. (Feb. 6, 2012 R.T. 20:14-18.) Plaintiffs rely entirely on the conclusory allegation that the MAP policies are "substantially similar;" and

- The Second Amended Complaint continues to "blur" the lines between distinct product markets by pleading a single putative product market for "high-end Guitars and Guitar Amplifiers." (Second Amended Complaint (Dkt. 178) ¶ 58; *see* Aug. 22, 2011 Order (Dkt. 133) at 6:9-19.) This is not a cognizable product market because plaintiffs do not allege facts suggesting that different types of guitars (bass, electric, acoustic) are reasonably interchangeable, or that guitars are reasonably interchangeable with amplifiers. Plaintiffs also fail to sufficiently plead a distinct market for "high-end" guitars and amplifiers.

Plaintiffs' failure to allege evidentiary facts supporting their theory that defendants entered into a conspiracy regarding MAP policies at private meetings during NAMM events confirms that they came up empty during the limited discovery period. In recognition of this fact, plaintiffs adjusted course in the Second Amended Complaint. Plaintiffs no longer allege, as they did before, that the conspiracy was "developed and implemented through NAMM." (Consolidated Complaint (Dkt. 50) ¶ 5.) Rather, without any supporting evidentiary allegations, plaintiffs now allege that NAMM—a not-for-profit trade association with a membership including approximately 9,000 member companies with diverse businesses and interests—"joined," "facilitated," "favored," "support[ed]," "assisted," and "promoted" a conspiracy among only six of its members due to alleged "influence" from Guitar Center and the other defendants. (Second Amended Complaint (Dkt. 178) ¶¶ 13, 14, 85, 93.) In essence, plaintiffs' core allegations are now that Guitar Center "pressured" the manufacturer defendants into adopting and enforcing "substantially similar" MAP policies by threatening to stop carrying their products if they did not do so. But these allegations do not constitute a conspiracy under decades-old Supreme Court and Ninth Circuit precedent. Manufacturers may engage in consciously parallel action, even at the behest of a dominant customer, without risking antitrust liability. Accordingly, even if the Court entertains plaintiffs' attempt to state a conspiracy unrelated to any alleged private meetings at NAMM events, it must still dismiss the Second Amended Complaint.

In addition, the Second Amended Complaint lacks any non-conclusory allegation linking any NAMM actions or events to any action by Guitar Center, or to any manufacturer defendant's adoption, implementation or enforcement of a MAP policy. Indeed, *there is not a single allegation in the Second Amended Complaint that anyone from NAMM ever communicated with anyone from Guitar Center about MAP policies*, let alone that it did so in furtherance of Guitar Center's supposed efforts to coerce manufacturers to implement and enforce them. Equally absent from the Second Amended Complaint is any factual allegation supporting the conclusory assertion that the other defendants influenced NAMM and NAMM's leadership. (*Id.* ¶ 130.) Plaintiffs' complete failure to allege any connection between NAMM and any actions of the other defendants is fatal to the Second Amended Complaint. *See In re Cal. Title Ins. Antitrust Litig.*, No. C 08-01341 JSW, 2009 WL 1458025, at *7 (N.D. Cal. May 21, 2009) ("A 'complaint must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it.'") (citation omitted).

The Second Amended Complaint is thus no different than the complaint dismissed in August 2011 in that it is still "not clear who is alleged to have conspired with whom, what exactly they agreed to, and how the conspiracy was organized and carried out" (August 22, 2011 Order (Dkt. 133) at 8:3-5), and the "role of NAMM is [] not particularly well alleged." (*Id*. at 8:15). As in *Kendall*, despite leave "to conduct discovery so they would have the facts they needed adequately to plead an antitrust violation," the Second Amended Complaint still "does not answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Kendall v. Visa U.S.A., Inc*., 518 F.3d 1042, 1048, 1051 (9th Cir. 2008); *cf. Kmety v. Bank of Am., Inc.*, No. 10cv1910-LAB (RBB), 2011 U.S. Dist. LEXIS 113010, at *8-9 (S.D. Cal. Sep. 30, 2011) ("[G]eneralized allegations about collusion . . . are inadequate to meet the pleading standard.") (Burns, J.).

Since plaintiffs attempted to amend with the benefit of discovery, and still fail to state a claim, the Court should dismiss the Second Amended Complaint with prejudice.

PROCEDURAL BACKGROUND

Plaintiffs filed their Consolidated Complaint on July 16, 2010, alleging violations of the Sherman Act, Cartwright Act, California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq*.), and Massachusetts' Consumer Protection Act (Mass. Gen. Laws ch. 93A, § 2). The focus of the Consolidated Complaint was the contention that the manufacturer defendants, Guitar Center, and NAMM met in private at NAMM trade show events and entered into a price-fixing conspiracy by agreeing to MAP policies. Plaintiffs alleged that "the Manufacturer Defendants attended NAMM events and met with each other, Guitar Center, NAMM and other co-conspirators to exchange information and discuss strategies for implementing MAPPs." (Consolidated Complaint (Dkt. 50) ¶ 93.) They further alleged that NAMM "facilitated discussions among its members to prop up prices," and at these discussions the defendants allegedly "agreed to set MAPPs at higher levels than before and to strictly enforce the MAPPs." (*Id*. ¶¶ 84-85.)

Defendants filed motions to dismiss the Consolidated Complaint on August 20, 2010.[1] After briefing and oral argument, the Court granted defendants' motions. The Court held that plaintiffs' Consolidated Complaint "lack[ed] sufficient detail to meet the standard announced in *Bell Atlantic* and explained further in *Kendall*" because "[i]t is not clear who is alleged to have conspired with whom, what exactly they agreed to, and how the conspiracy was organized and carried out." (Aug. 22, 2011 Order (Dkt. 133) at 6:7-8, 8:3-5.) The Court recognized that, to plead a conspiracy based on "circumstantial facts . . . Plaintiffs must also plead facts tending to exclude the possibility of simple parallel action without an agreement." (*Id*. at 7:8-11, 7:25-8:2.) The Court also held that plaintiffs' proposed definition of a relevant product market was defective. (*Id*. at 6:9-19.) Since plaintiffs' claims under the California and Massachusetts consumer protection statutes were based solely on the underlying antitrust claims, the Court dismissed the consumer protection claims as well. (*Id*. at 11:22-24, 12:14.)

