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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GLOBAL MUSIC RIGHTS, LLC, Plaintiff, vs. RADIO MUSIC LICENSE COMMITTEE, INC. et al., Defendants.	No. 2:16-cv-9051-TJH(ASx) STATEMENT OF INTEREST OF THE UNITED STATES The Honorable Terry J. Hatter, Jr. Under Submission September 9, 2019

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INTEREST OF THE UNITED STATES

The United States submits this Statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court.

The United States enforces the federal antitrust laws and has a strong interest in their correct application. Competitors' naked agreements to fix prices are one of the most pernicious forms of anticompetitive restraints that violate Section 1 of the Sherman Act, 15 U.S.C. § 1. Private, civil enforcement is an important supplement to the United States' efforts to eliminate these unlawful practices, so long as that enforcement is consistent with the law.

The present case involves an alleged buyers' cartel—a form of cartel that can be equally destructive of competition as a sellers' cartel, even though it is discussed less frequently in the case law. Because of this disparity, the United States offers this Statement to describe the legal standards governing whether an alleged agreement among buyers constitutes a per se illegal restraint of trade in violation of Section 1. This Statement assumes the truth of the allegations of the complaint in its analysis, as is required on a motion for judgment on the pleadings. The United States takes no position on the truth of the facts alleged.

STATEMENT

This case concerns music licensing. According to the operative complaint, Global Music Rights, LLC (GMR) is a performing rights organization (PRO) that aggregates the public-performance rights of its affiliated songwriters and sells licenses bundling together those rights. 1st Am. Compl. ¶ 4 (Dkt. No. 23). GMR offers licenses to a wide variety of buyers, including owners of commercial terrestrial (AM

or FM) radio stations. *Id.* ¶¶ 4-5. Radio Music Licensing Committee, Inc. (RMLC) is an entity that negotiates with PROs for public-performance licenses on behalf of radio stations representing 90% of the country's terrestrial radio revenue. *Id.* ¶¶ 1-2.

GMR and RMLC have sued each other, with each alleging the other is, among other things, an illegal cartel in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. *See* 1st Am. Compl. (Dkt. No. 23); 2d Am. Compl., *RMLC v. GMR*, No. 2:19-cv-3957 (C.D. Cal. June 20, 2019) (Dkt. No. 163). Currently pending before the court are RMLC's motion for judgment on the pleadings (Dkt. No. 95) and GMR's motion to dismiss, *RMLC v. GMR*, No. 2:19-cv-3957 (C.D. Cal. July 11, 2019) (Dkt. No. 167). This Statement addresses the legal requirements for a buyers' cartel and therefore focuses solely on the briefing related to RMLC's pending motion.

ARGUMENT

I. Agreements Among Buyers To Violate The Antitrust Laws Are Just As Pernicious As Agreements Among Sellers.

Section 1 of the Sherman Act bars "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Courts have long interpreted the Act to prohibit only "unreasonable" restraints of trade. *E.g.*, *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982); *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). The reasonableness of most restraints is assessed under the "rule of reason." *Maricopa Cty.*, 457 U.S. at 343. "As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Id.*

Not all restraints of trade are governed by the rule of reason. *N. Pac. Ry.*, 356 U.S. at 5. Some categories of restraints are so inherently destructive of competition that they are subject to the per se rule, under which they are "deemed to be unlawful in and of themselves." *Id.* By "treating categories of restraints as necessarily illegal," the per se rule "eliminates the need to study the reasonableness of an individual restraint." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *see United States v. Mfrs.' Ass'n of Relocatable Bldg. Indus.*, 462 F.2d 49, 51-52 (9th Cir. 1972) (discussing per se rule). Examples of per se illegal restraints include agreements among competitors to fix prices, *e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980), rig bids, *e.g.*, *United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018), or divide markets, *e.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990). *See also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898) (in case involving horizontal price fixing, bid rigging, and market allocation, rejecting a reasonable-prices defense because "we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract"), *aff'd as modified in other part*, 175 U.S. 211 (1899). Such restraints are referred to as "naked" restraints because they are not the product of legitimate collaboration and thus "can have no purpose other than restricting output and raising prices." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J.).

