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Tundra Inc.*

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 TUNDRA INC.,

15
16 Plaintiff,

17 v.

18 FAIRE WHOLESALE, INC.,

19 Defendant.
20
21
22
23

Case No. 3:23-cv-2513

COMPLAINT FOR:

1. **VIOLATIONS OF SHERMAN ACT**
2. **VIOLATIONS OF CALIFORNIA'S UNFAIR COMPETITION LAW**
3. **TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS**

JURY TRIAL DEMANDED

1 Tundra Inc. (“Tundra” or “Plaintiff”) brings this action against Faire Wholesale, Inc.
2 (“Defendant” or “Faire”) and alleges as follows:

3 **I. PRELIMINARY STATEMENT**

4 1. Faire (formerly known as “Indigo Fair”) dominates the market for online wholesale
5 marketplaces that connect local independent retailers (“Retailers”) throughout the United States
6 with new or emerging domestic brands offering wholesale products (“Brands”), holding a 90%
7 share of that market as measured by dollar sales volume.¹ Faire acquired its monopoly market
8 position by deploying unfair, anticompetitive, and exclusionary tactics that have thwarted
9 competition from other actual and would-be market participants and harmed the Brands, Retailers,
10 and consumers that Faire claims to serve – all in violation of the Sherman Act and California law,
11 as set forth below.

12 2. Faire did not become the dominant online wholesale platform by offering a superior
13 product, better pricing, or more attractive terms and conditions. Since its inception, Faire has made
14 money primarily by charging Brands fixed-percentage commissions for sales occurring on its
15 platform, although Faire has raised its commission levels over time, with commissions now
16 ranging as high as 25%, making Faire the highest-cost competitor in the market. Other competitors
17 have also sought to compete using commission-based models, but charging lower commission
18 levels than Faire. Tundra, on the other hand, developed an innovative business model that provides
19 essentially the same service as Faire but without charging any commissions, instead relying
20 primarily upon paid platform-based advertising to generate revenue. Threatened by Tundra’s
21 innovative, no-commission platform, and by lower-priced commission-based competitors, Faire
22 has implemented and exploited exclusionary agreements with Brands and Retailers to block rivals
23 from gaining a foothold in the market.

24 3. Each year, Brands and Retailers sell through Faire a gross value of products
25 approximately 5-10 times more than all of its competitors combined. Faire as of October 2022
26

27 ¹ See <https://businessofhome.com/articles/faire-hits-1-billion-in-sales> (“the rise of online-only
28 B2B marketplaces” “has altered the wholesale buying process” and “Faire has become the
largest online wholesale community in the world”).

1 claimed on its website to service some 600,000 Retailers, more than ten times that of Tundra, and
2 over 85,000 Brands. More recently, Faire has advertised on its website that its platform
3 encompasses “over 100,000 independent brands.” Faire has achieved this dominant position by
4 mandating and enforcing anticompetitive restraints and using various forms of coercion and
5 threatened penalties to enforce its monopoly and destroy competition. Faire’s anticompetitive
6 practices, among other things, substantially raise its rivals’ costs of doing business and erect
7 meaningful barriers to competitors, impeding their ability to expand and achieve efficient scale.
8 As a result of these practices and the broader harm they have caused to competition, Faire has been
9 able to inflate its commissions to still-higher levels, allowing Faire to extract supracompetitive
10 profits and to wield even greater power by using its commission structure as a coercive tool to
11 threaten and discipline Brands and reinforce Faire’s exclusionary policies and practices.

12 4. To sign up for Faire, Brands and Retailers must agree to the following:

- 13 a) If a Retailer purchases even a single product from a Brand on Faire, the Retailer
14 becomes contractually prohibited from ever doing business with that Brand
15 except on Faire. Similarly, if a Brand sells even a single product to a Retailer
16 on Faire, it is contractually prohibited from selling any products to that same
17 Retailer anywhere else, online or offline. This is an exclusive dealing
18 requirement of indefinite duration that binds any Retailer or Brand that does
19 business on Faire. This requirement will be referred to herein as the “Exclusive
20 Dealing Requirement.” If a Brand or Retailer violates the Exclusive Dealing
21 Requirement, it can be kicked off Faire forever. This exclusivity restriction
22 harms Brands, Retailers, Faire’s competitors, and end consumers. It harms
23 Brands and Retailers by blocking their ability to do business with one another
24 through other means or on other platforms, including on Tundra’s commission-
25 free marketplace, where Brands and Retailers would otherwise be able to
26 complete transactions at a lower cost. Once a Brand and a Retailer transact
27 business on even a single product on Faire, those parties are contractually barred
28 by Faire’s Exclusive Dealing Requirement from doing business together in any

1 other way for any product. This harms Faire’s competitors by substantially
2 foreclosing their market opportunities, putting many Brands and Retailers
3 entirely off limits to such competitors from the moment those Brands and
4 Retailers transact a single sale on Faire. Faire’s Exclusive Dealing Requirement
5 also harms end consumers, as it forces Retailers to purchase from many Brands
6 only through Faire’s high-commission platform, increasing what Retailers have
7 to pay for wholesale product purchases, which in turn drives up the prices
8 Retailers charge for those same items when sold to consumers.