[1] Defendant NAMM filed an individual motion to dismiss and a motion to strike certain allegations related to a Federal Trade Commission investigation.

After holding that the case could not proceed on the basis of the existing complaint, the Court granted plaintiffs leave to amend their complaint after a period of limited discovery. During the limited discovery period, defendants responded to interrogatories. Defendants also searched through tens of thousands of documents, including those from the files of senior executives and decision-makers, and produced documents reflecting any discussion of MAP policies in private meetings at a NAMM event. After the defendants' document productions were complete, plaintiffs deposed eight individuals, including seven of defendants' current and former senior executives who attended NAMM events and had responsibilities related to MAP policies during the relevant 2004 to 2007 timeframe, and NAMM's CEO. Plaintiffs were permitted to pursue any line of questioning related to private meetings at NAMM events in which defendants allegedly discussed MAP policies, and plaintiffs did pursue such questioning.

Plaintiffs filed two motions to compel additional discovery. First, plaintiffs sought the production of each manufacturer defendant's written MAP policies, regardless of whether the MAP policies had ever been discussed at a private meeting during a NAMM event. Second, plaintiffs sought permission to ask deposition questions regarding open speeches and panel discussions at NAMM events where MAP policies were discussed. In written orders dated December 19 and 28, 2011, Magistrate Judge Porter denied both of the motions because plaintiffs sought discovery that exceeded the scope of the limited discovery permitted by the Court's August 22, 2011 order. (Dkt. 158, 163.)

Plaintiffs objected to Magistrate Judge Porter's orders, and defendants filed a response. At the hearing on plaintiffs' objections, the Court rejected plaintiffs' argument that a MAP policy that the defendants had never discussed at a private meeting during a NAMM event could provide the basis for pleading a conspiracy. (Feb. 6, 2012 R.T. 20:6-11.) The Court then overruled plaintiffs' objections in a written order. (Feb. 7, 2012 Order (Dkt. 174).)

Plaintiffs filed their Second Amended Complaint on February 22, 2012. It does not plead that any of the defendants ever discussed MAP policies at a private meeting during a NAMM event, much less that they entered into a conspiracy at any NAMM event. Instead, it now emphasizes a different theory of conspiracy. Plaintiffs allege that Guitar Center, one of the largest

customers of the manufacturer defendants, caused each manufacturer defendant to implement and enforce MAP policies by threatening to stop carrying each of their products if they did not do so. (Second Amended Complaint (Dkt. 178) ¶¶ 8, 93-95, 102.) The manufacturer defendants allegedly responded to this "pressure" by adopting and enforcing "substantially similar" MAP policies. (*Id.* ¶¶ 95-97.) When making their decisions regarding MAP policies, the manufacturer defendants allegedly knew that Guitar Center also pressured the other defendants to adopt and enforce MAP policies (*id.* ¶¶ 101-02), and recognized that adopting and implementing "substantially similar" MAP policies would be more profitable to each of them than either adopting divergent MAP policies, or not adopting them at all. (*Id.* ¶ 104.) On the basis of these allegations, plaintiffs purport to state an antitrust claim.

LEGAL STANDARD

An essential element of a claim for violation of Section 1 of the Sherman Act is that defendants entered into a conspiracy in restraint of trade. A Section 1 claim requires a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Unilateral conduct or parallel conduct (defendants individually deciding to take the same action) does not constitute a Section 1 violation. *Twombly v. Bell Atl. Corp.*, 550 U.S. 544, 553-54 (2007). Thus, to plead a plausible antitrust claim under Section 1, plaintiffs must allege facts that "tend[] to exclude the possibility of independent action" and "not merely parallel conduct that could just as well be independent action." *Id.* at 554, 556-57 (citations omitted).

A complaint alleging an antitrust conspiracy fails when the "evidentiary facts" offered are consistent with unilateral and independent business decisions to engage in similar conduct. *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 669 (9th Cir. 2009) (per curiam) (affirming order granting motion to dismiss alleged antitrust conspiracy claim); *Kendall*, 518 F.3d at 1048 (affirming order granting motion to dismiss complaint because "[a]ppellants failed to plead any evidentiary facts beyond parallel conduct to prove their allegation of a conspiracy"). As the Ninth Circuit observed in *Kendall*, "[a]llegations of facts that could just as easily suggest rational, legal business behavior . . . as they could suggest an illegal conspiracy are insufficient to

plead a violation of the antitrust laws." 518 F.3d at 1049. Particularly in antitrust cases such as this one, in which plaintiffs will no doubt seek to obtain costly and protracted discovery (with the concomitant *in terrorem* effect that such discovery may have on litigation and settlement decisions), allegations suggesting that a conspiracy is merely possible or conceivable are insufficient to permit "a potentially massive factual controversy to proceed." *Twombly*, 550 U.S. at 558.

ARGUMENT

I. THE SECOND AMENDED COMPLAINT FAILS TO FOLLOW THE COURT'S INSTRUCTIONS TO ALLEGE FACTS THAT WOULD SATISFY *TWOMBLY*

A. The Second Amended Complaint Fails To Plead Evidentiary Facts Suggesting A Single Private Meeting Between Or Among Any Of The Defendants At Which They Discussed MAP Policies

In its order dismissing plaintiffs' Consolidated Complaint, the Court instructed plaintiffs that, in order to successfully amend, they would need to make specific allegations about the supposedly private meetings at NAMM trade shows at which defendants allegedly conspired, including "who attended the meetings they have generally identified, what was said, and what was agreed." (Aug. 22, 2011 Order (Dkt. 133) at 8:3-5, 8:13-14, 13:4-8.) The Court also made it clear that plaintiffs could not rely upon allegations about "what manufacturers in general did" but instead had to plead specific facts about what the specific officers or agents of each manufacturer did. (*Id*. at 9:13-17.)