When competitors agree to a restraint that is per se illegal, it does not matter whether they are buyers or sellers of goods or services. Per se rules apply to agreements among competing buyers in the same way that they apply to competing sellers because the Sherman Act protects competition not only in output markets

where sellers compete to sell goods or services, but also in input markets where businesses compete to purchase various inputs. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 323 (2007) (explaining, in a Section 2 case, that "[j]ust as sellers use output prices to compete for purchasers, buyers use bid prices to compete for scarce inputs"). The Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these." *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). Rather, the Act "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id.*

In *Mandeville Island Farms*, for example, the Supreme Court concluded that it was "clear" that an agreement among sugar refiners to pay a uniform price to sugar beet growers "is the sort of combination condemned by the Act, even though the price-fixing was by *purchasers*, and the persons specially injured under the treble damages claim are sellers, not customers or consumers." 334 U.S. at 235 (footnotes omitted; emphasis added). In *Joyce*, 895 F.3d at 676, 677, similarly, the Ninth Circuit described an agreement among potential *buyers* of foreclosed real property "to suppress competition by refraining from bidding against each other at public auctions" as "classic bid rigging." Because such "bid rigging is a form of horizontal price fixing," it is "a per se violation of the Sherman Act." *Id.* at 677. Finally, in *United States v. Brown*, 936 F.2d 1042, 1044, 1045 (9th Cir. 1991), the Ninth Circuit determined that an agreement among billboard advertising companies to "refrain from bidding on each other's former [billboard] leaseholds for a period of one year after the space was lost or abandoned" "clearly allocated markets between the two billboard

companies." It did not matter that the agreement concerned an input market (billboard leaseholds) for which the defendants were competing *buyers* because "[a] market allocation agreement between competitors at the same market level is a classic per se antitrust violation." *Id.* at 1045.

For per se illegal restraints, "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). In the price-fixing context, for example, "the reasonableness of the prices" fixed is irrelevant. *Id.* at 229. The Supreme Court has explained: "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.* at 224 n.59; *see also, e.g.*, *Maricopa Cty.*, 457 U.S. at 348 (stating, in case concerning a sellers' price-fixing agreement, that "[o]ur decisions foreclose the argument that the agreements at issue escape per se condemnation because they . . . fix *maximum* prices" (emphasis added)). Accordingly, in a buyer-cartel case, it is no defense that the agreement lowered the prices consumers pay. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) (rejecting, as a mater of law, the defense that "a conspiracy to depress prices would not harm consumers but benefit them").

II. Certain of RMLC's Arguments Misstate The Law On Buyers' Price-Fixing Agreements And Should Be Rejected.

In its briefing in support of its motion for judgment on the pleadings, RMLC makes several statements about the law governing price-fixing agreements generally,

and buyers' price-fixing agreements specifically, that are inconsistent with the case law. These misstatements concern the intent required to join a price-fixing conspiracy, the nature of the agreement required to constitute price fixing, and the extent to which the success of a price-fixing conspiracy is a necessary element of a Section 1 claim. The United States addresses each below.

A. Intent

Section 1 "does not prohibit all unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (brackets omitted; quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 775 (1984)). A plaintiff alleging a Section 1 violation must plead factual allegations plausibly showing that the defendant and its co-conspirator(s) "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)). When a plaintiff alleges the existence of a per se illegal restraint, that "necessarily illegal" restraint is itself the unlawful objective. *Leegin*, 551 U.S. at 886. For that reason, "[o]nce the agreement's existence is established, no further inquiry into the practice's actual effect on the market or the parties' intentions is necessary to establish a § 1 violation." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015).

In its motion for judgment on the pleadings, RMLC suggests that GMR was required to plead an additional fact to state a per se claim under Section 1: that "RMLC's members actually agreed with each other to do something that they *intended would harm competition*." RMLC Mot. 10 (emphasis added). That

suggestion is contrary to established law. In civil cases in which a plaintiff has pleaded horizontal price fixing, bid rigging, or market allocation, just like in criminal cases in which those offenses are charged, a plaintiff "is not required to 'prove specific intent to produce anticompetitive effects.'" *Joyce*, 895 F.3d at 679 (criminal case; quoting *United States v. Alston*, 974 F.2d 1206, 1213 (9th Cir. 1992)); *see also In re Musical Instruments*, 798 F.3d at 1191 (explaining principle in a civil case).

RMLC never acknowledges this authority, but instead incorrectly argues that a Section 1 plaintiff must plead plausibly that the defendant "intended to harm or restrain trade or commerce." RMLC Mot. 10 (quoting *Kendall v. VISA U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008)). The precedent that RMLC quotes, however, is the Ninth Circuit's description of what a *rule-of-reason* claim requires. *See Kendall*, 518 F.3d at 1047 (citing *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir. 1989), which in turn described what "[t]he rule of reason requires [of] a claimant"). There is no similar requirement for a per se claim. *In re Musical Instruments*, 798 F.3d at 1191. Contrary to RMLC's suggestion, therefore, whether GMR has plausibly pleaded that RMLC intended to harm commerce is irrelevant to the question whether GMR has stated a per se claim.

