

FILED

09 OCT 28 PM 4:00

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: *ep* DEPUTY

By FAX

- 1 ROBERT C. SCHUBERT (S.B.N. 62684)
- 2 KIMBERLY A. KRALOWEC (S.B.N. 163158)
- 3 SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
- 4 Three Embarcadero Center, Suite 1650
- 5 San Francisco, California 94111
- 6 Telephone: (415) 788-4220
- 7 Facsimile: (415) 788-0161
- 8
- 9 JAMES A. QUADRA (S.B.N. 131084)
- 10 G. SCOTT EMBLIDGE (S.B.N. 121613)
- 11 SYLVIA M. SOKOL (S.B.N. 200126)
- 12 MOSCONE, EMBLIDGE, & QUADRA, LLP
- 13 220 Montgomery Street, Suite 2100
- 14 San Francisco, California 94104
- 15 Telephone: (415) 362-3599
- 16 Facsimile: (415) 362-2006
- 17
- 18 KATHLEEN S. ROGERS (S.B.N. 122853)
- 19 LAW OFFICE OF KATHLEEN S. ROGERS
- 20 140 Fourteenth Avenue
- 21 San Mateo, California 94402
- 22 Telephone: (650) 766-3126
- 23
- 24 L. TRACEE LORENS (S.B.N. 150138)
- 25 LORENS & ASSOCIATES, APLC
- 26 701 "B" Street, Suite 1400
- 27 San Diego, CA 92101
- 28 Telephone: (619) 239-1233
- Facsimile: (619) 239-1178
- Attorneys for Plaintiffs and the Putative Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT LESKO, SUZANNE ONDRE, and
LISA PRITCHETT, individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

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

Defendants.

No. **'09 CV 2418** L **WVG**
CLASS ACTION COMPLAINT FOR
VIOLATION OF § 1 OF THE SHERMAN
ACT
DEMAND FOR JURY TRIAL.

ORIGINAL

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

ep

1 Plaintiffs Robert Lesko, Suzanne Ondre and Lisa Pritchett, upon personal knowledge as to
2 facts pertaining to themselves and upon information and belief as to all other matters, allege as
3 follows:

4 **I. NATURE OF ACTION**

5 1. In March 2009, the Federal Trade Commission ("FTC") announced that the
6 National Association of Music Merchants, Inc. ("NAMM"), one of the defendants herein, had
7 entered into a consent order following charges that NAMM violated federal antitrust law by
8 facilitating, enabling and encouraging the exchange of competitively sensitive pricing information
9 among NAMM members concerning musical instruments and accessories ("Musical Products")
10 that they manufactured, distributed, and/or sold.

11 2. Plaintiffs, consumers and direct purchasers from Guitar Center, Inc. ("Guitar
12 Center"), a NAMM member, a retailer of Musical Products, and one of the defendants herein,
13 bring this action on their own behalf and on behalf of a class of purchasers of Musical Products
14 between January 1, 1999 and February 1, 2008.

15 3. Plaintiffs seek damages from Defendants under Section 1 of the Sherman Antitrust
16 Act, 15 U.S.C. § 1. As stated in more detail below, Plaintiffs allege that Guitar Center, along with
17 NAMM and its members, conspired to maintain, implement and/or enforce Minimum Advertised
18 Pricing ("MAP") policies that had the purpose and effect of fixing prices, securing higher price
19 levels, restricting retail price competition and eliminating price discounting altogether in the
20 Musical Products market.

21 4. In particular, from at least 2005-2007, and earlier, NAMM organized meetings and
22 programs where competing Musical Product retailers, including Guitar Center, were permitted and
23 encouraged to discuss and agree regarding the restriction of retail price competition, strategies for
24 the adoption, implementation, and enforcement of minimum advertised price policies, and
25 appropriate and optimal retail prices and margins. In effect, NAMM facilitated resale price
26 maintenance ("RPM") agreements between and among its members. (MAP and RPM, as used
27 herein, refer to the same practice of setting and enforcing minimum pricing levels.)
28

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. The NAMM meetings led to agreements between Guitar Center, other leading Musical Product retailers, and Musical Product manufacturers to impose an RPM scheme designed to raise and maintain retail prices for Musical Products.

6. Defendants' conduct unreasonably restrained trade in the relevant market(s) (defined below), causing substantial anti-competitive effects and inflated prices to consumers from approximately January 1, 1999 through at least February 1, 2008, in violation of § 1 of the Sherman Act.