Despite the Court's clear directive, plaintiffs' Second Amended Complaint fails to plead any such facts. It does not identify a single private meeting between or among any of the defendants at which they discussed, let alone agreed to, MAP policy terms. For example, with regard to Gibson, the Second Amended Complaint does not identify by name any individual associated with Gibson who did anything at all. Plaintiffs not only deposed a Gibson representative, but also received documents from the files of Gibson's CEO, president, and others. Despite such discovery, the Second Amended Complaint does not even allege that any specific person who represented Gibson attended *any* NAMM event—whether open or closed, private or public—at which a MAP policy was discussed. Nor does the Second Amended Complaint allege

that specific representatives of any other defendants met in private to discuss MAP policies.

Plaintiffs' failings are not surprising, given their admissions that the documents produced and depositions taken during the limited discovery period did not provide any evidence of a conspiracy. Indeed, at the February 6, 2012 hearing on plaintiffs' objections to Magistrate Judge Porter's discovery orders, counsel for plaintiffs admitted that, after closure of the limited discovery period, plaintiffs still did not have a basis to plead their conspiracy consistent with Rule 11: "[T]he elements that you asked us to plead we don't know. We don't know what the terms were. We don't know how they were similar to one another. We don't know how the defendants knew about the other MAPP policies." (Feb. 6, 2012 R.T. 20:14-18.)

In further acknowledgment of this failing, plaintiffs' Second Amended Complaint makes a feeble effort to re-describe the speeches, panel discussions, and round table presentations that were open to the many thousands of attendees of NAMM trade shows as "private" meetings.[2] For instance, the Second Amended Complaint alleges that NAMM "sponsored meetings and invitation-only events" at which pricing information was exchanged and MAP policies were discussed (*id.* ¶ 110), that "NAMM gave the MAPs 'center stage' at its semi-annual shows" (*id.* ¶ 115), that NAMM "hosted a discussion" involving MAP policies that was subsequently reported in a trade journal (*id.* ¶ 118), and that NAMM "hosted a panel discussion on MAPs." (*Id.* ¶ 119.)

This tactic does not help plaintiffs satisfy their burden to allege a conspiracy, because this Court has already expressly held that "remarks at open panel discussions attended by many people at trade shows cannot reasonably constitute the terms of an illegal agreement." (Aug. 22, 2011 Order (Dkt. 133) at 12:1-3.) The Court reiterated this holding in its written order overruling plaintiffs' objections to Magistrate Judge Porter's discovery orders, stating "if any price-fixing conspiracy took place, it cannot plausibly have taken place in the course of large open meetings." (Feb. 7, 2012 Order (Dkt. 174) at 2:5-6.) In light of these orders, plaintiffs' attempt to characterize

[2] Plaintiffs argue that these speeches and discussions were "not open to the public" because NAMM event attendees are issued "pre-printed NAMM event badge[s], which are not available or distributed to the general public." (Second Amended Complaint ¶¶ 111, 115.) Of course, the requirement that NAMM event attendees have a ticket or event badge does not convert these open discussions and speeches into "private" meetings in the relevant sense of the term. These events are no more "private" than a professional baseball game that requires a ticket for admission.

open speeches and discussions as "private meetings" is a further admission that they have no basis on which to claim that defendants reached an agreement at any private meeting during a NAMM event.

Plaintiffs fare no better with their allegations regarding the two NAMM-sponsored Global Summits, which were attended by dozens of representatives of organizations across the music industry, along with the "media." (Second Amended Complaint (Dkt. 178) ¶¶ 127-29.) As implausible as it is that defendants would hatch a conspiracy during an open event at a NAMM trade show (Aug. 22, 2011 Order (Dkt. 133) at 12:1-6), it is even more implausible that they would do so at an event attended by the media. In any event, these two Global Summits were previously identified in plaintiffs' Consolidated Complaint ((Dkt. 50) ¶¶ 96, 107); like that failed complaint, plaintiffs' Second Amended Complaint pleads no evidentiary facts regarding any discussion of MAP policies, let alone an agreement regarding MAP policies, at either of these Global Summits. Plaintiffs allege only that certain (but not all) of the defendants attended and provided financial support for the Global Summits. (Second Amended Complaint (Dkt. 178) ¶¶ 127-29.) Hosting an industry event with sponsorships from certain participants is not suspicious and is entirely consistent with the independent unilateral conduct of a not-for-profit trade association. *Kendall*, 518 F.3d at 1049 (allegations "that could just as easily suggest rational, legal business behavior . . . as illegal conspiracy are insufficient"). Equally settled is that "[a]ttendance at industry trade shows and events . . . 'is presumed legitimate and is not a basis from which to infer a conspiracy, without more.'" *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1257 (W.D. Wash. 2009) (quoting *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007)). At most, then, these Global Summits provided a bare opportunity to conspire, which is insufficient to state an antitrust claim as a matter of law, as this Court has recognized. (Aug. 22, 2011 Order (Dkt. 133) at 12:3-6 ("Attendance at trade shows isn't in itself suspicious, . . . and standing alone would only support an allegation that Defendants had an opportunity to conspire." (internal citation omitted).)

In short, plaintiffs have pleaded no evidentiary facts suggesting that any of the defendants ever discussed MAP policies during a private meeting at a NAMM event (or at any other time),

much less that they entered into an alleged conspiracy at any such private meeting.

B. The Conclusory Allegation That The Manufacturer Defendants' MAP Policies Are "Substantially Similar" Does Not Suffice To Suggest A Plausible Conspiracy

The Second Amended Complaint also does not meet the Court's requirement of pleading "enough of the MAPs' terms to show how they restrained competition." (Aug. 22, 2011 Order (Dkt. 133) at 10:17-18.) It does nothing more than generally describe changes that a single manufacturer defendant, Fender, made to its MAP policy over a period of approximately four years, and then make the conclusory allegation that the other manufacturer defendants adopted and enforced "substantially similar" MAP policies over this same time period. (Second Amended Complaint (Dkt. 178) ¶¶ 96, 97; *see also id.* ¶¶ 8, 11, 100, 103.) As an initial matter, the Second Amended Complaint fails to identify the ways in which the various manufacturer defendants' MAP policies are allegedly "similar" (much less when or where the defendants made any alleged agreement to adopt or adjust MAP terms, or how they allegedly instituted these adjustments). The Second Amended Complaint's frequent use of the phrase "substantially similar" MAP policies is a mere label or conclusion that is insufficient to allege a conspiracy under *Twombly*. 550 U.S. at 555; *see also William O. Gilley Enters.*, 588 F.3d at 669 ("[C]laimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts" (quoting *Kendall*, 518 F.3d at 1047)).

