

1 HONORABLE RICHARD A. JONES
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 GORLICK DISTRIBUTION CENTERS,
11 LLC,

12 Plaintiff,

13 v.

14 CAR SOUND EXHAUST SYSTEM, INC.,
15 et al.,

16 Defendants.

CASE NO. C07-1076RAJ

ORDER

17 **I. INTRODUCTION**

18 This matter comes before the court on Defendant Allied Exhaust System, Inc.’s
19 motion for partial summary judgment (Dkt. # 83). The court has considered the parties’
20 briefing and supporting evidence, and also heard oral argument. For the reasons
21 explained below, the court GRANTS IN PART and DENIES IN PART the motion (Dkt.
22 # 83).

23 **II. BACKGROUND**

24 Plaintiff Gorlick Distribution Centers, LLC (“Gorlick”) distributes “aftermarket”
25 automotive parts, which are new or reconditioned parts used during the repair or
26 servicing of automobiles. Gorlick purchases the parts from manufacturers and resells
27 them to automotive repair stations, muffler shops, and retail automotive parts stores.

28 ORDER – 1

1 Gorlick distributes aftermarket exhaust systems and catalytic converters, among other
2 types of parts.

3 Car Sound Exhaust System, Inc. (“Car Sound”), a former defendant in this action
4 (*see* Notice of Voluntary Dismissal (Dkt. #35)), manufactures the “Magnaflow” brand of
5 exhaust systems and catalytic converters. Car Sound sells Magnaflow products to
6 distributors in Washington, Oregon, and California.

7 Gorlick and Defendant Allied Exhaust Systems, Inc. (“Allied”) both purchased
8 Magnaflow products from Car Sound. Gorlick and Allied are competitors in West Coast
9 markets. Gorlick claims that Car Sound has economically favored Allied over Gorlick in
10 two ways: (1) Per an agreement with Allied, Car Sound refused to ship Magnaflow
11 products to Gorlick in Washington or Oregon (hereinafter “the Northwest”), and (2) Car
12 Sound provided Allied with illegal discounts and rebates.

13 Gorlick’s complaint against Allied asserts claims for, *inter alia*, price
14 discrimination under the Robinson-Patman Act (“RPA”), 15 U.S.C. § 13(f), and a claim
15 for restraint of trade under the Sherman Act, 15 U.S.C. § 1. Allied now moves for
16 summary judgment against those two claims.

17 III. ANALYSIS

18 A. Legal Standards on a Summary Judgment Motion.

19 Summary judgment is appropriate if there is no genuine issue of material fact and
20 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The
21 moving party bears the initial burden of demonstrating the absence of a genuine issue of
22 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving
23 party meets that initial burden, the opposing party must then set forth specific facts
24 showing that there is a genuine issue of fact for trial in order to defeat the motion.

25 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The court must view the
26 evidence in the light most favorable to the non-moving party. *See Eastman Kodak Co. v.*

1 *Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992).

2 **B. Plaintiff’s RPA Claim Survives Summary Judgment as to Car Sound’s**
3 **Shipping Policy.**

4 Gorlick claims that Allied is liable under Section 2(f) of the RPA because it knowingly
5 received or induced illegal price discrimination from Car Sound. The court will first address the
6 elements of an RPA claim, and then turn to examine the evidence.

7 **1. Legal Elements of an RPA Claim.**

8 One section of the RPA addresses buyer liability:

9 It shall be unlawful for any person engaged in commerce, in the course of such
10 commerce, knowingly to induce or receive a discrimination in price which is
11 prohibited by this section.

