IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1437/7/7/22

BETWEEN:

ELISABETTA SCIALLIS

Applicant/
Proposed Class Representative

- v -

(1) FENDER MUSICAL INSTRUMENTS EUROPE LIMITED
(2) FENDER MUSICAL INSTRUMENTS CORPORATION

Respondents/
Proposed Defendants

REASONED ORDER

UPON reading the Proposed Class Representative's collective proceedings claim form filed on 21 March 2022 and the Proposed Class Representative's application made on 21 March 2022 pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") for permission to serve the collective proceedings claim form on the Second Proposed Defendant ("Fender US") out of the jurisdiction (the "Rule 31(2) Application")

AND UPON reading the first witness statement of Jeremy Evans made on 21 March 2022 in support of the Rule 31(2) Application

AND UPON reading a letter from the Proposed Class Representative's legal representative notifying the Tribunal of the address for service of Fender US

IT IS ORDERED THAT:

1. The Proposed Class Representative be permitted to serve Fender US outside the jurisdiction.

2. This Order is made without prejudice to the rights of Fender US to apply pursuant to Rule 34 of the Tribunal Rules to dispute the Tribunal's jurisdiction. Any such application should take account of the observations set out in *Epic Games, Inc. v Apple Inc.* [2021] CAT 4 at [3].

REASONS

(1) Background to the claim

1. The Proposed Class Representative ("PCR") has applied for a Collective Proceedings Order pursuant to section 47B of the Competition Act 1998 ("Competition Act") so as to enable the continuation of collective proceedings on an opt out basis claiming aggregate damages for loss suffered by purchasers of electric and acoustic guitars and accessory guitar products ("Proposed Class Members"). The claims arise from allegedly unlawful resale price maintenance engaged in by the First Proposed Defendant ("Fender Europe").

2. The claims which the PCR proposes to pursue are a mix of follow on and standalone claims under section 47A of the Competition Act, and are claims for breach of statutory duty by infringing the Chapter I prohibition contained in section 2 of the Competition Act and/or Article 101 TFEU (for convenience together "the Chapter I Prohibition") ("the Claim").

3. On 22 January 2020, the Competition and Markets Authority ("CMA") issued a decision (Case 50565-3) ("the Decision") against Fender Europe and its indirect parent company, Fender US. The Decision related to what was referred to as "the Fender Pricing Policy" which applied in respect of the online

advertising and sale of electric guitars and basses, and acoustic guitars and basses ("the Relevant Products") supplied by Fender Europe in the United Kingdom ("the Infringement"). Fender US was an addressee of the Decision and was found jointly and severally liable on the basis that it was the indirect parent company of Fender Europe; it was able to exercise decisive influence over the conduct of Fender Europe and the presumption that it had done so over its subsidiary's commercial policy had not been rebutted. The Decision is final as against both Fender US and Fender Europe as neither sought to appeal.

4. The Decision relates specifically to an agreement between and/or concerted practice involving Fender Europe and one of its resellers, identified as "Reseller 1" during the period 12 January 2013 to 17 April 2018 ("the Relevant Period") ("the Agreement"). The Decision also indicates that it is likely that the effects of the Infringement were more widespread and extended to other Fender Europe resellers. Although the CMA had reasonable grounds for suspecting that more than 25 UK resellers of the Relevant Products were subject to and generally agreed to adhere to the Fender Pricing Policy, for reasons of administrative efficiency, the CMA chose to focus on the Agreement with Reseller 1 only. The CMA made clear it made no findings in respect of UK resellers of the Relevant Products other than Reseller 1 (Paragraphs 4.30 to 4.33 of the CMA Decision).

5. The Decision also referred to evidence which suggested that the infringing conduct applied to other associated musical instrument-related products (such as amplifiers and other accessories) in addition to the Relevant Products (footnote 130). The Relevant Products and these associated products are together referred to in the Claim Form as "the Relevant Musical Instrument Products". The Decision also referred to evidence that certain resellers adhered to the Fender Pricing Policy both online and instore (para 3.53; footnote 136) but made no findings in this regard.