Plaintiffs' failure to allege the terms of any MAP policy other than Fender's is telling given their representation to the Court at the February discovery hearing that they had obtained versions of Yamaha's and Kaman's MAP policies through "independent means" and planned "to show that there are similar enforcement provisions and similar restrictions over time." (Feb. 6, 2012 R.T. 14:15-21.) Despite this representation, the Second Amended Complaint that plaintiffs filed two weeks later shows no such thing. What this means is that after plaintiffs did an "independent investigation" that compared (what they take to be) the actual written MAP terms for several of the manufacturer defendants, the best allegation they could muster is that the MAP policies are "substantially similar," without any explanation of why this is allegedly so. (Second Amended Complaint (Dkt. 178) ¶ 97.) Plaintiffs couch this allegation in "information and belief" in an attempt to add gravity to it. (*Id.*) But if they actually had genuine information that showed these

MAP policies were similar in some meaningful way, plaintiffs surely would have pleaded such information in their Second Amended Complaint. Plaintiffs are obviously in no better position now to plead "enough of the MAPs' terms to show how they restrained competition," as the Court directed them to do, than they were when they filed their Consolidated Complaint. (Aug. 22, 2011 Order (Dkt. 133) at 10:17-18.)

Plaintiffs' allegations also fail because the Second Amended Complaint does not tie any manufacturer defendants' adoption or amendment of MAP policies to any private meeting or putative antitrust conspiracy. Put differently, even if plaintiffs had alleged that the MAP policies were substantially similar in some relevant respect (which they have not), their claim would still fail because their allegations do not suggest that the MAP policies were made "substantially similar" pursuant to any conspiracy.[3] This Court has already endorsed this reasoning: At the hearing on plaintiffs' objections to Magistrate Judge Porter's discovery orders, plaintiffs noted that Fender had produced its written MAP policies, and they tried to convince the Court to order the other defendants to produce their written MAP policies, even if the defendants had never discussed their MAP policies at a private meeting at a NAMM event.[4] The Court rejected plaintiffs' argument because a "freestanding policy that doesn't result in conversations to fix prices" cannot support plaintiffs' attempt to plead a conspiracy; "[i]f [a manufacturer defendant] had such a policy and no one discussed it, there's no antitrust conspiracy, then at this stage I don't think that that's necessarily relevant." (Feb. 6, 2012 R.T. 20:6-11.) The Court's written order was to the same effect: "It is not enough that Plaintiffs plead MAPP agreements' terms in general; they must plead facts showing that MAPP agreements that were part of a price-fixing conspiracy restrained

[3] As explained more fully in Section II below, the allegation that the manufacturer defendants adopted and enforced "substantially similar" MAP policies, without more, does not plead a plausible conspiracy because such consciously parallel acts are completely consistent with unilateral and self-interested acts. By plaintiffs' own admission, the manufacturer defendants would not have needed to meet to obtain information on each other's MAP policies, since they publicly "announced" their revised MAP policies "in retailer communications, in the trade press or in product presentations." (Second Amended Complaint (Dkt. 178) ¶ 98.)

[4] Fender agreed to produce its written MAP policies to lessen its document review burden, not because defendants discussed these policies at private meetings at NAMM events. If plaintiffs had discovered any information at deposition or in documents that tied Fender's MAP policies to a private meeting, plaintiffs clearly would have made such an allegation.

trade. What is missing from [plaintiffs'] argument here is any connection between MAPPs agreements and a conspiracy." (Feb. 7, 2012 Order (Dkt. 174) at 3:16-19.)

By itself, plaintiffs' failure to plead evidentiary facts identifying any private meetings at NAMM events related to MAP policies, let alone an agreement regarding MAP policies, warrants dismissal of the Second Amended Complaint, as does plaintiffs' failure to identify any way in which the MAP policies are allegedly "substantially similar" because of an alleged conspiracy.

C. The Alleged Product Market Remains Defective

In its order dismissing plaintiffs' Consolidated Complaint, the Court held that plaintiffs improperly "blurred" the lines between distinct product markets because they combined products that were complements to each other in the same relevant market. (Aug. 22, 2011 Order (Dkt. 133) at 6:18-19.) In addition, by "[g]rouping various musical instruments and amplifiers together," the Consolidated Complaint pled "an unidentifiable and overly broad market, primarily because fretted musical instruments are not reasonably interchangeable." (*Id.* at 6:12-14.)

The Second Amended Complaint fails to cure the defects in plaintiffs' product market definition. Plaintiffs define the product market as "new, high-end Guitars and Guitar Amplifiers." (Second Amended Complaint (Dkt. 178) ¶ 58.) This definition is not better than the one that the Court previously rejected. Plaintiffs continue to group guitars and amplifiers into a single putative product market, even though the Court has already found that guitars and amplifiers are complementary products ("meaning customers use them together") rather than reasonable substitutes for each other. (Aug. 22, 2011 Order (Dkt. 133) at 6:16-19.) As a result, these products are not in the same relevant market as a matter of law. *Little Rock Cardiology Clinic, P.A. v. Baptist Health*, 573 F. Supp. 2d 1125, 1144-45 (E.D. Ark. 2008) ("Assuming as true the well-pleaded and irreproachable allegation that hospitalized cardiology patients require services from both a cardiologist and a hospital, what follows is not that both sets of services are in the same product market but rather the opposite – the two sets of services are complements, not substitutes, and therefore are not in the same product market. This is not a factual question, but a legal one . . . .").

The Court has also already indicated that electric, acoustic and bass guitars are themselves "not reasonably interchangeable." (Aug. 22, 2011 Order (Dkt. 133) at 6:12-14.) The Second Amended Complaint pleads no facts that suggest otherwise. It does not allege that the demand for each of these products would change in response to changes in the prices of the other products, or that consumers who intend to purchase an acoustic guitar, for example, would "switch" to purchasing a bass guitar if retailers increased the prices that they charge for acoustic guitars.[5] It also does not allege that musicians use acoustic guitars, electric guitars, or bass guitars for similar purposes, or regard them as substitutes for one another. Nor are there any allegations that guitar amplifiers are reasonably interchangeable with bass guitar amplifiers.