7. NAMM's conduct and that of other defendants named herein, all of whom are members of NAMM, are illegal under § 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.

8. Absent defendants' anti-competitive conduct, Plaintiffs and the other class members would have paid lower prices for the Musical 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

9. The Court has jurisdiction over the claims relating to violations of the Sherman Antitrust Act (28 U.S.C. §§ 1331 and 1337; 15 U.S.C. § 15).

10. 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, and defendant NAMM is headquartered in this district.

III. PARTIES

11. Plaintiff Robert Lesko is a resident of Modesto, California. On or about April 16, 2005, Mr. Lesko purchased a Marshall guitar amplifier and a guitar stand from Guitar Center. On or about June 8, 2005, he purchased a Gibson guitar and case, along with a guitar strap and strap locks, from Guitar Center. On or about August 30, 2005, he purchased a Fender guitar amplifier from Guitar Center. On or about November 3, 2005, he purchased an Ovation guitar and case,

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

along with strings and a guitar strap, from Guitar Center. On or about January 3, 2006, he purchased a Musicman bass guitar and case from Guitar Center.

12. Plaintiff Suzanne Ondre is a resident of San Francisco, California. On or about January 6, 2008, Ms. Ondre purchased a Takamine guitar and accessories, including a strap, from Guitar Center.

13. Plaintiff Lisa Pritchett is a resident of San Mateo, California. On or about December 20, 2006, Ms. Pritchett purchased an Ibanez guitar, along with a strap and stand, from Guitar Center.

14. 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. NAMM is a trade association comprised of more than 9,000 members, including defendant Guitar Center, as well as manufacturers, distributors, and dealers of musical instruments and related products. Most United States manufacturers, distributors, and dealers of musical instruments are members of NAMM. Its members, including defendants herein, control NAMM.

15. 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 Musical Products. Guitar Center is a member of NAMM. 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.

16. Plaintiffs are informed and believe and thereon allege that as to all transactions 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. Plaintiffs are further informed and believe 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.

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 Musical Products throughout the United States.

20. Defendant Guitar Center and members of Defendant NAMM have sold and shipped substantial quantities of Musical 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 Musical Products.

V. SUBSTANTIVE ALLEGATIONS

A. During the Class Period, NAMM Was the Industry's Vehicle to Control Prices in the United States Musical Products Market.

21. Most U.S. manufacturers, distributors, and dealers of Musical Products 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 promoting consumer demand for musical instruments, lobbying the government, offering seminars, promoting music education, and organizing trade shows. NAMM sponsors two major U.S. trade shows each year, where manufacturers introduce new products and meet with dealers. These shows also provide competitors with a chance to meet and discuss issues of concern to the industry." See <http://www.ftc/opa/2009/03/namm.shtm>.

22. On information and belief, from the late 1990s to at least 2008, Defendants worked to facilitate uniform agreement both as to the implementation and enforcement of MAP as well as

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1 other pricing. The purpose of facilitating agreement both as to MAP policies and pricing was that
2 Guitar Center, as well as other retailer members of NAMM, were concerned about increased
3 competition by mass merchants, such as Wal-Mart and Costco, as well as internet retailers.

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

7
8 Many years ago, the importance of attending a NAMM Show may not
9 have seemed important, today it is absolutely necessary. Owners and
10 key personnel should be at NAMM. . . the education seminars are
11 priceless! The interaction with the industry people and colleagues is
12 also priceless.

13 24. In the late 1990s or early 2000s, at a NAMM show, "a high-profile retailer
14 delivered a stinging address, lamenting the fact that manufacturers sat idly as price wars raged and
15 retail profits plummeted." This address coincided with the adoption of MAP policies by leading
16 musical instrument manufacturers, which commenced in approximately 1999 and continued
17 thereafter. See "Do MAP Policies Work?" *Music Trades* (Aug. 1, 2001).

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

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

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

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

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

28 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* revealed that:

Last year [2000], when we polled leading m.i. [musical instrument]
dealers about the value of minimum advertised price (MAP) policies,

1 only 31% said they had a positive effect on gross margins. 60% said
2 that MAP had no effect at all on selling prices, while 9% responded the
3 programs actually decreased margins. When asked the same question
4 this year [2001], retailers expressed a major change of heart. 51% said
5 that MAP policies had improved their gross margins during the past 12
6 months, and only 44% deemed the policies ineffectual.