9 b) If a Brand wants to offer even a single product on Faire, it must offer every
10 product it sells on Faire, which will be referred to herein as the “Entire Catalog
11 Requirement.” Hence, Brands that might prefer to list only some products on
12 Faire and other products on Tundra are contractually prohibited from doing so.
13 The Entire Catalog Requirement substantially exacerbates the harms caused by
14 Faire’s Exclusive Dealing Requirement. The fact that Brands doing business
15 on Faire must list all of their products on the platform has the natural and
16 intended effect of expanding the scope Faire’s mandated exclusive dealing. The
17 Entire Catalog Requirement, in other words, has a multiplying effect, causing
18 the adverse market effects of Faire’s restrictive policies to be exponentially
19 greater.

20 5. Faire did not always have, much less enforce, these policies and practices. As discussed
21 below, Faire adopted these policies and practices in response to efforts by Tundra and others to
22 build and expand their own online wholesale marketplaces. And Faire has become increasingly
23 aggressive in exploiting such policies and practices to limit the growth and opportunities of its
24 rivals, a number of which have now been forced to exit the market.

25 6. Through imposing and enforcing the Exclusive Dealing Requirement and related
26 policies, Faire is able to protect and expand its dominant market position while at the same time
27 extracting supracompetitive profits by charging above-market commissions. A firm’s ability to
28 maintain market dominance while simultaneously imposing anticompetitive conditions and

1 charging above-market prices is a telltale sign of monopoly power. The antitrust laws are most
2 concerned with monopolies that are durable, or long-lasting, placing such firms in a position to
3 exploit their market dominance at great cost to consumers and causing lasting harm to affected
4 markets—particularly where such monopolies are maintained through exclusionary conduct. This
5 is the type of dominance that Faire has achieved, and it has done so, in substantial part, through
6 exclusionary policies and practices that have been designed and implemented with the effect of
7 depriving Brands, Retailers, and ultimately end consumers of the benefits of fair competition,
8 including the specific benefits of Tundra’s commission-free business model.

9 7. Faire is also increasingly using fear and intimidation to enforce its anticompetitive
10 policies, thereby coercing Brands and Retailers to remain trapped in a restrictive system that blocks
11 them from competing freely themselves or enjoying the benefits of free competition. Among other
12 things, Faire openly and aggressively polices compliance with its policies, terms, and conditions,
13 and treats Brands and Retailers harshly when noncompliance is detected. For any Brand or Retailer
14 that deviates from Faire’s contractual restrictions, the consequence is often that they are forever
15 barred from using Faire’s platform. But the consequences for Brands can be greater still.

16 8. Faire charges Brands a 25% commission on first orders and a 15% commission on
17 subsequent orders, but these commissions can be waived in some circumstances, provided that the
18 Brand is fully compliant with Faire’s then-current policies. Yet for a Brand that Faire believes
19 may have departed from such policies, Faire reserves the right to demand payment of previously
20 waived commissions—in effect, imposing a substantial financial penalty for any deviation from
21 Faire’s restrictive terms and conditions. Faire also at times withholds payment from Brands for
22 merchandise sold on the Faire platform in response to concerns about suspected noncompliance
23 with Faire’s policies. Faire uses the threat of such financial penalties as a coercive tool to control
24 Brands and Retailers operating on its platform, and to discourage such companies from doing
25 business with Faire’s competitors.

26 9. As a result of Faire’s anticompetitive and often punitive actions, Brands and Retailers
27 feel compelled to remain on Faire even though they increasingly resent Faire’s restrictive policies
28 and would prefer to take some or all of their business elsewhere, including to Tundra. And

1 competitors like Tundra are thus foreclosed from fairly competing for the business of such
2 customers, because once a Brand or Retailer has become locked in to Faire’s platform and related
3 policies it becomes extremely costly for such customers to move even a portion of their business
4 to Tundra’s marketplace. Even though Tundra’s innovative marketplace is entirely commission-
5 free, Faire’s punitive policies, terms, and conditions make switching to Tundra prohibitively
6 costly.

7 10. These practices violate the Sherman Act, which prohibits monopolization, attempted
8 monopolization, and unreasonable restraints on trade, as well as California’s Unfair Competition
9 Law (Business and Professions Code Section 17200) (the “UCL”). In addition, Faire has tortiously
10 interfered with Tundra’s contractual relationships with its customers. This suit seeks to halt Faire’s
11 anticompetitive, unfair, and illegal practices, obtain redress for the severe damage caused to
12 Tundra, and restore fair competition in the market for online wholesale product marketplaces.

13 II. THE PARTIES

14 11. Tundra is a Delaware corporation with its principal place of business at 345 Heritage
15 Ave, #1600, Portsmouth, NH, 03801.

16 12. Faire is a Delaware corporation with its principal place of business at 100 Potrero Ave.,
17 San Francisco, CA 94103. Summons may be served by and through its registered agent, Kunal
18 Bajaj at 100 Potrero Ave., San Francisco, CA 94103.

19 III. JURISDICTION AND VENUE

20 13. This Court has subject matter jurisdiction over the federal antitrust claims pursuant to
21 15 U.S.C. § 4, 28 U.S.C. § 1331, and 28 U.S.C. § 1337(a). The Court has subject matter
22 jurisdiction over the UCL and tortious interference claims arising under state law pursuant to 28
23 U.S.C. § 1367(a), because Tundra’s state law claims arise out of the same nucleus of operative
24 facts as its federal law claims.

