

1 DOUGLAS E. OLSON (CSB# 38649)
dougolson@sandiegoplw.com
 2 JAMES V. FAZIO, III (CSB# 183353)
jamesfazio@sandiegoplw.com
 3 TREVOR Q. CODDINGTON, PH.D. (CSB# 243042)
trevorcoddington@sandiegoplw.com
 4 SAN DIEGO IP LAW GROUP LLP
 12526 High Bluff Drive, Suite 300
 5 San Diego, CA 92130
 Telephone: (858) 792-3446
 6 Facsimile: (858) 792-3447

7 Attorneys for Plaintiffs,
 GEOFFREY L. MCCABE and
 8 KAHLER INTERNATIONAL, INC.

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

12 GEOFFREY L. MCCABE, an individual
 13 residing in California, and KAHLER
 INTERNATIONAL, INC., a California
 14 Corporation,

15 Plaintiffs,

16 vs.

17 FLOYD ROSE GUITARS, a Washington
 corporation; FLOYD ROSE MARKETING,
 18 INC., a Washington corporation; FLOYD D.
 ROSE, an individual residing in Washington;
 19 DAVITT & HANSER MUSIC CO., a
 Kentucky corporation; PING WELL
 20 INDUSTRIAL CO., Ltd., a Taiwan
 corporation; AP GLOBAL ENTERPRISES
 21 INC., a New Jersey corporation; SCHALLER
 ELECTRONIC GMBH, a Germany
 22 corporation; and LERNER, DAVID,
 LITTENBERG, KRUMHOLZ AND
 23 MENTLIK LLP, a New Jersey limited
 liability partnership, and DOES 4 through 10,
 24 inclusive,

25 Defendants.

CASE NO. 3:10-CV-00581-JLS-JMA

**THIRD AMENDED COMPLAINT FOR
 PATENT INFRINGEMENT, FALSE
 MARKING, STATUTORY UNFAIR
 COMPETITION, AND FALSE
 ADVERTISING**

DEMAND FOR JURY TRIAL

1 Pursuant to the Court’s Order of April 23, 2012 (D.E. 124), Plaintiff Geoffrey L. McCabe
2 (“**McCabe**”), along with newly added Co-Plaintiff Kahler International, Inc. (“**Kahler**
3 **International**”), hereby submits a Third Amended Complaint against Floyd Rose Guitars; Floyd
4 Rose Marketing, Inc. (d.b.a., Floyd Rose Guitars); Floyd D. Rose, an individual; Davitt & Hanser
5 Music Co.; Ping Well Industrial Co., Ltd.; AP Global Enterprises Inc. (formerly DOE 1); Schaller
6 Electronic GmbH (formerly DOE 2); Lerner, David, Littenberg, Krumholz and Mentlik LLP
7 (formerly DOE 3); and DOES 4 through 10 (collectively “Defendants”), and allege as follows:

8 **INTRODUCTION**

9 1. This action involves tremolo devices for stringed musical instruments such as
10 electric guitars and more particularly, string tuning mechanisms found on tremolo devices. A
11 tremolo device typically includes a lever arm or bar (commonly known as a “whammy bar”)
12 attached to a bridge and/or tailpiece of an electric guitar. In use, a guitarist moves the tremolo bar
13 back and forth to activate the tremolo device in order to vary the tension and/or length of all
14 strings temporarily, thereby changing the pitch of those strings to create a tremolo or vibrato
15 effect.

16 2. Clarence Leonidas Fender, also known as Leo Fender, is generally credited with
17 introducing the first fulcrum tremolo device, on the Stratocaster electric guitar (or “Strat”) in
18 1954. A fulcrum tremolo is a unique species of tremolo in that the entire tremolo, including both
19 the bridge and tailpiece portions, pivots about a fulcrum axis and is held in an initial tuned
20 position by the balance between the tension of the strings pulling the tremolo in one direction on
21 the one hand, and biasing or tensioning springs, which connect the fulcrum tremolo to the
22 instrument body, pulling the tremolo in the opposite direction, on the other hand. The fulcrum
23 tremolo is unique compared to other tremolo designs because a change in the tension of any string
24 disturbs the initial position of the tremolo and thereby alters the initial harmonic tuning of the
25 instrument. Accordingly, for the fulcrum tremolo, adjusting the tuning pegs on the head of the
26 guitar to reestablish the string back to the initial pitch also, simultaneously, reestablishes the
27 initial harmonic tuning of the instrument. Leo Fender was awarded U.S. Patent No. 2,741,146, on
28 April 10, 1956, for his fulcrum tremolo design. Leo Fender founded the famous Fender Electric

1 Instrument Manufacturing Company, which is now known as Fender Musical Instruments
2 Corporation (“Fender”).

3 3. In the mid to late 1970s, Defendant Floyd D. Rose developed an improved fulcrum
4 tremolo (sometimes referred to as his “double-locking” invention) by adding, among other things,
5 clamping devices positioned at the nut of the instrument and the bridge portion of the tremolo in
6 order to clamp the guitar strings at two points after the instrument is first tuned by the tuning pegs
7 at the head of the guitar. The purpose of the clamping devices is to improve the stability of the
8 tuned condition of the strings during and after movement of the tremolo bar, which was not
9 achievable with older tremolo devices such as those found on the original Fender Strat. For his
10 improvement, Defendant Floyd D. Rose was awarded U.S. Patent No. 4,171,661 (the ‘661
11 patent), on October 23, 1979. The ‘661 patent later expired on January 3, 1997.

12 4. A major drawback of Floyd D. Rose’s first commercially available double-locking
13 invention was that, in practice, it was very difficult for a user, i.e., guitarist, to achieve proper
14 tuning of the guitar strings once the clamping devices were locked in place. Typically, it would
15 take a guitarist numerous attempts, sometimes ten or more, or by chance, to get the locked guitar
16 strings in proper tune. Moreover, even if proper string tuning was achieved, any slight string
17 stretching due to, for example, a change in atmospheric conditions would result in the clamped
18 strings going out-of-tune, and the guitarist would have to repeat the laborious task of retuning and
19 locking the guitar strings. In other words, once the clamping devices were placed on the guitar,
20 there was no way to adjust the tension of any string, i.e., adjust the pitch tuning of each string,
21 which are otherwise subject to small, but significant stretching over time and use. Thus, Floyd D.
22 Rose’s double-locking invention, by itself as disclosed in the ‘661 patent, was impractical and not
23 adopted by professional guitarists.

24 5. Realizing this, Floyd D. Rose went on to include a fine tuner arrangement on his
25 double-locking tremolo devices to permit further tuning of the strings within a limited range after
26 the strings have been clamped. Once the string clamps were engaged, the only means for
27 adjusting string tension is by fine tuners, one for each string, located on the tremolo itself.
28 Accordingly, this means that upon performing a single adjustment by at least one of the fine tuner

1 adjustment knobs the associated string is returned back to initial pitch and simultaneously
2 reestablishes the initial harmonic tuning and pitch tuning of all the strings of the instrument. For
3 his fine tuner arrangement, Defendant Floyd D. Rose was awarded U.S. Patent No. 4,497,236 (the
4 '236 patent) on February 5, 1985, which was based on an application filed March 15, 1982, and
5 U.S. Patent No. 4,549,461 (the '461 patent) on October 29, 1985, which was based on an
6 application filed February 4, 1985. The '236 patent later expired on March 15, 2002. The '236
7 patent and '461 patent, as well as other Rose patents, were prosecuted, obtained, licensed, and
8 enforced by attorneys at Defendant Lerner, David, Littenberg, Krumholz and Mentlik LLP
9 ("Lerner, David").

10 6. In the late 1970s or early 1980s, Floyd Rose began commercializing his double-
11 locking tremolo system with fine tuners, which is still in production today and marketed under the
12 brand name "Original Floyd Rose Fulcrum Tremolo" or "The Floyd Rose Original" tremolo.
13 With the likes of world-renowned rock guitarists such as Eddie Van Halen adopting and
14 endorsing the Original Floyd Rose Fulcrum Tremolo since the early 1980s, Floyd Rose and his
15 related business entities generated unprecedented sales of tremolo devices and garnered
16 significant royalties and royalty rates (believed to be up to 50% if not more) under the '661 patent
17 and '236 patent for licensed third-party fulcrum tremolos with fine tuners and guitars with
18 licensed fulcrum tremolos with fine tuners. In fact, Defendant Floyd D. Rose's U.S. Patent No.
19 4,967,631 (the '631 patent) directed to a "low profile" version of his fulcrum tremolo, which was
20 filed on September 5, 1989, notes that "[t]he tremolo and tuning apparatus in accordance with the
21 Floyd Rose inventions have enjoyed huge commercial success, the inventions of such patents
22 having been licensed throughout the electric guitar industry." Col. 2: 53-56.

23 7. In fact, by the mid-1980s the popularity of the Original Floyd Rose Tremolo had
24 grown meteorically and was rivaled only by the universally recognized alternative, the dissimilar
25 Kahler cam-based tremolo bridge-tailpiece manufactured by American Precision Metal Works,
26 Inc. ("American Precision"), a California tremolo manufacturer and prime competitor. The size
27 of the market dominance afforded by the initial expansion of the popularity of the Floyd Rose
28 tremolo was defined by an aggressive strategy that in part demanded cross-licensing agreements

1 with other fine-tuning patent owners by way of frivolous lawsuits intended not to enforce lawful
2 patent rights, but to unfairly disparage and discredit as well as weaken a competitor with the high
3 financial burden associated with defending against patent infringement claims.

4 8. For example, in 1986 when the '236 patent and '631 patent were asserted by
5 Lerner, David on behalf of Floyd D. Rose and his exclusive licensee at the time, Kramer Music
6 Products, Inc. ("Kramer"), against American Precision (Civil Action No. 85-3608-RMT-JRx,
7 Central District of California), Floyd D. Rose and his representatives at Lerner, David (as well as
8 countless musicians, repair persons, and luthiers skilled in the art) knew the Original Floyd Rose
9 Fulcrum Tremolo and the Kahler cam-based tremolo belonged to two distinct species of tremolos
10 and that the allegations for infringement of Rose's fine-tuner claims were inherently not based in
11 fact, but obscure enough to the court system in general to prosecute a lawsuit. However, this
12 lawsuit backfired on Floyd D. Rose, Kramer, and Lerner David as it was clearly established
13 during discovery that asserted claims including claims 16-19, 23, 24, and 26 of Rose's '236
14 patent and claim 1 of Rose's '461 patent, were invalid as being anticipated under 35 U.S.C. §
15 102(a) and 102(b) by a prior art "Micro-Frets" guitar (as well as U.S. Patent No. 4,201,108 to
16 Bunker or U.S. Patent No. 3,237,502 to Moseley), and/or rendered obvious under 35 U.S.C. §
17 103(a). In fact, Floyd D. Rose himself admitted during a deposition that numerous claims of his
18 '236 patent and '461 patent covered the prior art. The prior art Micro-Frets guitar, as well as the
19 Bunker '108 patent and the Mosely '502 patent, were not considered by the United States Patent
20 & Trademark Office during prosecution of the '236 patent and '461 despite the fact that Rose
21 and/or his attorneys at Lerner, David were aware of some, if not all, of that prior art.

22 9. Thus, the incorporation of fine tuners on fulcrum tremolos was not Floyd D.
23 Rose's invention and consequently, no lawful basis existed for the monetization of claims 16-19,
24 23, 24, and 26 of Rose's '236 patent and claim 1 of Rose's '461 patent as those claims were
25 anticipated and/or rendered obvious by prior art. Nonetheless, Floyd D. Rose and Lerner, David,
26 among other Defendants, would later conceal these facts and intentionally deceive numerous
27 licensees, competitors, and the music industry as a whole that Floyd D. Rose invented fine tuners
28 on fulcrum tremolos and had valid and enforceable patent rights to such, e.g., under the '236 and

1 '461 patents, when none, in fact, existed. In effect, Floyd D. Rose and Lerner, David, among
2 other Defendants, hid their broken monopoly to maintain a "fictitious monopoly" with which they
3 would continue to enjoy the benefits of their power to control the market place by excluding
4 legitimate competitors with innovative products from competing with Floyd D. Rose.

5 10. Floyd D. Rose, Kramer, Lerner, David, and Andrew Papiccio ("Papiccio"), of
6 Defendant AP Global Enterprises, Inc. ("APG") and who was working for Defendant Floyd. D.
7 Rose and/or Kramer at that time, were notified during the lawsuit with American Precision of the
8 prior art Micro-Frets guitar, Bunker's '108 patent, Moseley's '502 patent, and the legal
9 ramifications of such. For instance, in a December 5, 1986 letter to John Nelson of Lerner, David
10 from American Precision's counsel James F. Lesniak of Southern California intellectual property
11 law firm Knobbe, Martens, Olson & Bear, which is attached hereto as Exhibit A, it was stated in
12 no uncertain terms that:

13 Your only argument to distinguish the Micro-Frets guitar has been that the
14 individual string tension adjustment members on the Micro-Frets tremolo were
15 not intended to be 'fine tuners.' As you well know, **anticipation under 35**
16 **U.S.C. § 102 is not avoided** by the discovery of a new use, property or advantage
17 of an old product. But even this law need not be relied on, since Mr. Rose
18 conceded in his deposition that adjustment of the Micro-Frets adjustment screws
19 raises or lowers the tension of the strings, which is the expressed definition of fine
20 tuning in the subject patents. Further, Mr. Rose acknowledged that all the other
21 elements of independent Claims 16 of the '236 patent and 1 of the '461 patent are
22 present in the Micro-Frets device. (Rose deposition pp. 404-406) Moreover, it
23 cannot even be argued that the particular physical structure of the Micro-Frets
24 string tension adjustment mechanism cannot function as a fine tuner. Mr. Rose
25 conceded in his deposition at Page 405 that the string adjustment range of the
26 Micro-Frets guitar was similar to his and may be more in some cases. In addition,
27 the Micro-Frets structure is virtually identical to the fine tuning structure of the
28 prior art Bunker Patent, U.S. 4,201,108.

23 In our opinion, at least as of the present time, it is **unconscionable** for you to
24 continue to assert the above claims against APM, or any other company or
25 individual for that matter. Continued assertion of these invalid claims would
26 certainly constitute **patent misuse**, which we believe would render all of the
27 claims of both of the above patents invalid under current law, as well as
28 subjecting the Plaintiffs to joint and several liability for **unfair competition** and
antitrust violations.

1 Finally, we submit that you cannot continue to assert the above invalid claims
2 without being in clear **violation of the strictures of Rule 11** of the Federal Rules
3 of Civil Procedure, thereby subjecting counsel, as well as the parties, to
4 **sanctions**. (emphasis added.)

5 11. Within months after the Lesniak December 5th letter, Floyd D. Rose and Kramer
6 dropped the assertion of the '236 patent claims and '461 patent claims including, but not limited
7 to claims 16-19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent, against
8 American Precision and the lawsuit was dismissed as all parties knew that a court or jury would
9 rule in American Precision's favor. At that time, Floyd D. Rose and Kramer entered into a
10 settlement agreement, from which a business relationship with American Precision was started
11 whereby American Precision would manufacture tremolos for Floyd D. Rose, Kramer, and their
12 customers. The terms of that relationship were set forth in a written license agreement, which
13 expressly stated that **no royalty whatsoever** was required from American Precision to
14 manufacturer and sell tremolos covered by claims 16-19, 23, 24, and 26 of the '236 patent and
15 claim 1 of the '461 patent since those claims were known and accepted to be invalid and
16 unenforceable by all parties.

17 12. Nonetheless, thereafter Defendant Floyd D. Rose, Lerner, David, and Papiccio
18 (and later including Defendants Floyd Rose Marketing, Inc. and AP Global Enterprises, Inc.),
19 knowingly and intentionally developed a "fictitious monopoly" forcing unknowingly (or
20 conspiring with knowingly) manufacturers, distributors, and/or competitors including, but not
21 limited to co-Defendants Davitt & Hanser Music Co., Ping Well Industrial Co., Ltd., and Schaller
22 Electronic GmbH ("Schaller") to, among other things, (1) take a license to and **pay royalties** for
23 the knowingly invalid and unenforceable claims of Rose's '236 patent and '461 patent, as well as
24 (2) take a license to and pay royalties for other fraudulently procured and invalid Rose patents, (3)
25 take a license to and pay royalties for purported trade dress rights of Rose that didn't exist, (4)
26 mark tremolo products with expired and/or knowingly invalid and unenforceable '236 patent
27 (including products that did not fall within the scope of the '236 patent), (5) violate contractual
28 obligations and/or ethical duties, (6) engage in acts of unfair competition and false advertising,
(7) engage in intentional deception, (8) restrain trade in violation of United States antitrust laws,

1 and (9) fail to compensate McCabe for willful infringement of the five patents asserted here, all of
2 which have been fully vindicated as valid upon reexamination by the United States Patent &
3 Trademark Office (PTO) at the request of Defendant Floyd Rose Marketing and two of which
4 have been considered by the Investigative Staff of the U.S. International Trade Commission and
5 deemed valid, enforceable, and infringed by numerous Defendants here.

6 13. Might does not make right. All Defendants including Lerner, David must be held
7 accountable for their unfair, illegal, and fraudulent actions and the consequences of their long
8 term intentional and unlawful restraining and limiting of competitive efforts in the marketplace
9 including, but not limited to those of Kahler International and McCabe for the commercialization
10 of significant and patented advancements in fulcrum tremolo technology.

11 **JURISDICTION AND VENUE**

12 14. This action arises under, among others, the Patent Laws of the United States, Titles
13 15 and 35 of the United States Code.

14 15. This Court has subject matter jurisdiction over these claims pursuant to at least 15
15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(a), and 1367.

16 16. Venue is proper in this Judicial District under 28 U.S.C. §§ 1391 and 1400(b).

17 **THE PARTIES**

18 17. McCabe is an individual residing in Los Angeles, California.

19 18. Kahler International, Inc. is a corporation organized and existing under the laws of
20 the State of California, having a place of business at 1836 Ord Way, Oceanside, California 92056.

21 19. Defendant Lerner, David, Littenberg, Krumholz & Mentlik LLP (“**Lerner,**
22 **David**”) is a limited liability partnership organized and existing under the laws of the State of
23 New Jersey, having a place of business at 600 South Avenue West, Westfield, New Jersey 07090-
24 1497.

25 20. Lerner, David regularly solicits and conducts business in California with
26 California entities and attorneys from Lerner, David have historically attended the January
27 NAMM Show, which takes place annually in Anaheim, California.

28 21. Lerner, David is and has been the sole administrator of Floyd D. Rose’s

1 intellectual property licensing programs. Lerner, David has historically received a contingency
2 share of the licensing revenue received under Floyd D. Rose's intellectual property rights.

3 22. Lerner, David has represented or assisted Floyd D. Rose in at least two federal
4 lawsuits in California.

5 23. Attorneys from Lerner, David are licensed to practice law in California.

6 24. Floyd D. Rose has received a number of patents directed to phosphodiester bonds
7 including, but not limited to U.S. Patent No. 6,232,465 issued on May 15, 2001. Those patents
8 were prosecuted at the United States Patent & Trademark Office by Lerner, David. Those patents
9 were eventually sold to Solexa, Inc. of Hayward, California, which was later acquired by
10 Illumina, Inc. on January 26, 2007. Illumina, Inc. is headquartered in San Diego, California. As
11 compensation for Lerner, David's work in procuring and/or selling those patents, Joseph
12 Litterberg, Sidney David, Arnold Krumholz, William Mentlik, and John Nelson of Lerner David
13 received shares of common stock in Solexa, Inc. (now Illumina, Inc.).

14 25. Historically, Lerner, David has commingled royalty payments received from
15 licensees of Floyd Rose's intellectual property rights with funds of their clients including Floyd
16 D. Rose and/or, on information and belief, Lerner, David's own funds.

17 26. Defendant Floyd Rose Marketing, Inc. ("**FRM**") is a corporation organized and
18 existing under the laws of the State of Washington, having had a place of business located at 6855
19 176th Avenue, NE, Bellevue, Washington 98052 and presently having a place of business located
20 at 227 Bellevue Way NE #330, Bellevue, Washington 98004. According to official corporate
21 records of the State of Washington, Defendant Floyd D. Rose is designated as President of FRM.

22 27. FRM has on occasion done business as Floyd Rose Guitars at a facility located at
23 6855 176th Avenue, NE, Redmond, Washington 98052. FRM also does business as "Floyd Rose"
24 with a mailing address of P.O. Box 601, Oakhurst, New Jersey 07755, the same address listed for
25 Defendant AP Global Enterprises, Inc. FRM also has done business as "Floyd Rose Guitar Lab"
26 on various occasions.

27 28. Defendant Floyd D. Rose ("**Rose**"), an individual, resides at 500 106th Avenue NE
28 #607, Bellevue, Washington 98044. Rose resided in San Diego County at 117 Via de la Valle,

1 Del Mar, California 92014 from June 10, 1993 to November 5, 1999. Up to May of 2010, Rose
2 owned property in San Diego County at 610 N Tremont St., Oceanside, California 92054. Rose
3 regularly attends the National Association of Music Merchants (NAMM) Show held annually in
4 southern California to launch, demonstrate, and solicit sales of Rose branded products. Rose also
5 regularly visits southern California to personally meet with artists who endorse his products.
6 According to United States Patent & Trademark Office records, Rose has done business as Rose
7 Tremolo Systems.

8 29. FRM is the alter-ego of Floyd D. Rose. They are both named "Floyd Rose." At
9 various times, FRM was operated out of Rose's home residence at 117 Via de la Valle, Del Mar,
10 California 92014. Rose is the spokesman for FRM. FRM solicits business through the domain
11 name www.floydrose.com.

12 30. FRM and/or Floyd D. Rose is/are the alter-ego of Lerner, David. Lerner, David has
13 managed the business affairs of Floyd D. Rose and/or FRM including the aggressive world-wide
14 marketing and licensing of Rose's purported intellectual property rights. Historically, Lerner,
15 David has had a controlling interest in the intellectual property owned by Floyd D. Rose. Lerner,
16 David has received and controlled the flow of intellectual property royalty payments to Floyd D.
17 Rose, Kramer, and/or Davitt & Hanser Music Co.