6. Damages are sought against Fender Europe and Fender US in relation to:

   (1) Online sales in the UK by Reseller 1 throughout the Relevant Period of Relevant Products supplied by Fender Europe. The PCR intends to rely upon the Decision including the CMA's finding as to the joint

understanding between Fender Europe and Reseller 1 that the Fender Pricing Policy applied to all Fender Europe resellers, and the broader impact of the agreement with Reseller 1;

(2) Online sales in the UK between 12 January 2013 and 30 September 2015 ("the First Infringement Period") of Relevant Products supplied by Fender Europe, by (a) all Fender Europe resellers (excluding what are termed "Mass Resellers"); or alternatively (b) in addition to Reseller 1, the other 25 Fender Europe resellers in the UK named in the CMA Decision. In relation to this claim, the PCR intends to rely upon findings in the Decision in relation to establishing an infringement of the Chapter I Prohibition;

(3) Online and instore sales in the UK of Relevant Musical Instrument Products supplied by Fender Europe, by all Fender Europe resellers (excluding Mass Resellers) between 1 October 2015 and at least 17 April 2018 ("the Second Infringement Period"). In relation to this claim, and in order to establish the alleged infringement, the PCR intends to rely upon findings in the Decision, evidence cited in the Decision, and other evidence to be obtained on disclosure.

7. The Collective Proceedings Claim Form alleges that the consequence of the alleged infringements is that consumers also paid materially higher prices than they would otherwise have done for:

(1) Relevant Products supplied by manufacturers other than Fender, and sold through all retail channels in the UK in the First Infringement Period; and

(2) Relevant Musical Instrument Products supplied by manufacturers other than Fender and sold through all retail channels in the UK in the Second Infringement Period.

8. It is also alleged that the price effects continued for a period of a year after the Relevant Period ceased (the "Run-Off Period").

9. The Proposed Class comprises:

(1) any person who purchased in the UK a Relevant Product in the First Infringement Period; and

(2) any person who purchased in the UK a Relevant Musical Instrument Product in the Second Infringement Period or within the Run-Off Period (which ended 17 April 2019).

10. The reason for the different date ranges in the First and Second Infringement Period, and the different product definitions is to reflect the requirement in Rule 31 of the Competition Appeal Tribunal Rules 2003. That rule requires that claims arising prior to 1 October 2015 must be based on a relevant decision (such as the Decision in this case). For claims arising on or after 1 October 2015, it is permissible not only to rely on the CMA's Decision but also to bring fully standalone claims in the Tribunal.

11. In addition, it is proposed that there will be a specific claim for interest for class members who purchased the Relevant Musical Instrument Products on finance.

(2) Application under Rule 31(2) of the Tribunal Rules

12. I think it is likely, as the PCR contends, that the proceedings are to be treated as taking place in England and Wales. Accordingly, the Tribunal approaches service out of the jurisdiction on the same basis as the High Court by reference to the relevant principles in the Civil Procedure Rules 1998 ("CPR") (*DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18].

(a) Serious Issue to be Tried

13. I am satisfied that there is a serious issue to be tried on the merits of the claim, and that there is a real, as opposed to fanciful prospect of success.

14. As regards the Claim in respect of Reseller 1, the Decision as regards the Infringement is binding on the Tribunal and the Proposed Defendants pursuant

to section 58A(2) of the Competition Act. Further, I consider that there is a real prospect of establishing that loss has been suffered as a result of Proposed Class Members paying materially higher prices.

15. I note that the CMA made a number of findings of fact relating to the operation and enforcement of the Fender Pricing Policy, although it only found the Infringement in relation to Reseller 1. The CMA considered that the infringement as found in the Decision would have had a wider impact and that many resellers would have followed the pricing of Reseller 1 in relation to the Relevant Products supplied by Fender. In these circumstances, I am satisfied that there is a real prospect of the Proposed Claim Representative establishing that the Fender Pricing Policy extended beyond Reseller 1 to its other Fender Europe UK resellers, and that loss was suffered as a result.