25 14. This Court has personal jurisdiction over Faire because, upon information and belief,
26 Faire is a resident of this judicial district (“District”), has systematic and continuous contacts in
27 this District, regularly transacts business within this District, and regularly avails itself of the
28

1 benefits of this District. Upon information and belief, Faire derives substantial revenues from sales
2 in this District.

3 15. Venue is proper in this District under 28 U.S.C. § 1391(b) in that Faire is subject to
4 personal jurisdiction in this District. First, Defendant Faire resides in this District, making venue
5 proper under 28 U.S.C. § 1391(b)(1). Further, a substantial part of the events giving rise to the
6 claim occurred in this District (which contains Faire’s corporate headquarters), making venue
7 proper under 28 U.S.C. § 1391(b)(2).

8 **IV. DIVISIONAL ASSIGNMENT**

9 16. Divisional Assignment to the San Francisco Division is proper pursuant to Civil Local
10 Rule 3-2(c) and (d) because a substantial portion of the events giving rise to this action occurred
11 in San Francisco County, where Defendant Faire maintains its principal place of business.

12 **V. FAIRE’S EXCLUSIONARY CONDUCT AND RELATED MARKET IMPACTS**

13 ***a. The Online Market To Match Brands With Retailers***

14 17. Over the past two decades, consumer-facing online retailers such as Amazon have
15 delivered increased convenience, better price transparency, and a host of other benefits to
16 consumers. While direct-to-consumer online models have been extremely successful, Americans
17 still buy an enormous share of their products in physical stores, commonly known as “physical
18 retail,” a channel that is vital for small retailers. Less well known, but critically important to the
19 success of these small businesses, is the market for online wholesale marketplaces, where products
20 can be purchased in bulk, including from smaller Brands. Smaller Retailers use such online
21 marketplaces to identify Brands with attractive products, and conveniently make bulk product
22 orders from such Brands at preferential “wholesale” prices.² The Retailer then sells such products
23 to end consumers at the Retailer’s physical location, earning profits from the margin between the
24

25
26 ² The largest retail companies have their own supply chains, where wholesale prices are
27 negotiated with each supplier as part of ordering potentially millions of items for thousands of
28 stores. This dispute is not about those supply chains, and that market is entirely separate from
the one involved in this suit, as neither Faire nor Tundra operates in this market nor seeks to do
so.

1 wholesale prices paid to procure the items and the higher retail prices the Retailer is able to charge
2 to its customers.³

3 18. Despite the success of large, “big box” retailers such as Target and Walmart, there are
4 hundreds of thousands of independent retail stores that have only one or a few retail locations.
5 These Retailers typically sell a relatively small selection of high-quality, hand-picked goods such
6 as specialty foods, candles and soaps, and home decorations and furnishings. Such Retailers make
7 up an important part of the nation’s broader retail sales sector in both percentage and absolute
8 terms.

9 19. Small, independent makers of products sold through the independent retail channel—
10 again, referred to herein as “Brands”—are essential to the viability of Retailers because they
11 provide a significant share of the products that Retailers sell at their stores. These Brands are
12 typically small, individually owned companies that create and sell their own high-quality products.
13 While some Brands market their products directly to consumers on a site like Etsy, this is often
14 not practical for several reasons, including lack of brand visibility, a lack of scale, difficulty with
15 logistics for individual sales, and a lack of convenience. As such, many Brands instead market
16 directly to Retailers at wholesale. The ability of Retailers and Brands to find each other and make
17 good “matches” is absolutely essential for the survival of both: the better the Brand’s products can
18 be “matched” with Retailers who want to sell them, the more likely it is that each can remain
19 financially viable in the face of stiff competition from larger, more established brands and larger
20 retail chains.

21 20. For decades, traditional in-person trade shows were the most common forum for
22 Brands and Retailers to identify each other and establish a wholesale relationship. Traditional
23 trade shows, however, require a significant investment of time and resources, for both buyers and
24 sellers. There are only a few such trade shows each year, and representatives must travel to the
25

26 ³ Direct internet retailers such as Amazon do not have the same business model as Faire or
27 Tundra and are not in competition with them. Amazon typically sells single product units
28 directly to consumers, and neither Faire nor Tundra even allow consumers to purchase individual
products. Amazon, as a direct-to-consumer retailer, clearly is not in the business of supplying
bulk items to other retailers at wholesale prices.

1 trade show, set up a booth, and spend several days and thousands of dollars to reach a relatively
2 small number of potential customers. Through online wholesale channels, Brands and Retailers
3 can now interact and do business with each other far more efficiently. Not only are the costs of
4 doing wholesale business online far lower compared to traditional trade shows, but online
5 wholesale marketplaces also enable Brands and Retailers to reach a far broader audience and scope
6 of potential business partners, as compared to traditional trade shows.