18 31. FRM is merely a conduit for the affairs of Floyd D. Rose, Lerner, David, and/or
19 Papiccio. FRM has been operated out of Rose's residence at 6427 Lake Washington Blvd. NE,
20 Kirkland, Washington 98033 in addition to his previous residence in Del Mar, California.
21 Additionally, Floyd D. Rose, Lerner, David, and/or Papiccio individually have received and
22 continue to receive a significant amount of licensing revenue directly from licensees (i.e., not
23 through FRM) for the trademarked brand "Floyd Rose," Rose's patents (most of which, if not all,
24 are owned and licensed in his name and not FRM), purported trade dress rights, and Rose's
25 publicity rights for being Floyd Rose.

26 32. FRM, APG, and/or Floyd D. Rose have been used to perpetrate fraud in order to,
27 among other things, maintain a fictitious monopoly. FRM, Floyd D. Rose, Papiccio, and Lerner,
28 David have been intentionally deceiving the public, competitors, and/or licensees by, among other

1 things, (1) enforcing and receiving royalties for invalid and unenforceable claims of Rose’s ‘236
2 patent and ‘461 patent, (2) failing to inform licensees of Rose’s ‘236 patent and ‘461 patent of the
3 existence of the invalidating prior art such as the pre-existing Micro-Frets guitar, Bunker’s 108
4 patent, and Moseley’s ‘502 patent, (3) enforcing and receiving royalties for one or more
5 fraudulently procured “convergence tuning” patents, (4) enforcing and receiving royalties for
6 trade dress rights that do not exist, (5) falsely marking and advertising tremolo products with
7 expired, invalid, and unenforceable patents (including those of which that did not cover the
8 product being marked in violation of 35 U.S.C. § 292 as amended in 2011) for decades, (6)
9 conspiring with and/or forcing licensees to violate contractual obligations, (7) violating ethical
10 duties and professional standards of conduct, (8) falsely advertising that tremolo products are
11 patented when in fact they are not subject to any valid or enforceable patent rights – a practice
12 that continues to this day, and (9) restraining trade in violation of United States antitrust laws.

13 33. Defendant Davitt & Hanser Music Co. (“**DHM**”) is a corporation organized and
14 existing under the laws of the State of Kentucky, having a principal place of business located at
15 2395 Arbor Tech Drive, Hebron, Kentucky 41048.

16 34. Defendant Ping Well Industrial Co., Ltd. (“**PWI**”) is a corporation organized and
17 existing under the laws of Taiwan, having a principal place of business located at No. 51, Sho Yi
18 5 Lane, Taichung, Taiwan.

19 35. PWI engages in business in California. In 2010 and 2011, PWI manufactured,
20 sold, and/or shipped music equipment parts, e.g., machine guitar heads, on numerous occasions to
21 Taylor-Listug, Inc. (d.b.a., Taylor Guitars), a California corporation located in San Diego County
22 at 1980 Gillespie Way, El Cajon, California 92020. PWI has manufactured and imported, and
23 continues to manufacture and import Floyd D. Rose branded products and components thereof
24 (including those that form the basis for McCabe’s claims of patent infringement, false marking,
25 and unfair competition), which are ultimately sold in the United States and California in
26 particular. PWI has conducted business with and shipped products to Jean Larrivee Guitars USA
27 Inc. The manufacturing facility of Jean Larrivee Guitars USA Inc. is located in Oxnard, CA.
28

1 36. Shown below are pictures of a Floyd Rose Discovery series guitar (shown left) –
 2 exhibit CPX-14 of ITC Inv. No. TA-586 – equipped with a Speedloader tremolo system, which is
 3 one of the accused infringing products in this lawsuit. The Speedloader tremolo is branded with
 4 the name “Floyd Rose” (shown middle). The Speedloader tremolo was manufactured by PWI and
 5 stamped with the initials “PW” (shown right). PW stands for Ping Well.



15 37. PWI has systematic and continuous contacts with California. PWI manufactures or
 16 has manufactured custom made tremolo devices (infringing McCabe’s patents asserted here) for
 17 Floyd D. Rose, FRM, DHM, and AP Global Enterprises, Inc. who (1) sell or have sold those
 18 devices to California entities and (2) show or have showed those devices at the January NAMM
 19 show held annually in Anaheim California. In fact, according to a July 2004 article appearing in
 20 Musicians Hotline (available at
 21 www.musicianshotline.com/archive/builder_profiles/floyd_rose.htm), Floyd D. Rose was
 22 acknowledged as admitting that “We are just about to introduce our low-end version of our
 23 guitars, a Ping Well bridge that is being made in Taiwan under my control; so all the speedloader
 24 bridges will be my standards for quality. Even the lower end versions.”

25 38. Defendant AP Global Enterprises, Inc. (“APG”) is a corporation organized and
 26 existing under the laws of New Jersey, having a principal place of business at P.O. Box 601,
 27 Oakhurst, New Jersey 07555. FRM (d.b.a., Floyd Rose) is represented to be a division of APG at
 28

1 www.floydrose.com. APG is believed to be owned by Papiccio. APG regularly solicits and
2 conducts business in California with California entities and was registered as an exhibitor for the
3 January 2011 NAMM Show, which took place in Anaheim, California.

4 39. APG does business as “AP International.” At www.floydrose.com, “Floyd Rose”
5 is represented to be a division of “AP International.” APG has also done business as AP
6 International Enterprises, Inc. Official corporate records for the State of New Jersey indicate that
7 corporate status for AP International Enterprises, Inc. was revoked sometime around 2003 for
8 failing to file annual reports for 2 consecutive years.

9 40. Defendant Schaller Electronic GmbH (“**Schaller**”) is a corporation organized and
10 existing under the laws of Germany, having a principal place of business at An der Heide 15,
11 92353 Postbauer-Heng, Germany. Schaller has systematic and continuous ties to California, and
12 annually attends the annual NAMM Show held in southern California to solicit and conduct
13 business. Schaller has manufactured and imported, and continues to manufacturer and import
14 Rose-branded products and components thereof (including those that form the basis for McCabe’s
15 claims of patent infringement and false marking), which are ultimately sold in the United States
16 and California in particular.

17 41. Lerner, David has represented and/or continues to represent FRM, Rose, and/or
18 APG in license negotiations with numerous licensees around the world including DHM, PWI, and
19 Schaller, in proceedings before the District Court for the Central District of California and the
20 District of New Jersey, in proceedings before the United States Patent & Trademark Office, and
21 investigations before the U.S. International Trade Commission. Joseph Littenberg of Lerner,
22 David has personally negotiated licenses on behalf of FRM, Rose, and/or APG with licensees
23 located around the world including California.

24 42. McCabe and Kahler International are ignorant of the true names and capacities of
25 the individuals and entity Defendants sued herein as DOES 4 through 10, inclusive, and therefore
26 sued these Defendants by such fictitious names. McCabe and Kahler International will amend the
27 complaint to assert their true names when they have been ascertained.
28

GENERAL ALLEGATIONS REGARDING MCCABE’S PATENTS

1
2 43. Beginning in the late 1980s, Plaintiff Geoffrey L. McCabe invented certain
3 improved designs of fulcrum tremolos including, among other things, a fulcrum tremolo with a
4 macro-tuner. A macro-tuner is a full range tuner, which permits both harmonic tuning of the
5 instrument and the complete pitch tuning of each guitar string without the need for a tuning peg at
6 the head of the guitar. For his improved fulcrum tremolo designs, Geoffrey L. McCabe has been
7 awarded seven U.S. Patents since October of 1990, five of which are asserted here.

8 44. On October 12, 1999, the United States Patent & Trademark Office (“PTO”) duly
9 and lawfully issued U.S. Patent No. 5,965,831, entitled “Tuning Means for Stringed Musical
10 Instrument” (“the ‘831 patent”). McCabe owns all rights, title, and interest to the ‘831 patent. On
11 December 7, 2010, Defendant FRM initiated ex parte reexamination of claims 1-12 of the ‘831
12 patent before the PTO. Upon its reexamination, the PTO confirmed the patentability of claims 1-
13 12 and issued an Ex Parte Reexamination Certificate on April 3, 2012. A copy of the ‘831 patent
14 and its respective Ex Parte Reexamination Certificate are attached hereto as Exhibit B.

15 45. On November 16, 1999, the PTO duly and lawfully issued U.S. Patent No.
16 5,986,191, entitled “Tuning Means for Fulcrum Tremolo” (“the ‘191 patent”). McCabe owns all
17 rights, title, and interest to the ‘191 patent. On December 7, 2010, Defendant FRM initiated ex
18 parte reexamination of claims 1-5, 14-19, 21, and 22 of the ‘191 patent before the PTO. Upon its
19 reexamination, the PTO confirmed the patentability of claims 5, 17-19, 21, and 22 (as originally
20 presented) and claims 1-4 and 14-16 (as amended), and issued an Ex Parte Reexamination
21 Certificate on April 17, 2012. A copy of the ‘191 patent and its respective Ex Parte
22 Reexamination Certificate are attached hereto as Exhibit C.

23 46. On January 16, 2001, the PTO duly and lawfully issued U.S. Patent No. 6,175,066,
24 entitled “Tuning Means for Stringed Musical Instrument” (“the ‘066 patent”). McCabe owns all
25 rights, title, and interest to the ‘066 patent. On December 7, 2010, Defendant FRM initiated ex
26 parte reexamination of claims 8-12 of the ‘066 patent before the PTO. Upon its reexamination,
27 the PTO confirmed the patentability of claims 8-12 and issued an Ex Parte Reexamination
28 Certificate on June 7, 2011. A copy of the ‘066 patent and its respective Ex Parte Reexamination

1 Certificate are attached hereto as Exhibit D. The conclusion reached by the PTO upon
2 reexamination reflected the same validity conclusion reached by the ITC Investigative Staff in
3 Inv. No. 337-TA-586, namely that the '066 patent was valid in view of FRM's invalidity
4 contentions. The ITC Investigative Staff also concluded that the '066 patent was enforceable and
5 infringed by the Speedloader products accused here.

6 47. On May 10, 2005, the PTO duly and lawfully issued U.S. Patent No. 6,891,094,
7 entitled "Tuning Means for Stringed Musical Instrument" ("the '094 patent"). McCabe owns all
8 rights, title, and interest to the '094 patent. On December 7, 2010, Defendant FRM initiated ex
9 parte reexamination of claims 1, 14-18, and 20-22 of the '094 patent before the PTO. Upon its
10 reexamination, the PTO confirmed the patentability of claims 1, 14-18, and 20-22 and issued an
11 Ex Parte Reexamination Certificate on April 10, 2012. A copy of the '094 patent and its
12 respective Ex Parte Reexamination Certificate are attached hereto as Exhibit E. The ITC
13 Investigation Staff in Inv. No. 337-TA-586 previously concluded that the '094 patent was valid in
14 view of FRM's invalidity contentions. The ITC Investigative Staff also concluded that the '094
15 patent was enforceable and infringed by the Speedloader products accused here.

16 48. On December 30, 2008, the PTO duly and lawfully issued U.S. Patent No.
17 7,470,841, entitled "Tuning Apparatus for Stringed Instrument" ("the '841 patent"). McCabe
18 owns all rights, title, and interest to the '841 patent. On December 7, 2010, Defendant FRM
19 initiated ex parte reexamination of claims 29-31 of the '841 patent before the PTO. Upon its
20 reexamination, the PTO confirmed the patentability of claims 29-31 and issued an Ex Parte
21 Reexamination Certificate on April 3, 2012. A copy of the '841 patent and its respective Ex Parte
22 Reexamination Certificate are attached hereto as Exhibit F.

23 49. Defendants' SpeedLoader Tremolo and SpeedLoader Fixed Bridge, and guitars
24 equipped with the SpeedLoader Tremolo or SpeedLoader Fixed Bridge (collectively, "the
25 accused infringing products") satisfy, either literally or under the doctrine of equivalents, every
26 element recited in one or more claims of the '831, '191, '066, '094, and '841 patents. Each and
27 every Defendant directly and indirectly infringes one or more claims of the '831, '191, '066,
28 '094, and '841 patents, and their infringement has been and continues to be willful.

1 50. Defendants' guitars equipped with a SpeedLoader Tremolo or SpeedLoader Fixed
2 Bridge include at least two commercial lines of guitars marketed under the brand names
3 "Redmond Series" (versions 1-5 and K) and "Discovery Series." The Redmond Series and the
4 Discovery Series of guitars do not have traditional tuning pegs on the head and are therefore
5 tuned by a plurality of macro-tuners positioned on a fulcrum tremolo.

6 51. FRM made, used, sold, imported, exported, and/or offered for sale the accused
7 infringing products, and continues to make, use, sell, import, export, and/or offer for sale the
8 accused infringing products, and has a financial interest in the commercialization of the accused
9 infringing products.

10 52. FRM sells or has sold after importation into the United States various stringed
11 musical instruments and components thereof including the accused infringing products. The
12 accused infringing products are or have been imported for sale in the United States.

13 53. Floyd D. Rose made and used the accused products, and continues to make and
14 use the accused infringing products, and has a financial interest in the commercialization of the
15 accused infringing products.

16 54. DHM used, sold, imported, exported, and/or offered for sale the accused infringing
17 products, and had a financial interest in the distribution of the accused products through
18 commercial channels.

19 55. PWI made, sold, and imported, in whole or in part, into the United State the
20 accused infringing products, and continues to make, sell, and import, in whole or in part, into the
21 United States the accused infringing products for FRM, Floyd D. Rose, DHM, and/or APG.

22 56. PWI is an original equipment manufacturer (OEM) for manufacturing one or more
23 of the accused infringing products.

24 57. APG made, used, sold, imported, exported, and/or offered for sale the accused
25 infringing products, and continues to make, use, sell, import, export, and/or offer for sale the
26 accused products, and has a financial interest in the commercialization of the accused infringing
27 products.

28 58. Schaller made, sold, and imported, in whole or in part, into the United State the

1 accused products, and continues to make, sell, and import, in whole or in part, into the United
2 States the accused infringing products for FRM, Floyd D. Rose, DHM, and/or APG.

3 59. Schaller is an original equipment manufacturer (OEM) for manufacturing one or
4 more of the accused infringing products.

5 60. On or about January 19, 2001, McCabe was introduced to and met with Floyd D.
6 Rose while introducing his macro-tuner technology and prototypes to prospective business
7 partners at the North American Music Merchants (NAMM) at the Schaller exhibition booth in
8 Anaheim, CA. During that meeting, Floyd D. Rose requested to see and read the '831 patent in
9 the presence of McCabe and Paul Reed Smith, a luthier, a named inventor on a number of U.S.
10 patents, and the founder and owner of PRS Guitars. At that time, McCabe informed Floyd D.
11 Rose of the October 31, 1990, priority date of the '831 patent and the broad scope of the macro-
12 tuner claims of the '831 patent.

13 61. FRM, Floyd D. Rose, DHM, APG, and/or Schaller commercially introduced the
14 accused infringing products two years later at the 2003 NAMM Show, which was held in
15 Anaheim, CA. McCabe witnessed one or more of the accused products placed on various
16 manufacturers' guitars at that trade show including Fender, the largest manufacturer of musical
17 products in the United States.

18 62. McCabe is informed and believes, and thereon alleges, that Floyd D. Rose
19 understands and believes that the accused products infringe one or more claims of the '831, '191,
20 '066, '094, and/or '841 patents, and hence wishes to take a license from or reach a reasonable and
21 fair settlement with McCabe. Nonetheless, Joseph F. Littenberg and John R. Nelson, and possibly
22 other attorneys at the law firm of Lerner, David, and/or APG who own a major portion of and/or
23 have a controlling interest in Floyd D. Rose's intellectual property rights have at one time or
24 another unreasonably and in bad faith thwarted any and all licensing or settlement negotiations
25 between McCabe and FRM, and McCabe and Floyd D. Rose.

26 63. McCabe is informed and believes, and thereon alleges, that Joseph F. Littenberg
27 and John R. Nelson, and possibly other attorneys at the law firm of Lerner, David, at one time or
28 another unreasonably and in bad faith thwarted any and all licensing or settlement negotiations

1 between McCabe and PWI, McCabe and Schaller, and McCabe and DHM.

2 64. McCabe is informed and believes, and thereon alleges, that Schaller or one or
3 more attorneys of Schaller understands and believes that the accused products infringe one or
4 more claims of the '831, '191, '066, '094, and/or '841 patents. An independent evaluation of one
5 or more claims of the '831, '191, '066, '094, and '841 patents was conducted on Schaller's
6 behalf, which concluded that those claims were valid and infringed by the Speedloader products.

7 65. Previous counsel of McCabe, ISR Law, discussed the accused products vis-à-vis
8 the claims of the '831, '191, and '066 patents with John Nelson, counsel for FRM and/or Floyd
9 D. Rose, at the January 2004 NAMM show in Anaheim, CA. McCabe's counsel followed up with
10 an email to John Nelson regarding FRG's and FRM's infringement of the '831, '191, and '066
11 patents. Attorneys from ISR Law, who were working on McCabe's behalf at the time, included
12 Michael G. Smith, a former patent examiner and registered patent attorney, and Ellis B. Rameriz,
13 a former supervisory patent examiner and registered patent attorney.

14 66. In May of 2005, after ISR Law dissolved and ended its relationship with McCabe,
15 McCabe attempted to contact John Nelson regarding Defendants' infringement of the '831 patent,
16 '191 patent, '066 patent, and the newly issued '094 patent, which McCabe felt would bring his
17 efforts for a resolution to fruition. John Nelson directed McCabe to speak directly with Floyd D.
18 Rose.

19 67. In January of 2006, while at the NAMM show in Anaheim, CA, McCabe
20 approached Floyd D. Rose to discuss his and his namesake companies' infringement of the '831,
21 '191, '066, and '094 patents. Floyd D. Rose directed McCabe to speak with John Nelson, who
22 subsequently refused to speak with McCabe and directed McCabe to speak to Floyd D. Rose.

23 68. On November 3, 2006, the U.S. International Trade Commission ("ITC")
24 instituted an investigation based on a complaint filed October 3, 2006, and supplemented October
25 24, 2006, by McCabe. *See In re Certain Stringed Musical Instruments and Components Thereof*,
26 Inv. No. 337-TA-586, 71 Fed. Reg. 64738 (Nov. 3, 2006). The complaint alleged violations of
27 section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the
28 United States, the sale for importation, and the sale within the United States after importation of

1 certain stringed musical instruments and components thereof by reason of infringement of one or
2 more of claims 1-6, 8, 9, and 11 of the '066 patent; claims 1-6 of the '831 patent; claims 1 and
3 14-22 of the '094 patent; and claims 1-3, 6-10, 14, 15, 23, 27, 28, and 32 of the '191 patent. The
4 complaint named as respondents FRG; Ibanez, Inc. (Hoshino) US ("Hoshino"); Vigier, Inc.
5 ("Vigier"); and Schaller Electronic GmbH. On May 7, 2007, Hoshino and Vigier were terminated
6 from the investigation on the basis of settlement agreements reached with McCabe.

7 69. On August 13, 2007, a one day evidentiary hearing in Inv. No. 337-TA-586 was
8 conducted at the ITC in Washington, DC before the Honorable Charles E. Bullock, administrative
9 law judge of the ITC. Counsel for McCabe appeared on behalf of McCabe, who testified at the
10 hearing. None of the respondents including FRM (d.b.a., Floyd Rose Guitars) and Schaller nor
11 their counsel attended. Floyd D. Rose and his counsel did not attend the hearing. Rhett Snotherly
12 and T. Spence Chubb, attorneys with the ITC's Office of Unfair Import Investigations ("OUII" or
13 "ITC Investigate Staff"), appeared at the hearing on behalf of the United States public. At the
14 hearing, McCabe withdrew his infringement allegations with respect to his '831 patent and '191
15 patent to streamline the investigation.

16 70. The ITC Investigative Staff participates as a full party representing the public
17 interest in the trial phase of investigations conducted under 19 U.S.C. § 1337. The ITC
18 Investigative Staff consists primarily of attorneys experienced in intellectual property.

19 71. The ITC Investigative Staff concluded during its independent fact investigation in
20 ITC Inv. No. 337-TA-586 that FRM and Schaller violated 19 U.S.C. § 1337. Specifically, the ITC
21 Investigative Staff stated that "guitars containing the Speedloader Tremolo Bridge System
22 infringe claims 8-9, and 11 of the '066 patent and claims 1, 14-18, and 20-22 of the '094 patent
23 and guitars containing the Speedloader Fixed Bridge System infringe claims 1, 14-18, and 22 of
24 the '094 patent" and that "Rose induces and contributorily infringes these claims of the asserted
25 patents with the sale of the Speedloader Tremolo and Fixed Bridge Systems as component parts."
26 The ITC Investigative Staff further concluded that "[n]one of the asserted claims have been
27 shown to be invalid or unenforceable." Copies of redacted versions of (1) the Commission
28 Investigative Staff's Proposed Findings of Fact and Conclusions of Law dated August 31, 2007,

1 (2) the Commission Investigative Staff's Posthearing Brief dated August 31, 2007, and (3) The
2 Commission Investigative Staff's Posthearing Reply Brief dated September 14, 2007, from Inv.
3 No. 337-TA-586, are attached hereto as Exhibits G, H, and I, respectively. These copies were
4 redacted by the ITC pursuant to a protective order entered in that investigation. The copies were
5 made public to McCabe by the ITC after the filing of McCabe's First Amended Complaint.

6 72. On December 3, 2007, Judge Bullock issued a final initial determination finding
7 no violation of section 337 of the Tariff Act in ITC Inv. No. 337-TA-586 on the ground that
8 complainant McCabe's activities did not satisfy the economic prong of the domestic industry
9 requirement, i.e., McCabe lacked the requisite standing. Accordingly, Judge Bullock did not
10 reach the questions of infringement, validity, and enforceability of the '066, '831, '094, and '191
11 patents. ITC Inv. No. 337-TA-586 was terminated by way of the Commission's Opinion on May
12 16, 2008.