7 See "Do MAP Policies Work?" *Music Trades* (Aug. 1, 2001).

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

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

17 *Id.*

18 30. In addition to reducing competition from internet retailers, *Music Trades* also
19 credited MAP policies with a more "sane approach to industry pricing," stating that "retail margins
20 appear to have stabilized." *Id.*

21 31. Thus, MAP policies were a hot topic at the January 2001 NAMM trade show.
22 *Music Trades* reported that retailers' then-current gross margins of 27% to 32% were far lower
23 than they had been in the 1990s, and that both large and small retailers "have jointly concluded that
24 they simply can't afford to give up any more gross margin points." See "Brick and Mortar Gets
25 New Respect," *Music Trades* (Mar. 2001).

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

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

5 34. At the January 2002 NAMM Show, NAMM continued to facilitate discussion
6 among its members on the optimal use of MAP policies. As a result, manufacturers
7 “acknowledged the retail concern with profitability by instituting minimum advertised price, or
8 MAP, policies. In fact, mention of MAP pricing was routinely included in just about every new
9 product presentation.” *See* “Blue Skies Ahead? ... (NAMM in Anaheim 2002),” *Music Trades*
10 (Mar. 1, 2002).

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

16 36. For example, at the summer 2004 NAMM show, “[a] number of exhibitors also
17 announced higher MAP prices in a bid to shore up dealer margins. As one supplier noted, ‘The
18 truth is, there isn’t a lot of difference between our products and our competitors. If we’re going to
19 get dealer support, we’ve got to make these guys money.’” *See* “NAMM’s Grand Finale in
20 Nashville,” *Music Trades* (Sept. 1, 2004).

21 37. Similarly, at the NAMM show in the summer of 2005, Peavey Electronics (a
22 manufacturer of musical instrument products, including guitars and accessories), among others,
23 outlined its MAP policy, reiterating “Peavey’s commitment to dealer profitability.” *See* “Peavey
24 40th anniversary dealer meeting (Indianapolis NAMM Report),” *Music Trades* (Sept. 1, 2005).

25 38. But NAMM did not only encourage individual dealers or retailers to discuss and
26 agree on how to restrict price competition. In fact, it facilitated joint discussions by all members of
27 NAMM. At NAMM’s biannual trade shows and conventions, NAMM hosted “NAMM Show
28

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1 University Sessions.” These sessions were designed to facilitate discussion and education on a
2 wide variety of music industry topics, including price competition and restrictions to competition.

3 39. At the January 2006 trade show, NAMM hosted several sessions regarding MAP
4 policies. For example, NAMM facilitated a panel discussion regarding MAP policies. On a panel
5 comprised of industry leaders, such as the Vice President and General Manager of Yamaha’s Pro-
6 Audio and Combo division, sales managers from Kaman Music Corp. and Avedis Zildjian, and
7 several retailers, the suppliers were “unanimous, offering a guardedly positive assessment of MAP
8 policies.” See “MAP policies on trial: do they help? Do they hurt? Is there a better way? (Report
9 From NAMM),” *Music Trades* (Mar. 1, 2006).

10 40. At this Panel, one lone voice supported competition on prices. Bryan Junk of
11 massmusic.net asked the Panel and the audience, “We’re supposed to compete, aren’t we?”
12 According to one industry report of the Panel session:

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

19 *Id.*

20 41. However, Mr. Junk’s comments did not reflect the majority position. Rather, the
21 Panel discussed the fact that, absent MAP, “prices would rapidly migrate down to 10% over cost
22” The Panel even advocated revising the current MAP pricing “upwards to give retailers a
23 better profit margin.” The Panel also discussed how to enforce the MAP policies, agreeing that
24 “MAP is only as effective as its enforcement” *Id.*

25 42. NAMM also released a report based on comments it compiled from the January
26 2006 trade show participants and attendees. NAMM released the following poll results, in which it
27 provided the answers:

28 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.)

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

3.2 Competition from internet and catalogue merchants.

* * *

2.5 MAP pricing policies that set margins too low.

See "Justified Optimism or Rose Colored Glasses?" *Music Trades* (Mar. 1, 2006).

43. NAMM hosted another session entitled, "Does the Industry Need a MAP Makeover?" At this session, Music for Everyone Association of Independent Music Retailers ("MFE"), a California retailers association, presented a "voluntary MAP formula/guideline" which it "recommended for general use" See "Marketplace realities demand new approach to map policies: with fixed costs the same on all merchandise, a sliding pricing scale makes sense," *Music Trades* (Nov. 1, 2005).