7 21. Given the vastly different and more efficient opportunities and benefits that online
8 wholesale marketplaces provide, such platforms have emerged as a completely distinct market.
9 The COVID-19 pandemic further advanced the development of this distinct market by magnifying
10 both the need for and benefits of both identifying wholesale business partners and completing
11 related transactions online. Travel restrictions during COVID all but eliminated physical trade
12 shows for a period of years, but even in the aftermath of such travel restrictions trade shows are
13 no longer regarded by most Brands and Retailers as an efficient or convenient means to connect
14 and transact business, and attendance at trade shows has continued to wane. Although some
15 Brands and Retailers continue to participate in traditional in-person trade shows, in most cases this
16 is in addition to such Brands and Retailers using one or more online wholesale marketplaces.
17 Trade shows are not, and never have been, a viable substitute for online wholesale marketplaces,
18 nor are there any other viable substitutes for online wholesale marketplaces.

19 ***b. Faire Enters in 2017 But Soon Faces Competitive Threats***

20 22. The first online wholesale marketplace to connect Brands and Retailers was created
21 and launched in 2014 by Etsy, and known as “Etsy Wholesale.” However, by mid-2018 Etsy
22 Wholesale had been shut down, an early sign of the difficulties of successfully entering this area
23 of e-commerce. Faire was founded in 2017 and was able to take advantage of Etsy Wholesale’s
24 shutdown the following year.

25 23. From the outset, Faire had a commission-based business model. Initially, Faire charged
26 Brands 15% commissions for orders completed on Faire’s marketplace, although it quickly
27
28

1 increased this to an 18% commission later in 2017. And by 2018 Faire raised its commissions to
2 25% for first-time orders.⁴

3 24. Several other competitors entered the market following Faire and sought to compete
4 by providing comparable online services designed to match Brands and Retailers. Tundra was
5 among the first companies to launch an alternative to Faire's marketplace, although Tundra set
6 itself apart by eschewing a commission-based model in favor of a more innovative, easy to use,
7 entirely commission-free platform. Instead of charging commissions, Tundra generates revenue
8 primarily through platform-based advertising. Tundra's differentiated commission-free business
9 model presented a particularly significant threat to Faire's business. However, other competitors
10 entered the market as well, and sought to compete in part by undercutting Faire's commissions.
11 Whereas Faire by 2018 was charging, at the highest level, 25% commissions, other competitors
12 charged commissions between 10% and 15%, and some below 10%.

13 25. Given the fortuitous timing of Faire's entry, it was able to claim a leading market
14 position in the wake of Etsy Wholesale's withdrawal. But as Tundra and other competitors
15 entered, offering more attractive business models and comparable or better online platforms and
16 services, Faire's early lead in this developing market was seriously threatened. And Faire
17 responded by implementing new policies and practices designed to minimize and block such
18 competition.

19 *c. Faire Employs Anticompetitive Restrictions To Capture Retailers,*
20 *Exploit Brands, and Exclude Rivals*

21 26. To protect its market dominance, Faire has implemented and enforced a variety of
22 exclusionary policies and practices, which in combination have done severe harm to competition
23 and allowed Faire to strengthen its monopoly control over the market.

24 **27. Exclusive Dealing Requirement.** In response to growing competition from Tundra
25 and other online wholesale marketplaces, Faire implemented an exclusive dealing provision, which
26 has been reflected in its Terms of Service for Brands and Retailers since at least early 2019. Under

27 _____
28 ⁴ Faire very recently announced that it is raising certain commission levels yet again, effective
July 5, 2023.

1 this provision, which Faire refers to as its “No Circumvention” policy, once a Brand completes
2 any order with a Retailer on Faire’s marketplace, the Brand is contractually prohibited from doing
3 business with the Retailer “in any manner” other than on Faire—meaning that the Brand cannot
4 transact with the same Retailer on any other competing online wholesale marketplace, and likewise
5 cannot do business with the Retailer offline. This restriction is accompanied by an explicit threat
6 that violation of this condition may cause the “deactivat[ion] or terminat[ion]” of the offending
7 accounts at any time.⁵ This Exclusive Dealing Requirement, which has no legitimate business
8 justification, was implemented with the purpose and effect of substantially foreclosing competition
9 from Faire’s rivals, and is a key means by which Faire has secured and maintained monopoly
10 power.

11 28. As an example, suppose that Brand A sells home décor items on Faire as well as on
12 Tundra, and Retailer B is also on both platforms. If Brand A and Retailer B do a single transaction
13 on Faire, they are contractually prohibited from doing any business with each other on Tundra or
14 other competing online wholesale marketplaces for all time. Furthermore, they are prohibited from
15 ever doing business together “in any manner” offline. The Exclusive Dealing Requirement thus
16 has the effect of “removing” these Brand-Retailer pairings from all commercial channels except
17 for Faire, forever.

18 29. Given Faire’s overwhelmingly dominant market position, accounting for
19 approximately 90% of all sales completed on domestic online wholesale marketplaces, this
20 Exclusive Dealing Requirement has the effect of foreclosing Faire’s rivals from the vast majority
21 of Brand-Retailer pairings and related sales transactions occurring online across the United States.
22 And Faire’s dominant market position continues to strengthen and expand, at the cost of its
23 competitors. Indeed, two competitors—Trada and Abound—were forced to exit the market this
24 year, and two other competitors—Hubba and Boutsy—exited in 2021-22. Thus, Faire’s monopoly
25 grip on the market is only growing stronger, and through the Exclusive Dealing Requirement Faire
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27

28 ⁵ Faire Terms of Service for Brands and Conditions at Section 11(e).