13 73. On January 12, 2009, McCabe filed a complaint for patent infringement against
14 FRM and Hipshot Products, Inc. ("Hipshot") in the United States District Court for the Central
15 District of California (*Geoffrey McCabe v. Floyd Rose Marketing, Inc.*, Case No. 2:09-cv-00253-
16 RGK-E). In the complaint, McCabe accused FRM of infringing one or more claims of the '831,
17 '066, and '094 patents.

18 74. On March 2, 2009, McCabe submitted a first amended complaint for patent
19 infringement in Case No. 2:09-cv-00253-RGK-E. In the first amended complaint, McCabe
20 accused FRM of infringing one or more claims of the '831, '066, '094, and '841 patents.

21 75. On June 6, 2009, FRM was dismissed without prejudice from Case No. 2:09-cv-
22 00253-RGK-E pursuant to Fed. R. Civ. Pro. No. 41(a) in order for McCabe to efficiently pursue
23 his claims against Hipshot. At that time, McCabe was proceeding in the case pro se and planned
24 to file a subsequent and separate lawsuit against FRM.

25 76. On October 4, 2009, Hipshot Products, Inc. was dismissed from Case No. 2:09-cv-
26 00253-RGK-E upon Hipshot entering into a settlement agreement with McCabe for infringement
27 of the '094, '066, and '841 patents. The settlement included compensation for past infringement
28 of the '094, '066, and '841 patents, as well as a license under the '841 patent. Case No. 2:09-cv-

1 00253-RGK-E was closed on February 11, 2010.

2 77. McCabe licenses all of his active U.S. patents including the '831, '191, '066, '094,
3 and '841 patents. Licensees of those patents sell and distribute products worldwide through
4 online stores, retail distribution efforts, direct sales force, and third-party wholesalers, resellers,
5 and value added resellers.

6 78. McCabe is informed and believes, and thereon alleges, that at least 6,000 Floyd
7 Rose branded guitars incorporating a SpeedLoader Tremolo or SpeedLoader Fixed Bridge have
8 entered the commercial market since introduction in 2003. Defendants also make, use, sell, offer
9 for sale, import and/or export an unknown, but significant number of SpeedLoader Tremolo and
10 SpeedLoader Fixed Bridge devices apart from the aforesaid Floyd Rose guitars.

11 79. FRM, Rose, DHM, and/or APG made (and continue to make), sold (and continue
12 to sell), imported (and continue to import), exported (and continue to export), used (and continue
13 to use) and/or offered for sale (and continue to offer for sale) replacement guitar strings under the
14 brand name Floyd Rose SpeedLoader Guitar Strings for guitars equipped with the SpeedLoader
15 Tremolo or SpeedLoader Fixed Bridge. The basis for the demand for the aforesaid replacement
16 guitar strings is primarily the SpeedLoader Tremolo or SpeedLoader Fixed Bridge integrated in a
17 guitar. There is no market for the aforesaid replacement guitar strings separate from guitars
18 equipped with the SpeedLoader Tremolo or SpeedLoader Fixed Bridge. These strings are hence,
19 conveyed sales associated with the accused infringing products.

20 80. On March 29, 2010, with McCabe now satisfying standing requirements, the ITC
21 instituted a second investigation based on a complaint filed February 26, 2010, by McCabe. *See*
22 *In re Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-708, 75
23 Fed. Reg. 63 (March 29, 2010). The complaint alleged violations of section 337 of the Tariff Act
24 of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for
25 importation, and the sale within the United States after importation of certain stringed musical
26 instruments and components thereof by reason of infringement of one or more of claims 1-6, 8, 9,
27 and 11 of the '066 patent; claims 1-3, 5 and 6 of the '831 patent; claims 1, 14-18, and 20-22 of
28 the '094 patent; claims 1-3, 6, 14, 23, 27, and 32 of the '191 patent; and claims 6, 8-11, 27, 29,

1 and 31 of the '841 patent. The complaint named as respondents: FRG; FRM; Rose; DHM; PWI;
2 Lerner, David; and Hoshino.

3 81. Lerner, David was mysteriously dropped as a Respondent at the outset of Inv. No.
4 337-TA-708. No formal notice or order was issued by the ITC nor was McCabe given the
5 opportunity to object to such.

6 82. In late May of 2010, Respondents FRG, FRM, DHM, and PWI initiated and
7 agreed to a Consent Order whereby "Respondents shall not, except under consent or license from
8 Complainant or his assignees, sell for importation, import into the United States or sell in the
9 United States after importation, or knowingly aid, abet, encourage, participate in, or induce the
10 sale for importation, importation into the United States or sale in the United States after
11 importation, of the accused stringed musical instruments and components thereof, including
12 without limitation fulcrum tremolos marketed under the brand names Floyd Rose SpeedLoader
13 fulcrum tremolos, and guitars with Floyd Rose SpeedLoader tremolos including but not limited to
14 those guitars so equipped and marketed under the brand names Floyd Rose Discovery Series and
15 Floyd Rose Redmond Series guitars, that are alleged to infringe on or more of the following:
16 Claim 1 of Complainant's U.S. Patent No. 5,986,191 ("the '191 Patent"); Claim 8 of
17 Complainant's U.S. Patent No. 6,175,066 ("the '066 Patent"); and Claims 29 and 31 of
18 Complainant's U.S. Patent No. 7,470,841 ("the '841 Patent')." The Consent Order was granted
19 by Judge Bullock on June 4, 2010. ITC Inv. No. 337-TA-708 was terminated as to the remaining
20 Respondents by way of the Commission's Initial Determination dated September 7, 2010.

21 83. To this day, FRM, Floyd D. Rose, and APG offer for sale after importation
22 components of Floyd Rose SpeedLoader fulcrum tremolos. Floyd Rose Tremolo Kits & Parts are
23 currently advertised at www.floydrose.com and were currently advertised at www.apintl.com,
24 which is owned by APG. For instance, a "Floyd Rose Tremolo Kits & Parts" catalog is currently
25 available at www.floydrose.com. The catalog is attached hereto as Exhibit J. On page 7 of the
26 catalog, Floyd Rose Speedloader Bridges are advertised. Components of the Speedloader Bridges
27 are advertised throughout the catalog.

28 84. McCabe is informed and believes, and thereon alleges, that Floyd D. Rose, FRM,

1 and/or APG are violating the Consent Order issued in Inv. No. 337-TA-708 by selling
2 components of Floyd Rose Speedloader Bridges after importation.

3 **GENERAL ALLEGATIONS REGARDING FLOYD D. ROSE,**
4 **FRM, APG, AND LERNER, DAVID**

5 85. McCabe and Kahler International are informed and believe, and thereon allege,
6 that Lerner, David, attorneys for FRM, Floyd D. Rose, and APG (and possibly for DHM, PWI,
7 and Schaller at one time or another), have owned a controlling equity interest in FRM and/or
8 APG, and/or have managed the business affairs of Floyd D. Rose, FRM, and/or APG including
9 the licensing of Rose's purported intellectual property rights.

10 86. Historically, over decades, attorneys from Lerner, David have personally
11 negotiated and drafted numerous fraudulently induced intellectual property licensing agreements
12 on behalf of Lerner, David, Kramer, Floyd D. Rose, and/or FRM. On information and belief,
13 these numerous and fraudulently induced intellectual property licensing agreements, creating, in
14 effect, a fictitious monopoly have been personally negotiated by Joseph Littenberg and John
15 Nelson of Lerner, David. Joseph Littenberg has travelled to Europe, Asia, and around the United
16 States including California on numerous occasions to personally negotiate licenses on behalf of
17 Floyd D. Rose or Kramer.

18 87. For example, many licensing agreements negotiated and drafted by Lerner, David
19 on behalf of Lerner, David, Floyd D. Rose, Kramer, and FRM specify the receipt of royalties for
20 knowingly invalid and unenforceable patent claims including, but not limited to claims 16-19, 23,
21 24, and 26 of the '236 patent and claim 1 of the '461 patent. In 1986 and 1987, Lerner, David and
22 FRM, Floyd D. Rose, Kramer, and Papiccio, were put on notice during enforcement of the '236
23 and '461 patents that claims 16-19, 23, 24, and 26 of the '236 patent and claim 1 of the '461
24 patent were invalid as being anticipated under 35 U.S.C. § 102(a) and 102(b) by a prior art
25 "Micro-Frets" guitar (as well as Bunker's '108 patent or Moseley's '502 patent) and that further
26 enforcement of those claims would constitute, among other things, **acts of unfair competition**
27 **and antitrust violations.**

28 88. Nonetheless, Lerner, David and FRM, Floyd D. Rose, Kramer, and Papiccio went

1 on to later license those knowingly invalid and unenforceable claims time and time again to
2 unsuspecting licensees (including Defendants PWI and Schaller) who were not informed of the
3 invalid and unenforceable nature of those claims and, thereby, acting in an unlawful and
4 anticompetitive manner rendered the entire '236 patent and '461 patent (and possibly others)
5 unenforceable. Yet, Lerner, David paid United States Patent & Trademark Office maintenance
6 fees on the '236 patent and '461 patent to keep the appearance that those patents were
7 enforceable.

8 89. Another element of this multi-tiered strategy for expanding their fictitious
9 monopoly included licensing agreements negotiated and drafted by Lerner, David, on behalf of
10 Lerner, David, Floyd D. Rose, Kramer, and FRM that specify the receipt of royalties for
11 purported trade dress rights that do not exist. Lerner, David, FRM, Rose, and APG improperly
12 and deceitfully claim (and/or have claimed) trade dress rights associated with the look and
13 appearance of The Floyd Rose Original tremolo. Rose has never sought registration of his
14 purported trade dress rights with the United States Patent & Trademark Office. The Floyd Rose
15 Original tremolo was patented by way of, among other patents, the '661 patent, '236 patent, and
16 '461 patent. Every feature of The Floyd Rose Original tremolo is functional and essential to the
17 use or purpose of the tremolo, and thus cannot serve as a basis of trade dress rights. The look and
18 appearance of The Floyd Rose Original tremolo is not an ornamental, incidental, or arbitrary
19 aspect of the device.

20 90. On information and belief, another element of Lerner, David's multi-tiered
21 strategy included threats of "license or be sued" followed by a lawsuit for the recovery of royalty
22 payments that either broke the licensee or extracted even higher royalty rates.

23 91. Further, in order to further extend the fictitious monopoly, many licensing
24 agreements negotiated and drafted by Lerner, David on behalf of Lerner, David, Floyd D. Rose
25 and FRM specify the receipt of royalties for one or more fraudulently procured patents filed on
26 behalf of Floyd D. Rose in 1995 by Lerner, David. Floyd D. Rose has received thirteen or so
27 United States patents covering aspects of "convergence tuning" including, but not limited to U.S.
28 Patent No. 5,705,760 issued on January 6, 1998 ("the convergence tuning patents"), ten of which

1 were concurrently filed on June 7, 1995. A requirement for “convergence tuning” as stated in
2 these patents: “The term ‘convergence’ as used herein refers to the substantially simultaneous
3 occurrence of harmonic and pitch tuning of one or more strings for a guitar or other stringed
4 instruments. This means that the string will simultaneously be harmonically tuned and pitch tuned
5 upon performing a single adjustment which concurrently affects the string tension and the
6 distance between a pair of critical contact surfaces on the associated instrument.”

7 92. One or more, if not all, of the convergence tuning patents of Floyd D. Rose were
8 procured by fraud on the PTO. Particularly, Floyd D. Rose and his representatives at Lerner,
9 David represented to the PTO that convergence tuning was novel (or failed to disclose that
10 convergence tuning was not novel and instead taught in the prior art including Rose’s own prior
11 art patents). McCabe is informed and believes, and thereon alleges, the Floyd D. Rose and his
12 representatives at Lerner, David (as well as countless musicians, repair persons, and luthiers
13 skilled in the art) knew that “convergence tuning” like fine-tuning on a fulcrum tremolo was
14 practiced in the prior art at the time the convergence tuning patents were pending before the PTO.
15 The PTO would not have issued one or more of those “convergence tuning” patents had it known
16 that the purported novelty of the phrase “convergence tuning” was simply fabricated to describe
17 something already practiced in the prior art.

18 93. In his expert report submitted in ITC Inv. No. 337-TA-586 and dated April 30,
19 2007, which is attached here to as Exhibit K, Mr. Gary Kahler, in support of McCabe, opined that
20 “any ‘fine tuner’ knob on any fulcrum tremolo will meet this [convergence tuning] requirement
21 and the subject matter of these [convergence tuning] Rose patents without this requirement is
22 essentially the same as the McCabe subject matter in the October 31, 1990 parent application.”
23 “In other words, the subject matter of [McCabe's] '066 and '094 [patents] exploits this mechanical
24 fact, whereas, Floyd Rose seemingly successfully re-patented his own work, not just in one patent
25 but, in at least 10 patents, to distinguish Rose inventions over McCabe inventions in the Asserted
26 Patents.”

27 94. In the mid to late 1980s, Kramer held an exclusive license to all of Floyd D.
28 Rose’s intellectual property rights in existence at that time with the right to sublicense those rights

1 to other parties. At that time, Papiccio was Vice President for Kramer. Thereafter, Papiccio left
2 Kramer to work for Floyd D. Rose and/or FRM. To this day, Papiccio works for FRM, Floyd D.
3 Rose, and APG.

4 95. Pursuant to litigation knowingly asserting Rose patent rights for fine-tuning
5 outside the scope of the “fulcrum” species of tremolos initiated by Lerner, David as part of its
6 “license or be sued” strategy, American Precision Metal Works, Inc. entered into a cross-license
7 agreement with Kramer in April of 1987 for the Floyd D. Rose patents. That license agreement,
8 which is attached hereto as Exhibit L (redacted version subject to Court’s Order on Motions to
9 Seal, January 17, 2012 – D.E. 113), **does not include a monetary payment of any royalties**
10 under claims 16-19, 23, 24, and 26 of the ‘236 patent and claim 1 of the ‘461 patent and others
11 because **those claims were accepted by Kramer, Floyd D. Rose, Papiccio, and Lerner, David**
12 **to be invalid and unenforceable.** That license agreement was negotiated and drafted by Lerner,
13 David, who under the agreement was itself designated to directly receive (on behalf of Kramer)
14 all licensing payments made by American Precision. At the time of the litigation settlement,
15 Floyd D. Rose, Kramer, Lerner, David, and Papiccio knew Kramer was overextended financially
16 due to, among other things, inflated royalties to Floyd D. Rose, and would later default on its
17 obligations to American Precision. In 1989, Kramer declared bankruptcy after losing a royalty
18 lawsuit brought by Floyd D. Rose. McCabe and Kahler International are informed and believe,
19 and thereon allege, that Floyd D. Rose, Kramer, Lerner, David, and Papiccio negotiated the cross-
20 license in bad faith in order to eventually eliminate by financial exhaustion, American Precision
21 from the market.

22 96. Upon information and belief, any lawful basis for the enforcement of the American
23 Precision cross-license had been nullified when Floyd D. Rose, Kramer, Lerner, David, and/or
24 Papiccio licensed the knowingly invalid claims 16-19, 23, 24, and 26 of the ‘236 patent and claim
25 1 of the ‘461 patent to other parties beginning as early as June 1988, just two months after
26 conceding in the American Precision settlement/license. Yet, when Kramer failed to pay
27 American Precision and hence American Precision was unable to satisfy licensing payments to
28 Floyd D. Rose, Lerner, David on behalf of Floyd D. Rose sought and won a monetary judgment

1 (for unpaid royalties) against American Precision, resulting in American Precision's effective exit
2 from the tremolo market. American Precision was the only United States manufacturer of
3 tremolo devices competing with Floyd Rose tremolos, which resulted in Floyd D. Rose and FRM
4 having an actual monopoly over the entire United States market for any tremolo with fine tuners.

5 97. With its fictitious monopoly in place, Floyd D. Rose, Kramer, Lerner, David,
6 FRM, and Papiccio went on to later defraud numerous potential competitors into taking a license
7 to and pay royalties for the knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of
8 the '236 patent and claim 1 of the '461 patent, as well as trade dress rights that didn't exist, and/or
9 fraudulently procured convergence tuning patents. McCabe is informed and believes, and thereon
10 alleges, that in the late 1980s, this anticompetitive scheme yielded approximately \$200,000 per
11 month in royalties under licenses to Floyd D. Rose's purported intellectual property rights and
12 created an illusion of exclusivity and legitimate success that firmly established the Original Floyd
13 Rose tremolo as the only rightful device deserving patent rights for fine-tuners on **any** tremolo,
14 the unlawful enforcement of which created a powerfully successful "fear-based" deterrent to any
15 and all competitors that, in effect, demanded that for any manufacturer to offer such a "highly
16 regarded" product meant taking a license from Lerner David or risk long-term legal battles
17 complete with all their disadvantages, a fictitious position that garnered tens of license
18 agreements world-wide.

19 **Boo Heung (Korea) is Defrauded**

20 98. In January of 1989, Kramer (on behalf of Rose) licensed (and charged royalties
21 for) the knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and
22 claim 1 of the '461 patent to Boo Heung Industrial Co. of Korea ("Boo Heung"). That license
23 agreement, which is attached hereto as Exhibit M (redacted version subject to Court's Order on
24 Motions to Seal, January 17, 2012 – D.E. 113), was negotiated and drafted by Lerner, David, who
25 under the agreement was designated to receive (on behalf of Kramer) all licensing payments
26 made by Boo Heung.

27 99. McCabe is informed and believes, and thereon alleges, that Boo Heung was not
28 informed (during negotiations of the 1989 license) by either Lerner, David, Floyd D. Rose,

1 Kramer, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's '108 patent or
2 Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23, 24, and 26
3 of the '236 patent and claim 1 of the '461 patent.

4 100. Boo Heung would not have agreed in 1989 to license or pay royalties for claims
5 16-19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents)
6 had it been informed of the invalid and unenforceable nature of those claims.

7 101. On January 1, 1994, Floyd D. Rose licensed (and charged royalties for) the
8 knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and claim 1
9 of the '461 patent to Boo Heung. That license agreement, which is attached hereto as Exhibit N
10 (redacted version subject to Court's Order on Motions to Seal, January 17, 2012 – D.E. 113), was
11 negotiated and drafted by Lerner, David, who under the agreement was designated to receive (on
12 behalf of Rose) all licensing payments made by Boo Heung.

13 102. McCabe and Kahler International are informed and believe, and thereon allege,
14 that Boo Heung was not informed (during negotiations of the 1994 license) by either Lerner,
15 David, Floyd D. Rose, FRM, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's
16 '108 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19,
17 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent.

18 103. Boo Heung would not have agreed in 1994 to license or pay royalties for claims
19 16-19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents)
20 had it been informed of the invalid and unenforceable nature of those claims.

21 104. In January of 2001 and January of 2002, Floyd D. Rose entered into license
22 agreements again with Boo Heung for trade dress rights that did not exist. Those license
23 agreements were negotiated and drafted by Lerner, David, who under the agreement was
24 designated to receive (on behalf of Rose) all licensing payments made by Boo Heung.

25 105. Lerner, David, Floyd D. Rose, Kramer, FRM, and/or Papiccio defrauded Boo
26 Heung and fraudulently induced Boo Heung into, among other things, licensing knowingly
27 invalid and/or unenforceable intellectual property rights.
28

1 **Westheimer Corporation (U.S.) and Cort Musical are Defrauded**

2 106. In September of 1988, Kramer (on behalf of Rose) licensed (and charged royalties
3 for) the knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the ‘236 patent and
4 claim 1 of the ‘461 patent to Westheimer Corporation (“Westheimer”) of Illinois, United States
5 and Cort Musical Instruments Col, Ltd (“Cort Musical”). That license agreement, which is
6 attached hereto as Exhibit O (redacted version subject to Court’s Order on Motions to Seal,
7 January 17, 2012 – D.E. 113), was negotiated and drafted by Lerner, David, who under the
8 agreement was designated to receive (on behalf of Kramer) all licensing payments made by
9 Westheimer and/or Cort Musical.

10 107. McCabe and Kahler International are informed and believe, and thereon allege,
11 that Westheimer and Cort Musical were not informed (during negotiations of the 1988 license) by
12 either Lerner, David, Floyd D. Rose, Kramer, or Papiccio of the prior art Micro-Frets guitar (as
13 well as Bunker’s ‘108 patent or Moseley’s ‘502 patent) and the invalid and unenforceable nature
14 of claims 16-19, 23, 24, and 26 of the ‘236 patent and claim 1 of the ‘461 patent.

15 108. Westheimer and Cort Musical would not have agreed in 1988 to license or pay
16 royalties for claims 16-19, 23, 24, and 26 of the ‘236 patent and claim 1 of the ‘461 patent (or any
17 other Rose patents) had they been informed of the invalid and unenforceable nature of those
18 claims.

19 109. Lerner, David, Floyd D. Rose, Kramer, FRM, and/or Papiccio defrauded
20 Westheimer and Cort Musical, and fraudulently induced Westheimer and Cort Musical into
21 licensing knowingly invalid and/or unenforceable intellectual property rights.

22 **Cor-Tek Corporation (Korea) is Defrauded**

23 110. On July 1, 1999, Floyd D. Rose licensed (and charged royalties for) the knowingly
24 invalid and unenforceable claims 16-19, 23, 24, and 26 of the ‘236 patent and claim 1 of the ‘461
25 patent to Cor-Tek Corporation of Korea (“Cor-Tek”). That license agreement, which is attached
26 hereto as Exhibit P (redacted version subject to Court’s Order on Motions to Seal, January 17,
27 2012 – D.E. 113), was negotiated and drafted by Lerner, David, who under the agreement was
28 designated to receive (on behalf of Rose) all licensing payments made by Cor-Tek.

1 111. McCabe and Kahler International are informed and believe, and thereon allege,
2 that Cor-Tek was not informed (during negotiations of the 1999 license) by either Lerner, David,
3 Floyd D. Rose, FRM, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's '108
4 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
5 24, and 26 of the '236 patent and claim 1 of the '461 patent.