Plaintiffs' putative market definition also fails because they do not allege any facts that support the assertion that "high-end" guitars and amplifiers are part of a distinct market that excludes "mid-range" or "low-end" guitars and amplifiers. (Second Amended Complaint (Dkt. 178) ¶¶ 1, 58.) Indeed, the Second Amended Complaint does not contain a single allegation regarding pricing or price changes of "high-end" electric guitars, acoustic guitars, bass guitars or amplifiers, nor does it contain a single allegation regarding market share or market power in this putative market. Although plaintiffs do cite some average annual pricing data for all "acoustic and electric guitars" and for all "amplifiers," these two data sets cover all types of guitars and amplifiers, whether "high-end" or not. (*Id*. ¶¶ 150, 153-54.) As a result, the Second Amended Complaint fails to plead facts defining a distinct "high-end" market for guitars and amplifiers, which is fatal because "[c]ourts have repeatedly rejected efforts to define markets by price variances or product quality variances." *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (dismissing Sherman and Cartwright Act claims); *see also PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010) (upholding the district court's order granting defendant's motion to dismiss because plaintiff

[5] *See Golden Gate Pharm. Servs. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2010 U.S. Dist. LEXIS 47896, at *9-10 (N.D. Cal. Apr. 16, 2010) (where the relevant market consisted of products sold in the pharmaceutical industry, the court held that plaintiffs failed to allege that consumers would react to price changes for a drug treating one disease by purchasing a drug designed to treat a different disease, or that the drugs were reasonably interchangeable, and dismissed the claim), *aff'd* 433 Fed. Appx. 598 (9th Cir 2011).

"failed sufficiently to allege why [brand name] goods are not interchangeable with non-brand name products"); *Star Tobacco, Inc. v. Darilek*, 298 F. Supp. 2d 436, 446 (E.D. Tex. 2003) (dismissing antitrust counterclaims based on a market delineated as "discount cigarettes" because defendants failed to allege facts to show that discount and branded cigarettes were not interchangeable).

In short, the Second Amended Complaint's putative product market definition still "blurs" the lines between distinct product markets (amplifiers and guitars, on the one hand, and various types of guitars or amplifiers, on the other), and it fails to plead facts suggesting that "high-end" guitars and amplifiers plausibly comprise a relevant product market. The Second Amended Complaint does not state an antitrust claim as a matter of law.

II. PLAINTIFFS' ATTEMPT TO ALLEGE A HUB AND SPOKE CONSPIRACY FAILS AS A MATTER OF LAW

Plaintiffs, undoubtedly recognizing that they did not uncover any facts to support their original effort to allege a conspiracy hatched and implemented at private meetings at NAMM events, alter course. They now attempt to state a conspiracy based only on allegations that Guitar Center used its position as the nation's leading retailer of musical instruments to "pressure" the manufacturer defendants into implementing and enforcing MAP policies, by threatening to discontinue its sales of their products if they did not do so. (Second Amended Complaint (Dkt. 178) ¶¶ 8, 93-94.) Each manufacturer defendant allegedly decided to implement and enforce "substantially similar" MAP policies, knowing that the others were doing the same thing under similar "pressure" from Guitar Center, and while recognizing that the adoption and enforcement of "substantially similar" MAP policies by all of them would be "more attractive" than adopting and enforcing divergent MAP policies or not adopting MAP policies at all. (*Id.* ¶¶ 95-97, 101-04.) Plaintiffs contend that these allegations state a hub and spoke conspiracy claim in violation of Section 1 of the Sherman Act. (*Id.* ¶¶ 94, 165.) They are wrong as a matter of law.

Plaintiffs' claim that the manufacturer defendants adopted and enforced MAP policies, knowing that one of their largest customers was (supposedly) trying to get all of them to do so, does not allege an antitrust conspiracy under Supreme Court precedent that is literally decades old.

That allegation states nothing more than consciously parallel conduct, and the assertion that a large customer "pressured" each supplier does not mean that the vendors then were suddenly in a horizontal conspiracy with each other. Thus, this Court should dismiss this iteration of plaintiffs' conspiracy theory, even if it is inclined to entertain it.

A. A Hub And Spoke Antitrust Conspiracy Claim Requires More Than Consciously Parallel Acts Among The Spokes

Plaintiffs here have acknowledged that they are trying to allege a single "hub and spoke" conspiracy among Guitar Center, NAMM and the manufacturer defendants, one colloquially called a "rimmed wheel" conspiracy among the spokes as well as the hub, as this Court has recognized. (Aug. 22, 2011 Order (Dkt. 133) at 7:12-25.) To plead such a conspiracy, plaintiffs must allege facts sufficient to show that there is a "rim" to the wheel, i.e., a horizontal agreement among the spokes. *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04 (4th Cir. 2002) (allegations that Microsoft had similar agreements with each of two of its customers failed to state a claim under the antitrust laws because the plaintiff did not allege a "rim" to the wheel, i.e., a conspiracy among the customers; the Supreme Court was "clear" in *Kotteakos v. United States*, 328 U.S. 750 (1946) that "a wheel without a rim is not a single conspiracy"); *PSKS*, 615 F.3d at 420 (affirming dismissal in case involving vertical retail price maintenance agreements between a dual-distributor manufacturer and its retailers, where there was no allegation of "an agreement among retailers" to implement the retail price maintenance policy; "there is no wheel and therefore no hub-and-spoke conspiracy, and that allegation was therefore properly dismissed"); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435-36 (6th Cir. 2008) (affirming dismissal of an antitrust complaint because plaintiffs "offer[ed] only a rimless theory" without allegations of a "rim holding everything together").

This Court held in its dismissal order that the plaintiffs "must . . . plead facts tending to exclude the possibility of simple parallel action without an agreement" in order to allege a hub and spoke conspiracy. (Aug. 22, 2011 Order (Dkt. 133) at 8:1-2.) The Court recognized that *Twombly* holds that consciously parallel conduct "does not suggest conspiracy" and thus found that plaintiffs' complaint was deficient. (*Id.* at 8:8-10 (quoting *Twombly*, 550 U.S. at 556).)