1 has contractually ensured that competitors that might otherwise lure business away from Faire's
2 marketplace are shut out from such business opportunities.

3 30. Well over 70% of the wholesale business done on Faire is done by pairings of Brands
4 and Retailers that have previously transacted on Faire and are thus bound by Faire's Exclusive
5 Dealing Requirement. Given that Faire has a stable market share in excess of 90%, and that more
6 than 70% of Faire's business is subject to exclusivity restrictions, through the Exclusive Dealing
7 Requirement Faire has plainly foreclosed a substantial portion of the market to competition.

8 31. Faire's Exclusive Dealing Requirement has been extremely effective in insulating the
9 company against competition, owing in part to how actively and aggressively Faire enforces this
10 policy. Faire's Terms of Service for Brands state that the company "reserves the right to deactivate
11 or terminate" any Brand that "fails to abide by" the Exclusive Dealing Requirement. And Faire
12 devotes significant resources to policing compliance with this provision. For any Brand operating
13 on Faire, the risk of being terminated and banned from Faire's marketplace is a serious threat. If
14 a Brand is removed from Faire, it potentially loses access to 90% or more of the business done on
15 online wholesale marketplaces, which could be financially ruinous for any Brand. Faire enforces
16 this and other requirements through electronic surveillance across the internet, also known as "data
17 scraping." Faire has repeatedly and permanently excluded both Brands and Retailers from the
18 Faire platform for violating the company's Terms of Service for Brands or Retailers, and this type
19 of aggressive surveillance and punitive enforcement has been highly effective in deterring Brands
20 from deviating from Faire's strict expectation of exclusivity.

21 32. **Entire Catalog Requirement.** As of 2019, Faire requires that if a Brand is to list a
22 single product on Faire, it must list every single product it sells (online or offline) on Faire. In
23 other words, a Brand cannot sell 10 out of the 25 products it makes on Faire and the other 15 on
24 Tundra. If it did so, the Brand would risk being kicked off Faire completely. Similarly, a Brand
25 cannot list any product on Tundra that it does not also list on Faire. This all-or-nothing requirement
26 expands the scope of the business Brands are required to do on Faire, which in turn expands the
27 scope and effect of Faire's Exclusive Dealing Requirement. In addition, the Entire Catalog
28 Requirement greatly impedes the ability of rival online wholesale marketplaces to attract the

d. ***Faire Engages In Other Unfair And Tortious Acts***

36. Faire also uses a variety of other unfair practices to make it difficult for rivals to compete, and that constitute tortious interference with contract.

37. Faire Targets Tundra Brands To Further Increase Its Market Share. Tundra has also been told by Brands that Faire has targeted them “in regards to their Tundra account” and caused them to cease doing business on Tundra. Specifically, on February 23, 2021, Tundra received an email from a Brand doing business both on Faire and Tundra indicating that Faire was pressuring them to leave Tundra and do business only on Faire. The Brand wrote to a Tundra customer support representative:

Thank you so much for reaching out! I really appreciate your concern and your help.

To be completely honest, Faire reached out to me because there were “complaints” about my products being on Tundra at a lower cost. I explained to them this was Tundra’s model and that Tundra doesn’t take a commission, suppliers offer products at a lower cost. I’m sure they’re well aware, but I had to explain so they realized how they were limiting my business’s reach if I can only be on Faire.

Faire is big now and with that comes more rules. I’m in violation of their vendor policy. I’m talking to them about it because that’s really limiting my reach as a small business.

Do you know if this is truly a problem? Have other vendors suddenly had a problem with this? I’ve had Faire for several years, and Tundra for at least a year now. I’m curious how this is just now becoming a problem. I can’t be the only one.

38. This correspondence shows that Faire contacts customers Tundra has valid and existing contracts with and induces them to change their pricing on Tundra, or to leave Tundra’s platform altogether. Despite the Brand’s concern that it was “limiting my business’s reach if I could only be on Faire,” in response to Faire’s pressure tactics this Brand has since left Tundra and now only markets its products on Faire. On information and belief, this pattern of targeted attacks on companies doing business on Tundra is widespread. As the same Brand stated, “I’m sure I’m not the only brand they’re coming after in regards to their Tundra account. Really disappointing.”

39. Faire Attacks Tundra’s New WSC Platform. Tundra in 2022 launched a new platform, Wholesale Co-op (“WSC”), which allowed retailers to earn cash back on their orders on wholesale marketplaces, including Faire. Faire responded with a concerted effort to dismantle this new offering. It threatened businesses that signed up for WSC or were considering joining,

1 employed highly skilled engineers to thwart WSC’s platform and disrupt the business, used
2 electronic subterfuge to attempt to greatly increase costs for WSC of operating its service, and
3 threatened crippling legal action if the names of all participating Retailers weren’t immediately
4 disclosed.

5 40. Faire recently told a brand that had just signed up for WSC that participating on WSC
6 would amount to a breach of Faire’s policies and result in the Brand’s removal from Faire. The
7 Brand in question, fearing the damage to its business that would result from being expelled from
8 Faire, informed WSC that it would have to withdraw from their services due to Faire’s demands.