6 112. Cor-Tek would not have agreed in 1999 to license or pay royalties for claims 16-
7 19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents)
8 had it been informed of the invalid and unenforceable nature of those claims.

9 113. Lerner, David, Floyd D. Rose, FRM, and/or Papiccio defrauded Cor-Tek and
10 fraudulently induced Cor-Tek into licensing knowingly invalid and/or unenforceable intellectual
11 property rights.

12 **Fernandes (Japan) is Defrauded**

13 114. In September of 1987, Kramer and Floyd D. Rose licensed (and charged royalties
14 for) the knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and
15 claim 1 of the '461 patent to Fernandes Co. Ltd. of Japan ("Fernandes"). That license agreement,
16 which is attached hereto as Exhibit Q (redacted version subject to Court's Order on Motions to
17 Seal, January 17, 2012 – D.E. 113), was negotiated and drafted by Lerner, David, who under the
18 agreement was designated to receive (on behalf of Rose) all licensing payments made by
19 Fernandes.

20 115. McCabe and Kahler International are informed and believe, and thereon allege,
21 that Fernandes was not informed (during negotiations of the 1987 license) by either Lerner,
22 David, Floyd D. Rose, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's '108
23 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
24 24, and 26 of the '236 patent and claim 1 of the '461 patent.

25 116. Fernandes would not have agreed in 1987 to license or pay royalties for claims 16-
26 19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents)
27 had it been informed of the invalid and unenforceable nature of those claims.

28 117. Lerner, David, Floyd D. Rose, Kramer, FRM, and/or Papiccio defrauded

1 Fernandes and fraudulently induced Fernandes into licensing knowingly invalid and/or
2 unenforceable intellectual property rights.

3 **World Musical Instruments (Korea) is Defrauded**

4 118. On January 1, 1999, Floyd D. Rose licensed (and charged royalties for) the
5 knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and claim 1
6 of the '461 patent to World Musical Instruments Co., Ltd. of Korea ("World Musical
7 Instruments"). That license agreement, which is attached hereto as Exhibit R (redacted version
8 subject to Court's Order on Motions to Seal, January 17, 2012 – D.E. 113), was negotiated and
9 drafted by Lerner, David, who under the agreement was designated to receive (on behalf of Rose)
10 all licensing payments made by World Musical Instruments.

11 119. McCabe and Kahler International are informed and believe, and thereon allege,
12 that World Musical Instruments was not informed (during negotiations of the 1999 license) by
13 either Lerner, David, Floyd D. Rose, or Papiccio of the prior art Micro-Frets guitar (as well as
14 Bunker's '108 patent or Moseley's '502 patent) and the invalid and unenforceable nature of
15 claims 16-19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent.

16 120. World Musical Instruments would not have agreed in 1999 to license or pay
17 royalties for claims 16-19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any
18 other Rose patents) had it been informed of the invalid and unenforceable nature of those claims.

19 121. In November of 2000, entered into a license agreement with World Musical
20 Instruments for trade dress rights that did not exist. That license agreement was negotiated and
21 drafted by Lerner, David, who under the agreement was designated to receive (on behalf of Rose)
22 all licensing payments made by World Music Instruments.

23 122. On January 1, 2002, Floyd D. Rose licensed (and charged royalties for) the
24 knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and claim 1
25 of the '461 patent to World Musical Instruments. That license agreement, which is attached
26 hereto as Exhibit S (redacted version subject to Court's Order on Motions to Seal, January 17,
27 2012 – D.E. 113), was negotiated and drafted by Lerner, David, who under the agreement was
28 designated to receive (on behalf of Rose) all licensing payments made by World Musical

1 Instruments.

2 123. McCabe and Kahler International are informed and believe, and thereon allege,
3 that World Musical Instruments was not informed (during negotiations of the 2002 license) by
4 either Lerner, David, Floyd D. Rose, or Papiccio of the prior art Micro-Frets guitar (as well as
5 Bunker's '108 patent or Moseley's '502 patent) and the invalid and unenforceable nature of
6 claims 16-19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent.

7 124. World Musical Instruments would not have agreed in 2002 to license or pay
8 royalties for claims 16-19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any
9 other Rose patents) had it been informed of the invalid and unenforceable nature of those claims.

10 125. World Musical Instruments is or was a business partner of DHM.

11 126. Lerner, David, Floyd D. Rose, Kramer, FRM, and/or Papiccio defrauded World
12 Musical Instruments and fraudulently induced World Musical Instruments into licensing
13 knowingly invalid and/or unenforceable intellectual property rights.

14 **Gotoh (Japan) is Defrauded**

15 127. On January 1, 2002, Floyd D. Rose licensed (and charged royalties for) the
16 knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and claim 1
17 of the '461 patent to Gotoh Gut Co., Ltd. of Japan ("Gotoh"). That license agreement, which is
18 attached hereto as Exhibit T (redacted version subject to Court's Order on Motions to Seal,
19 January 17, 2012 – D.E. 113), was negotiated and drafted by Lerner, David, who under the
20 agreement was designated to receive (on behalf of Rose) all licensing payments made by Gotoh.

21 128. McCabe and Kahler International are informed and believe, and thereon allege,
22 that Gotoh was not informed (during negotiations of the 2002 license) by either Lerner, David,
23 Floyd D. Rose, FRM, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's '108
24 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
25 24, and 26 of the '236 patent and claim 1 of the '461 patent.

26 129. Gotoh would not have agreed in 2002 to license or pay royalties for claims 16-19,
27 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents) had it
28 been informed of the invalid and unenforceable nature of those claims.

1 130. Lerner, David, Floyd D. Rose, FRM, and/or Papiccio defrauded Gotoh and
2 fraudulently induced Gotoh into licensing knowingly invalid and/or unenforceable intellectual
3 property rights.

4 **Hoshino (Japan) is Defrauded**

5 131. On January 1, 2001, Floyd D. Rose licensed (and charged royalties for) the
6 knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the ‘236 patent and claim 1
7 of the ‘461 patent to Hoshino Gakki Co., Ltd. of Japan (“Hoshino”). That license agreement,
8 which is attached hereto as Exhibit U (redacted version subject to Court’s Order on Motions to
9 Seal, January 17, 2012 – D.E. 113), was negotiated and drafted by Lerner, David, who under the
10 agreement was designated to receive (on behalf of Rose) all licensing payments made by
11 Hoshino.

12 132. McCabe and Kahler International are informed and believe, and thereon allege,
13 that Hoshino was not informed (during negotiations of the 2001 license) by either Lerner, David,
14 Floyd D. Rose, FRM or Papiccio of the prior art Micro-Frets guitar (as well as Bunker’s ‘108
15 patent or Moseley’s ‘502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
16 24, and 26 of the ‘236 patent and claim 1 of the ‘461 patent.

17 133. Hoshino would not have agreed in 2001 to license or pay royalties for claims 16-
18 19, 23, 24, and 26 of the ‘236 patent and claim 1 of the ‘461 patent (or any other Rose patents)
19 had it been informed of the invalid and unenforceable nature of those claims.

20 134. Floyd D. Rose initiated a lawsuit in 2003 against Hoshino and its U.S. affiliate for
21 the alleged failure to pay royalties under the fraudulently induced 2001 license. *See Floyd D.*
22 *Rose v. Hoshino Gakki Co., Ltd.*, Case No. 2:03-cv-03801-HAA-GDH, District of New Jersey. In
23 that lawsuit, Floyd D. Rose was represented by John Nelson of Lerner, David. According to the
24 complaint filed by Floyd D. Rose, “[s]ince its inception, in about May 1985, the licensing
25 program, sometimes referred to as the Floyd Rose Tremolo Licensing Program, has generated
26 royalty income of over \$18 million.” “Since becoming a licensee in 1985, defendant Hoshino
27 Gakki has paid over \$3.5 million in royalties under the Floyd Rose Tremolo Licensing Program.”

28 135. McCabe and Kahler International are informed and believe, and thereon allege,

1 that Hoshino was not informed (during litigation or settlement of the 2003 lawsuit) by either
2 Lerner, David, Floyd D. Rose, FRM, or Papiccio of the prior art Micro-Frets guitar (as well as
3 Bunker's '108 patent or Moseley's '502 patent) and the invalid and unenforceable nature of
4 claims 16-19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent, as well as the
5 fraudulently induced nature of the 2001 license to Hoshino.

6 136. Lerner, David, Floyd D. Rose, FRM, and/or Papiccio defrauded Hoshino and
7 fraudulently induced Hoshino into licensing knowingly invalid and/or unenforceable intellectual
8 property rights.

9 **Takeuchi (Japan) is Defrauded**

10 137. On June 1, 1987, Kramer (on behalf of Rose) licensed (and charged royalties for)
11 the knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and
12 claim 1 of the '461 patent to Takeuchi Seisakusho Mfg. Co., Ltd. of Japan ("Takeuchi"). That
13 license agreement, which is attached hereto as Exhibit V (redacted version subject to Court's
14 Order on Motions to Seal, January 17, 2012 – D.E. 113), was negotiated and drafted by Lerner,
15 David, who under the agreement was designated to receive (on behalf of Kramer) all licensing
16 payments made by Takeuchi.

17 138. McCabe and Kahler International are informed and believe, and thereon allege,
18 that Takeuchi was not informed (during negotiations of the 1987 license) by either Lerner, David,
19 Floyd D. Rose, Kramer, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's '108
20 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
21 24, and 26 of the '236 patent and claim 1 of the '461 patent.

22 139. Takeuchi would not have agreed in 1987 to license or pay royalties for claims 16-
23 19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents)
24 had it been informed of the invalid and unenforceable nature of those claims.

25 140. On January 1, 2002, Floyd D. Rose licensed (and charged royalties for) the
26 knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and claim 1
27 of the '461 patent to Takeuchi). That license agreement, which is attached hereto as Exhibit W
28 (redacted version subject to Court's Order on Motions to Seal, January 17, 2012 – D.E. 113), was

1 negotiated and drafted by Lerner, David, who under the agreement was designated to receive (on
2 behalf of Rose) all licensing payments made by Takeuchi.

3 141. McCabe and Kahler International are informed and believe, and thereon allege,
4 that Takeuchi was not informed (during negotiations of the 2002 license) by either Lerner, David,
5 Floyd D. Rose, FRM, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's '108
6 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
7 24, and 26 of the '236 patent and claim 1 of the '461 patent.

8 142. Takeuchi would not have agreed in 2002 to license or pay royalties for claims 16-
9 19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents)
10 had it been informed of the invalid and unenforceable nature of those claims.

11 143. Lerner, David, Floyd D. Rose, FRM, and/or Papiccio defrauded Takeuchi and
12 fraudulently induced Takeuchi into licensing knowingly invalid and/or unenforceable intellectual
13 property rights.

14 **Ping Well is Defrauded**

15 144. On January 1, 1991, Floyd D. Rose licensed (and charged royalties for) the
16 knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and claim 1
17 of the '461 patent to Defendant PWI. That license agreement, which is attached hereto as Exhibit
18 X (redacted version subject to Court's Order on Motions to Seal, January 17, 2012 – D.E. 113),
19 was negotiated and drafted by Lerner, David, who under the agreement was designated to receive
20 (on behalf of Rose) all licensing payments made by PWI.

21 145. McCabe and Kahler International are informed and believe, and thereon allege,
22 that PWI was not informed (during negotiations of the 1991 license) by either Lerner, David,
23 Floyd D. Rose, FRM, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's '108
24 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
25 24, and 26 of the '236 patent and claim 1 of the '461 patent.

26 146. PWI would not have agreed in 1991 to license or pay royalties for claims 16-19,
27 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents) had it
28 been informed of the invalid and unenforceable nature of those claims.

1 147. On January 1, 2002, Floyd D. Rose licensed (and charged royalties for) the
2 knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and claim 1
3 of the '461 patent to PWI. That license agreement, which is attached hereto as Exhibit Y
4 (redacted version subject to Court's Order on Motions to Seal, January 17, 2012 – D.E. 113), was
5 negotiated and drafted by Lerner, David, who under the agreement was designated to receive (on
6 behalf of Rose) all licensing payments made by PWI.

7 148. McCabe and Kahler International are informed and believe, and thereon allege,
8 that PWI was not informed (during negotiations of the 2002 license) by either Lerner, David,
9 Floyd D. Rose, FRM, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's '108
10 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
11 24, and 26 of the '236 patent and claim 1 of the '461 patent.

12 149. PWI would not have agreed in 2002 to license or pay royalties for claims 16-19,
13 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents) had it
14 been informed of the invalid and unenforceable nature of those claims.

15 150. Lerner, David, Floyd D. Rose, FRM, and/or Papiccio defrauded PWI and
16 fraudulently induced PWI into licensing knowingly invalid and/or unenforceable intellectual
17 property rights.

18 151. PWI's interests in this lawsuit are adverse to those of Floyd D. Rose, FRM,
19 Lerner, David, and APG.

20 **Schaller is Defrauded**

21 152. On January 1, 1989, Kramer (on behalf of Rose) licensed (and charged royalties
22 for) all Rose patents including the knowingly invalid and unenforceable claims 16-19, 23, 24, and
23 26 of the '236 patent and claim 1 of the '461 patent to Schaller. That license agreement, which is
24 attached hereto as Exhibit Z (redacted version subject to Court's Order on Motions to Seal,
25 January 17, 2012 – D.E. 113), was negotiated and drafted by Lerner, David, who under the
26 agreement was designated to receive (on behalf of Kramer) all licensing payments made by
27 Schaller.

28 153. McCabe and Kahler International are informed and believe, and thereon allege,

1 that Schaller was not informed (during negotiations of the 1989 license) by either Lerner, David,
2 Floyd D. Rose, Kramer, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's '108
3 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
4 24, and 26 of the '236 patent and claim 1 of the '461 patent.

5 154. Schaller would not have agreed in 1989 to license or pay royalties for claims 16-
6 19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents)
7 had it been informed of the invalid and unenforceable nature of those claims.

8 155. On January 1, 1991, Floyd D. Rose licensed all his patents including the
9 knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the '236 patent and claim 1
10 of the '461 patent to Schaller. That license agreement, which is attached hereto as Exhibit AA
11 (redacted version subject to Court's Order on Motions to Seal, January 17, 2012 – D.E. 113), was
12 negotiated and drafted by Lerner, David, who under the agreement was designated to receive (on
13 behalf of Rose) all licensing payments made by Schaller.

14 156. McCabe and Kahler International are informed and believe, and thereon allege,
15 that Schaller was not informed (during negotiations of the 1991 license) by either Lerner, David,
16 Floyd D. Rose, FRM, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker's '108
17 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
18 24, and 26 of the '236 patent and claim 1 of the '461 patent.

19 157. Schaller would not have agreed in 1991 to license or pay royalties for claims 16-
20 19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent (or any other Rose patents)
21 had it been informed of the invalid and unenforceable nature of those claims.

22 158. Lerner, David, Floyd D. Rose, Kramer, FRM, and/or Papiccio defrauded Schaller
23 and fraudulently induced Schaller into licensing knowingly invalid and/or unenforceable
24 intellectual property rights.

25 159. Schaller's interests in this lawsuit are adverse to those of Floyd D. Rose, FRM,
26 Lerner, David, and APG.

27 **Davitt & Hanser (DHM) is Defrauded**

28 160. On July 1, 2004, Floyd D. Rose entered into a license agreement with DHM for

1 trade dress rights that did not exist and the fraudulently procured convergence tuning patents.
2 That license agreement, which is attached hereto as Exhibit AB (redacted version subject to
3 Court’s Order on Motions to Seal, January 17, 2012 – D.E. 113), was negotiated and drafted by
4 Lerner, David, who under the agreement was designated to receive (on behalf of Rose) all
5 licensing payments made by DHM.

6 161. Under the 2004 license to DHM, Floyd D. Rose assigned to DHM his rights and
7 obligations in any and all existing licenses that Rose had previously granted including the
8 fraudulently induced licenses to (i) Boo Heung, (ii) Cor-Tek, (iii) Gotoh, (iv) Hoshino, (v) PWI,
9 (vi) Takeuchi, (vii) World Music Instruments, and (vii) Schaller.

10 162. Under the 2004 license to DHM, Floyd D. Rose received at least **\$3.5 million** in
11 compensation, of which Lerner, David received a significant portion thereof.

12 163. Under the 2004 license to DHM, DHM agreed to “pay all health insurance costs
13 for Floyd Rose and his spouse, under the current or comparable health insurance program in
14 which Rose and his spouse are enrolled, and to also pay the salary and health expenses for John
15 Thomas Riboloff for one (1) year or so long as long Mr. Riboloff (“Riboloff”) remains an
16 employee, whichever is longer....” Mr. Riboloff is a designated co-inventor of Floyd D. Rose in
17 U.S. Patent No. 7,045,693.

18 164. McCabe and Kahler International are informed and believe, and thereon allege,
19 that DHM was not informed (during negotiations of the 2004 license) by either Lerner, David,
20 Floyd D. Rose, FRM, or Papiccio of the prior art Micro-Frets guitar (as well as Bunker’s ‘108
21 patent or Moseley’s ‘502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
22 24, and 26 of the ‘236 patent and claim 1 of the ‘461 patent that was established in 1986.

23 165. DHM would likely not have agreed in 2004 to license or pay royalties for Rose’s
24 intellectual property rights had it known of the fraud committed on (i) Boo Heung, (ii) Cor-Tek,
25 (iii) Gotoh, (iv) Hoshino, (v) PWI, (vi) Takeuchi, (vii) World Music Instruments, and (vii)
26 Schaller, the unjustified nature of Rose’s trade dress rights, and/or the fraudulent nature of one or
27 more of Rose’s convergence tuning patents.

28 166. Lerner, David, Floyd D. Rose, FRM, and/or Papiccio defrauded DHM and

1 fraudulently induced DHM into licensing knowingly invalid and/or unenforceable intellectual
2 property rights.

3 167. DHM's interests in this lawsuit are adverse to those of Floyd D. Rose, FRM,
4 Lerner, David, and APG.

5 168. McCabe and Kahler International are informed and believe, and thereon allege,
6 that Lerner, David, Floyd D. Rose, Kramer, and/or FRM have entered into numerous other
7 licenses negotiated and drafted by Lerner, David for the knowingly invalid and unenforceable
8 claims 16-19, 23, 24, and 26 of the '236 patent and claim 1 of the '461 patent, and/or trade dress
9 rights that do not exist.

10 169. On June 1, 1989, Kramer entered into an agreement with Schaller whereby royalty
11 payments from Schaller to Kramer shall be reduced pursuant to a separate agreement between and
12 among Kramer, Floyd D. Rose, and Lerner, David such that "the total royalty payments to be
13 made by Schaller are to be divided between only Floyd D. Rose and the law firm of Lerner,
14 David. A copy of that agreement is attached hereto as Exhibit AC (redacted version subject to
15 Court's Order on Motions to Seal, January 17, 2012 – D.E. 113).

16 170. Lerner, David was a signatory to the Patent and Trademark License Agreement
17 between Floyd D. Rose and DHM effective July 1, 2004 (Exhibit AB), establishing that during
18 the period of 2004-2009: (1) Lerner, David was the sole administrator of the "Floyd Rose
19 Tremolo Licensing Program" and royalty payments received from licensees under such were
20 made payable directly to Lerner, David; (2) Floyd. D. Rose assigned his rights (including the
21 receipt of royalty payments) in licenses existing at the time to DHM and that those licenses
22 included licenses granted by Floyd. D. Rose to the following licensees: (i) Boo Heung Precision
23 Machinery Co., Ltd., (ii) Cor-Tek Corporation, (iii) Floyd Rose Marketing, Inc.; (iv) Gotoh Gut
24 Co., Ltd., (v) Hoshino Gakki Co., Ltd., (vi) Ping Well, (vii) Takeuchi Seisakusho Mfg. Co., Ltd.,
25 (viii) World Musical Instruments Co., Ltd., (ix) Schaller, (x) Sung-II Hitech Co., Ltd., (xi)
26 Nippon Gakki Co., Ltd., and (xii) Dean Markley Strings, Inc.; (3) Lerner, David withheld 1/3 of
27 all royalty payments received from licensees (excluding the case of Hoshino, where Lerner,
28 David withheld 1/2 of the royalty payments); and (4) after taking its contingency cut, Lerner,

1 David distributed the remaining royalty funds to DHM, who was then obligated to pay 80% of
2 such to Floyd D. Rose. Accordingly, Lerner, David had a profound and vested pecuniary interest
3 in the outcome of the Floyd Rose Tremolo Licensing Program.

4 171. On January 1, 2005, DHM entered into a “Patent and Trade Dress License
5 Agreement” with Schaller specifying that all royalty payments and notices pursuant to that
6 agreement shall be made directly to Lerner, David. A copy of that agreement is attached hereto as
7 Exhibit AD (redacted version subject to Court’s Order on Motions to Seal, January 17, 2012 –
8 D.E. 113).

9 **FIRST CLAIM FOR RELIEF**

10 **(Infringement of U.S. Patent No. 5,965,831)**

11 **(McCabe Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

12 172. McCabe repeats, realleges, and incorporates by reference the allegations set forth
13 in paragraphs 1 through 171 of this Complaint.

14 173. This is a claim for patent infringement and arises under the Patent Laws of the
15 United States, Title 35 of the United States Code.

16 174. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller (collectively
17 “Defendants”), through their agents, officers, directors, employees and servants, have been and
18 are currently willfully and intentionally infringing the ‘831 patent by making, using, selling,
19 importing, exporting, and/or offering to sell products such as, but not limited to the aforesaid
20 accused products, that are covered by at least one claim of the ‘831 patent. Defendants’ acts
21 constitute infringement of the ‘831 patent in violation of 35 U.S.C. § 271.

22 175. Defendants’ products such as, but not limited to the SpeedLoader Tremolo and the
23 SpeedLoader Fixed Bridge, and guitars equipped with the SpeedLoader Tremolo or SpeedLoader
24 Fixed Bridge satisfy, either literally or under the doctrine of equivalents, each and every element
25 recited in one or more claims of the ‘831 patent.