44. 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

Id.

1 45. MFE explained that the formulas were designed to permit “[f]ormula discounts
2 from retail start[ing] at zero” and to provide a “(much) higher” profit percentage for lower-priced
3 products.” *Id.*

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

9 47. At the 2006 Summer NAMM Show, NAMM again held an industry panel
10 discussion, comprised of NAMM’s president and CEO, Joe Lamond, a vice president of Yamaha,
11 and the Chairman and CEO of Fender Musical Instruments, among others. NAMM touted this
12 roundtable as follows: “In the two-hour session suppliers and retailers of all sizes will be able to
13 share views about critical issues affecting profitability, including MAP pricing, Interact sales tax,
14 and the entrance of mass consumer merchandisers into the industry.” Among the topics facilitated
15 at this meeting were MAP prices that were set too low and profit margins. *See* “Get ready for a
16 memorable show as the world’s live music capital hosts NAMM,” *Music Trades* (July 1, 2006).

17 48. NAMM continued to facilitate industry discussions of MAP pricing at its 2007
18 winter show. One roundtable discussion focused on, *inter alia*, increasing profit margins and MAP
19 pricing. *See* “Why going to NAMM is a total no-brainer,” *Music Trades* (Jan. 1, 2007) (agenda for
20 NAMM January 2007 show).

21 49. Thus, NAMM organized meetings and programs for its members at which
22 competing retailers of Musical Products, as well as manufacturers of those Products, were
23 permitted and encouraged to exchange information and discuss strategies for implementing
24 minimum advertised price policies, the restriction of retail price competition, and the need for
25 higher retail prices.

26 50. Representatives of NAMM determined the scope of information exchange and
27 discussion by selecting moderators and setting the agenda for these programs.
28

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

5
6 **B. No Legitimate Business Reason for MAP Policies; Price Restrictions and Restrictions
on Discounting.**

7 52. Relative to Guitar Center and other retail members of NAMM, internet-based
8 retailers are small companies that compete in the relatively new "e-commerce" trade channel.
9 Internet retailers of Musical Products are highly efficient competitors because, among other
10 reasons, their operating expenses are low. This allows them to compete vigorously on price, both
11 with other internet retailers and with retailers in other trade channels, such as Guitar Center (which
12 operates through "brick and mortar" stores as well as on the internet). Thus, when allowed to
13 compete freely, internet retailers' price competition enhances consumer welfare by bringing down
14 prices.

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

20 54. NAMM's and its members' response to internet retailing was both predictable and
21 anti-competitive. As recognized at an FTC 2002 public workshop entitled "Possible Anti-
22 competitive Efforts to Restrict Competition on the Internet," one expert explained:

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

27 * * *

28

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

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

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

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

13 **C. The FTC Action.**

14 57. 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 to recur”

21 58. Specifically, the FTC, after an investigation, alleged that between 2005 and 2007,
22 NAMM organized various meetings and programs for its members, such as defendants herein, at
23 which competing retailers of Musical Products were permitted and encouraged to exchange
24 competitively sensitive information, including prices and margins, and discussed strategies for
25 implementing minimum advertised pricing as well as restrictions of retail price competition.

26 59. The FTC alleged that the “challenged conduct served no legitimate business
27 purpose and resulted in no significant efficiency benefits.”
28

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1 60. According to the FTC's press release announcing NAMM's settlement of "FTC
2 Charges of Illegally Restraining Competition," "[t]he FTC's proposed consent order is designed to
3 remedy NAMM's anti-competitive conduct." The Commission's vote to accept the complaint and
4 the consent order was 4-0.

5 61. According to the FTC's complaint, "at meetings and programs sponsored by
6 NAMM, competing retailers of musical instruments and other NAMM [associates] discussed
7 strategies for raising retail prices and exchanged information on competitively sensitive subjects
8 such as prices, margins, minimum advertised price policies and their enforcement."