9 **VI. INTERSTATE COMMERCE**

10 41. Faire is engaged in, and its activities substantially affect, interstate trade and commerce.
11 Faire has sold over 125 million products in the last year, with an average of over \$10 million in
12 sales per day during peak buying periods.

13 **VII. RELEVANT PRODUCT MARKET**

14 42. The relevant product market in this action is the market for online wholesale
15 marketplaces that connect local retailers throughout the United States with new or emerging
16 domestic brands. Faire and Tundra both compete in this market. This market is separate and
17 distinct from other wholesale channels, including traditional trade shows. Online wholesale
18 marketplaces enable Brands and Retailers to identify each other, create “matches,” and commence
19 with processing wholesale product orders in ways that are far more efficient than any other method
20 of doing such business. As explained above, attending traditional trade shows is costly and
21 inconvenient, and in recent years attendance at trade shows has dwindled. Brands and Retailers
22 alike have come to appreciate that online wholesale marketplaces provide a far superior platform
23 for advancing their businesses. Among other benefits, a Brand or Retailer can use a platform like
24 Faire or Tundra as a one-stop repository for wholesale licenses and payment, whereas with other
25 approaches for conducting wholesale business, including traditional trade shows, each transaction
26 between a Brand and a Retailer may be accompanied by significant paperwork and other
27 inconveniences.

1 43. Some Brands do seek to market directly to consumers using services like Etsy, but that
2 is an entirely different business channel and in no way a substitute for online wholesale
3 marketplaces that connect Brands and Retailers and facilitate the efficient creation and
4 perpetuation of wholesale Brand-Retailer relationships. Similarly, some Brands and Retailers are
5 able to identify each other through online searches or word of mouth, and may develop direct
6 wholesale relationships outside of online wholesale marketplaces. This again is no substitute for
7 the broader benefits that are uniquely available to Brands and Retailers through participation in
8 online wholesale marketplaces, which create exposure to many thousands of potential wholesale
9 business partners, and enable Brands and Retailers opportunities to efficiently grow their
10 businesses in ways that cannot be achieved through any alternative means, online or offline.

11 44. There are no reasonable or economically viable substitutes for the services provided to
12 Brands and Retailers through online wholesale marketplaces.

13 45. Given the lack of viable alternatives, a hypothetical monopolist in the market for online
14 wholesale marketplaces could profitably impose a small but significant non-transitory increase in
15 price.

16 **VIII. RELEVANT GEOGRAPHIC MARKET**

17 46. For the purposes of this lawsuit, the United States of America is the relevant geographic
18 market. There are multiple online wholesale marketplaces operating within the US, including
19 Faire and Tundra. US-based Brands and Retailers typically use online wholesaler marketplaces
20 that are focused upon serving US-based businesses. For such US-based Brands and Retailers, the
21 only reasonable substitute for an online wholesale marketplace such as Faire or Tundra would be
22 another online wholesale marketplace operating within the US and serving US-based Brands and
23 Retailers.

24 **IX. MARKET AND MONOPOLY POWER**

25 47. In addition to Faire and Tundra, online wholesale marketplace services for US-based
26 Brands and Retailers are offered by Boston-based Mable and New York-based Bulletin, among
27 others. But Faire is by far the dominant firm in this market. Across Retailers, Faire as of 2023
28 accounts for 90% or more of all business conducted on US-based online wholesale marketplaces,

1 as measured by the dollar value of purchases. As such, Faire has at least a 90% market share,
2 which is an accurate reflector of the degree of Faire's market dominance.

3 48. Faire's market dominance is protected and reinforced by high barriers to entry and
4 expansion. Indeed, Faire's anticompetitive practices by design and in practice substantially raise
5 its rivals' costs and erect significant obstacles to the ability of such firms to fairly compete and
6 expand, with the effect that Faire is able to hold its competitors, including Tundra, at bay,
7 preventing those competitors from achieving efficient scale. Faire, on the other hand, uses the
8 same anticompetitive practices to maintain and grow the scale of its business and increase the
9 degree of its control over both Brands and Retailers.

10 49. Faire's market dominance is reinforced in part through networks effects, which it
11 consciously exploits to its advantage. As explained above, many Brands and Retailers have
12 become locked in to using Faire's online wholesale marketplace and their businesses would suffer
13 significant harm if they were removed from Faire's platform. Faire has used its size advantages,
14 together with restrictive policies and practices discussed above, to gain further control over Brands
15 and Retailers and to compel such firms to agree to Faire's above-market commissions and other
16 anticompetitive Terms of Service for Brands and Retailers and related practices. There are many
17 Brands and Retailers doing business on Faire's platform that would like to do business with Tundra
18 or other rivals, or to expand the scope of their relationships with such rivals, but that cannot justify
19 doing or expanding business with Faire's competitors for fear of the adverse economic
20 consequences that could result from Faire's anticompetitive policies and practices. As a result,
21 even for a competitor like Tundra that charges no commissions, doing business with Tundra is
22 costly for many Brands and Retailers, if not cost-prohibitive.