26 176. The 2004 license between Floyd D. Rose and DHM expressly acknowledges
27 McCabe’s claim of infringement in view of McCabe’s ‘831 patent.

28 177. Defendants’ infringement will continue unless enjoined by this Court.

1 178. Defendants have derived and received, and will continue to derive and receive,
2 gains, profits and advantages from the aforesaid acts of infringement in an amount that is not
3 presently known to McCabe. By reason of the aforesaid acts of infringement, McCabe has been
4 damaged and is entitled to monetary relief in an amount to be determined at trial.

5 179. Because of the aforesaid infringing acts, McCabe has suffered and continues to
6 suffer great and irreparable injury, for which McCabe has no adequate remedy at law.

7 180. Under the doctrine of convoyed sales, applicable Defendants are liable for the
8 manufacture, use, and/or sale of Speedloader guitar strings. The Speedloader guitar strings and
9 accused infringing products form a guitar. The Speedloader guitar strings are not usable on any
10 product other than the infringing products.

11 **SECOND CLAIM FOR RELIEF**

12 **(Infringement of U.S. Patent No. 7,470,841)**

13 **(McCabe Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

14 181. McCabe repeats, realleges, and incorporates by reference the allegations set forth
15 in paragraphs 1 through 180 of this Complaint.

16 182. This is a claim for patent infringement and arises under the Patent Laws of the
17 United States, Title 35 of the United States Code.

18 183. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller (collectively
19 “Defendants”), through their agents, officers, directors, employees and servants, have been and
20 are currently willfully and intentionally infringing the ‘841 patent by making, using, selling,
21 importing, exporting, and/or offering to sell products such as, but not limited to the aforesaid
22 accused products, that are covered by at least one claim of the ‘841 patent. Defendants’ acts
23 constitute infringement of the ‘841 patent in violation of 35 U.S.C. § 271.

24 184. Defendants’ products such as, but not limited to the SpeedLoader Tremolo and the
25 SpeedLoader Fixed Bridge, and guitars equipped with the SpeedLoader Tremolo or SpeedLoader
26 Fixed Bridge satisfy, either literally or under the doctrine of equivalents, each and every element
27 recited in one or more claims of the ‘841 patent.

28 185. Defendants’ infringement will continue unless enjoined by this Court.

1 186. Defendants have derived and received, and will continue to derive and receive,
2 gains, profits and advantages from the aforesaid acts of infringement in an amount that is not
3 presently known to McCabe. By reason of the aforesaid acts of infringement, McCabe has been
4 damaged and is entitled to monetary relief in an amount to be determined at trial.

5 187. Because of the aforesaid infringing acts, McCabe has suffered and continues to
6 suffer great and irreparable injury, for which McCabe has no adequate remedy at law.

7 188. Under the doctrine of convoyed sales, applicable Defendants are liable for the
8 manufacture, use, and/or sale of Speedloader guitar strings. The Speedloader guitar strings and
9 accused infringing products form a guitar. The Speedloader guitar strings are not usable on any
10 product other than the infringing products.

11 **THIRD CLAIM FOR RELIEF**

12 **(Infringement of U.S. Patent No. 6,175,066)**

13 **(McCabe Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

14 189. McCabe repeats, realleges, and incorporates by reference the allegations set forth
15 in paragraphs 1 through 188 of this Complaint.

16 190. This is a claim for patent infringement and arises under the Patent Laws of the
17 United States, Title 35 of the United States Code.

18 191. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller (collectively
19 “Defendants”), through their agents, officers, directors, employees and servants, have been and
20 are currently willfully and intentionally infringing the ‘066 patent by making, using, selling,
21 importing, exporting, and/or offering to sell products such as, but not limited to the aforesaid
22 accused products, that are covered by at least one claim of the ‘066 patent. Defendants’ acts
23 constitute infringement of the ‘066 patent in violation of 35 U.S.C. § 271.

24 192. Defendants’ products such as, but not limited to the SpeedLoader Tremolo and the
25 SpeedLoader Fixed Bridge, and guitars equipped with the SpeedLoader Tremolo or SpeedLoader
26 Fixed Bridge satisfy, either literally or under the doctrine of equivalents, each and every element
27 recited in one or more claims of the ‘066 patent.

28 193. Defendants’ infringement will continue unless enjoined by this Court.

1 194. Defendants have derived and received, and will continue to derive and receive,
2 gains, profits and advantages from the aforesaid acts of infringement in an amount that is not
3 presently known to McCabe. By reason of the aforesaid acts of infringement, McCabe has been
4 damaged and is entitled to monetary relief in an amount to be determined at trial.

5 195. Because of the aforesaid infringing acts, McCabe has suffered and continues to
6 suffer great and irreparable injury, for which McCabe has no adequate remedy at law.

7 196. The '066 patent covers an enlarged bridge element on a tremolo whereas the '831,
8 '841, '094, and '191 patents cover variations of macro-tuners. Infringement of the '066 patent is
9 not related to infringement of the '831, '841, '094, and '191 patents. Accordingly, applicable
10 Defendants are liable to McCabe for a reasonable royalty under the '066 patent in addition to a
11 reasonable royalty under one or more of the '831, '841, '094, and '191 patents.

12 **FOURTH CLAIM FOR RELIEF**

13 **(Infringement of U.S. Patent No. 6,891,094)**

14 **(McCabe Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

15 197. McCabe repeats, realleges, and incorporates by reference the allegations set forth
16 in paragraphs 1 through 196 of this Complaint.

17 198. This is a claim for patent infringement and arises under the Patent Laws of the
18 United States, Title 35 of the United States Code.

19 199. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller (collectively
20 "Defendants"), through their agents, officers, directors, employees and servants, have been and
21 are currently willfully and intentionally infringing the '094 patent by making, using, selling,
22 importing, exporting, and/or offering to sell products such as, but not limited to the aforesaid
23 accused products, that are covered by at least one claim of the '094 patent. Defendants' acts
24 constitute infringement of the '094 patent in violation of 35 U.S.C. § 271.

25 200. Defendants' products such as, but not limited to the SpeedLoader Tremolo and the
26 SpeedLoader Fixed Bridge, and guitars equipped with the SpeedLoader Tremolo or SpeedLoader
27 Fixed Bridge satisfy, either literally or under the doctrine of equivalents, each and every element
28 recited in one or more claims of the '094 patent.

1 201. Defendants' infringement will continue unless enjoined by this Court.

2 202. Defendants have derived and received, and will continue to derive and receive,
3 gains, profits and advantages from the aforesaid acts of infringement in an amount that is not
4 presently known to McCabe. By reason of the aforesaid acts of infringement, McCabe has been
5 damaged and is entitled to monetary relief in an amount to be determined at trial.

6 203. Because of the aforesaid infringing acts, McCabe has suffered and continues to
7 suffer great and irreparable injury, for which McCabe has no adequate remedy at law.

8 204. Under the doctrine of convoyed sales, applicable Defendants are liable for the
9 manufacture, use, and/or sale of Speedloader guitar strings. The Speedloader guitar strings and
10 accused infringing products form a guitar. The Speedloader guitar strings are not usable on any
11 product other than the infringing products.

12 **FIFTH CLAIM FOR RELIEF**

13 **(Infringement of U.S. Patent No. 5,986,191)**

14 **(McCabe Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

15 205. McCabe repeats, realleges, and incorporates by reference the allegations set forth
16 in paragraphs 1 through 204 of this Complaint.

17 206. This is a claim for patent infringement and arises under the Patent Laws of the
18 United States, Title 35 of the United States Code.

19 207. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller (collectively
20 "Defendants"), through their agents, officers, directors, employees and servants, have been and
21 are currently willfully and intentionally infringing the '191 patent by making, using, selling,
22 importing, exporting, and/or offering to sell products such as, but not limited to the aforesaid
23 accused products, that are covered by at least one claim of the '191 patent. Defendants' acts
24 constitute infringement of the '191 patent in violation of 35 U.S.C. § 271.

25 208. Defendants' products such as, but not limited to the SpeedLoader Tremolo and the
26 SpeedLoader Fixed Bridge, and guitars equipped with the SpeedLoader Tremolo or SpeedLoader
27 Fixed Bridge satisfy, either literally or under the doctrine of equivalents, each and every element
28 recited in one or more claims of the '191 patent.

1 209. Defendants' infringement will continue unless enjoined by this Court.

2 210. Defendants have derived and received, and will continue to derive and receive,
3 gains, profits and advantages from the aforesaid acts of infringement in an amount that is not
4 presently known to McCabe. By reason of the aforesaid acts of infringement, McCabe has been
5 damaged and is entitled to monetary relief in an amount to be determined at trial.

6 211. Because of the aforesaid infringing acts, McCabe has suffered and continues to
7 suffer great and irreparable injury, for which McCabe has no adequate remedy at law.

8 212. Under the doctrine of convoyed sales, applicable Defendants are liable for the
9 manufacture, use, and/or sale of Speedloader guitar strings. The Speedloader guitar strings and
10 accused infringing products form a guitar. The Speedloader guitar strings are not usable on any
11 product other than the infringing products.

12 **SIXTH CLAIM FOR RELIEF**

13 **(False Marking)**

14 **(McCabe Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

15 213. McCabe repeats, realleges, and incorporates by reference the allegations set forth
16 in paragraphs 1 through 212 of this Complaint.

17 214. This claim is for false patent marking arising under 35 U.S.C. § 292 as amended
18 by the Leahy-Smith America Invents Act enacted on September 16, 2011. Leahy-Smith America
19 Invents Act, Pub. L. No. 112-29, sec. 16(b), § 292, 125 Stat. 284, 329 (2011).

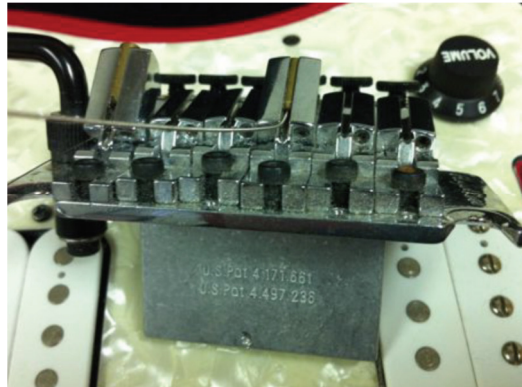
20 215. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller violated and continue to
21 violate 35 U.S.C. § 292, by marking and continuing to mark unpatented articles including the
22 SpeedLoader Tremolo and the SpeedLoader Fixed Bridge, and guitars equipped with the
23 SpeedLoader Tremolo or SpeedLoader Fixed Bridge ("the SpeedLoader products") and spring
24 blocks with expired patent numbers that do not cover (nor ever did cover) those products, with an
25 intent to deceive the public.

26 216. The SpeedLoader Products were commercially introduced in 2003 at the January
27 NAMM Show held in Anaheim, California.

28 217. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller have marked unpatented

1 articles including, but not limited to the SpeedLoader products with U.S. Patent No. 4,171,661,
2 which expired on January 3, 1997, and/or U.S. Patent No. 4,497,236, which expired on March 15,
3 2002.

4 218. For example, the Speedloader Tremolo shown below, which is manufactured by
5 PWI and obtained by McCabe in 2007, is marked with the expired '661 and '236 patents.



13 219. The '661 patent claims matter that covers the clamping devices included with The
14 Floyd Rose Original tremolo developed in the late 1970s. The '661 patent claims matter that does
15 not cover the purported improvements found in the SpeedLoader Tremolo and the SpeedLoader
16 Fixed Bridge, and guitars equipped with the SpeedLoader Tremolo or SpeedLoader Fixed Bridge.

17 220. The '236 patent claims matter that covers the fine tuners on The Floyd Rose
18 Original tremolo developed in the early 1980s. The '236 patent claims subject matter that does
19 not cover the purported improvements found in the SpeedLoader Tremolo and the SpeedLoader
20 Fixed Bridge, and guitars equipped with the SpeedLoader Tremolo or SpeedLoader Fixed Bridge.

21 221. Since 1986, FRM, Floyd D. Rose, Papiccio, and Lerner, David have known of the
22 invalid and unenforceable nature of the '236 patent. Nonetheless, FRM, Floyd D. Rose, DHM,
23 PWI, APG, and Schaller have marked numerous products including the SpeedLoader products
24 and variations of the Original Floyd Rose Tremolo with the invalid and unenforceable '236
25 patent.

26 222. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller did not and do not have a
27 reasonable belief that any of the marked products were properly marked.

28 223. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller could have marked the

1 SpeedLoader products with one or more of Rose's convergence tuning patents, but did not do so
2 in order to conceal the fraudulent nature of the convergence tuning patents, and to mislead
3 licensees and potential licensees into erroneously believing they were licensing the older, and
4 more well-known '661 and '236 patents. On information and belief, no products have ever been
5 marked with the convergence tuning patents.

6 224. The SpeedLoader products were marked with the expired '661 patent and/or
7 expired and invalid '236 patent by FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller (with
8 Lerner, David's knowledge and/or consent) in order to deceive the public into believing that those
9 products were covered under the '661 patent and '236 patent when in fact they were not.

10 225. The SpeedLoader products were marked with the expired '661 patent and/or
11 expired and invalid '236 patent by FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller (with
12 Lerner, David's knowledge and/or consent) in order to deceive the public into believing the '661
13 patent and the '236 were enforceable and valid when in fact they were unenforceable and/or
14 invalid.

15 226. The SpeedLoader products have been manufactured in whole or in part by at least
16 PWI and Schaller under the direct control of Floyd D. Rose, Papiccio, DHM, and FRM; PWI and
17 Schaller each having intentionally marked those products with the expired '661 and '236 patent
18 numbers.

19 227. The SpeedLoader products were marked with the expired '661 patent and/or
20 expired '236 patent rather than the unexpired convergence tuning patents in an attempt to
21 maintain the fictitious monopoly created by the historic unlawful licensing revenue received by
22 Floyd D. Rose, FRM, Lerner, David, and Papiccio under the '661 patent and '236 patent, and to
23 counter diminishing brand loyalty to Rose branded products due to a move to low quality
24 components manufactured in Asia.

25 228. Lerner, David, FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller all knew the
26 '661 patent and '236 patent were expired at the time when they marked products with the '661
27 patent and/or '236 patent.

28 229. Floyd D. Rose, FRM, DHM, PWI, APG, and/or Schaller personally inspected a

1 prototype tremolo (including patent number markings) before bulk quantities are manufactured.

2 230. Floyd D. Rose’s approval of prototype tremolos (including patent number
3 markings) is required before any manufacturer can proceed with manufacturing bulk quantities.

4 231. Lerner, David, Floyd D. Rose and DHM were acutely aware that Rose’s ‘236
5 patent and ‘661 patent had expired when they entered into a patent and trademark license
6 agreement on July 1, 2004 (Exhibit AB, “the Rose-DHM agreement”). The Rose-DHM
7 agreement, which was drafted by Lerner, David, explicitly acknowledges the expiration of the
8 ‘236 patent and the ‘661 patent.

9 232. Pursuant to the Rose-DHM agreement, DHM agreed to purchase from Rose “all
10 such tooling currently owned by Rose and used by Schaller and/or Ping Well for producing Floyd
11 Rose Speedloader Bridges” and “any new tooling required in the future for producing
12 Speedloader Bridges” – the very same tooling used to mark the SpeedLoader products with
13 Rose’s expired ‘236 patent and ‘661 patent numbers. The Rose-DHM agreement also placed strict
14 obligations on DHM to ensure “quality control” and “patent marking” compliance in the
15 manufacture of Rose branded devices.

16 233. Article VIII of the Rose-DHM agreement is devoted to a section entitled “Patent
17 Marking” that states:

18 [DHM] shall mark all LICENSED PRODUCTS manufactured, sold, or otherwise
19 transferred pursuant to this AGREEMENT in accordance with the statutes of the
20 Unites [*sic*] States or other relevant jurisdictions relating to the marking of
21 patented articles. Such notice shall be in the form as may be prescribed from time
22 to time by ROSE in order to be certain that the notice is properly updated to reflect
the current status of the LICENSED PATENTS, and may include the notation that the
goods are “Licensed Under Floyd Rose Patents”, or “Licensed under Floyd Rose
Pats.” or “Licensed Under Patent No. (listing applicable patents).”

23 234. DHM breached Article VIII by marking, among other things, the SpeedLoader
24 products with expired patent numbers.

25 235. On information and belief, DHM breached Article VIII with the consent of Floyd
26 D. Rose, Papiccio, FRM, and/or Lerner, David.

27 236. Lerner, David, Schaller, and DHM were acutely aware that Rose’s ‘236 patent and
28

1 '661 patent had expired when they entered into a patent and trade dress license agreement on
2 January 1, 2005 (Exhibit AD, "the Schaller-DHM agreement"). The Schaller-DHM agreement,
3 which was drafted by Lerner, David, explicitly acknowledges the expiration of the '236 patent
4 and the '661 patent.

5 237. Article V of the Schaller-DHM agreement is devoted to a section entitled "Patent
6 Marking" that states:

7 Licensee shall mark all LICENSED PATENT PRODUCTS manufactured, sold, or
8 otherwise transferred pursuant to this PATENT AND TRADE DRESS LICENSE
9 AGREEMENT in accordance with the statutes of the United States relating to the
10 marking of patented articles. In the event the patent notice is made on a tremolo
11 unit incorporated into a guitar, the notice can be marked in a manner to be either
12 identifiable or unidentifiable from the outside of the guitar body. Such notice shall
13 be in the form as may be prescribed from time to time by LICENSOR in order to be
14 certain that the notice is properly updated to reflect the current status of the
15 LICENSED PATENTS. For LICENSED PATENT PRODUCTS, the required notice may
16 include the notation that the goods are "Licensed Under Floyd Rose Patents", or
17 "Mfg. under Floyd Rose Patents," or "Mfg. under Floyd Rose Pats." or "Licensed
18 under Floyd Rose Pats." or "Licensed Under Patent No. (listing applicable
19 patents)"; provided, however, that in each of the foregoing sets of notations, or in
20 any other patent notation, the words of the name "Floyd Rose" shall not be more
21 prominent than any of the other words in such notice."

22 238. Schaller breached Article V by marking, among other things, the SpeedLoader
23 products with expired patent numbers.

24 239. On information and belief, Schaller breached Article V with the consent of Floyd
25 D. Rose, Papiccio, DHM, and/or Lerner, David.

26 240. Lerner, David, Floyd D. Rose, and PWI were acutely aware that Rose's '661
27 patent was expired and Rose's '236 patent would soon expire months later when they entered into
28 a patent license agreement on January 1, 2002 (Exhibit Y, "the Rose-PWI agreement"). The
Rose-PWI agreement, which was drafted by Lerner, David, explicitly acknowledges the
expiration dates of the '236 patent and the '661 patent.

241. Article V of the Rose-PWI agreement is devoted to a section entitled "Patent
Marking" that states:

LICENSEE shall mark all LICENSED PRODUCTS manufactured, sold, or otherwise
transferred under this PATENT LICENSE AGREEMENT in accordance with the

1 Statutes of the United States relating to the marking of patented articles. In the
2 event the patent notice is made on a tremolo unit incorporated into a guitar, the
3 notice can be marked in a manner to be either identifiable or unidentifiable from
4 the outside of the guitar body. Such notice shall be in the form as may be
5 prescribed from time to time by LICENSOR in order to be certain that the notice is
6 properly updated to reflect the current status of the LICENSED PATENTS. For
7 CATEGORY A1 LICENSED PRODUCTS, the required notice may include the notation
8 that the goods are “Licensed Under Certain Floyd Rose Patents”, or “Licensed
9 Under Certain Floyd Rose Pats.” or “Licensed Under Certain Claims of U.S.
10 Patent Nos. 4,497,236 and 4,549,461”; and for CATEGORY A2 LICENSED
11 PRODUCTS and CATEGORY B LICENSED PRODUCTS, the required notice may
12 include the notation that the goods are “Licensed Under Floyd Rose Patents”, or
13 “Mfg. under Floyd Rose Patents,” or “Mfg. under Floyd Rose Pats.” or “Licensed
14 under Floyd Rose Pats.” or “Licensed Under Patent No. (listing applicable
15 patents)”; provided, however, that in each of the foregoing sets of notations, or in
16 any other patent notation, the words of the name “Floyd Rose” shall not be more
17 prominent than any of the other words in such notice.”

18 242. In the Rose-PWI agreement, “Category A1 Licensed Products” refer to the
19 knowingly invalid and unenforceable claims 16-19, 23, 24, and 26 of the ‘236 patent and claim 1
20 of the ‘461 patent.

21 243. PWI breached Article V by marking, among other things, the SpeedLoader
22 products with expired patent numbers.

23 244. On information and belief, PWI breached Article V with the consent of Floyd D.
24 Rose, Papiccio, and/or Lerner, David.

25 245. Floyd D. Rose personally authorizes, directs, or actively participates in the false
26 marking actions complained of herein.

27 246. Papiccio personally authorizes, directs, or actively participates in the false marking
28 actions complained of herein.

29 247. PWI, Schaller, and DHM each authorize, direct, or actively participate in the false
30 marking actions complained of herein.

31 248. Floyd D. Rose has licensed his ‘661 patent and/or ‘236 patent as an individual and
32 not as FRM.

33 249. Since January 3, 1997, FRM, DHM, PWI, Schaller, and Floyd D. Rose have
34 marked (with Lerner, David’s knowledge and/or consent) The Floyd Rose Original tremolo with
35 expired patent numbers, e.g., the ‘661 patent and later adding the ‘236 patent, in an attempt to

1 unfairly stifle competition and to squeeze revenue from a dying product line.

2 250. In the 2007 discovery phase of ITC Investigation No. TA-586, an associate of
3 Lerner, David – Mitchell Mehlman – signed and submitted a discovery response on behalf of
4 Respondent Floyd D. Rose, acknowledging McCabe’s contention that the “Original Floyd Rose
5 and Speedloader tremolos are stamped with [expired] Patent Nos. 4,497,236 and 4,171,661” –
6 nonetheless no action was subsequently taken by Defendants to remove the expired patent
7 numbers from current and future devices.

