


New Jersey Reporter Launches Music Industry Class Action Lawsuit

(9/19/2009)

On September 11, a class action complaint against NAMM, Guitar Center, and Fender was filed in California Southern District Court in San Diego alleging that the three conspired to raise prices on amplifiers, guitars, and other "fretted instruments." Violin is also singled out.

The plaintiff is Brooklyn-based David Giambusso, a reporter for the New Jersey *Star-Ledger* who has frequently reported on class action lawsuits for that paper and the *New York Times*. He is also a guitarist with the band, Ann Courtney and the Late Bloomers, which just released an album on an independent label. According to the 20-page complaint, Giambusso bought a Fender at a local Guitar Center "in or about" September of 2007. He is suing for \$5,000,000, plus legal fees.



 NAMM issued a statement confirming that it received a copy making antitrust claims, and is reviewing the suit.

"Fender Musical Instruments Corporation (FMIC) views the claims against it in *Giambusso vs. NAMM, et al* as groundless," states Jason Padgitt, FMIC vice president of corporate communications. "As background, FMIC, along with NAMM and many other manufacturers and retailers in the musical instrument industry, received a request for information from the Federal Trade Commission (FTC) in March 2007 as part of a nonpublic investigation of the industry. FMIC fully cooperated with and responded to the

FTC. The FTC entered into a consent agreement with NAMM, which became a consent order, in April 2009. FMIC was not, and is not, a party to the above-referenced consent agreement or order, or any other, with the FTC. On August 24, 2009, the FTC notified FMIC that, other than its consent agreement and order with NAMM, it had determined that no additional action was warranted and its investigation against FMIC has been closed.

"FMIC is surprised that this lawsuit was brought against it, particularly in light of the results of the FTC's investigation, and it will vigorously defend any and all claims against it."

The FTC settlement does not allege NAMM or its members actually violated any anti-trust laws.

Guitar Center was contacted, but at press time, hadn't yet released a comment.

The Complaint

What's alleged is that pricing information was shared, "restricting retail price competition, or by eliminating price discounting entirely." The complaint accuses NAMM, Guitar Center, and Fender of unlawfully restraining trade, attempted monopolization, and unfair competition. The complaint also alleges price-fixing on guitar strings.

The complaint states: "Beginning in 2005, the exact date being unknown to plaintiff and exclusively within the knowledge of defendants and their coconspirators entered into a continuing contract, combination or conspiracy to unreasonably restrain trade and commerce in violation of Section 1 of the Sherman Antitrust Act by artificially reducing or eliminating competition in the U.S."

Two lawyers at two firms are pursuing the suit: Lee Squitieri of New York-based Squitieri & Fearon, and Mark Tamblin of Sacramento-based Waxler Wallace.

When reached at his desk at the Star Ledger, Giambusso declined to comment, but he had Squitieri return MMR's call. When asked about why the dates of the alleged conspiracy were January 2005 to December 2007, he replied: "I'll sum it up with a hippie quote: If it was good enough for the FTC, it's good enough for us." (In the FTC's settlement with NAMM, that was the period the FTC alleged that competitively sensitive information was exchanged, as were "strategies for implementing minimum advertised pricing and restrictions of retail price competition." NAMM, in its press release at the time, disputed that that is what the settlement meant, pointing out the FTC never produced any evidence of wrong doing, only that there was opportunity for wrong doing.)

While Giambusso is the sole name on the class action suit, in the complaint it says that thousands of fretted instruments were sold at the nearly 300 Guitar Centers during that period. But it also says that an effort to contact others was "impractical." "You can represent everybody once a judge certifies it," Squitieri told MMR. Once that's done, "others might join. But a class action lawsuit can proceed with one [client]."

He added that they have been investigating since April, and then said that they found, "a lot of screaming and hollering" about pricing and the "concentration" of stores.

From the Complaint:

Those in this industry who take time to read the complaint will certainly find it intriguing. Here are some highlights:

- "Plaintiff is informed and believes and alleges that as to all transactions relevant herein, each defendant was an agent of one or more defendants named and, as such, was acting within the purpose, course and scope of such agency. Plaintiff is further informed and believes that each defendant aided and abetted, and acted in concert with and/or conspired with each and every defendant to commit the acts complained of herein."
- "According to the MMR issue of July 2009, 171 outlets selling fretted instrument closed." This is used as proof of the conspiracy. That thousands of all kinds of retailers went out of business because the country is experiencing the worse economic downturn since the Great Depression was not acknowledged.
- "Despite the large gross margins, the [MI] industry has been consolidating rather than attracting new entrants," the complaint reads. "Even mass market retailers have decided not to compete with defendants herein on the same scale and scope." It failed to note that there exists quite a bit more demand for cell phones and MP3 players than guitars, or a possible reason mass merchants have backed away from musical products is due to too many returns because of broken strings, not being able to service the instrument, and being too much trouble for not enough profit for stores better suited for selling coffee makers and televisions.
- "Between 2005 and 2007, NAMM organized various meetings and programs for its members at which competing retailers of musical instruments were permitted and encouraged to exchange information and discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices. Representatives of NAMM determined the scope of information exchanged by selecting a moderator and setting the agenda for these programs. At these NAMM-sponsored events, NAMM members discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and working of such policies; appropriate and optimal retail price and margins; and other competitively sensitive issues." MMR is awaiting an answer to the question of whether or not Giambusso ever attended a NAMM show.
- Included in the complaint is an MMR post-NAMM show quote from a dealer. Readers are certainly used to members going on record saying he or she is glad they attended the show, that they found it "absolutely necessary" and the "education seminars are priceless. The interaction with the industry people and colleagues is also priceless." Positioned in the complaint as it is, the clichéd comment appears ominous.
- The complaint alleges that, "potential competitors have been restrained from entering into the relevant market and have been prevented from competing effectively against defendants." Present economic conditions notwithstanding, it's been reported that over the years that the number of retailers has remained mostly even, with new stores sprouting up often.
- Any manufacturer and retailer who has witnessed prices and margins deflate for a decade due to increased competition on the Internet and eBay, and the increased manufacture of better quality instruments from China at lower prices will find this section peculiarly interesting: "Specifically, defendants: (a) sold their musical instruments at prices substantially in excess of marginal costs, (b) enjoyed high profits margins thereon, (c) sold such products substantially in excess of the competitive price, and (d) enjoyed substantial barriers to market entry and growth."
- "Guitar Center possesses, and has demonstrated, a dangerous probability of achieving monopoly power in the relevant market. Guitar Center continues to dominate this market through the unlawful conduct described above, to the detriment of plaintiff and the class." To back this, the complaint featured quotes from retailers expressing concern over Guitar Center in trade magazines, but not quotes of other retailers saying on the record that they benefit from Guitar Center's advertising muscle and ability to build awareness, or how the competition has enabled them to differentiate themselves with different product and services.

There are other interesting claims, like that, "since 2006 the price of an average guitar has increased by more than \$60" and that Guitar Center and Fender have profited "despite a 10 percent decline in unit sales."

While some may charge that Giambusso and his lawyers are rather removed from the realities of this industry, that point is now moot. Both firms boast their success in class action lawsuits, and unless the accused trio can convince the judge to throw the case out, this will be another unwelcome and expensive chapter in the industry's history.

As for Giambusso, don't jump to the conclusion that he carries a grudge against the guitar company he accuses of conspiracy and anti-trust impropriety: On his band's Web site it states that he, "provides comment from the outer orbits as signals from distant galaxies jangle through his beleaguered Fender."