23 50. In light of the aforementioned barriers, it is highly unlikely that any meaningful new
24 entry or expansion into the market for the online wholesale marketplaces will occur on a timely or
25 sufficient basis to limit or restrain Faire's substantial market and monopoly power.

26 51. As Faire has secured increased economic power and control over the relevant market,
27 it has exercised such power by charging consistently higher commissions and by coercing Brands
28 and Retailers to acquiesce to Faire's various anticompetitive restrictions. As Brand owner Chelsea

1 Ward stated in 2019, “I love the opportunity Faire offers small makers, but I feel like Faire is also
2 run by opportunists hoping to gouge the maker community. Where we have no option but to be
3 on Faire and pay whatever fee they charge just to stay competitive.”

4 52. Notwithstanding such negative customer sentiments, Brands and Retailers continue to
5 list their products on Faire, subjecting themselves to Faire’s above-market commissions and
6 anticompetitive policies and practices. Brands and Retailers feel compelled to do business with
7 Faire because, as noted, they realistically have “no option.”

8 **X. CAUSAL ANTITRUST INJURY**

9 53. The anticompetitive conduct by Faire described herein has caused substantial and
10 ongoing harms to Tundra’s business, which constitute cognizable antitrust injuries.

11 54. As explained above, Faire has adopted various anticompetitive policies and practices
12 with the purpose and effect of restricting competition from rival online wholesale marketplaces,
13 including Tundra. Faire’s exclusionary conduct has severely restricted Tundra’s business
14 opportunities and foreclosed Tundra from a substantial portion of the relevant market, including
15 by blocking Tundra’s ability to do business with most Retailers and Brands that, by participating
16 in Faire’s market-dominant platform, have become subject to Faire’s anticompetitive Terms of
17 Service for Brands and Retailers and related practices.

18 55. Through its challenged policies and practices, Faire has harmed Brands, Retailers, end
19 consumers, and the competitive process as a whole. As intended, Faire has specifically used
20 anticompetitive terms and conditions in agreements with Brands and Retailers to thwart
21 competition from Faire’s rivals. This conduct and the broader array of practices described above
22 give rise to multiple violations of the federal antitrust laws, and Tundra’s injuries flow from the
23 same competition-reducing aspects of Faire’s conduct that give rise to such violations.

24 56. But for Faire’s anticompetitive conduct, Tundra’s innovative, commission-free
25 platform would have succeeded in generating substantially more business from Brands and
26 Retailers, and the total harm done to Tundra’s business as a result of such practices will be
27 reasonably ascertainable through proof to be submitted at trial.

FIRST CAUSE OF ACTION

(Monopolization Under 15 U.S.C. § 2)

57. Tundra incorporates the preceding paragraphs as though fully set forth herein.

58. The market for online wholesale marketplaces connecting Brands and Retailers in the United States is a well-defined relevant antitrust market.

59. Faire has monopoly power in this market, as evidenced by its dominant market share and various other indicia of monopoly power described herein.

60. Faire has used a variety of forms of exclusionary conduct, including unlawful exclusive dealing agreements reinforced through other punitive and coercive practices, to limit and exclude competition from Tundra and other rivals, allowing Faire to illegally acquire and maintain its monopoly market position. There is no legitimate business justification for such conduct. This course of conduct constitutes monopolization in violation of Section 2 of the Sherman Act.

61. Faire's exclusionary conduct has caused substantial harm to competition and specific, cognizable antitrust injuries to Tundra.

62. Faire's conduct has occurred in and affected interstate commerce.

SECOND CAUSE OF ACTION

(Attempted Monopolization Under 15 U.S.C. § 2)

63. Tundra incorporates the preceding paragraphs as though fully set forth herein.

64. The market for online wholesale marketplaces connecting Brands and Retailers in the United States is a well-defined relevant antitrust market.

65. Faire has substantial market power in this market, as evidenced by its dominant market share and various other indicia of monopoly power described herein.

66. Faire has used a variety of forms of exclusionary conduct, including unlawful exclusive dealing agreements reinforced through other punitive and coercive practices, to limit and exclude competition from Tundra and other rivals. Faire has engaged in such practices with the specific intent to exclude competition and obtain an unlawful monopoly, and through such conduct Faire has a dangerous probability of succeeding in monopolizing the relevant market. There is no

1 legitimate business justification for this conduct. This course of conduct constitutes attempted
2 monopolization in violation of Section 2 of the Sherman Act.

3 67. Faire's exclusionary conduct has caused substantial harm to competition and specific,
4 cognizable antitrust injuries to Tundra.

5 68. Faire's conduct has occurred in and affected interstate commerce.

6 **THIRD CAUSE OF ACTION**

7 **(Unreasonable Restraint of Trade Under 15 U.S.C. § 1)**

8 69. Tundra incorporates the preceding paragraphs as though fully set forth herein.

9 70. The market for online wholesale marketplaces connecting Brands and Retailers in the
10 United States is a well-defined relevant antitrust market.

11 71. Faire has substantial market power in this market, as evidenced by its dominant market
12 share and various other indicia of monopoly power described herein.

13 72. Faire's aforementioned agreements with Brands and Retailers constitute concerted
14 action and unreasonable restraints of trade.