Twombly's requirement that antitrust plaintiffs plead more than consciously parallel conduct incorporates decades of substantive antitrust jurisprudence that holds that consciously parallel business behavior, without more, does not state a conspiracy. *See* 550 U.S. at 553-54 (citing *Theater Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)); *see also Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300-01 (11th Cir. 2003); *Kendall*, 518 F.3d at 1048 (affirming dismissal of a price-fixing conspiracy claim under *Twombly*, because banks' alleged practice of all "charging, adopting or following" the same fee amounts was itself insufficient as a matter of law to constitute a conspiracy, and the merchants "failed to plead any evidentiary facts beyond parallel conduct to prove their allegation of a conspiracy").

Under these legal standards, plaintiffs must allege the "rim" to the wheel with something more than allegations that the vendor defendants engaged in consciously parallel conduct with the hub.

B. Plaintiffs Have Not Alleged A Plausible Rim To The Wheel

Plaintiffs allege that each manufacturer defendant adopted similar MAP policies; that Guitar Center was supposedly pressuring each of them separately to adopt and enforce MAP policies; that each manufacturer defendant knew or was aware that Guitar Center was doing so; and that the manufacturer defendants realized that it would be "more attractive" for them to all comply with Guitar Center's demands than otherwise. (Second Amended Complaint (Dkt. 178) ¶¶ 8, 93-97, 101-04.) These allegations do not state a plausible horizontal conspiracy among the defendants because plaintiffs cannot allege (and did not) that each manufacturer adopted and enforced MAP policies even though their individual business interest would suggest that they should not have, and only because Guitar Center assured each of them that the others would join the conspiracy. These are the essential elements of a hub and spoke conspiracy claim. *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010).

In *Hess*, plaintiffs alleged that defendants had engaged in a hub and spoke conspiracy because all of the spokes (the hub's dealers) acquiesced in the hub's demand that they not carry the products of the hub's rivals; that each spoke knew that the others were doing so; that the hub was

the dominant player in the market and therefore each spoke had to do what it demanded; and that the spokes would be better off financially if they participated in the scheme. *Id.* The Third Circuit observed that "simply because each Dealer, on its own, might have been economically motivated to exert efforts to keep [the hub's] business and charge the elevated prices [the hub] imposed does not give rise to a plausible inference of an agreement among the Dealers themselves." *Id.* For this reason, it held that plaintiffs' allegations "do no more than intimate 'merely parallel conduct that could just as well be independent action,'" and affirmed dismissal of the complaint. *Id.* at 256 (quoting *Twombly*, 550 U.S. at 557).

Plaintiffs here allege that the manufacturer defendants knew that adopting similar MAP policies would be "more attractive" than adopting divergent MAP policies, or adopting none at all. (Second Amended Complaint (Dkt. 178) ¶ 104.) Plaintiffs apparently believe that these allegations "nudge" them over the line between possible and plausible, as *Twombly* requires. *See* 550 U.S. at 570. But this allegation does not establish the necessary rim to the wheel either. Plaintiffs do not allege that it was against the individual self interest of each vendor to respond to Guitar Center's alleged pressure, and for good reason. Since *Monsanto*, 465 U.S. at 764, courts have consistently held that it is in the self interest of manufacturers to respond to complaints of dominant customers.

For example, in *Garment District, Inc. v. Belk Stores Services, Inc.*, 799 F.2d 905 (4th Cir. 1986), a dominant retailer of women's clothing threatened to stop purchasing the manufacturer's products unless the manufacturer terminated a competing retailer that was selling the manufacturer's products at a discount, and the manufacturer complied "because of the pressure exerted" by the large dealer. *Id.* at 906-07. The terminated discounter alleged that the manufacturer had conspired with the dominant retailer to terminate the plaintiff. *Id.* The Fourth Circuit affirmed a directed verdict for the manufacturer. *Id.* at 911. It held that the manufacturer's decision to terminate the discounter to avoid losing the business of the disgruntled dominant retailer was in the manufacturer's independent self interest. *Id.* at 909. The court explicitly rejected plaintiff's principal argument that cases like *Monsanto* did not apply because there, a manufacturer had responded to the complaints of independent dealers, as opposed to "the

coordinated pressure that was exerted by [the large dealer] who threatened [the manufacturer] with the loss of business of approximately 200 [of the large dealer's] stores." *Id*.

To the same effect is the Ninth Circuit's decision in *Jeanery, Inc. v. James Jeans, Inc*., 849 F.2d 1148, 1151, 1156-58 (9th Cir. 1988) (affirming a judgment in favor of the manufacturer notwithstanding a jury verdict, where a manufacturer of jeans terminated a plaintiff discount retailer after other retailers had complained to the manufacturer about the discounting and one of the manufacturer's best customers threatened not to purchase any more product unless the discounter was terminated).

Thus, plaintiffs' allegations that each vendor knew that Guitar Center (supposedly) had demanded that each of them adopt MAP policies, and each had complied because of that "pressure," do not plausibly suggest that each vendor conspired with the others to take the actions they each did. Plaintiffs' hub and spoke conspiracy allegations fail as a matter of law.

III. THE CONCLUSORY ASSERTIONS ABOUT NAMM ARE INSUFFICIENT TO STATE A CLAIM AGAINST IT AND DEMONSTRATE THAT THE ENTIRE COMPLAINT FAILS

As was the case with the Consolidated Complaint dismissed last year, the "role of NAMM is likewise not particularly well alleged" (August 22, 2011 Order (Dkt. 133) at 8:15) in the Second Amended Complaint. The Second Amended Complaint essentially repeats verbatim and, in other instances, simply rephrases the same allegations as to NAMM that the Court already found deficient. The only new averments as to NAMM are the following:

- "NAMM was motivated to further the [alleged] conspiracy" because Guitar Center and the other defendants "were among NAMM's most influential members" (Second Amended Complaint (Dkt. 178) ¶¶ 93, 130);
- Pre-printed badges, not available to the general public, were required to enter the widely-attended NAMM trade shows, including the panel discussions identified in the Second Amended Complaint (*id.* ¶ 111);
- NAMM's President sent "talking points" to NAMM's Board members, supposedly in support of MAP policies, and NAMM gave MAP policies "center stage" at its trade shows (*id.* ¶¶ 114, 115, 125); and
- Certain defendants (but not all) attended and provided financial support for the two NAMM-sponsored Global Economic Summits identified in plaintiffs' earlier complaint (*id.* ¶¶ 127-28; *see generally* Consolidated Complaint (Dkt. 50) ¶¶ 96, 107).