16. Further, in so far as the claims are standalone claims brought in respect of the Fender Pricing Policy, and its impact on Fender's resellers more generally, I note that the CMA recorded that on the basis of the evidence it had seen (1) it had reasonable grounds for suspecting that the Fender Pricing Policy extended to all or at least the vast majority of Fender Europe's resellers in respect of the Relevant Products, and (2) that it applied to Relevant Musical Instrument Products supplied by Fender Europe. I note that in addition to documents and evidence produced for the purposes of the CMA investigation, there will also be disclosure. I am satisfied that in the circumstances there is a real prospect of establishing infringement in relation to Relevant Products that extended to Fender Europe's resellers more generally, and in relation to the wider class of products so as to include guitar accessories and the like supplied by Fender Europe, and that Proposed Class Members suffered loss as a result.

17. I also accept that there is a real prospect of an expert economist being able to test empirically the extent to which price effects on Relevant Products and Relevant Musical Instrument Products supplied by Fender Europe had an effect on prices of equivalent products supplied by other manufacturers. As to this, I have had regard to the Expert Report of Iestyn Williams dated 18 March 2022 exhibited to the witness statement of Elisabetta Sciallis, the PCR, dated 21 March 2022.

(b) The jurisdictional "gateways" under CPR Practice Direction 6B ("PD6B")

18. The PCR relies on two of the jurisdictional gateways specified in paragraph 3.1 of CPR PD6B. The first is paragraph 3.1(3). The PCR contends that Fender US is a necessary and proper party to her claim against Fender Europe. As to this, Fender Europe is a company incorporated in England and Wales, and I am told that the PCR will proceed to serve the claim form on Fender Europe: no permission is required. I am satisfied that (1) for the reasons already explained, as between the PCR and Fender Europe there is a real issue which it is reasonable for the Tribunal to try (paragraph 3.1(3)(a)); and (2) Fender US is a necessary and proper party (paragraph 3.1(3)(b)) to the claims given that it was an addressee of the Decision, was found jointly and severally liable for its subsidiary's infringements, and the basis for liability as regards the standalone claims is alleged to be the same as for the follow-on claims.

19. Given my conclusion in relation to paragraph 3.1(3) of PD6B, it is not strictly necessary to consider the second gateway relied upon which is paragraph 3.1(9). The PCR contends that the claim is a tort claim where damage was sustained within the jurisdiction. In my view there is a good arguable case that this gateway is also met on the basis that the claims (1) arise out of tortious breaches of statutory duty committed in the UK as they relate to Fender Europe's agreements and/ or concerted practices with its UK resellers; and (2) the alleged damage was sustained in the UK: the definition of Proposed Class Member presupposes that a person will have purchased a Relevant Product (in the First Infringement Period), or Relevant Musical Instrument Product (in the Second Infringement Period or Run-off Period) in the UK. The claims are brought against Fender US on the basis that it is liable on a joint and several basis, including in relation to the standalone claims as to which the basis for liability is alleged to be the same as for the follow-on claims.

(c) Appropriate Forum

20. I am also satisfied for the purposes of Rule 31(3) of the Tribunal Rules that the UK (and this Tribunal) is the proper place in which to bring the claims. As I

have said, the Proposed Class Members are likely to be largely made up of individuals domiciled in the UK. The PCR's application suggests that the majority of the Proposed Class Members are likely to be domiciled in England and Wales. On the information available, the products to which these proceedings relate were marketed and sold in the UK. The damage occurred in this jurisdiction. Fender Europe is a company incorporated in England, and has its registered office here. Fender Europe will be sued in England as of right. The claims are in part follow-on claims from a Decision of the CMA based on a breach of competition rules as applied in the UK.

21. In all the circumstances, this Tribunal is clearly the appropriate forum for the trial of the Claim, and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction.

Bridget Lucas QC
Chair of the Competition Appeal Tribunal

Made: 17 June 2022
Drawn: 17 June 2022