9 62. The conduct of the defendants was the cause of supracompetitive price levels for
10 products in the Musical Product market. In October 2008, Music Merchandise Review, reported
11 that Anthem Music Group's head D. Kilkenny observed "over the past several years instrument
12 prices seem to be increasing at a greater rate than that of inflation . . ." According to the *Music*
13 *Trades* "Annual Census of the Music Industries" published in 2009, in 2006, the average price of a
14 guitar was \$309, by 2007 the average price was \$350 and by 2008 the average price was \$372. *See*
15 <http://www.musictrades.com/census.htm>. Thus, the industry was able to increase aggregate sales
16 from \$1,022,861,000.00 in 2006 to \$1,151,290,000.00 in 2008 despite a 10% decline in unit sales.
17 *See id.*

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

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

- 23 1. Urging, encouraging, advocating, suggesting, coordinating, participating in,
24 or facilitating in any manner the exchange of information between or among
25 Musical Product Manufacturers or Musical Product Dealers relating to:
- 26 (a) the retail price of Musical Products; or
- 27 (b) any term, condition or requirement upon which any Musical Product
28 Manufacturer or Musical Product Dealer deals, or is willing to deal,
with any other Musical Product Manufacturer or Musical Product

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

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

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

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

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

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

15 See Federal Trade Commission Decision and Order, *In the Matter of National Association of*
16 *Music Merchants, Inc.*, Docket No. C-4255, April 8, 2009, at 4-5.

17 **D. Anti-Competitive Effects of Defendants' Unlawful Conduct**

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

21 66. The MAP policies inflicted on music retailers by NAMM and manufacturers are
22 anti-competitive. According to a *Wall Street Journal* report dated October 23, 2008, Bradley
23 Reed, sales manager for Musician's Advocate, Inc., said his company "has little choice but to
24 honor manufacturers' policies on advertised prices because otherwise it risks having its supplies
25 cut off or being delisted as an authorized distributor." See "Instruments, audio gear scrutinized in
26 price probe," *Wall Street Journal* (Oct. 23, 2008).

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

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- (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 Products 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, supracompetitive profits to the detriment of competitors and purchasers of musical instruments.

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

E. Relevant Market

69. The relevant product market in this case is retail sales of Musical Products, as defined above.

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

71. By virtue of their power to control prices and exclude competition in the relevant market, defendant Guitar Center and its unnamed co-conspirators at all relevant times jointly possessed market power in the relevant market. Moreover, at all relevant times, defendant Guitar Center and its unnamed co-conspirators jointly possessed dominant shares of the market for retail sales of Musical Products. Defendant NAMM and its members, including Guitar Center and unnamed co-conspirators, collectively possessed market power in the relevant market.

72. Likewise, defendant Guitar Center and its unnamed coconspirators at all relevant times possessed substantial market power in the market for their products, due, in part, to the high level of product differentiation in the industry. Specifically, they: (a) sold their Musical Products at prices substantially in excess of marginal costs, (b) enjoyed high profit margins thereon, (c) sold

1 such products substantially in excess of the competitive price, and (d) enjoyed substantial barriers
2 to market entry and growth.

3 73. Defendants exchanged, and facilitated exchanges among themselves and unnamed
4 co-conspirators, competitively sensitive information that had the purpose, tendency and capacity to
5 facilitate price coordination among competitors.

6 74. There is substantial concentration among the firms that manufacture the products in
7 the relevant market.

8 75. Defendants and their unnamed co-conspirators together imposed and enforced
9 minimum retail price maintenance and minimum advertised price policies that were contrary to
10 manufacturers' economic interests because each manufacturer's rational economic goal was to
11 increase sales volume rather than terminate retailers.

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

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

27 77. The presence of unfettered competition from actual or potential competitors, which
28 were selling lower-priced musical instruments, would have forced defendants and unnamed co-

1 conspirators to lower the prices of their Musical Products in order to remain competitive and/or
2 counter a perceived threat of additional entry.

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

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

18 VI. CLASS ACTION ALLEGATIONS

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

21 All individuals and persons who purchased one or more Musical
22 Products from any of the defendants from January 1, 1999 through
23 February 1, 2008 ("Class Period").

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

27 81. Plaintiffs do not know the exact size of the Class since such information is
28 exclusively in the control of defendants. Plaintiffs believe that there are thousands of Class

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

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

84. 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 Musical 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 to suffer antitrust injury in the form and nature of overcharges;
- (d) Whether defendants' unlawful conduct caused plaintiffs and other Class members to pay more for Musical Products than they otherwise would have paid;
- (e) The appropriate classwide measure of damages; and
- (f) Whether defendants' anti-competitive conduct is continuing, thus entitling the Class to injunctive relief to promote unrestrained trade and free and fair competition.

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

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

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

17 87. Any applicable statutes of limitation have been tolled by defendants' affirmative
18 acts of fraudulent concealment and continuing misrepresentations.

19 88. Because of the self-concealing nature of defendants' actions and their affirmative
20 acts of concealment, plaintiffs and the Class assert the tolling of any applicable statutes of
21 limitations affecting the claims raised herein.