These allegations do nothing to cure the deficiencies that warranted dismissal of the complaint last year.

A. Allegations Regarding NAMM's Supposed Motivation To Further The Conspiracy Fail To Satisfy *Twombly*

Plaintiffs cannot revive their complaint by alleging that "NAMM was motivated to further the [alleged] conspiracy" because the other defendants were "among NAMM's most influential members" (Second Amended Complaint (Dkt. 178) ¶¶ 93, 130.) Even accepting these conclusory allegations as true, a defendant's alleged motive to conspire with another defendant is wholly insufficient to state a claim that a conspiracy occurred. In *Twombly*, for example, the Supreme Court dismissed an antitrust complaint notwithstanding allegations that the defendants had a "compelling common motivation" to conspire. *Twombly*, 550 U.S. at 550-51; *see also In re Flat Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 964 (N.D. Cal. 2007) ("'[M]otivation to enter a conspiracy is never enough' to show an agreement." (quoting 4 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1411, p. 68 (2d ed. 2003))); *Schering-Plough Corp. v. F.T.C.*, 402 F.3d 1056, 1069-70 (11th Cir. 2005) ("The simple presence of economic motive weighs little on the scale of probative value.").

Independent of their legal insignificance, plaintiffs' allegations regarding NAMM's motivations due to the defendants' supposed influence are also insufficient because they are entirely conclusory and lacking in specifics. *See Plant Oil Powered Diesel Fuel Sys., Inc. v. ExxonMobil Corp.*, 801 F. Supp. 2d 1163, 1192 (D. N.M. 2011) (threadbare allegations, such as about defendants' "influence" over an organization do not satisfy *Twombly* and *Kendall* requirements for pleading a conspiracy); *Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. CV 07-00043 MMM (SSx), 2007 WL 4976364, at *9 (C.D. Cal. Oct. 29, 2007) (general allegation of "coercion" insufficient because plaintiff did not allege facts regarding "*who* coerced *whom*, *when* the coercion took place [and] *how* the coercion was effected . . . .) (emphasis in original). Absent from the Second Amended Complaint are any evidentiary factual allegations supporting plaintiffs' bare assertions that Guitar Center used "its influence within NAMM and the NAMM leadership" in furtherance of efforts "to conspire with and coerce the Manufacturing Defendants."

(Second Amended Complaint (Dkt. 178) ¶ 93.) In fact, the only non-conclusory allegation in the Second Amended Complaint that anyone from NAMM ever met or communicated with anyone from Guitar Center is plaintiffs' allegation in Paragraph 129 that Guitar Center's Chief Executive Officer "addressed the assembly" at a NAMM Global Summit in 2007, *almost four years after* the alleged conspiracy began. (*Id.* ¶¶ 1, 129.) Nowhere in Paragraph 129 (or elsewhere in the Second Amended Complaint) do plaintiffs allege that the speaker discussed MAP policies or did anything to influence NAMM during this session, or at any other time.

Accordingly, plaintiffs' new allegations that NAMM had a motive to facilitate the alleged conspiracy due to influence from the other defendants do nothing to address the infirmities identified by this Court last year.

B. Plaintiffs Cannot State A Claim By Alleging That NAMM Trade Shows Were Not Open To The Public At Large

Nor can plaintiffs rescue their claims by citing deposition testimony for the proposition that the panel discussions and other widely attended NAMM trade show events identified in the Second Amended Complaint were open to NAMM's 9,000 member companies, but not to the "general public." (*Id.* ¶ 111). The Consolidated Complaint dismissed last year already alleged that panel discussions at NAMM trade shows were not open to the general public. (*See* Consolidated Complaint (Dkt. 50) ¶ 92.) Additional allegations that events at the NAMM trade shows were open to its thousands of members but not the general public do not make the conspiracy plausible.

As this Court admonished in its August 22, 2011 Order:

- "[R]emarks at open panel discussions attended by many people at trade shows cannot reasonably constitute the terms of an illegal agreement under these circumstances" (August 22, 2011 Order (Dkt. 133) at 12:1-3);
- "Attendance at trade shows isn't in itself suspicious" (*id.* at 12:3-4); and
- "The meetings at issue, by nature, would all be private meetings at trade shows, not speeches or other open events . . . ." (*id.* at 13:6-7).

(*See also* Feb. 7, 2012 Order (Dkt. 174) at 2:5-6 (reiterating that, "if any price-fixing conspiracy took place, it cannot plausibly have taken place in the course of large open meetings.").) These conclusions were not based on an assumption that the NAMM trade shows were open to the

public. Thus, new allegations that NAMM's 9,000 member companies required badges to attend NAMM events fail to advance the ball in the slightest for plaintiffs.

Likewise, aside from being conclusory at best, plaintiffs' reworded allegations in the Second Amended Complaint that "NAMM participated in and facilitated the conspiracy with programs at its non-public semi-annual trade shows," (Second Amended Complaint (Dkt. 178) ¶ 110), and used open discussion panels at trade shows "to further support the use of MAPs" (*id.* ¶ 119), flatly ignore the Court's prior conclusions about the implausibility of a conspiracy taking place through panel discussions at widely-attended NAMM events open to the employees and guests of its 9,000 member companies. (*See* August 22, 2011 Order (Dkt. 133) at 13:6-7 ("The meetings at issue, by nature, would all be private meetings at trade shows, not speeches or other open events . . . .").) They do nothing to negate this Court's previous conclusions that "[i]t is not clear who is alleged to have conspired with whom, what exactly they agreed to, and how the conspiracy was organized and carried out" (*id.* at 8:3-5), and that the "role of NAMM [in the alleged conspiracy] is . . . not particularly well alleged." (*Id.* at 8:15.)