12 15 U.S.C. § 13(f). Because Section 13(f) liability depends on the buyer’s knowledge that
13 the price discrimination received or induced is unlawful, a buyer cannot be liable under
14 Section 13(f) “if the lower prices he induces are either within one of the seller’s defenses
15 such as the cost justification or not known by him not to be within one of those defenses.”
16 *Automatic Canteen Co. of Am. v. F.T.C.*, 346 U.S. 61, 74 (1953). The court qualified that
17 statement with the following:

18 If the requirement of knowledge in §2(f) has any significant function, it is
19 to indicate that the buyer whom Congress in the main sought to reach was
20 the one who, knowing full well that there was little likelihood of a defense
21 for the seller, nevertheless proceeded to exert pressure for lower prices.
22 Enforcement of the provisions of §2(f) against such a buyer should not be
23 difficult. Proof of a cost justification being what it is, too often no one can
24 ascertain whether a price is cost-justified. But trade experience in a
25 particular situation can afford a sufficient degree of knowledge to provide a
26 basis for prosecution. By way of example a buyer who knows that he buys
27 in the same quantities as his competitor and is served by the seller in the
28 same manner or with the same amount of exertion as the other buyer can
fairly be charged with notice that a substantial price differential cannot be
justified.

25 *Automatic Canteen*, 346 U.S. at 79-80. In a subsequent case, the Supreme Court again
26 clarified buyer liability under the RPA: “[A] buyer cannot be liable if a prima facie case
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1 could not be established against the seller or if the seller has an affirmative defense.”
2 *Great Atlantic & Pacific Tea Co., Inc. v. F.T.C.*, 440 U.S. 69, 76 (1979). It is the
3 plaintiff’s burden to establish the seller’s violation and the buyer’s knowledge thereof.
4 *Automatic Canteen*, 346 U.S. at 79 n.6. Knowledge may be inferred from circumstantial
5 evidence. *See, e.g., Kroger Co. v. F.T.C.*, 438 F.2d 1372, 1377-78 (6th Cir.), *cert.*
6 *denied*, 404 U.S. 871 (1971).

7 In this motion, the elements at issue are whether the evidence shows that (1)
8 Allied knowingly induced or received price discrimination, and if so, whether (2) Allied
9 knew or should have known that the price discrimination was illegal and not subject to a
10 seller defense.

11 **2. Viewing the Evidence in the Light Most Favorable to Gorlick, Gorlick**
12 **has Established that Allied Knew It Received Illegal Price**
13 **Discrimination in the Form of Car Sound’s Shipping Policy.**

14 Allied argues that Gorlick’s RPA claim must fail because Gorlick has failed to
15 establish that Allied “knew the prices, discounts, and other terms Car Sound gave Gorlick
16 or any other Car Sound distributor.” Def.’s Mot. (Dkt. # 83) at 11. To support this
17 argument, Allied cites the deposition testimony of Car Sound President Gennaro Paolone
18 (stating that Car Sound never shares the price lists of one distributor with another
19 distributor), and the deposition testimony of Car Sound Vice President Larry Norris (the
20 same). *See* Thomsen Decl. (Dkt. # 84), Exs. 1 & 6. Four Allied employees, including the
21 former CEO and three managers, testified that Allied did not know the prices that Car
22 Sound gave Gorlick or other competitors. *See* Thomsen Decl. (Dkt. # 84), Exs. 2, 7-9.

23 Gorlick suggests that Allied’s knowledge of price discrimination can be inferred
24 from a number of pieces of evidence, specifically (1) Allied’s knowledge that Car Sound
25 was not shipping to Gorlick in the Northwest; (2) a 2003 memo from an Allied manager
26 to Allied employees stating that though Car Sound would not share its list of customer
27 prices, the manager would ask Car Sound for the information if an Allied employee

1 requested it; (3) a 2008 e-mail between an Allied manager and a Car Sound sales
2 representative; and (4) Allied’s possession of a Car Sound confidential price sheet that
3 did not identify customers, but explained the different terms offered to categories of
4 customers.¹

