

## Ninth Circuit Affirms Dismissal of Challenge to Alleged Horizontal Adoption of Minimum Advertised Prices

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In what has been described as the latest opinion on the use of hub and spoke theories to allege conspiracies in violation of Section 1 of the Sherman Act, the plaintiffs took the position that the viability of their claims depended exclusively on whether they had adequately alleged a horizontal conspiracy. *In re: Musical Instruments and Equipment Antitrust Litigation*, No. 12-56674, 2015 U.S. App. Lexis 14960, slip op. at 13-14 (9th Cir. August 25, 2015) (“Plaintiffs made it clear both before the district court and on appeal that their theory of the case depends on establishing . . . horizontal agreements”). Plaintiffs did not claim that the “hub’s” conduct constituted part of the alleged antitrust violations. *Id.* at 22 n.9 (“nor do plaintiffs allege that the MAP policies themselves are illegal vertical agreements”); *id.* at 14 n.4. Plaintiffs pleaded a number of asserted “plus factors” to support their horizontal theories, all of which were rejected by the district court and the Ninth Circuit majority, which relied extensively on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Plaintiffs filed a number of putative class actions following an FTC investigation of possible violations by a trade association of Section 5 of the Federal Trade Commission Act. The trade association was the National Association of Music Merchants Inc. (“NAMM”). The FTC did not allege a violation of Section 1 of the Sherman Act. The FTC and NAMM resolved the dispute with a consent decree forbidding NAMM from “facilitating in any manner the exchange of information between or among Musical Product Manufacturers or Musical Product Dealers relating to . . . pricing policies, including but not limited to Minimum Advertised Price Policies.” *Musical Instruments*, slip op. at 6-7. “MAP policies” set the minimum prices at which a retailer could advertise the manufacturers’ guitars and amplifiers. “NAMM

neither admitted nor denied the FTC's allegations, and the FTC did not levy any monetary fine." *Id.* at 7.

The members of the putative class purchased guitars and amplifiers from defendant Guitar Center, Inc., the largest retailer of musical instruments in the United States. Guitar Center allegedly controlled nearly one-third of all guitar and amplifier sales in the United States. *Musical Instruments*, slip op. at 4 n.1. The guitars and amplifiers were manufactured by five major manufacturers—Fender, Gibson, Yamaha, Hoshino and Kaman. The defendant manufacturers, along with defendant NAMM, allegedly conspired from 2004 through 2009 under pressure from Guitar Center to implement and enforce the MAP policies. The complaints stated that the MAP policies tended to raise prices and restrain competition. *Id.* at 4-5. The manufacturers allegedly agreed with Guitar Center to implement the policies, and additionally the “manufacturers agreed among themselves to adopt the MAP policies proposed by Guitar Center.” *Id.* at 5. Plaintiffs alleged that at NAMM-sponsored events, the manufacturers extensively discussed the adoption and implementation of MAP policies. *Musical Instruments*, dissent at 33-34.

After limited discovery, the defendants gained a dismissal with prejudice of the complaint for failure to state a claim under Rule 12(b)(6). Slip op. at 7-8. One statement of the test applied by the court of appeals for determining whether a conspiracy had been adequately pleaded was,

Allegations of facts that could just as easily suggest rational, legal business behavior by defendants as they could suggest an illegal conspiracy are insufficient to plead a Section 1 violation.

*Musical Instruments*, slip op. at 16, citing, *inter alia*, *Twombly*, 550 U.S. at 553-58 & n. 5 [internal quotation marks omitted]; *Iqbal v. Ashcroft*, 556 U.S. 662, 668 (2009).

The court held that Plaintiffs' claims were defeated by their allegations that Guitar Center's pressure on the manufacturers resulted in their implementation of MAP policies. That pressure provided each of the manufacturers with an independent, noncollusive reason to implement MAP policies. The court held that “the complaint itself . . . provides ample independent business reasons why each of the manufacturers adopted and enforced MAP policies even absent an agreement among

the defendant manufacturers. . . . Manufacturers' decisions to heed similar demands by a common, important customer do not suggest conspiracy or collusion." *Musical Instruments*, slip op. at 21.

Plaintiffs attempted to plead "plus factors" to support the inference that a conspiracy had taken place. Viable plus factors are nonconclusory allegations of fact that plausibly suggest the existence of horizontal agreements to the exclusion of rational, independent business conduct. *Musical Instruments*, slip op. at 14, 17. Plaintiffs alleged the following six plus factors: "(1) [D]efendants shared a common motive to conspire; (2) the manufacturer defendants acted against their self-interest; (3) the manufacturer defendants simultaneously adopted substantially similar MAP policies; (4) the FTC's investigation and consent decree; (5) the defendants' participation in NAMM; and (6) retail prices for guitars and guitar amplifiers rose during the class period as the number of units sold fell." *Musical Instruments*, slip op. at 18.

1. *Common motive to conspire*. Majority: "[A]llegations of parallel conduct—though recast as common motive—is insufficient to plead a Section 1 violation." *Id.* at 19 & n. 8 ("common motive for increased profits always exists"). Dissent: Did not assert that common motive in and of itself was sufficient to allege a conspiracy. *Id.* at 30-31.
2. *Action against self-interest*. Majority: "[P]laintiffs fail to account for conscious parallelism and the pressures of an interdependent market." *Musical Instruments*, slip op. at 20. This was not a case "where individual action would be so perilous in the absence of advance agreement that no firm would make the challenged move without such an agreement." *Id.* Further, here it was in the self-interest of each manufacturer to accommodate a major customer's demand for MAP policies. *Id.* at 21. Dissent: This suggests illegal agreements when considered with additional factors. *Id.* at 31.
3. *Simultaneous adoption of MAP policies*. Majority: This was not an example of "[c]omplex and historically unprecedented changes in pricing structure made at the same time by multiple competitors . . ." *Musical Instruments*, slip op. at 21-22. The manufacturers "adopted the policies over a period of several years, not simultaneously." *Id.* at 22. The manufacturers' response to Guitar Center's pressure was "a hallmark of independent parallel conduct—not collusion." *Id.* Dissent: A three-year period is short enough to suggest collusion. Plaintiffs should have had discovery about the MAP policies' exact terms. *Id.* at 32.

4. *The FTC's investigation of NAMM.* Majority: The FTC asserted only a violation of Section 5, which does not require the allegation or proof of a combination or conspiracy. Neither the FTC complaint nor the consent decree alleged any actual conspiracy among the manufacturers. *Musical Instruments*, slip op. at 23. Dissent: The FTC alleged that certain trade association meetings “had the purpose, tendency, and capacity to facilitate collusion,” which supported an inference of collusion here. *Id.* at 32-33.
5. *Defendants' attendance at NAMM trade association meetings.* Majority: Participation in trade association meetings where information is exchanged and strategies are advocated is not enough by itself to allege the existence of a conspiracy. Trade association meetings have legitimate functions, such as providing information to industry members and conducting research to further the legitimate goals of the participants. *Musical Instruments*, slip op. at 24. Dissent: Specific MAP pricing structures were discussed and promoted at the meetings, which suggests collusion. *Id.* at 33-34.
6. *Rising prices.* Majority: The price of the products rose while the volume sold diminished. This could have had any number of causes, such as an increase in the cost of raw materials. Plaintiffs failed to link it to any conspiracy. *Id.* at 25-29. Dissent: This shows that it was plausible that collusion, something outside of normal market processes, was at work. *Id.* at 33-35.