8 251. The expired ‘236 and ‘661 patent numbers could have easily been eliminated by
9 Floyd D. Rose, FRM, APG, Schaller, PWI, and DHM from the manufacturing process of Rose
10 branded tremolos without a significant expenditure of time and money.

11 252. Lerner, David could have and/or should have instructed Floyd D. Rose, FRM,
12 APG, Schaller, PWI, and DHM to stop marking Rose branded tremolos with expired patent
13 numbers prior to the commencement of this lawsuit, particularly after Lerner, David was notified
14 of the false marking in 2007.

15 253. During the January 2010 NAMM Show in Anaheim, CA, FRM, Floyd D. Rose,
16 APG, and Schaller marketed and offered for sale tremolo devices including, but not limited to
17 The Floyd Rose Original tremolo, SpeedLoader Tremolo and SpeedLoader Fixed Bridge, as well
18 as guitars equipped with the aforesaid tremolo devices marked with U.S. Patent No. 4,171,661
19 and U.S. Patent No. 4,497,236.

20 254. Each aforesaid falsely marked article is likely to, or at least has the potential to,
21 discourage or deter persons and companies from commercializing competing products.

22 255. The underlying technology of The Floyd Rose Original tremolo has been freely
23 available (to competitors and the public at large) without Floyd D. Rose’s (or Lerner, David’s)
24 consent since the expiration of the ‘661 patent in 1997.

25 256. Each aforesaid falsely marked article has wrongfully quelled competition with
26 respect to such articles, thereby causing harm to McCabe, the United States, and the public at
27 large.

28 257. McCabe is informed and believes, and thereon alleges, that at least 20,000 or more

1 units have been marked with U.S. Patent No. 4,171,661 and/or U.S. Patent No. 4,497,236 and
2 sold by FRM, DHM, Floyd D. Rose, Schaller, PWI, and/or APG per year for the past 14 years.

3 258. Floyd D. Rose's convergence tuning patents improperly extend the expired patent
4 rights associated with U.S. Patent No. 4,171,661 and/or U.S. Patent No. 4,497,236.

5 259. McCabe is informed and believes, and thereon alleges, that FRM, Papiccio, and/or
6 Floyd D. Rose have deceptively claimed at public meetings as well as in public literature that the
7 SpeedLoader Tremolo is unique in that it practices convergence tuning. The Floyd Rose Original
8 tremolo with fine tuners, which dates back to the early 1980s, practices convergence tuning.

9 260. Several international distributors of licensed Floyd Rose tremolos each have
10 distributed Floyd Rose fulcrum tremolos marked with the expired patent numbers, U.S. Patent
11 No. 4,171,661 and/or U.S. Patent No. 4,497,236. McCabe witnessed the aforesaid falsely marked
12 tremolo devices while attending the January 2010 NAMM Show in Anaheim, CA.

13 261. FRM, Floyd D. Rose, Lerner, David, and APG wrongfully and illegally advertised
14 and continue to advertise a fictitious patent monopoly with all the benefits they would not possess
15 otherwise and, as a result, have benefited commercially and financially by maintaining false
16 statements of patent rights. FRM and APG currently publicize that The Floyd Rose Original
17 tremolo is patented.

18 262. FRM, Floyd D. Rose, Lerner, David, and APG improperly and deceitfully
19 represent and receive royalties for non-existent trade dress rights associated with various bridge
20 systems.

21 **McCabe's Competitive Injury**

22 263. McCabe is a competitor of Floyd D. Rose, FRM, APG, Schaller, PWI, and DHM.
23 McCabe licenses patented tremolo technology that competes with Floyd D. Rose's patented
24 technology (whether valid or not, whether enforceable or not) and commercial products. For
25 example, McCabe's patented macro-tuner technology (as found in the '841, '831, '094, and '191
26 patents asserted herein) not only covers Rose's Speedloader products, but predates Rose's
27 convergence tuning patents by at least five years as well. The Defendants' acts of false marking
28 were intended to further extend the fictitious monopoly by misleading competitors as well as the

1 public at large into erroneously believing Rose first invented macro-tuners on fulcrum tremolos
2 (like they did with fine tuners on a fulcrum tremolo).

3 264. McCabe has suffered actual injury and/or competitive injury by Defendants' acts
4 of false marking on the Original Floyd Rose tremolo, Speedloader products, and sustain blocks.

5 265. For example, since the introduction of Rose's Speedloader tremolos in 2003,
6 McCabe has been unable to reach license agreements with licensees for his patented technology
7 due to Defendants' long-term false marking activities noted above.

8 266. During the 2003 NAMM show, Rose's Speedloader tremolos and guitars were
9 introduced by Floyd D. Rose, FRM, and APG under heavy advertising and publicity funded by
10 the proceeds from the ongoing fictitious monopoly in order to re-energize the perception of
11 market exclusivity and their well known, fear-based legal strategy. Rose's Speedloader tremolos
12 (marked with the expired and inapplicable '661 patent and the expired, invalid, and inapplicable
13 '236 patent) were on display at numerous exhibition booths such as, but not limited FRM,
14 Schaller, Fender, and Carvin Guitars. In fact, the introduction of Rose's Speedloaders tremolos
15 and guitars garnered much attention by 2003 NAMM show attendees and was one of the biggest
16 news stories at the 2003 NAMM show.

17 267. At the same 2003 NAMM show, McCabe approached many exhibitors to discuss
18 commercialization of his patented macro-tuner technology and related tremolo prototypes. In fact,
19 Seymour Duncan, a guitarist, luthier, and founder of Seymour Duncan (a company and NAMM
20 show exhibitor that is best known for manufacturing guitar pickups) stated at the time, based on
21 his own experience over a ten day trial period, that McCabe's tremolo prototype was the best he's
22 ever played at any NAMM show.

23 268. At the same 2003 NAMM show, McCabe began patent licensing negotiations with
24 exhibitor Sonic Sales, Inc. ("Sonic"). Based on their evaluation of the market's receptivity for the
25 McCabe innovations at the show, Sonic became seriously interested in commercializing
26 McCabe's patented macro-tuner and other related technology. In performing due diligence on
27 McCabe's patents (namely the '831, '191, and '066 patents), Sonic maintained its interest in
28 licensing McCabe's patents and stated findings that McCabe's patents were "good" (i.e., valid

1 and broad in scope).

2 269. However, after months of additional due diligence on McCabe's infringement
3 claim against Rose's Speedloader tremolos and guitars, Sonic backed out of the licensing deal
4 negotiated with McCabe. McCabe is informed and believes, and thereon alleges, that Sonic upon
5 recognizing McCabe's infringement claim against Rose's Speedloaders, feared a countersuit by
6 Rose, namely an infringement suit enforcing Rose's '661 patent (now expired) and Rose's '236
7 patent (now expired), whether frivolous or not, since those patents were falsely represented by
8 Defendants as covering Rose's Speedloaders via the false patent markings.

9 270. Likewise, at the 2003 NAMM show, McCabe began patent licensing negotiations
10 with exhibitors Westheimer and Cort Musical. Westheimer and Cort Musical were interested in
11 commercializing McCabe's patented macro-tuner and ball-bearing technology. However, despite
12 a strong and sustained interest over several months, Westheimer and Cort Musical ended those
13 licensing discussions. McCabe is informed and believes, and thereon alleges, that Westheimer
14 and Cort Musical upon recognizing McCabe's infringement claim against Rose's Speedloaders,
15 feared a countersuit by Rose against McCabe, namely an infringement suit enforcing Rose's '661
16 patent (now expired) and Rose's '236 patent (now expired), whether frivolous or not, since those
17 patents were falsely represented by Defendants as covering Rose's Speedloaders via the false
18 patent markings.

19 271. By 2005, Co-plaintiff Kahler International decided to pursue the licensing of the
20 McCabe portfolio upon McCabe's contention that the issuance of his '094 patent would bring the
21 Rose patent issues to resolution. Unfortunately, McCabe could not find resolution of his dispute
22 with Floyd D. Rose and Lerner, David and by 2006, Kahler International declined to license and
23 commercial McCabe's patented macro-tuner technology as it feared yet another frivolous patent
24 infringement claim by Rose under Rose's '661 patent (now expired) and Rose's 236 patent (now
25 expired) as a direct result of the Rose defendants falsely representing (via false patent markings)
26 to the public at large that Rose's '661 and '236 patents were not only enforceable, but covered
27 Rose's Speedloaders and guitars.

28 272. Kahler International's general and rational fear of the Rose defendants, and more

1 particularly their attorneys at Lerner, David, was later memorialized in a letter from Gary Kahler
2 to McCabe dated August 11, 2006 (emphasis added), a copy of which is attached hereto as
3 Exhibit AE:

4 I have known you for over 15 years and I do respect the fact that you want this
5 tremolo Model 7170 and other units in this product series manufactured.

6 I have invested considerable funds and time into the Digital engriner [sic]
7 drawings, prototyping, displaying the 7170 at the NAMM Show and placing it in
8 our 2006 catalogue because I was going forward with a licensing agreement with
9 you

10 *****

11 As of the January 2006 NAMM show, it became clear to me that you had patent
12 issues with Floyd Rose and Jack Hanser, CEO of Hanser Holdings and owner of
13 the BC Rich brand name.

14 *****

15 This is a big problem for me...**I know Floyd Rose's attorneys...no matter how
16 correct you are...or how they infringe your patents. They have unlimited
17 funds and personnel to literally bury you in paper work and bankrupt you
18 with their war chest.**

19 I can not personally or as the CEO of Kahler International Inc. can I possibly
20 manufacture your products until I have assurance that I am not buying into a
21 liability lawsuit and/or counter lawsuit.

22 **My experience with Floyd Rose and the law firm of Lerner, David,
23 Littenberg Krumholz and Mentlik of New jersey is that fairness and the law
24 has very little to do with anything.**

25 *****

26 Therefore; I can not manufacture your designs including the model 7170 series
27 until you can fully indemnify me personally and my company and prove you have
28 the funds to fight the KDLKM law firm's lawsuits and/or countersuits.

When you can assure me of the above...we can go forward and do business.

273. Because of the false marking acts of FRM, Floyd D. Rose, DHM, PWI, APG, and
Schaller (with Lerner, David's knowledge and/or consent), Sonic, Westheimer, Cort Musical, and
Kahler International were (or are) reluctant to enter into a business relationship with McCabe, or
license any of McCabe's patents. Accordingly, McCabe's ability to compete with FRM, Floyd D.
Rose, DHM, PWI, APG, and Schaller has been harmed.

274. As a result of Defendants' conduct, McCabe has suffered competitive injury in the
form of lost licensing revenue, lost benefits, and lost business opportunities. Pursuant to 35

1 U.S.C. § 292, McCabe seeks compensatory damages for the competitive injury it has incurred as
2 a result of Defendants' conduct in an amount to be determined at trial in this matter.

3 **SEVENTH CLAIM FOR RELIEF**

4 **(Statutory Unfair Competition under Cal. Bus. & Prof. Code § 17200 *et seq.*)**

5 **(McCabe Against All Defendants – FRM, Floyd D. Rose, DHM, PWI,
6 APG, Lerner, David and Schaller)**

7 275. McCabe repeats, realleges, and incorporates by reference the allegations set forth
8 in paragraphs 1 through 274 of this Complaint.

9 276. This claim is for statutory unfair competition in violation of California Business &
10 Professions Code § 17200 *et seq.*

11 277. FRM, Floyd D. Rose, DHM, PWI, APG, Lerner, David, and Schaller have
12 committed (1) unlawful business acts or practices, (2) unfair business acts or practices, and (3)
13 fraudulent business acts or practices.

14 278. The acts of FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller alleged herein
15 include manufacturing, selling, and offering for sale unpatented articles marked with expired
16 patent numbers and/or invalid and unenforceable patent numbers in violation of 35 U.S.C. § 292
17 (with Lerner, David's knowledge and/or consent).

18 279. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller marked various products
19 with expired patent numbers (with Lerner, David's knowledge and/or consent), the subject matter
20 of which do not (nor ever did) cover those products in an attempt to restrain trade and stifle
21 competition by intentionally deceiving the public into believing applicable Defendants owned
22 patent rights or own licenses to patent rights when in fact those patent rights are fictitious.
23 Particularly, FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller marked various products with
24 the invalid and unenforceable '236 patent (with Lerner, David's knowledge and/or consent) to
25 form a fictitious monopoly and thereby, unfairly eviscerate competition and create improper (as
26 well as insurmountable) barriers of entry into the applicable market.

27 280. However, in addition to the acts of false patent marking, Defendants have
28 committed statutory unfair competition based on additional acts unrelated to false patent marking.

1 281. For example, FRM, Floyd D. Rose, APG, and Lerner, David have fraudulently
2 licensed and enforced (or assisted in the licensing and enforcement of knowingly invalid and
3 unenforceable claims such as, but not limited to claims 16-19, 23, 24, and 26 of Rose's '236
4 patent and claim 1 of Rose's '461 patent to numerous entities including Boo Heung, Westheimer,
5 Cort Musical, Cor-Tek, Fernandes, World Musical Instruments, Gotoh, Hoshino, Takeuchi, PWI,
6 Schaller, DHM, and on information and belief, other entities. FRM, Floyd D. Rose, APG, and
7 Lerner, David have never disavowed these knowingly invalid and unenforceable patent rights. To
8 the contrary, Lerner, David on behalf of FRM, Floyd D. Rose, and/or APG, after learning of the
9 invalid and unenforceable nature of the '236 patent, paid maintenance fees to the PTO on March
10 4, 1988, then on February 24, 1992, and then again on April 15, 1996, to maintain the purported
11 enforceability of the '236 patent. Such conduct is likely to mislead competitors as well as the
12 public at large into erroneously believing the '236 patent and the '461 patent were valid and
13 enforceable when in fact they were not. Because of the dynamics inherent in a large scale (albeit
14 fictitious) monopoly, intentionally garnered by these fraudulent licenses and invalid and
15 unenforceable Rose patent rights, potential business partners, otherwise capable of offering
16 significant opportunities to McCabe, such as, but not limited to Sonic, Westheimer, Cort Musical,
17 and/or Kahler International have been reluctant to enter into a business relationship with McCabe.
18 Because potential business partners have been misled by the mere presence of the fictitious
19 monopoly into believing they need a patent license from Rose, McCabe's ability to compete with
20 FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller, and/or license his patents, has been
21 harmed.

22 282. In another example of unfair competition, FRM, Floyd D. Rose, APG, DHM, and
23 Lerner, David have licensed and enforced (or assisted in the licensing and enforcement) of trade
24 dress rights that do not exist. For example, FRM, Floyd D. Rose, APG, DHM, and Lerner, David
25 have represented that Floyd D. Rose owns trade dress rights to the "whale tale" shape of certain
26 tremolo bridges and that no other competitor can manufacture a tremolo with a "whale tale" shape
27 without paying royalties to Floyd D. Rose via Lerner, David. On at least one occasion, Papiccio
28 has personally stated to Gary Kahler that Kahler International is not permitted to manufacture a

1 tremolo with a “whale tale” shape without paying royalties to Floyd D. Rose. However, a “whale
2 tale” feature is functional and essential to the use or purpose of a tremolo with fine tuners, and
3 thus cannot serve as a basis of trade dress rights. The look and appearance of the “whale tale” is
4 not an ornamental, incidental, or arbitrary aspect of the device. Such conduct is likely to mislead
5 competitors as well as the public at large into falsely believing Rose owns certain trade dress
6 rights when in fact he did not and does not. Because of these representations of non-existent trade
7 dress rights, potential business partners such as, but not limited to Sonic, Westheimer, Cort
8 Musical, and/or Kahler International are reluctant to enter into a business relationship with
9 McCabe. Because potential business partners have been misled into believing they need a trade
10 dress license from Rose, McCabe’s ability to compete with FRM, Floyd D. Rose, DHM, PWI,
11 APG, and Schaller, and/or license his patents, has been harmed.

12 283. In another unfair competition example, FRM, Floyd D. Rose, APG, DHM, and
13 Lerner, David have licensed and enforced (or assisted in the licensing and enforcement) of one or
14 more knowingly invalid and/or fraudulently procured convergence tuning patents of Rose. Such
15 conduct is likely to mislead competitors as well as the public at large into believing Rose owns
16 certain valid and/or enforceable convergence tuning patents when in fact he does not. Because of
17 these fraudulently procured convergence tuning patents, which are predated by McCabe’s macro-
18 tuner patents, potential business partners such as, but not limited to Sonic, Westheimer, Cort
19 Musical, and/or Kahler International are reluctant to enter into a business relationship with
20 McCabe. Because potential business partners have been misled into believing that Rose invented
21 convergence tuning, McCabe’s ability to compete with FRM, Floyd D. Rose, DHM, PWI, APG,
22 and Schaller, and/or license his patents, has been harmed.

23 284. As another example, in their negotiations with Boo Heung, Westheimer, Cort
24 Musical, Cor-Tek, Fernandes, World Musical Instruments, Gotoh, Hoshino, Takeuchi, PWI,
25 Schaller, and DHM, lawyers including Joseph Littenberg and John Nelson of Lerner, David
26 violated New Jersey Rule of Professional Conduct (RPC) No. 4.1 (1984)(Truthfulness in
27 Statements to Others), which states: (a) In representing a client a lawyer shall not knowingly: (1)
28 make a false statement of material fact or law to a third person; or (2) fail to disclose a material

1 fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act
2 by a client. (b) The duties stated in this Rule apply even if compliance requires disclosure of
3 information otherwise protected by RPC 1.6.” Lerner, David did not disclose to Boo Heung,
4 Westheimer, Cort Musical, Cor-Tek, Fernandes, World Musical Instruments, Gotoh, Hoshino,
5 Takeuchi, PWI, Schaller, and DHM of the prior art Micro-Frets guitar (as well as Bunker’s ‘108
6 patent or Moseley’s ‘502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
7 24, and 26 of the ‘236 patent and claim 1 of the ‘461 patent. Such conduct is likely to mislead
8 competitors as well as the public at large into believing claims 16-19, 23, 24, and 26 of the ‘236
9 patent and claim 1 of the ‘461 patent were valid and enforceable. A violation of a rule of
10 professional conduct can form the basis of an unlawful unfair competition claim. *See, e.g.,*
11 *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839-41 (1994). Because potential business
12 partners like Boo Heung, Westheimer, Cort Musical, Cor-Tek, Fernandes, World Musical
13 Instruments, Gotoh, Hoshino, Takeuchi, PWI, Schaller, and DHM have never been informed of
14 the invalid and unenforceable nature of claims 16-19, 23, 24, and 26 of the ‘236 patent and claim
15 1 of the ‘461 patent, McCabe’s ability to compete with FRM, Floyd D. Rose, DHM, PWI, APG,
16 and Schaller, and/or license his patents, has been harmed.

17 285. As another example, in their representation of Floyd D. Rose against Hoshino in
18 New Jersey District Court, lawyer John Nelson of Lerner, David violated New Jersey RPC No.
19 3.3 by not disclosing to the tribunal that claims 16-19, 23, 24, and 26 of Rose’s ‘236 patent and
20 claim 1 of Rose’s ‘461 patent of the Rose-Hoshino contract were invalid and unenforceable, and
21 that the Rose-Hoshino contract itself was entered into by fraud. John Nelson also violated Rule 11
22 of the Federal Rules of Civil Procedure. Such conduct is likely to mislead competitors as well as
23 the public at large into believing claims 16-19, 23, 24, and 26 of the ‘236 patent and claim 1 of
24 the ‘461 patent were valid and enforceable. Because potential business partners like Hoshino have
25 never been informed of the invalid and unenforceable nature of claims 16-19, 23, 24, and 26 of
26 the ‘236 patent and claim 1 of the ‘461 patent, McCabe’s ability to compete with FRM, Floyd D.
27 Rose, DHM, PWI, APG, and Schaller, and/or license his patents, has been harmed.

28 286. FRM, Floyd D. Rose, APG, and Lerner, David defrauded Boo Heung,

1 Westheimer, Cort Musical, Cor-Tek, Fernandes, World Musical Instruments, Gotoh, Hoshino,
2 Takeuchi, PWI, Schaller, DHM, and on information and belief, other entities, by not disclosing,
3 among other things, the prior art Micro-Frets guitar (as well as Bunker's '108 patent or Moseley's
4 '502 patent) and the invalid nature and unenforceable nature of claims 16-19, 23, 24, and 26 of
5 Rose's '236 patent and claim 1 of Rose's '461 patent. Such conduct is likely to mislead
6 competitors as well as the public at large into believing claims 16-19, 23, 24, and 26 of the '236
7 patent and claim 1 of the '461 patent were valid and enforceable. Because potential business
8 partners like Boo Heung, Westheimer, Cort Musical, Cor-Tek, Fernandes, World Musical
9 Instruments, Gotoh, Hoshino, Takeuchi, PWI, Schaller, DHM have been defrauded, McCabe's
10 ability to compete with FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller, and/or license his
11 patents, has been harmed.

12 287. Boo Heung, Westheimer, Cort Musical, Cor-Tek, Fernandes, World Musical
13 Instruments, Gotoh, Hoshino, Takeuchi, PWI, Schaller, DHM, and on information and belief,
14 other entities, have been deceived by the acts of FRM, Floyd D. Rose, APG, and Lerner, David
15 complained herein.

16 288. Licenses with Boo Heung, Westheimer, Cort Musical, Cor-Tek, Fernandes, World
17 Musical Instruments, Gotoh, Hoshino, Takeuchi, PWI, Schaller, DHM, and on information and
18 belief, other entities, were negotiated in bad faith by FRM, Floyd D. Rose, APG, and Lerner,
19 David.

20 289. McCabe is informed and believes, and thereon alleges, that Papiccio has publicly
21 disparaged McCabe at NAMM shows by, among other things, remarking to various exhibitors
22 that McCabe has "no case" against Floyd Rose and that McCabe is a "nut." Such conduct is likely
23 to mislead competitors as well as the public at large into believing that McCabe's patents are
24 invalid and unenforceable, despite the fact that both the PTO and the Investigative Staff of the
25 ITC determined after investigation that two of McCabe's patents are valid and infringed by Rose.
26 Because potential business partners have been misled into believing McCabe has no case and is a
27 nut, McCabe's ability to compete with FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller has
28 been harmed.