5 The court finds that most of the evidence cited by Gorlick does not show that
6 Allied knew it was receiving discriminatory prices. The 2003 memo is simply puffery on
7 the part of the Allied manager, conveying his confidence that Car Sound would share
8 pricing information with him, but the Allied manager also testified that no such
9 information request was ever made and that he did not ask Car Sound to disclose the
10 information. *See* Thomsen Decl. (Dkt. # 84), Ex. 11. The 2008 e-mail exchange
11 discusses changes to Car Sound’s pricing as a result of its settlement with Gorlick, but
12 does not infer anything about Allied’s price knowledge pre-settlement, which is the
13 relevant time period for this lawsuit. *See* 2d Lundsgaard Decl. (Dkt. # 98), Ex. 6. And to
14 whatever degree Car Sound’s “confidential” price sheet informed Allied about the price
15 categories Car Sound established for its customers, it does not establish that Allied would
16 have any basis to know which categories applied to which distributors or whether those
17 price categories were illegal. *See* 2d Lundsgaard Decl., Ex. 4.²

18
19 ¹ This confidential price sheet referenced various categories of pricing, including “trailer load”
20 and “pallet” pricing discounts, and Gorlick attempts to argue that sheet establishes that Allied
21 knew it was receiving discounts that it did not deserve and that other competitors did not receive.
22 *See* Pltf.’s Opp’n (Dkt. # 91) at 13-14. But just because Allied may have been aware that Car
23 Sound did not strictly enforce its pricing terms with Allied (according to the sheet) does not
24 suggest anything about what Allied should have assumed about Car Sound’s treatment of
25 competitors as a result. *See, e.g.,* Thomsen Decl. (Dkt. # 84), Exs. 8-9 (Allied employees’
26 deposition testimony that Allied was unaware whether Gorlick obtained the same rebates or
27 discounts).

28 ² The court also rejects Gorlick’s argument regarding Allied’s knowledge through trade
experience, under *Fred Meyer, Inc. v. F.T.C.*, 359 F.2d 351 (9th Cir. 1966), *rev’d in part on*
other grounds, F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968). This case is factually
distinguishable from *Fred Meyer* because, as described *supra*, there is no evidence that Allied
solicited the allegedly discriminatory treatment, or that Allied knew how Car Sound applied its
multi-level discount/rebate system among its various distributors. That Allied knew only that
Car Sound did not strictly enforce its pricing system with regard to Allied does not suggest that

1 But with regard to Car Sound’s refusal to ship to Gorlick in the Northwest: it is
2 undisputed that Allied was aware of this policy. Allied argues that the practice was legal,
3 and thus cannot support an RPA claim. Allied cites *Continental T.V., Inc. v. GTE*
4 *Sylvania, Inc.*, 537 F.2d 980, 997 (9th Cir. 1976), as upholding a manufacturer’s ability to
5 “impose restrictions and designate a particular business as its exclusive distributor in a
6 given area, even if it eliminates other distributors,” absent evidence of monopolization
7 (which Gorlick does not allege). Def.’s Reply (Dkt. # 100) at 10. While that may be true
8 (and Gorlick argues that Allied’s characterization of *Sylvania* is legally incorrect), this
9 case is not about an exclusive distributorship. Allied and Gorlick competed directly on
10 the West Coast, and both sold Car Sound product. The issue here is the difference in
11 shipping terms: Car Sound would ship to Allied in the Northwest, but would not ship to
12 Gorlick in the Northwest. Gorlick nonetheless sought to sell Car Sound product in the
13 Northwest and, in order to do so in light of Car Sound’s shipping policy, ordered Car
14 Sound product in California and then shipped the product to its Northwest locations.
15 Different shipping terms may constitute cognizable price discrimination under the RPA,
16 which prohibits both direct and indirect price discrimination. *See Corn Prods. Refining*
17 *Co. v. F.T.C.*, 324 U.S. 726, 740 (1945).