C. The Allegations Related To The Talking Points Document Do Not Suggest A Conspiracy

In an effort to suggest that their search during the limited discovery period was not in vain, plaintiffs make conclusory allegations about talking points NAMM's CEO sent to NAMM Board members. Tellingly, plaintiffs do not attach the document to their Second Amended Complaint, and they also do not quote any substance. Instead, plaintiffs provide their own conclusory spin on what it allegedly says. Even accepting plaintiffs' spin, the document does not suggest any conspiracy.

Plaintiffs allege that NAMM's CEO distributed "talking points" to NAMM Board members regarding MAP policies so that the Board members would be "on the same page" when discussing MAP policies. (Second Amended Complaint (Dkt. 178) ¶ 114.) But plaintiffs do not make a single allegation that sets forth what the document actually says about MAP policies, nor do they allege that Guitar Center or any of the manufacturer defendants heard the talking points, participated in the formation of the talking points, received them, or in any way endorsed or

adopted them as part of a conspiracy.

In addition, although plaintiffs describe the document as "pro-MAP," this description is plaintiffs' own conclusory gloss on the document; plaintiffs do not allege that this term or anything similar in substance to this term actually appears in the document itself. (*Id.* ¶ 125.) Moreover, if anything remotely suggestive of a conspiracy actually appeared on the face of the document, or had been disclosed during plaintiffs' deposition of the document's author, then plaintiffs surely would have featured such information in their complaint. Their failure to allege such information speaks volumes. And, without such factual support, the Second Amended Complaint's allegations about the talking points are precisely the kind of vague and conclusory allegations that defy the *Twombly* and *Kendall* standards for pleading an antitrust conspiracy. *See Kendall*, 518 F.3d at 1047 (antitrust complaint requires evidentiary facts which, if true, "will prove" defendant entered into a conspiracy).

In any event, even if the document did suggest that NAMM favored MAP policies in some unspecified way (which, again, plaintiffs do not allege), an allegation to this effect still would not come close to plausibly linking any of the defendants to an alleged conspiracy. Indeed, plaintiffs' sole effort to tie this document to any discussion that may have included the other defendants is their conclusory assertion that NAMM board members "reiterated" unspecified information purportedly contained in the document at an open "roundtable discussion" that was sponsored by a trade journal and took place "outside of NAMM." (Second Amended Complaint (Dkt. 178) ¶ 125.) The Second Amended Complaint contains no allegations, however, that Mr. George Hines, the speaker mentioned in Paragraph 125, ever received the talking points, was employed by any defendant in this case,[6] much less that he spoke to any defendant about MAP policies.

Accordingly, plaintiffs' allegations in Paragraphs 114, 115 and 125 are insufficient to cure the defects in their Complaint. The allegations do nothing to link NAMM to the other defendants or to the alleged conspiracy.

[6] *See* Consolidated Complaint (Dkt. 50) ¶ 113 (alleging Mr. Hines is affiliated with George's Music Stores).

IV. PLAINTIFFS CANNOT STATE THEIR FAILED ANTITRUST CLAIM UNDER THE CALIFORNIA OR MASSACHUSETTS CONSUMER PROTECTION STATUTES

Plaintiffs' claims under the California and Massachusetts consumer protection statutes fail because they are based entirely on plaintiffs' failed antitrust claims. Plaintiffs purport to bring a claim under the "unlawful" and "unfair" prongs of California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq*.) ("UCL"). (Second Amended Complaint (Dkt. 178) ¶¶ 177, 178.) But since the Second Amended Complaint fails to plead a plausible conspiracy in violation of the Sherman or Cartwright Acts, it also fails to plead "unlawful" conduct under the UCL. *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 374 (Cal. Ct. App. 2001). In addition, "[i]f the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason . . . the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' towards consumers." *Id.* at 374-75 ("[C]onduct alleged to be 'unfair' because it unreasonably restrains competition and harms consumers . . . is not 'unfair' if the conduct is deemed reasonable and condoned under the antitrust laws"); *see also Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1240 (Cal. Ct. App. 2007) (same). Thus, the Second Amended Complaint's failure to state an antitrust claim dooms its attempt to state a claim based on the same alleged facts under the "unfair" prong of the UCL.

The same is true for claims brought under chapter 93A of the Massachusetts law. Courts have repeatedly found that a plaintiff cannot sustain a claim for violation of chapter 93A that is based entirely on a failed antitrust claim. *Suzuki of W. Mass, Inc. v. Outdoor Sports Expo, Inc.*, 126 F. Supp. 2d 40, 50 (D. Mass. 2001) (after dismissing the Sherman Act claims, the court found that the chapter 93A claims must be dismissed as well since the plaintiffs offered no independent allegations of unfair or deceptive trade practices); *Egan v. Athol Mem'l Hosp.*, 971 F. Supp. 37, 47 (D. Mass. 1997) (upon dismissal of state and federal antitrust claims, chapter 93A claims offering no independent evidence asserting unfair or deceptive trade practices must be dismissed as well); *Ben Elfman & Son, Inc. v. Criterion Mills, Inc.*, 774 F. Supp. 683, 687 (D. Mass. 1991) ("[A chapter] 93A claim must fail, however, if the antitrust and contract claims fail."). Here, plaintiffs offer no independent allegations asserting unfair or deceptive practices.

Plaintiffs' claims under the California and Massachusetts consumer protection statutes must therefore be dismissed.

CONCLUSION

This Court gave plaintiffs an opportunity to amend their complaint with the extraordinary benefit of a limited discovery period but plaintiffs still have failed to state a claim. For the reasons stated, defendants respectfully request an order dismissing the Second Amended Complaint with prejudice. *See Kendall*, 518 F.3d at 1052 (leave to amend rejected where plaintiffs "were already granted leave to amend once and were given an opportunity to conduct discovery").

Dated: March 26, 2012

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ELECTRONIC CASE FILING ATTESTATION

I, Margaret M. Zwisler, am the ECF User whose identification and password are being used to file this **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT**. I hereby attest that the concurrence in the filing of this has been obtained from signatories to this document.

s/ Margaret M. Zwisler
Margaret M. Zwisler

CERTIFICATE OF SERVICE

On March 26, 2012, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Southern District of California, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice of service of this document by electronic means. Any other counsel of record will be served by electronic mail and/or first class mail on the same date.

s/ Margaret M. Zwisler
Margaret M. Zwisler