B. Price Fixing

To plead a per se violation of the Sherman Act, a plaintiff must allege that the defendant and its co-conspirator(s) agreed to a course of conduct that falls within a category of restraints "deemed to be unlawful in and of themselves." *N. Pac. Ry.*, 356 U.S. at 5. When, as here, a plaintiff claims that a defendant was part of a conspiracy among competitors to fix prices, the plaintiff must plausibly plead that two or more competitors "agreed upon" pricing or a component of pricing. *Socony-Vacuum*, 310

U.S. at 223. An agreement would constitute price fixing, for example, "if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices." *Id.* at 222. Additional examples include agreements that involve "an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, [or] a factor which prevents the determination of those prices by free competition alone." *Id.* at 223. For all price-fixing agreements, "the machinery employed by a combination for price-fixing is immaterial," *id.*, because "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition," *id.* at 213 (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)).

1. Categorization of Alleged Restraint

RMLC wrongly argues that GMR's complaint does not plead price fixing but rather, at most, describes a group-boycott claim. *See* RMLC Mot. 19; RMLC Reply 3-8, 18-19. The two categories of restraints—price fixing and group boycott—are not, however, mutually exclusive. Parties can reach an agreement that "involves not only a boycott but also a horizontal price-fixing arrangement." *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 436 n.19 (1990).

Superior Court Trial Lawyers is an example of a case in which an agreement qualified as both types of restraints. In that case, "a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation." 493 U.S. at 414. "Prior to the boycott CJA [Criminal Justice Act] lawyers were in competition with one another, each deciding independently whether and how often to offer to

provide services to the District at CJA rates." *Id.* at 422. "The agreement among the CJA lawyers was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services and, indeed, the only customer in the market for the particular services that CJA regulars offered." *Id.* at 422-23. The Supreme Court held that "[t]his constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered." *Id.* at 423 (quoting court of appeals). Without deciding whether the agreement was best characterized as a group boycott or price fixing, the Court ruled that "[t]he horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output" governed by the per se rule. *Id.* at 423, 436 & n.19.

Superior Court Trial Lawyers thus exemplifies the general principle that implicit (or on occasion explicit) in many price-fixing agreements (that is, agreements to sell at a particular price or according to a particular price structure) is a commitment that also shares the characteristics of a boycott: that is, a commitment not to sell at other prices or according to other price structures. This general principle has long been recognized in antitrust law. *See generally* George J. Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44, 46 (1964) (discussing how cartels try to prevent "significant deviations from the agreed-upon prices"). It is equally applicable to the sell-side and, as relevant here, the buy-side. For instance, an analogous restraint to *Superior Court Trial Lawyers* on the buy-side is a restraint in which a group of competing buyers agreed among themselves not to purchase from a seller unless that seller agreed to sell below a particular price. Just as in *Superior Court Trial Lawyers*,

such an agreement among competitors would include both a refusal-to-deal component and a price-fixing component. Accordingly, and contrary to RMLC's suggestion otherwise, the agreement would be per se illegal because it would constitute a naked restraint among the competing buyers on price or quantity purchased. *Cf. Superior Court Trial Lawyers*, 493 U.S. at 436 & n.19.

Superior Court Trial Lawyers also makes clear that RMLC misstates the law when it argues that "the Ninth Circuit has made clear [in *Adaptive Power Sols., LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 948 (9th Cir. 1998)] that the type of group boycott claim alleged here is not a price fixing claim as a matter of law." RMLC Mot. 19. *Adaptive* simply does not support RMLC's broad categorical rule (nor could it in light of *Superior Court Trial Lawyers*). *Adaptive* stands for the much more modest proposition that a refusal to deal, without an agreement as to pricing, is not price-fixing. *See* 141 F.3d at 950 (distinguishing a "refus[al] to deal with a high-priced supplier" *at all* from "a price-fixing conspiracy among competitors who agree among themselves to fix their prices"). *Adaptive* did not involve a situation in which competitors allegedly both agreed on pricing and agreed not to deal with a seller, as GMR argues it has pleaded here.