18 Allied does not deny that Car Sound did not ship to Gorlick in the Northwest,³ but
19 argues that this shipping policy was not illegal, because no injury to competition
20 occurred. According to Allied, even though Gorlick had to absorb shipping costs in order
21 to sell Car Sound product in the Northwest, Gorlick “always matched Allied’s retail
22 prices (or offered lower prices than Allied)[,]” so Car Sound’s shipping policy did not

23 Allied knew anything about how Car Sound did or did not enforce its pricing system with regard
24 to Gorlick or any other distributor. Under these circumstances, the court cannot find that Allied
25 should have had a reasonable suspicion that the discounts/rebates it received were probably
26 illegal, and thus the duty of inquiry does not apply. *See Fred Meyer*, 359 F.2d at 365-67.

26 ³ Allied does not dispute that it knew that Car Sound did not ship to Gorlick in the Northwest,
27 but does contend that Car Sound’s policy did not result from an agreement with Allied. *See*
28 Def.’s Reply at 10:4-8.

1 restrain intrabrand competition. Def.'s Reply (Dkt. # 100) at 10-11 (citing deposition
2 testimony that Gorlick matched Allied's prices). Allied also argues that there could not
3 have been any restraint on interbrand competition, given that it "is undisputed that many
4 of manufacturers' aftermarket exhaust products were distributed in the Northwest[.]"
5 Def.'s Reply (Dkt. # 100) at 11. Thus, according to Allied, Car Sound's shipping policy
6 did not have anticompetitive effects and thus was not illegal.

7 In response to those arguments, Gorlick contends that intrabrand competition was
8 affected precisely because Gorlick matched or occasionally beat Allied's retail prices:
9 Gorlick had to achieve that result despite its additional shipping costs. Gorlick's expert
10 opined that Car Sound's shipping policy affected intrabrand competition because Gorlick
11 charged higher prices relative to Allied when it had to absorb shipping costs as compared
12 with later, post-settlement, when it did not. *See* Ugone Decl. (Dkt. # 122) ¶ 19.
13 Eliminating the shipping prohibition allowed "Gorlick to compete much more effectively
14 and offer lower prices to its customers. Because Allied and Gorlick comprised the bulk
15 of the [Northwest] market, lower prices from Gorlick would mean lower prices
16 systemwide." *See* Pltf.'s Supp. Br. (Dkt. # 120) at 5; Ugone Decl. (Dkt. # 122) ¶¶ 19-20.
17 Thus, because Gorlick has submitted evidence of actual detrimental effects on
18 competition flowing from Car Sound's shipping policy, Gorlick contends that it has
19 shown that the shipping policy was illegal and thus Allied's knowledge that it received
20 illegal price discrimination triggers liability under the RPA. *See F.T.C. v. Indiana Fed'n*
21 *of Dentists*, 476 U.S. 447, 458-61 (1986) (discussing the standard for determining
22 whether a restraint on trade destroys competition, and the methods of proving injury to
23 competition).

24 The court agrees that, viewing the evidence in the light most favorable to Gorlick,
25 Gorlick's evidence defeats summary judgment as to Car Sound's shipping policy because
26 it shows that over a period of time, Gorlick's net price for Car Sound product was more
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1 than Allied’s price for those same products, and after Car Sound changed its shipping
2 policy, Gorlick “charged lower prices substantially more frequently than before.” *See*
3 *Ugone Decl.* (Dkt. # 122) ¶¶ 18-19. This evidence permits an inference that Car Sound’s
4 shipping policy had a detrimental effect on competition. *See Volvo Trucks North Am.,*
5 *Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 179 (2006) (permitting, in a case
6 involving allegations of a secondary-line price discrimination RPA violation, an
7 inference of competitive injury from “proof of a substantial price discrimination between
8 competing purchasers over time”).

9 Furthermore, viewing the evidence in the light most favorable to Gorlick, it can be
10 reasonably inferred that Allied should have known that Car Sound’s shipping policy was
11 not justified by cost — and cost justification is the only potential defense mentioned by
12 Allied with regard to Car Sound’s shipping policy⁴ — because shipping costs to Gorlick
13 or Allied in the Northwest should be similar, with perhaps some minor variations based
14 on order quantity. To whatever degree Allied contends that other “Allied practices”
15 (such as electronic ordering) justified Car Sound’s different treatment, there is no
16 evidence that those practices should have affected the cost of shipping to the Northwest.