15 73. There is no legitimate business justification for the challenged provisions, terms, and
16 conditions in Faire's agreements with Brands and Retailers, and Faire has enforced such
17 provisions, terms, and conditions with the intent and effect of unreasonably restraining competition
18 in the relevant market.

19 74. Faire's anticompetitive and restrictive agreements with Brands and Retailer, as written
20 and enforced, constitute unreasonable restraints of trade in violation of Section 1 of the Sherman
21 Act.

22 75. Faire's unlawful restraints of trade have caused substantial harm to competition and
23 specific, cognizable antitrust injuries to Tundra.

24 76. Faire's conduct has occurred in and affected interstate commerce.

25 **FOURTH CAUSE OF ACTION**

26 **(Unfair Competition Under Cal. Bus. & Prof. Code § 17200)**

27 77. Tundra incorporates the preceding paragraphs as though fully set forth herein.

1 78. The market for online wholesale marketplaces connecting Brands and Retailers in the
2 United States is a well-defined relevant market.

3 79. Faire has substantial market or monopoly power in this market, as evidenced by its
4 dominant market share and various other indicia of monopoly power described herein.

5 80. Faire has used a variety of forms of exclusionary conduct, including unlawful exclusive
6 dealing agreements reinforced through other punitive and coercive practices, to limit and exclude
7 competition from Tundra and other rivals. Faire has engaged in such practices with the specific
8 intent to exclude competition and obtain an unlawful monopoly, and through such conduct Faire
9 has acquired and maintained monopoly power, or at a minimum a dangerous probability of
10 succeeding in monopolizing the relevant market. There is no legitimate business justification for
11 this conduct.

12 81. This course of conduct, among other things, violates Cal. Bus. & Prof. Code § 17200.

13 82. Faire's conduct is unfair because it threatens an incipient violation of antitrust law, or
14 violates the policy or spirit of the antitrust laws because its effects are comparable to or the same
15 as a violation of antitrust law, or otherwise significantly threatens or harms competition.

16 83. Faire's unfair acts and practices have caused substantial harm to competition and
17 specific, cognizable injuries to Tundra.

18 **FIFTH CAUSE OF ACTION**

19 **(Tortious Interference with Contractual Relations)**

20 84. Tundra incorporates the preceding paragraphs as though fully set forth herein.

21 85. Faire has committed intentional interference with Tundra's contractual relationships
22 with one or more Brands.

23 86. Faire knows that contracts exist between Tundra and such third-party Brands.

24 87. Faire's unlawful actions detailed herein intentionally prevents or hinders performance
25 of those Tundra-Brand contracts. On at least one occasion, it contacted a Brand and pressured that
26 Brand to cease doing business with Tundra and/or risk being in violation of Faire's vendor policy.

27 88. Through taking such action, Faire intends to interfere with Brands' contractual
28 relationships with Tundra, and on that occasion, in fact did so—the Brand eventually left the

1 Tundra platform and, despite efforts to regain the business, the Brand currently markets on the
2 Faire platform and not Tundra.

3 89. There is no legitimate business justification for this conduct.

4 90. Faire substantially caused financial harm to Tundra through its above conduct.

5 **JURY DEMAND**

6 91. Tundra demands a jury trial on all counts triable by jury.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Tundra respectfully requests judgment from this Court as follows:

- 9 A. The entry of judgment against Faire for violations §§ 1 and 2 of the Sherman Act, as
10 well as California Business and Professions Code § 17200, and California law;
- 11 B. The imposition of injunctive relief against Faire and its officers, employees, agents,
12 attorneys, affiliates, successors, assigns, and others acting in privity or concert with
13 them, and their parents, subsidiaries, divisions, successors and assigns, prohibiting
14 Faire from committing further violations of §§ 1 and 2 of the Sherman Act, California
15 Business and Professions Code § 17200, and California law, and specifically requiring
16 that Faire discontinue the anticompetitive and unfair acts and practices that give rise to
17 Tundra's claims herein.
- 18 C. An award of compensatory damages to Tundra in an amount adequate to fully
19 compensate for the injuries to Tundra's business caused by Faire's unlawful behavior;
- 20 D. Treble damages, costs, and attorneys' fees;
- 21 E. Restitution; and
- 22 F. Such other legal and equitable relief as the Court may deem just and proper.

23
24 Respectfully submitted,

25
26 Dated: May 23, 2023

/s/ Chad Hummel

27 Chad Hummel (SBN 139055)
28 chummel@sidley.com

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CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Tundra Inc.

(b) County of Residence of First Listed Plaintiff Portsmouth, NH (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Chad Hummel (SBN 139055) SIDLEY AUSTIN LLP 1999 Avenue of the Stars, Suite 1700, Tel: (310) 595-9505

DEFENDANTS

Faire Wholesale, Inc.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff 2 U.S. Government Defendant 3 Federal Question (U.S. Government Not a Party) 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, HABEAS CORPUS, OTHER, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation-Transfer 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 15 U.S.C. § 2; 15 U.S.C. § 1 Brief description of cause: Monopolization, attempted monopolization; unreasonable restraint of trade; unfair competition; tortious interference with contractual relations

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ Amount TBD; injunctive relief CHECK YES only if demanded in complaint: JURY DEMAND: X Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”
- Date and Attorney Signature.** Date and sign the civil cover sheet.