22 89. Defendants continued to engage in the deceptive practice, and consequently,
23 unwary consumers were injured on a daily basis by defendants' unlawful conduct. Therefore,
24 plaintiffs and the Class submit that each instance that defendants engaged in the conduct
25 complained of herein and each instance that a member of the Class purchased a Musical Product
26 constitutes part of a continuing violation and operates to toll the statutes of limitation in this action.

27 90. Defendants are estopped from relying on any statute of limitations defense because
28 of their unfair or deceptive conduct.

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

92. By reason of the foregoing, the claims of plaintiffs and the Class 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 SECTION 1 OF THE SHERMAN ANTITRUST ACT, 15 U.S.C. § 1)

93. Plaintiffs incorporate by reference all the above allegations as if fully set forth herein.

94. Beginning in approximately 1999 or earlier, and continuing to at least approximately February 1, 2008, the exact dates being unknown to plaintiffs and exclusively within the knowledge of defendants and their co-conspirators, defendants and 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.

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

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

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

98. 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:

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- (a) Participating in meetings and conversations to discuss the prices and supply of Musical Products;
- (b) Communicating in writing and orally to fix target prices, floor prices, and price margins for Musical 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 Musical Products sold in the United States in a manner that deprived direct purchasers of free and open competition; and
- (e) Selling Musical Products to customers in the United States at non-competitive prices.

99. As a result of defendants' unlawful conduct, plaintiffs and the other members of the Class were injured in their business and/or property in that they paid more for Musical Products than they otherwise would have paid in the absence of defendants' unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that:

- A. The Court determine that this action may be maintained as a class action pursuant to Rule 23(b) of the Federal Rules of Civil Procedure, and declaring plaintiffs as the representatives of the Class and their counsel as counsel for the Class;
- B. The Court find that the combination and conspiracy and other illegal activities alleged herein be adjudicated a *per se* violation of, or alternatively, a rule of reason violation of § 1 of the Sherman Act, 15 U.S.C. § 1;
- C. Plaintiffs and each member of the Class recover damages against each defendant, jointly and severally, in an amount to be trebled in accordance with the antitrust laws (15 U.S.C. § 15);
- D. Defendants be permanently enjoined from continuing the illegal activities alleged herein;

1 E. Plaintiffs and the Class recover their expenses and costs of suit, including
2 reasonable attorneys' fees, to the extent provided by law; and

3 F. Plaintiffs and the Class be granted such other and further relief as the Court may
4 deem proper.

5 **DEMAND FOR JURY TRIAL**

6 Plaintiffs hereby demand a trial by jury on all claims so triable.

7
8 DATED: October 28, 2009

9 By 

10 ROBERT C. SCHUBERT (S.B.N. 62684)
11 KIMBERLY A. KRALOWEC (S.B.N. 163158)
12 SCHUBERT JONCKHEER KOLBE
13 & KRALOWEC LLP

14 Three Embarcadero Center, Suite 1650
15 San Francisco, California 94111
16 Telephone: (415) 788-4220
17 Facsimile: (415) 788-0161

18 JAMES A. QUADRA (S.B.N. 131084)
19 G. SCOTT EMBLIDGE (S.B.N. 121613)
20 SYLVIA M. SOKOL (S.B.N. 200126)
21 MOSCONE, EMBLIDGE, & QUADRA, LLP
22 220 Montgomery Street, Suite 2100
23 San Francisco, California 94104
24 Telephone: (415) 362-3599
25 Facsimile: (415) 362-2006

26 KATHLEEN S. ROGERS (S.B.N. 122853)
27 LAW OFFICE OF KATHLEEN S. ROGERS
28 140 Fourteenth Avenue
San Mateo, California 94402
Telephone: (650) 766-3126

L. TRACEE LORENS (S.B.N. 150138)
LORENS & ASSOCIATES, APLC
701 "B" Street, Suite 1400
San Diego, CA 92101
Telephone: (619) 239-1233
Facsimile: (619) 239-1178

Attorneys for Plaintiffs and the Putative Class

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

1 E. Plaintiffs and the Class recover their expenses and costs of suit, including
2 reasonable attorneys' fees, to the extent provided by law; and