1 290. As another act of unfair competition, FRM, Floyd D. Rose, and APG falsely
2 advertise (to this day) that The Floyd Rose Original Tremolo is patented when in fact it is not and
3 in violation of, among other things, Section 43 of the Lanham Act. Such conduct is likely to
4 mislead competitors as well as the public at large into erroneously believing that The Floyd Rose
5 Original Tremolo is subject to valid and enforceable patent rights, when in fact the underlying
6 technology is (or was) not subject to any patent rights whatsoever and has entered the public
7 domain. Because potential business partners have been misled into believing The Floyd Rose
8 Original Tremolo is patented at a time when it is not covered by any valid and enforceable patent
9 rights, McCabe's ability to compete with FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller,
10 and/or license his patents, has been harmed.

11 291. As another act of unfair competition, McCabe is informed and believes, and
12 thereon alleges, that FRM, Floyd D. Rose, and APG are violating an ITC Consent Order. Such
13 conduct is likely to mislead competitors as well as the public at large into believing that FRM,
14 Floyd D. Rose, and APG have the right to sell imported replacement parts for Speedloader
15 tremolos and guitars when in fact they do not. Because potential business partners have been
16 misled into believing infringing Speedloader tremolos can be repaired and/or refurbished with
17 imported replacement parts by Rose, McCabe's ability to compete with FRM, Floyd D. Rose,
18 DHM, PWI, APG, and Schaller, and/or license his patents, has been harmed.

19 292. FRM, Floyd D. Rose, Lerner, David, and APG have committed acts of patent
20 misuse in violation of antitrust laws. Such conduct is likely to mislead competitors as well as the
21 public at large into believing that The Floyd Rose Original Tremolo is subject to valid and
22 enforceable patent rights, when in fact the underlying technology is not subject to any patent
23 rights whatsoever and has entered the public domain. Because potential business partners have
24 been misled in believing The Floyd Rose Original Tremolo is patented at a time when it is not
25 covered by any valid and enforceable patent rights, McCabe's ability to compete with FRM,
26 Floyd D. Rose, DHM, PWI, APG, and Schaller, and/or license his patents, has been harmed.

27 293. As a direct and proximate result of the aforesaid deceptive business practices,
28 McCabe has and will continue to suffer great harm and damage. McCabe has incurred and will

1 continue to incur irreparable harm unless Lerner, David, FRM, Floyd D. Rose, DHM, PWI, APG,
2 and Schaller are enjoined from further commission of unfair and unlawful business acts and
3 practices.

4 294. FRM, Floyd D. Rose, DHM, PWI, APG, Lerner, David, and Schaller each have
5 been unjustly enriched through their commission of unfair and unlawful business acts and
6 practices.

7 295. On information and belief, Lerner, David's malpractice insurance does not cover
8 fraud based claims.

9 296. Therefore, McCabe is entitled under Section 17200 et seq. of the California
10 Business and Professions Code, to an injunction, disgorgement of ill-gotten gains, and restitution
11 (among other things).

12 297. In sum, McCabe is informed and believes, and thereon alleges, that Lerner, David
13 is one of the central bad actors in this lawsuit and whom by taking a controlling (as well as
14 contingency) interest in the Rose intellectual property portfolio at the early stages of an extremely
15 well-received commercial fulcrum tremolo at a unique point in time as the success and heady
16 atmosphere of rock and roll, money and fame of the early 1980's took root, unlawfully exploited
17 their unique position of being intellectual property attorneys to use their considerable clout and
18 expertise to improperly game the public at large and the musical instrument community into
19 bowing down (as well as contributing) to one of the most successful fictitious monopolies of the
20 last several decades. Lerner, David's no-holds barred unchecked multi-tier strategy to achieve an
21 unparalleled market dominance for Defendants included: (1) enforcement of patent rights by
22 lawsuit to unfairly disparage and discredit as well as weaken a competitor with the high financial
23 burden associated with defending against baseless patent infringement claims, (2) fraudulent
24 licensing that concealed that the basis for the patent monopoly, the fine-tuning patents rights,
25 were broken and non-existent in view of prior art, (3) enforcing licensing agreements that had lost
26 a considerable basis in view of prior art, (4) receiving royalties for one or more fraudulently
27 procured "convergence tuning" patents, (5) receiving royalties for non-existent trade dress rights
28 in order to deter competitors entering the market place and, thereby, deter innovation and next

1 generation products, (6) false marking of expired and/or invalid patents on the Original Floyd
2 Rose tremolo, and (7) false marking of expired, invalid, and/or inapplicable patents on
3 Speedloader products. Those egregious acts, ultimately, comprise antitrust, unfair competition,
4 and false advertising violations with which Defendants would continue to enjoy the benefits of
5 market power by creating at least a “wall of fear” in order to exclude legitimate competitors, such
6 as McCabe and his highly regarded patented innovations and those, such as Sonic,
7 Westhiemer/Cort, and Kahler International with their considerable renown and resources, who
8 would otherwise have chosen to partner with McCabe, from entering the market place in order to
9 create an extremely lucrative and impenetrable scam by which everyone else directly or
10 tangentially around them have already experienced losses in various degrees.

11 **EIGHTH CLAIM FOR RELIEF**

12 **(False Advertising Under Lanham Act Section 43(a))**

13 **(McCabe Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

14 298. McCabe repeats, realleges, and incorporates by reference the allegations set forth
15 in paragraphs 1 through 297 of this Complaint.

16 299. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller market (or have marketed)
17 guitar products knowingly and intentionally marked with expired patent numbers. The marking
18 of said guitar products with expired patent numbers falsely advertise patent rights that do not
19 exist.

20 300. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller market (or have marketed)
21 and advertise (or have advertised) guitar products knowingly and intentionally marked with
22 Rose’s invalid and unenforceable ‘236 patent. The marking of said guitar products with the
23 expired and unenforceable ‘236 patent falsely advertise patent rights that do not exist.

24 301. FRM, Floyd D. Rose, and/or APG operate the website www.floydrose.com. That
25 website has represented various Floyd Rose branded bridges as “patented” when in fact those
26 bridges are no longer subject to patent rights.

27 302. FRM, Floyd D. Rose, and/or APG publicize and distribute a catalog, entitled
28 “Floyd Rose Tremolo Kits & Parts” (the “Rose catalog” - the catalog is attached hereto as Exhibit

1 J). The Rose catalog is available at floydrose.com. The Rose catalog advertises, promotes, and
2 represents various Floyd Rose branded bridges as “patented” when in fact those bridges are no
3 longer subject to patent rights, i.e., the underlying technology of the bridges is freely available via
4 the public domain. For example, on numerous pages of the Rose catalog, FRM, Floyd D. Rose,
5 and/or APG represent that “No copy can duplicate the patented double-locking design of the
6 Floyd Rose Tremolo System that allows you to lock your guitar in tune at the nut and at the
7 bridge.”

8 303. On pages 15 and 16 of the Rose catalog, FRM, Floyd D. Rose, and/or APG
9 publicize, promote, and represent sustain blocks that are pictured with expired patent numbers
10 “U.S. Pat. 4,497,236” and “U.S. Pat. 4,171,661.” The ‘236 patent expired in 2002. The ‘661
11 patent expired in 1997.

12 304. FRM, Floyd D. Rose, and/or APG have represented in various public literature
13 and through public outlets such as, but not limited to www.apintl.com that various Floyd Rose
14 branded bridges are “patented” when in fact those bridges are no longer subject to patent rights
15 and have not been subject to patent rights for years.

16 305. At various NAMM shows, FRM, Floyd D. Rose, Schaller, DHM, and/or APG
17 have represented that various Floyd Rose branded bridges are “patented” when in fact those
18 bridges are no longer subject to patent rights.

19 306. The above-note representations are false and misleading in material respects and
20 have been for years. On information and belief, the representations were made by (and/or on
21 behalf of) FRM, Floyd D. Rose, PWI, Schaller, DHM, and/or APG with malice for the purpose
22 of, among other things, damaging the competitive position of competitors like McCabe. FRM,
23 Floyd D. Rose, PWI, Schaller, DHM, and/or APG knows and has known at all times that the
24 representations are false and misleading.

25 307. The foregoing acts and representations by FRM, Floyd D. Rose, PWI, Schaller,
26 DHM, and/or APG constitute false or misleading description of fact and/or law, which in
27 interstate commercial advertising or promotion misrepresents the nature and characteristics of
28 Rose’s bridges.

1 308. McCabe has suffered and continues to suffer direct and indirect harm, including
 2 financial harm, from FRM, Floyd D. Rose, PWI, Schaller, DHM, and/or APG's
 3 misrepresentations. McCabe also suffered a competitive disadvantage in marketing his own guitar
 4 products and has incurred considerable financial detriment.

5 309. The goodwill associated with McCabe's products has been lessened as a result of
 6 FRM, Floyd D. Rose, PWI, Schaller, DHM, and/or APG's misrepresentations. For example, by
 7 marking the Rose Speedloader products with expired and inapplicable patents that predate
 8 McCabe's macro-tuner patents (that cover Rose's Speedloader products), FRM, Floyd D. Rose,
 9 PWI, Schaller, DHM, and/or APG are misleading the public into erroneously believing that Rose
 10 invented a macro-tuner (like they did with fine-tuning on a fulcrum tremolo).

11 310. FRM, Floyd D. Rose, PWI, Schaller, DHM, and/or APG's acts set forth above
 12 have caused and continue to cause irreparable injury to McCabe's goodwill and reputation, and
 13 monetary damages alone cannot fully compensate McCabe for his injuries.

14 311. McCabe is entitled to a permanent injunction against FRM, Floyd D. Rose, PWI,
 15 Schaller, DHM, and/or APG, in addition to all other remedies under the Lanham Act, including
 16 but not limited to compensatory damages, treble damages, disgorgement of ill-gotten gains and
 17 profits, costs, and attorney's fees.

18 **NINTH CLAIM FOR RELIEF**

19 **(False Advertising under Cal. Bus. & Prof. Code § 17500 et seq.)**

20 **(McCabe Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

21 312. McCabe repeats, realleges, and incorporates by reference the allegations set forth
 22 in paragraphs 1 through 311 of this Complaint.

23 313. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller intended to
 24 dispose of property, Rose branded tremolos, guitars, and tremolo components, by sale.

25 314. In connect with the sale of its products, Defendants FRM, Floyd D. Rose, DHM,
 26 PWI, APG, and Schaller publicly disseminated deceptive, untrue, or misleading advertising,
 27 including by marking expired patent numbers on its products.

28 315. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller's false

1 advertising and marking of its products was undertaken in bad faith. Defendants could not have
2 reasonably believed that the patent number listed on their products all read upon, covered, or
3 protected those products, and/or were valid and enforceable.

4 316. For example, FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller have marked
5 unpatented articles including, but not limited to the SpeedLoader products with U.S. Patent No.
6 4,171,661, which expired on January 3, 1997, and/or U.S. Patent No. 4,497,236, which expired on
7 March 15, 2002.

8 317. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller knew or had
9 reason to know that the patent markings on their products were false.

10 318. Defendants' wrongful acts, as alleged herein, have had the intent and effect of
11 deterring competition and allowing Defendants to make substantial sales and profits on their
12 products statewide, and even worldwide.

13 319. As a result of Defendants' false advertising, McCabe has been deprived of profits
14 and benefits, and Defendants have wrongly obtained such profits and benefits in an amount to
15 conform to proof at trial. Additionally, McCabe has suffered irreparable harm, and injunctive
16 relief is necessary to enjoin further wrongful acts by Defendants and to remediate the
17 consequences of Defendants' false advertising, which occurred over ten years.

18 **TENTH CLAIM FOR RELIEF**

19 **(False Marking)**

20 **(Kahler International Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

21 320. Kahler International repeats, realleges, and incorporates by reference the
22 allegations set forth in paragraphs 1 through 319 of this Complaint.

23 321. This claim is for false patent marking arising under 35 U.S.C. § 292 as amended
24 by the Leahy-Smith America Invents Act enacted on September 16, 2011. Leahy-Smith America
25 Invents Act, Pub. L. No. 112-29, sec. 16(b), § 292, 125 Stat. 284, 329 (2011).

26 322. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller violated and continue to
27 violate 35 U.S.C. § 292, by marking and continuing to mark unpatented articles including the
28 SpeedLoader Tremolo and the SpeedLoader Fixed Bridge, and guitars equipped with the

1 SpeedLoader Tremolo or SpeedLoader Fixed Bridge (“the SpeedLoader products”) and sustain
2 blocks with expired patent numbers that do not cover (nor ever did cover) those products, with an
3 intent to deceive the public. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller have marked
4 unpatented articles including, but not limited to the SpeedLoader products with U.S. Patent No.
5 4,171,661, which expired on January 3, 1997, and/or U.S. Patent No. 4,497,236, which expired on
6 March 15, 2002. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller did not and do not have a
7 reasonable belief that any of the marked products were properly marked.

8 323. The ‘661 patent claims matter that covers the clamping devices included with The
9 Floyd Rose Original tremolo developed in the late 1970s. The ‘661 patent claims matter that does
10 not cover the purported improvements found in the SpeedLoader Tremolo and the SpeedLoader
11 Fixed Bridge, and guitars equipped with the SpeedLoader Tremolo or SpeedLoader Fixed Bridge.

12 324. The ‘236 patent claims matter that covers the fine tuners on The Floyd Rose
13 Original tremolo developed in the early 1980s. The ‘236 patent claims subject matter that does
14 not cover the purported improvements found in the SpeedLoader Tremolo and the SpeedLoader
15 Fixed Bridge, and guitars equipped with the SpeedLoader Tremolo or SpeedLoader Fixed Bridge.
16 At considerable expense, American Precision proved in Civil Action No. 85-3608-RMT-JRx,
17 Central District of California, during discovery that all of the asserted claims including, but not
18 limited to claims 16-19, 23, 24, and 26 of Rose’s ‘236 patent, were invalid as being anticipated
19 under 35 U.S.C. § 102(a) and 102(b) by a prior art “Micro-Frets” guitar (as well as U.S. Patent
20 No. 4,201,108 to Bunker or U.S. Patent No. 3,237,502 to Moseley) or rendered obvious under 35
21 U.S.C. § 103(a). Since 1986, FRM, Floyd D. Rose, Papiccio, and Lerner, David have known of
22 the invalid and unenforceable nature of the ‘236 patent. Nonetheless, FRM, Floyd D. Rose,
23 DHM, PWI, APG, and Schaller have marked numerous products including the SpeedLoader
24 products and variations of the Original Floyd Rose Tremolo with the invalid and unenforceable
25 ‘236 patent.

26 325. Floyd D. Rose personally authorizes, directs, or actively participates in the false
27 marking actions complained of herein.

28 326. Papiccio personally authorizes, directs, or actively participates in the false marking

1 actions complained of herein.

2 327. PWI, Schaller, and DHM each authorize, direct, or actively participate in the false
3 marking actions complained of herein.

4 328. Since January 3, 1997, FRM, DHM, PWI, Schaller, and Floyd D. Rose have
5 marked (with Lerner, David's knowledge and/or consent) The Floyd Rose Original tremolo with
6 expired and inapplicable patent numbers, e.g., the '661 patent and later adding the '236 patent, in
7 an attempt to unfairly stifle competition from competitors like Kahler International.

8 329. The expired '236 and '661 patent numbers could have easily been eliminated by
9 Floyd D. Rose, FRM, APG, Schaller, PWI, and DHM from the manufacturing process of Rose
10 branded tremolos without a significant expenditure of time and money. It is common practice in
11 the music industry, to remove patent numbers from products once the respective patents have
12 expired.

13 330. Each aforesaid falsely marked article is likely to, or at least has the potential to,
14 discourage or deter persons and companies like Kahler International from commercializing
15 competing products.

16 331. Each aforesaid falsely marked article has wrongfully quelled competition with
17 respect to such articles, thereby causing harm to Kahler International, the United States, and the
18 public at large.

19 **Kahler International's Competitive Injury**

20 332. Kahler International is the only United States manufacturer of tremolos for electric
21 guitars and electric basses. Kahler International currently offers several versions of tremolos,
22 which are critically acclaimed and viewed, by many, as superior in quality, workmanship, and
23 performance to tremolos provided by Floyd D. Rose, FRM, and/or APG. Kahler tremolos are
24 endorsed by world renowned guitarists such as, but not limited to Jerry Cantrell (of Alice in
25 Chains) and Kerry King (of Slayer).

26 333. FRM, DHM, and APG do not manufacture their tremolos in the United States, but
27 rather import them from various manufacturers abroad including PWI and Schaller.

28 334. Kahler International's primary competition in the tremolo market is FRM and

1 APG, and their distributors. On information and belief, FRM and APG have historically sold at
2 least ten times more tremolos than Kahler International on an annual basis.

3 335. For the past 20 years, Kahler International has participated as an exhibitor at every
4 January NAMM show except for 2000-2003. NAMM is a trade-only business show catering to
5 domestic and international dealers and distributors, and the product exhibits are an integral part of
6 the show, allowing the dealers and distributors to see what's new, negotiate deals and plan their
7 purchasing for the next 6 to 12 months. Only employees of the exhibiting manufacturers and/or
8 NAMM member retailers and distributors are allowed to attend, along with credentialed members
9 of the press. A majority of Kahler International's sales are consummated, or at the very least
10 initiated, at each and every NAMM show.

11 336. At every NAMM show Kahler International has participated in, up to and
12 including the January 2010 NAMM Show in Anaheim, CA, representatives of Kahler
13 International have personally witnessed FRM, Floyd D. Rose, DHM, APG, and Schaller
14 marketing and offering for sale tremolo devices including, but not limited to The Floyd Rose
15 Original tremolo, SpeedLoader Tremolo and SpeedLoader Fixed Bridge, as well as guitars
16 equipped with the aforesaid tremolo devices marked with U.S. Patent No. 4,171,661 and U.S.
17 Patent No. 4,497,236.

18 337. Based on the applicable Defendants' intentional acts of false marking, Kahler
19 International was led to believe at the time that Floyd D. Rose, FRM, and/or APG, with the aid of
20 their overly aggressive attorneys at Lerner, David, would enforce the '661 and '236 patent against
21 Kahler International in a patent infringement lawsuit if Kahler International were to
22 commercialize a competing double-locking tremolo with fine tuners. Accordingly, Kahler
23 International has not commercialized a double-locking tremolo with fine tuners despite the fact
24 that Kahler International inventories \$160,000 in applicable parts (at cost), tools, and fixtures,
25 which would generate approximately \$500,000 in sales.

26 338. The Defendants' intentional acts of false marking have stifled competition and
27 precluded competitors like Kahler International from introducing tremolos that compete with
28 those available from FRM, APG, PWI, DHM, and Schaller. For example, Kahler International

1 has declined to license and commercial McCabe's patented macrotuner technology out of fear of
2 a frivolous patent infringement claim by Rose against Kahler International under Rose's '661
3 patent (now expired) and Rose's 236 patent (now expired) as a direct result of the Rose
4 defendants representing (via false patent markings) to the public at large that Rose's '661 and
5 '236 patents covered Rose's Speedloaders and guitars (and hence, McCabe's macrotuners).

6 339. Defendants falsely marked products in an attempt to prevent competitors like
7 Kahler International from designing, using, and/or selling competing products.

8 340. FRM, Floyd D. Rose, and APG have wrongfully, and with deceptive intent,
9 conveyed to the public and to the competitors that they maintain patent rights that they do not
10 possess, and as a result, FRM, Floyd D. Rose, and APG have benefited commercially and
11 financially to the detriment of Kahler International. If the Defendants had not been falsely
12 marking their products with expired and inapplicable patent numbers and licensing knowingly
13 invalid and unenforceable patents, Kahler International would have been able to make and sell
14 many double-locking tremolos with fine tuners.

15 341. As a result of Defendants' conduct, Kahler International has suffered competitive
16 injury in the form of lost profits, lost benefits, and lost business opportunities. Pursuant to 35
17 U.S.C. § 292, Kahler International seeks compensatory and punitive damages for the competitive
18 injury it has incurred as a result of Defendants' conduct in an amount to be determined at trial in
19 this matter.

20 **ELEVENTH CLAIM FOR RELIEF**

21 **(Statutory Unfair Competition under Cal. Bus. & Prof. Code § 17200 *et seq.*)**

22 **(Kahler International Against All Defendants – FRM, Floyd D. Rose, DHM, PWI,
23 APG, Lerner, David and Schaller)**

24 342. Kahler International repeats, realleges, and incorporates by reference the
25 allegations set forth in paragraphs 1 through 341 of this Complaint.

26 343. This claim is for statutory unfair competition in violation of California Business &
27 Professions Code § 17200 *et seq.*

28 344. FRM, Floyd D. Rose, DHM, PWI, APG, Lerner, David, and Schaller have

1 committed (1) unlawful business acts or practices, (2) unfair business acts or practices, and (3)
2 fraudulent business acts or practices.

3 345. The acts of FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller alleged herein
4 include manufacturing, selling, and offering for sale unpatented articles marked with expired
5 patent numbers and/or invalid and unenforceable patent numbers in violation of 35 U.S.C. § 292
6 (with Lerner, David's knowledge and/or consent).

7 346. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller marked various products
8 with expired patent numbers (with Lerner, David's knowledge, assistance, and/or consent), the
9 subject matter of which do not (nor ever did) cover those products in an attempt to restrain trade
10 and stifle competition including Kahler International by intentionally deceiving the public into
11 believing applicable Defendants owned patent rights or own licenses to patent rights when in fact
12 those patent rights are fictitious and do not exist. Particularly, FRM, Floyd D. Rose, DHM, PWI,
13 APG, and Schaller marked various products with the invalid and unenforceable '236 patent (with
14 Lerner, David's knowledge and/or consent) to form a fictitious monopoly and thereby, unfairly
15 eviscerate competition.

16 347. However, in addition to the acts of false patent marking, Defendants have
17 committed statutory unfair competition based on additional acts unrelated to false patent marking.