17 Thus, because it is undisputed that Allied knew that Car Sound refused to ship to
18 Gorlick in the Northwest, and there are factual disputes as to whether that shipping policy
19 had anticompetitive effects and was therefore illegal, Gorlick’s RPA claim based on Car
20 Sound’s shipping policy will survive summary judgment. Gorlick’s RPA claim will not
21 go forward as to any of the other alleged discounts or rebates (such as pallet pricing or
22 trailer-load pricing), because Gorlick has not submitted evidence that Allied knew how
23 Car Sound applied those discounts or rebates, such that Allied would have no basis to
24 know that it was receiving price discrimination or whether Car Sound would have an
25 applicable defense.

26
27 ⁴ *See* Def.’s Mot. at 6:17-21.

1 **C. Plaintiff’s Sherman Act Claim Fails For Lack of Evidence of Concerted**
2 **Action.**

3 Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies
4 that unreasonably restrain competitive conditions. *See* 15 U.S.C. § 1; *National Soc. of*
5 *Professional Engineers v. United States*, 435 U.S. 679, 690 (1978) (citing *Standard Oil*
6 *Co. of New Jersey v. United States*, 221 U.S. 1 (1911)). Because Section 1 focuses on
7 contracts and other concerted action, it “does not reach conduct that is ‘wholly
8 unilateral.’” *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting
9 *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968)). Direct evidence of concerted action
10 is not required, however:

11 The Ninth Circuit has long recognized that “it is not necessary for a
12 plaintiff to show an explicit agreement among defendants in support of a
13 Sherman Act conspiracy,” and that concerted action may be inferred “from
circumstances evidence of [a] defendant’s conduct and course of dealing.”

14 *Sun Microsystems, Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166, 1192 (N.D.
15 Cal. 2009) (quoting *Movie 1 & 2 v. United Artists Commc’ns*, 90 F.2d 1245, 1251-52 (9th
16 Cir. 1990)).

17 Allied argues that Gorlick’s Sherman Act claim fails as a matter of law because
18 Gorlick has failed to present any evidence that Allied and Car Sound *agreed* that Car
19 Sound would not ship to Gorlick in the Northwest. According to Allied, Car Sound’s
20 decision not to ship to Gorlick in the Northwest was unilateral action, and therefore not
21 prohibited by Section 1 of the Sherman Act.

22 In opposition, Gorlick points to statements made by three individuals: Tom Jones,
23 Steve Blanding, and Larry Norris. Gorlick contends that these statements establish that
24 Allied induced Car Sound to not ship to Gorlick in the Northwest.

25 **1. Tom Jones’ Testimony.**

26 Allied’s former CEO Tom Jones was deposed as follows:
27

1 Q When you started distributing Car Sound product out of the Tukwila
2 warehouse, did you have any understanding as to whether or not
3 Gorlick was going to be distributing Car Sound product in
Washington and Oregon?

4 A I made the statement many times that: I'm not going to build the
5 market and – for – and then have somebody else come in on it. And
6 I made the statement many times: I don't want – if I build the
market, leave me alone. Many times.

7 Q The statement you made to Mr. Gorlick?

8 A No. To Car Sound.

9 Q Oh, okay. So to Mr. Paolone at Car Sound?

10 A And anybody who would listen.

11 Q Do you recall any reaction you got from Car Sound to that?

12 A I think that they always said, “No, we don't sell [sic] anybody.
13 You're our only distributor there.” But they – they always – the
14 caveat also was, they can't tell Mr. Gorlick what to do with the
15 product once he – once he gets it in a different location.