3 F. Plaintiffs and the Class be granted such other and further relief as the Court may
4 deem proper.

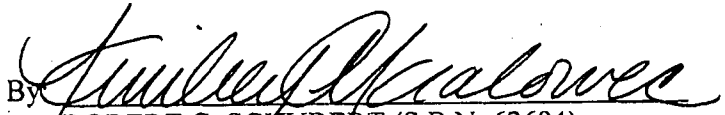
5 **DEMAND FOR JURY TRIAL**

6 Plaintiffs hereby demand a trial by jury on all claims so triable.

7
8 DATED: October 28, 2009

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
(415) 788-4220

BY 

ROBERT C. SCHUBERT (S.B.N. 62684)
KIMBERLY A. KRALOWEC (S.B.N. 163158)
SCHUBERT JONCKHEER KOLBE
& KRALOWEC LLP

Three Embarcadero Center, Suite 1650
San Francisco, California 94111
Telephone: (415) 788-4220
Facsimile: (415) 788-0161

JAMES A. QUADRA (S.B.N. 131084)
G. SCOTT EMBLIDGE (S.B.N. 121613)
SYLVIA M. SOKOL (S.B.N. 200126)
MOSCONE, EMBLIDGE, & QUADRA, LLP
220 Montgomery Street, Suite 2100
San Francisco, California 94104
Telephone: (415) 362-3599
Facsimile: (415) 362-2006

KATHLEEN S. ROGERS (S.B.N. 122853)
LAW OFFICE OF KATHLEEN S. ROGERS
140 Fourteenth Avenue
San Mateo, California 94402
Telephone: (650) 766-3126

L. TRACEE LORENS (S.B.N. 150138)
LORENS & ASSOCIATES, APLC
701 "B" Street, Suite 1400
San Diego, CA 92101
Telephone: (619) 239-1233
Facsimile: (619) 239-1178

Attorneys for Plaintiffs and the Putative Class

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

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
 Robert Lesko, Suzanne Ondre and Lisa Pritchett, individually and on behalf of all others similarly situated,
 (b) County of Residence of First Listed Plaintiff Stanislaus
 (EXCEPT IN U.S. PLAINTIFF CASES)
 (c) Attorney's (Firm Name, Address, and Telephone Number)
 Kimberly A. Kralowec (SBN 163158)
 SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
 (see attached Plaintiffs' counsel names and addresses)

DEFENDANTS
 09 OCT 28 PM 3:59
 Guitar Center, Inc., and National Association of Music Merchants, Inc.,
 CLERK, U.S. DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA
 County of Residence of First Listed Defendant _____
 (IN U.S. PLAINTIFF CASES ONLY)
 NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED BY:
 09 CV 2418 L WVG
 Attorneys (If Known) _____
 DEPUTY
BY FAX

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
 1 U.S. Government Plaintiff
 3 Federal Question (U.S. Government Not a Party)
 2 U.S. Government Defendant
 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)
 (For Diversity Cases Only)

Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 400 State Reapportionment <input checked="" type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	SOCIAL SECURITY	FEDERAL TAX SUITS
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

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. section 1 (Sherman Antitrust Act)
 Brief description of cause:
 Defendants' illegal price fixing and control of market.

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 (see attachment) _____ DOCKET NUMBER _____

DATE 10/28/09 SIGNATURE OF ATTORNEY OF RECORD Kimberly A. Kralowec
 FOR OFFICE USE ONLY
 RECEIPT # 6746 AMOUNT 350.00 APPLYING IFF _____ JUDGE _____ MAG. JUDGE _____
MS 10/28/09

ORIGINAL

JS 44 Reverse (Rev. 12/07)

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading 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. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

LIST OF PLAINTIFFS' COUNSEL

ROBERT C. SCHUBERT (S.B.N. 62684)
KIMBERLY A. KRLOWEC (S.B.N. 163158)
SCHUBERT JONCKHEER KOLBE & KRLOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, California 94111
Telephone: (415) 788-4220
Facsimile: (415) 788-0161

JAMES A. QUADRA (S.B.N. 131084)
G. SCOTT EMBLIDGE (S.B.N. 121613)
SYLVIA M. SOKOL (S.B.N. 200126)
MOSCONE EMBLIDGE, & QUADRA. LLP
220 Montgomery Street, Suite 2100
San Francisco, California 94104
Telephone: (415) 362-3599
Facsimile: (415) 362-2006

KATHLEEN S. ROGERS (S.B.N. 122853)
LAW OFFICE OF KATHLEEN S. ROGERS
140 14th Avenue
San Mateo, California 94402
Telephone: (650) 766-3126