18 348. For example, FRM, Floyd D. Rose, APG, and Lerner, David have fraudulently
19 licensed and enforced (or assisted in the licensing and enforcement of knowingly invalid and
20 unenforceable claims such as, but not limited to claims 16-19, 23, 24, and 26 of Rose's '236
21 patent and claim 1 of Rose's '461 patent to numerous entities including Boo Heung, Westheimer,
22 Cort Musical, Cor-Tek, Fernandes, World Musical Instruments, Gotoh, Hoshino, Takeuchi, PWI,
23 Schaller, DHM, and on information and belief, other entities. FRM, Floyd D. Rose, APG, and
24 Lerner, David have never disavowed these knowingly invalid and unenforceable patent rights. To
25 the contrary, Lerner, David on behalf of FRM, Floyd D. Rose, and/or APG, after learning of the
26 invalid and unenforceable nature of the '236 patent, paid maintenance fees to the PTO on March
27 4, 1988, then on February 24, 1992, and then again on April 15, 1996, to maintain the purported
28 enforceability of the '236 patent. Such conduct is likely to mislead competitors as well as the

1 public at large into believing the '236 patent and the '461 patent were valid and enforceable.
2 Because of the dynamics inherent in a large scale (albeit fictitious) monopoly, intentionally
3 garnered by these fraudulent licenses and invalid and unenforceable Rose patent rights, potential
4 customers and business partners have been reluctant to enter into a business relationship with
5 Kahler International. Because customers and potential business partners have been misled by the
6 mere presence of the fictitious monopoly into believing they need a patent license from Rose (or
7 that Kahler International needs such a license from Rose), Kahler International's ability to
8 compete with FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller has been harmed.

9 349. In another example of unfair competition, FRM, Floyd D. Rose, APG, DHM, and
10 Lerner, David have licensed and enforced (or assisted in the licensing and enforcement of) trade
11 dress rights that do not exist. In particular, FRM, Floyd D. Rose, APG, DHM, and Lerner, David
12 have represented that Floyd D. Rose owns trade dress rights to the "whale tale" shape of certain
13 tremolo bridges and that no other competitor can manufacture a tremolo with a "whale tale" shape
14 without paying royalties to Floyd D. Rose via Lerner, David. On at least one occasion, Papiccio
15 has personally stated to Gary Kahler that Kahler International is not permitted to manufacture a
16 tremolo with a "whale tale" shape without paying royalties to Floyd D. Rose. However, a "whale
17 tale" feature is functional and essential to the use or purpose of a tremolo with fine tuners, and
18 thus cannot serve as a basis of trade dress rights. The look and appearance of the "whale tale" is
19 not an ornamental, incidental, or arbitrary aspect of the device. Such conduct is likely to mislead
20 competitors as well as the public at large into believing Rose owns certain trade dress rights when
21 in fact he did (or does) not. Because of these representations of non-existent trade dress rights,
22 potential customers and business partners are reluctant to enter into a business relationship with
23 Kahler International. Because potential customers business partners have been misled into
24 believing they need a trade dress license from Rose (or that Kahler International needs such a
25 license from Rose), Kahler International's ability to compete with FRM, Floyd D. Rose, DHM,
26 PWI, APG, and Schaller, and to sell competitive products, has been harmed.

27 350. In another unfair competition example, FRM, Floyd D. Rose, APG, DHM, and
28 Lerner, David have licensed and enforced (or assisted in the licensing and enforcement) of one or

1 more knowingly invalid and/or fraudulently procured convergence tuning patents of Rose. Such
2 conduct is likely to mislead competitors as well as the public at large into believing Rose owns
3 certain valid and/or enforceable convergence tuning patents when in fact he does not. Because of
4 these fraudulently procured convergence tuning patents, which are predated by McCabe's macro-
5 tuner patents, potential customers and business partners are reluctant to enter into a business
6 relationship with Kahler International. Because customers and potential business partners have
7 been misled into believing that Rose invented convergence tuning, Kahler International's ability
8 to compete with FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller, and to sell competitive
9 products, has been harmed.

10 351. As another example, in their negotiations with Boo Heung, Westheimer, Cort
11 Musical, Cor-Tek, Fernandes, World Musical Instruments, Gotoh, Hoshino, Takeuchi, PWI,
12 Schaller, and DHM, lawyers including Joseph Littenberg and John Nelson of Lerner, David
13 violated New Jersey Rule of Professional Conduct (RPC) No. 4.1 (1984)(Truthfulness in
14 Statements to Others), which states: (a) In representing a client a lawyer shall not knowingly: (1)
15 make a false statement of material fact or law to a third person; or (2) fail to disclose a material
16 fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act
17 by a client. (b) The duties stated in this Rule apply even if compliance requires disclosure of
18 information otherwise protected by RPC 1.6." Lerner, David did not disclose to Boo Heung,
19 Westheimer, Cort Musical, Cor-Tek, Fernandes, World Musical Instruments, Gotoh, Hoshino,
20 Takeuchi, PWI, Schaller, and DHM of the prior art Micro-Frets guitar (as well as Bunker's '108
21 patent or Moseley's '502 patent) and the invalid and unenforceable nature of claims 16-19, 23,
22 24, and 26 of the '236 patent and claim 1 of the '461 patent as proven by American Precision.
23 Nor did Lerner, David disclose to Boo Heung, Westheimer, Cort Musical, Cor-Tek, Fernandes,
24 World Musical Instruments, Gotoh, Hoshino, Takeuchi, PWI, Schaller, and DHM that American
25 Precision was free (and not subject to a royalty) to produce tremolos covered by 16-19, 23, 24,
26 and 26 of the '236 patent and claim 1 of the '461 patent. Such conduct is likely to mislead
27 competitors as well as the public at large into believing claims 16-19, 23, 24, and 26 of the '236
28 patent and claim 1 of the '461 patent were valid and enforceable. A violation of a rule of

1 professional conduct can form the basis of an unlawful unfair competition claim. *See, e.g.,*
2 *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839-41 (1994). Because potential business
3 partners like Boo Heung, Westheimer, Cort Musical, Cor-Tek, Fernandes, World Musical
4 Instruments, Gotoh, Hoshino, Takeuchi, PWI, Schaller, and DHM have never been informed of
5 the invalid and unenforceable nature of claims 16-19, 23, 24, and 26 of the '236 patent and claim
6 1 of the '461 patent (and that it was Gary Kahler of American Precision who proved such),
7 Kahler International's ability to compete with FRM, Floyd D. Rose, DHM, PWI, APG, and
8 Schaller, and to sell competitive products, has been harmed.

9 352. As another example, in their representation of Floyd D. Rose against Hoshino in
10 New Jersey District Court, lawyer John Nelson of Lerner, David violated New Jersey RPC No.
11 3.3 by not disclosing to the tribunal that claims 16-19, 23, 24, and 26 of Rose's '236 patent and
12 claim 1 of Rose's '461 patent of the Rose-Hoshino contract were invalid and unenforceable, and
13 that the Rose-Hoshino contract itself was entered into by fraud. John Nelson also violated Rule 11
14 of the Federal Rules of Civil Procedure. Such conduct is likely to mislead competitors as well as
15 the public at large into believing claims 16-19, 23, 24, and 26 of the '236 patent and claim 1 of
16 the '461 patent were valid and enforceable. Because potential business partners like Hoshino have
17 never been informed of the invalid and unenforceable nature of claims 16-19, 23, 24, and 26 of
18 the '236 patent and claim 1 of the '461 patent, Kahler International's ability to compete with
19 FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller, and to sell competitive products, has been
20 harmed.

21 353. FRM, Floyd D. Rose, APG, and Lerner, David defrauded Boo Heung,
22 Westheimer, Cort Musical, Cor-Tek, Fernandes, World Musical Instruments, Gotoh, Hoshino,
23 Takeuchi, PWI, Schaller, DHM, and on information and belief, other entities, by not disclosing,
24 among other things, the prior art Micro-Frets guitar (as well as Bunker's '108 patent or Moseley's
25 '502 patent) and the invalid nature and unenforceable nature of claims 16-19, 23, 24, and 26 of
26 Rose's '236 patent and claim 1 of Rose's '461 patent. Such conduct is likely to mislead
27 competitors as well as the public at large into believing claims 16-19, 23, 24, and 26 of the '236
28 patent and claim 1 of the '461 patent were valid and enforceable. Because potential business

1 partners like Boo Heung, Westheimer, Cort Musical, Cor-Tek, Fernandes, World Musical
2 Instruments, Gotoh, Hoshino, Takeuchi, PWI, Schaller, DHM have been defrauded and forced to
3 pay royalties where none are due, Kahler International's ability to compete with FRM, Floyd D.
4 Rose, DHM, PWI, APG, and Schaller, and to sell competitive products, has been harmed.

5 354. As another act of unfair competition, FRM, Floyd D. Rose, and APG falsely
6 advertise (to this day) that The Floyd Rose Original Tremolo is patented when in fact it is not and
7 in violation of, among other things, Section 43 of the Lanham Act. Such conduct is likely to
8 mislead competitors as well as the public at large into believing that The Floyd Rose Original
9 Tremolo is subject to valid and enforceable patent rights, when in fact the underlying technology
10 is (or was) not subject to any patent rights whatsoever and has entered the public domain.
11 Because customers and potential business partners have been misled into believing The Floyd
12 Rose Original Tremolo is patented at a time when it is not covered by any valid and enforceable
13 patent rights, Kahler International's ability to compete with FRM, Floyd D. Rose, DHM, PWI,
14 APG, and Schaller, and to sell competitive products, has been harmed.

15 355. FRM, Floyd D. Rose, Lerner, David, and APG have committed acts of patent
16 misuse in violation of antitrust laws. Such conduct is likely to mislead competitors as well as the
17 public at large into believing that The Floyd Rose Original Tremolo is subject to valid and
18 enforceable patent rights, when in fact the underlying technology is not subject to any patent
19 rights whatsoever and has entered the public domain. Because customers and potential business
20 partners have been misled in believing The Floyd Rose Original Tremolo is patented at a time
21 when it is not covered by any valid and enforceable patent rights, Kahler International's ability to
22 compete with FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller, and to sell competitive
23 products, has been harmed.

24 356. As a direct and proximate result of the aforesaid deceptive business practices,
25 Kahler International has and will continue to suffer great harm and damage. Kahler International
26 has incurred and will continue to incur irreparable harm unless Lerner, David, FRM, Floyd D.
27 Rose, DHM, PWI, APG, and Schaller are enjoined from further commission of unfair and
28 unlawful business acts and practices.

1 357. FRM, Floyd D. Rose, DHM, PWI, APG, Lerner, David, and Schaller each have
2 been unjustly enriched through their commission of unfair and unlawful business acts and
3 practices.

4 358. Therefore, Kahler International is entitled under Section 17200 et seq. of the
5 California Business and Professions Code, to an injunction, disgorgement of ill-gotten gains, and
6 restitution (among other things).

7 **TWELTH CLAIM FOR RELIEF**

8 **(False Advertising Under Lanham Act Section 43(a))**

9 **(Kahler International Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

10 359. Kahler International repeats, realleges, and incorporates by reference the
11 allegations set forth in paragraphs 1 through 358 of this Complaint.

12 360. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller market (or have marketed)
13 guitar products knowingly and intentionally marked with expired patent numbers. The marking
14 of said guitar products with expired patent numbers falsely advertise patent rights that do not
15 exist.

16 361. FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller market (or have marketed)
17 and advertise (or have advertised) guitar products knowingly and intentionally marked with
18 Rose's invalid and unenforceable '236 patent. The marking of said guitar products with the
19 expired and unenforceable '236 patent falsely advertise patent rights that do not exist.

20 362. FRM, Floyd D. Rose, and/or APG operate the website www.floydrose.com. That
21 website has represented various Floyd Rose branded bridges as "patented" when in fact those
22 bridges are no longer subject to patent rights.

23 363. FRM, Floyd D. Rose, and/or APG publicize and distribute a catalog, entitled
24 "Floyd Rose Tremolo Kits & Parts" (the "Rose catalog" - the catalog is attached hereto as Exhibit
25 J). The Rose catalog is available at floydrose.com. The Rose catalog advertises, promotes, and
26 represents various Floyd Rose branded bridges as "patented" when in fact those bridges are no
27 longer subject to patent rights, i.e., the underlying technology of the bridges is freely available via
28 the public domain. For example, on numerous pages of the Rose catalog, FRM, Floyd D. Rose,

1 and/or APG represent that “No copy can duplicate the patented double-locking design of the
2 Floyd Rose Tremolo System that allows you to lock your guitar in tune at the nut and at the
3 bridge.”

4 364. On pages 15 and 16 of the Rose catalog, FRM, Floyd D. Rose, and/or APG
5 publicize, promote, and represent sustain blocks that are pictured with expired patent numbers
6 “U.S. Pat. 4,497,236” and “U.S. Pat. 4,171,661.” The ‘236 patent expired in 2002. The ‘661
7 patent expired in 1997.

8 365. FRM, Floyd D. Rose, and/or APG have represented in various public literature
9 and through public outlets such as, but not limited to www.apintl.com that various Floyd Rose
10 branded bridges are “patented” when in fact those bridges are no longer subject to patent rights
11 and have not been subject to patent rights for years.

12 366. At various NAMM shows, FRM, Floyd D. Rose, Schaller, DHM, and/or APG
13 have represented that various Floyd Rose branded bridges are “patented” when in fact those
14 bridges are no longer subject to patent rights.

15 367. The above-note representations are false and misleading in material respects and
16 have been for years. On information and belief, the representations were made by (and/or on
17 behalf of) FRM, Floyd D. Rose, PWI, Schaller, DHM, and/or APG with malice for the purpose
18 of, among other things, damaging the competitive position of competitors like Kahler
19 International. FRM, Floyd D. Rose, PWI, Schaller, DHM, and/or APG knows and has known at
20 all times that the representations are false and misleading.

21 368. The foregoing acts and representations by FRM, Floyd D. Rose, PWI, Schaller,
22 DHM, and/or APG constitute false or misleading description of fact and/or law, which in
23 commercial advertising or promotion misrepresents the nature and characteristics of Rose’s
24 bridges.

25 369. Kahler International has suffered and continues to suffer direct and indirect harm,
26 including financial harm, from FRM, Floyd D. Rose, PWI, Schaller, DHM, and/or APG’s
27 misrepresentations. Kahler International also suffered a competitive disadvantage in marketing
28 his own guitar products and has incurred considerable financial detriment.

1 370. The goodwill associated with Kahler International's products has been lessened as
2 a result of FRM, Floyd D. Rose, PWI, Schaller, DHM, and/or APG's misrepresentations. For
3 example, by marking various Rose branded products with expired and/or inapplicable patents,
4 FRM, Floyd D. Rose, PWI, Schaller, DHM, and/or APG are misleading the public into believing
5 that Rose patents are still enforceable when in fact they are not.

6 371. FRM, Floyd D. Rose, PWI, Schaller, DHM, and/or APG's acts set forth above
7 have caused and continue to cause irreparable injury to Kahler International's goodwill and
8 reputation, and monetary damages alone cannot fully compensate Kahler International for his
9 injuries.

10 372. Kahler International is entitled to a permanent injunction against FRM, Floyd D.
11 Rose, PWI, Schaller, DHM, and/or APG, in addition to all other remedies under the Lanham Act,
12 including but not limited to compensatory damages, treble damages, disgorgement of profits,
13 costs, and attorney's fees.

14 **THIRTEENTH CLAIM FOR RELIEF**

15 **(False Advertising under Cal. Bus. & Prof. Code § 17500 et seq.)**

16 **(Kahler International Against FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller)**

17 373. Kahler International repeats, realleges, and incorporates by reference the
18 allegations set forth in paragraphs 1 through 372 of this Complaint.

19 374. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller intended to
20 dispose of property, Rose branded tremolos, guitars, and tremolo components, by sale.

21 375. In connect with the sale of its products, Defendants FRM, Floyd D. Rose, DHM,
22 PWI, APG, and Schaller publicly disseminated deceptive, untrue, or misleading advertising,
23 including by marking expired patent numbers on its products.

24 376. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller's false
25 advertising and marking of its products was undertaken in bad faith. Defendants could not have
26 reasonably believed that the patent number listed on their products all read upon, covered, or
27 protected those products, and/or were valid and enforceable.

28 377. For example, FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller have marked

1 unpatented articles including, but not limited to the SpeedLoader products with U.S. Patent No.
2 4,171,661, which expired on January 3, 1997, and/or U.S. Patent No. 4,497,236, which expired on
3 March 15, 2002.

4 378. Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller knew or had
5 reason to know that the patent markings on their products were false.

6 379. Defendants' wrongful acts, as alleged herein, have had the intent and effect of
7 deterring competition and allowing Defendants to make substantial sales and profits on their
8 products statewide, and even worldwide.

9 380. As a result of Defendants' false advertising, Kahler International has been
10 deprived of profits and benefits, and Defendants have wrongly obtained such profits and benefits
11 in an amount to conform to proof at trial. Additionally, Kahler International has suffered
12 irreparable harm, and injunctive relief is necessary to enjoin further wrongful acts by Defendants
13 and to remediate the consequences of Defendants' false advertising, which occurred over ten
14 years

15 **PRAYER FOR RELIEF**

16 WHEREFORE, McCabe and Kahler International pray for judgment in their favor against
17 Defendants for the following relief:

18 A. An Order adjudging FRM, Floyd D. Rose, PWI, Schaller, DHM, and APG to have
19 infringed the '831, '841, '066, '094 and '191 patents under 35 U.S.C. § 271;

20 B. An Order adjudging FRM, Floyd D. Rose, PWI, Schaller, DHM, and APG to have
21 willfully infringed the '831, '841, '066, '094 and '191 patents under 35 U.S.C. § 271;

22 C. An injunction enjoining FRM, Floyd D. Rose, PWI, Schaller, DHM, and APG,
23 their respective officers, directors, agents, servants, employees and attorneys, and those persons
24 acting in concert or participation with Defendants, from directly or indirectly infringing the '831,
25 '841, '066, '094 and '191 patents in violation of 35 U.S.C. § 271;

26 D. That FRM, Floyd D. Rose, PWI, Schaller, DHM, and APG account for all gains,
27 profits, and advantages derived by Defendants' infringement of the '831, '841, '066, '094 and
28 '191 patents in violation of 35 U.S.C. § 271, and that Defendants pay to McCabe all damages

1 suffered by McCabe;

2 E. An order for a trebling of damages and/or exemplary damages because of FRM,
3 Floyd D. Rose, PWI, Schaller, DHM, and APG's willful misconduct under 35 U.S.C. § 284;

4 F. An Order adjudging that this is an exceptional case;

5 G. An award to McCabe of the attorneys' fees and costs incurred by McCabe in
6 connection with this action under 35 U.S.C. § 285;

7 H. An award of pre-judgment and post-judgment interest and costs of this action
8 against FRM, Floyd D. Rose, PWI, Schaller, DHM, Lerner, David and APG;

9 I. That Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller be
10 adjudged to have falsely marked tremolo devices and guitars with an intent to deceive in violation
11 of 35 U.S.C. § 292;

12 J. That Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller be ordered
13 to pay McCabe damages available under 35 U.S.C. § 292;

14 K. That Defendants FRM, Floyd D. Rose, DHM, PWI, APG, and Schaller be ordered
15 to pay Kahler International damages available under 35 U.S.C. § 292;

16 L. That Defendants Lerner, David, FRM, Floyd D. Rose, DHM, PWI, APG, and
17 Schaller be adjudged to have competed unfairly and unlawfully under California Business &
18 Professions Code §17200 *et seq.*;

19 M. That Defendants Lerner, David, FRM, Rose, DHM, PWI, APG, and Schaller be
20 adjudged to have been unjustly enriched by their unfair and unlawful acts under California
21 Business & Professions Code §17200 *et seq.*;

22 N. That the Court order Lerner, David, FRM, Floyd D. Rose, PWI, Schaller, DHM,
23 and APG to provide restitution to McCabe and Kahler International for its unlawful business
24 practices;

25 O. An Order adjudging FRM, Floyd D. Rose, PWI, Schaller, DHM, and APG to have
26 falsely advertised in violation of the Lanham Act;

27 P. That Defendants Lerner, David, FRM, Floyd D. Rose, DHM, PWI, APG, and
28 Schaller be adjudged to have falsely advertised under California Business & Professions Code

1 §17500 *et seq.*;

2 Q. Restitution of profits that Defendants have obtained through their false advertising
3 in violation of California Business & Professions Code §17500 *et seq.*;

4 R. That Defendants be directed to file with this Court and serve on Plaintiff within
5 thirty (30) days after service of the injunction order, a report in writing signed under oath
6 detailing the manner and form in which Defendants have complied with the injunction;

7 S. That Defendants be required to account to McCabe for any and all gains, profits
8 and advantages derived or obtained by them, and all damages sustained by McCabe, by reason of
9 Defendants' acts and conduct complained of herein, including Defendants' acts of patent
10 infringement, false marking, and unfair competition;

11 T. That the Court deem this case an exceptional one under 15 U.S.C. § 1117 and
12 award McCabe and Kahler International reasonable attorneys' fees and costs;

13 U. The attorneys' fees and costs that McCabe and Kahler International incurred in
14 this action pursuant to California Civ. Code § 1021.5; and

15 V. Such other and further relief as the Court may deem proper and just.

16 Dated: May 7, 2012

SAN DIEGO IP LAW GROUP LLP

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By: /s/Trevor Coddington

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DOUGLAS E. OLSON

20

JAMES V. FAZIO, III

TREVOR Q. CODDINGTON

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Attorneys for Plaintiffs

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GEOFFREY L. MCCABE and KAHLER
INTERNATIONAL, INC.

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DEMAND FOR JURY TRIAL

McCabe hereby demands a trial by jury on all issues so triable.

Dated: May 7, 2012

SAN DIEGO IP LAW GROUP LLP

By: /s/Trevor Coddington

DOUGLAS E. OLSON
JAMES V. FAZIO, III
TREVOR Q. CODDINGTON

Attorneys for Plaintiff
GEOFFREY L. MCCABE and KAHLER
INTERNATIONAL, INC.