In any event, GMR defends its complaint on the ground that it sufficiently pleads "naked price-fixing among horizontal competitors" by alleging that "radio companies that normally compete against each other for access to musical content agreed with one another to fix the maximum price any of them would pay for that content." GMR Opp'n 1 (emphasis removed). Because "the party who brings a suit is master to decide what law he will rely upon," *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913), this Court should decide whether GMR has plausibly pleaded

price fixing, regardless of whether its allegations could also, or should instead, be categorized as describing a group boycott.

2. Agreement as to Third-Party Price Setting

RMLC peddles a similarly simplistic argument when it wrongly claims that GMR has failed to state a price-fixing claim because it alleges merely an agreement among buyers to insist that the sales price be determined by a third party (here, an arbitrator), not an agreement on price itself. RMLC Mot. 19; RMLC Reply 4-8, 19. The mere fact, however, that a third party decides the price on which competitors will agree does not, standing on its own, remove the restraint from the price-fixing category. That restraint is still an agreement to charge the same prices and thus still eliminates competition on price.

The Ninth Circuit's conclusion in *Knevelbaard Dairies* that competitors can engage in price fixing by manipulating inputs for a benchmark rate that is set by an independent third party illustrates this point. 232 F.3d at 979. There, the Ninth Circuit held that the milk-producer plaintiffs' allegations—that purchasers of bulk milk and cheese unlawfully suppressed the state's minimum price for milk produced in the state—stated a claim of per se illegal buy-side price fixing. *Id.* at 986-87 (Cartwright Act case relying on Sherman Act decisions concerning the per se rule). Specifically, the plaintiffs had alleged that the purchasers coordinated their purchases of bulk cheese at auction in order to manipulate the market bulk-cheese price, which in turn was used by a third party—a state agency—to set the minimum milk price. *Id.* at 982.

RMLC is therefore wrong to argue that a third party's determination of the price at which competitors agree to buy or sell a good or service is enough to remove the

agreement from the price-fixing category. The agreement not to compete on price is the per se illegal restraint, and the "machinery employed" to decide the agreed-upon price—whether it is the manipulation of a benchmark as in *Knevelbaard Dairies* or, as here, use of an arbitrator—is immaterial. *Socony-Vacuum Oil Co.*, 310 U.S. at 223.

C. Success of Conspiracy

Finally, it is "well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring." *Socony-Vacuum*, 310 U.S. at 224 n.59. As the Supreme Court has explained, "[i]t is the 'contract, combination * * * or conspiracy, in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." *Id.* (ellipsis in original). Accordingly, "a conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity." *Id.*

RMLC's reply brief incorrectly argues that a buyers' price-fixing agreement must be successful to violate Section 1. According to RMLC, if the seller does not accept the buyers' agreed-upon price, the buyers' agreement is merely an "attempt to fix prices," and therefore lawful. *See* RMLC Reply 6 & n.4 (quoting *Liu v. Amerco*, 677 F.3d 489, 493 (1st Cir. 2012)). RMLC conflates the requirement that there be an *agreement* to fix prices with the *successful execution* of that agreement.

In the *Liu* case that RMLC quotes, the defendant allegedly made "express proposals to a competitor to raise prices" that were "spurned." 677 F.3d at 494-95. There was, accordingly, no "contract, combination . . . or conspiracy" between the

competitors that could violate Section 1. If there had been such an agreement, whether the conspiring competitors were successful in convincing customers to make purchases at their agreed price would be irrelevant to the question whether there had been a Section 1 violation (although it might affect what if any recovery would be available to a private plaintiff). For as the Supreme Court has long held, "a conspiracy to fix prices violates § 1 of the Act," and no matter "whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." *Socony-Vacuum*, 310 U.S. at 224 n.59; *see also Nash v. United States*, 229 U.S. 373, 378 (1913) (explaining that Section 1 "does not make the doing of any act other than the act of conspiring a condition of liability"); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 92 (2d Cir. 1999) ("Entry into an agreement to fix prices—even if the implementation of such an agreement is unsuccessful—is the illegal conduct under the Sherman Act, 15 U.S.C. § 1."); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273 (6th Cir. 1995) ("the success of a price-fixing agreement is irrelevant for establishing a violation of § 1 of the Sherman Act"). This Court should therefore reject RMLC's argument that GMR cannot state a price-fixing claim because, according to the operative complaint, GMR did not accept RMLC's alleged price demand.

CONCLUSION

For the foregoing reasons, the United States respectfully recommends that the Court apply the above-discussed law when it evaluates whether GMR has stated a per se price-fixing claim against RMLC.

Dated: December 5, 2019.

Respectfully submitted.

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