L. TRACEE LORENS (S.B.N. 150138)
LORENS & ASSOCIATES, APLC
701 "B" Street, Suite 1400
San Diego, CA 92101
Telephone: (619) 239-1233
Facsimile: (619) 239-1178

**Schedule A
Related Cases**

1	David Giambusso	v	National Association of Music Merchants, Inc.; Guitar Center, Inc.; and Fender Musical Instruments Corp.	3:2009cv02002 Southern District - California	Larry Alan Burns, presiding Jan M. Adler, referral
2	Allen Hale	v	Guitar Center, Inc. and National Association of Music Merchants, Inc.	2:2009cv06897 Central District - California	George H. Wu
3	Mark O'Leary	v	Guitar Center, Inc. and National Association of Music Merchants, Inc.	2:2009cv07015 Central District - California	Gary A. Feess
4	Colby Giles	v	Guitar Center, Inc. and National Association of Music Merchants, Inc.	3:2009cv02146 Southern District - California	Roger T. Benitez
5	Rory W. Collins	v	Guitar Center, Inc., and National Association of Music Merchants, Inc.	3:2009cv02151 Southern District - California	John A. Houston
6	Alex Teller	v	Guitar Center, Inc.	1:2009cv06104 Northern District - Illinois	George M. Marovich
7	David Keel	v	Guitar Center, Inc. and National Association of Music Merchants, Inc.	3:2009cv02156 Southern District - California	Barry Ted Moskowitz
8	Walter Witherspoon D/B/A Racy Brothers Enterprizes and Lil Walt	v	National Association of music Merchants, Inc.; Fender Musical Instruments	3:2009cv02178 Southern District - California	Barry Ted Moskowitz

	Production, on behalf of themselves and others similarly situated,		Company; Gibson Musical Instruments Corporation; Guitar Center, Inc.; Bain Capital, LLC; C.F. Martin & Co., Inc.; Korg, USA, Inc.; Peavey Electronics; Roland Corporation U.S.; Yamaha Corporation of America; Tascam, TEAC Corporation of North America, and TEAC		
9	Niranjan Parikh	v	Guitar Center, Inc. and National Association of Music Merchants, Inc.	2:2009cv07254 Central District - California	Christina A. Snyder
10	Joshua Ramsey and Jeremy Haskell	v	National Association of Music Merchants; Guitar Center, Inc.; Fender Musical Instruments Corporation; and Gibson Guitar Corporation d/b/a Gibson U.S.A.	3:2009cv02211 Southern District - California	Roger B. Benitez
11	Kate MacWilliamson	v	Guitar Center, Inc. and National Association of Music Merchants, Inc.	2:2009cv07375 Central District - California	Valerie Baker Fairbank
12	Kenneth Manyin	v	Guitar Center, Inc.; Yamaha Corporation of America; Fender Musical Instruments Corporation; Gibson Guitar Corporation; National	1:2009cv01950 District of Columbia	Richard W. Roberts

			Association of Music Merchants, Inc.		
13	Jason Paradise	v	National Association of Music Merchants, Inc.; Guitar Center, Inc.; Fender Musical Instruments Corp., and DOES 1-10	3:2009cv02285 Southern District - California	Michael M. Anello
14	Cynthia Sepulveda	v	Guitar Center, Inc. and National Association of Music Merchants, Inc.	3:2009cv02267 Southern District - California	Larry Alan Burns
15	Agustin Cervantes	v	Guitar Center, Inc. and National Association of Music Merchants, Inc.	2:2009cv07526 Central District - California	Larry Alan Burns
16	William S. Poff	v	Guitar Center, Inc. and National Association of Music Merchants, Inc.	2:2009cv07614 Central District - California	Consuelo B. Marhsall
17	Alex Bohl	v	National Association of Music Merchants Inc.; Guitar Center, Inc.; Guitar Center Stores, Inc., Fender Musical Instruments Corporation; Gibson Guitar Corp.; Dean Markley Electronics, Inc.; and D'Addario & Company, Inc.	3:2009cv02332 Southern District - California	Jeffrey T. Miller, presiding Barbara Lynn Major, referral

Court Name: USDC California Southern
Division: 3
Receipt Number: CAS006746
Cashier ID: msweaney
Transaction Date: 10/28/2009
Payer Name: JANNEY AND JANNEY

CIVIL FILING FEE
For: LESKO V GUITAR CENTER
Case/Party: D-CAS-3-09-CV-002418-001
Amount: \$350.00

CHECK
Check/Money Order Num: 254983
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.