16 Q That he could buy it, say, in California and ship it up here?

17 A Yes. And there's nothing they could do about that.

18 First Lundsgaard Decl. (Dkt. # 96), Ex. L. Though Gorlick characterizes this testimony
19 as describing “conversations with Car Sound at the time that clearly establish the
20 existence of an agreement” between Allied and Car Sound that Car Sound would not ship
21 to Gorlick in the Northwest, the court disagrees with that characterization. *See* Pltf.'s
22 Opp'n (Dkt. # 91) at 19. Mr. Jones's deposition testimony establishes that he told Car
23 Sound representatives that he wanted to be the only Car Sound distributor in Washington
24 and Oregon, and that Car Sound responded that they did not sell to any other Washington
25 or Oregon distributor. This does not amount to “offer; acceptance; agreement,” as
26 Gorlick contends. *See* Pltf.'s Opp'n at 20. At minimum, Mr. Jones's testimony

1 establishes a request, and a reassurance. Mr. Jones's testimony does not suggest that Car
2 Sound decided not to ship to Gorlick in the Northwest as a result of Mr. Jones's requests
3 — Car Sound's responses to Mr. Jones suggest that Car Sound had already made that
4 decision.

5 **2. Steve Blanding's E-mail.**

6 Allied's CEO Steve Blanding sent an e-mail to Car Sound's sales manager Larry
7 Norris in December 2004, which reads as follows:

8 Larry, its [sic] time to face the music. Harold continues to sell Magnaflow
9 and Carsound [sic] product in the Northwest and to undercut the market
10 significantly. You assure us that he is not supposed to have the product line
11 outside California and yet you close your eyes when he ships it up to
12 Seattle, Portland and Grants Pass.

13 He is not helping with market penetration (we already cover that market
14 like a blanket) he is simply whoring up the market and lowering the market
15 price for your quality product.

16 He is not loyal to your product line. He is simply using it as an entrée into
17 accounts which we already service with your product. We on the other
18 hand have been, and continue to be loyal to CarSound/Magnaflow to a fault
19 – BEYOND ANY REASONABLE DEGREE OF EXPECTATION.

20 WE CAN NO LONGER TOLERATE THIS SITUATION. IF WE NEED
21 TO GO TO WAR ON PRICE WE WILL DO SO. THIS WILL NOT
22 SERVE EITHER OF US WELL.

23 I do not like to play the "largest customer card" but I am beginning to
24 wonder what advantage we gain by our continuing loyalty. It is time for
25 you to show some moral backbone and step up to the issue. I expect you to
26 inform Harold in writing (and give me a copy of the correspondence) that
27 he is NOT authorized to sell your product outside of California and if he
28 continues to do so beyond January 10 he will no longer be allowed to carry
the product in California. We will be glad to take him out of his inventory
(you should do the lift and we will buy it from you) on or before January
10. We will assure that you do not lose market penetration in California
and the Northwest!

1 First Lundsgaard Decl., Ex. M. A couple of weeks after Mr. Blanding sent that e-mail, he
2 forwarded that same message to Mr. Norris again, asking “SECOND TIME: AM I
3 GOING TO HEAR BACK FROM YOU SOON?” First Lundsgaard Decl., Ex. N.
4 Gorlick cites these e-mails as evidence that “justifies a reasonable inference” that Allied
5 and Car Sound agreed that Car Sound would not ship to Gorlick in the Northwest, and
6 “certainly indicates Car Sound’s actions were not ‘independent.’” Pltf.’s Opp’n at 21.

7 The court again disagrees with Gorlick’s characterization of the evidence. This e-
8 mail amounts to an attempt by Allied to convince Car Sound to grant Allied an exclusive
9 distributorship in the Northwest. While the e-mail does note that Car Sound had
10 previously decided not to sell to Gorlick in the Northwest (“You assure us that he is not
11 supposed to have the product line outside of California”), this e-mail does not establish
12 that that decision was made at Allied’s behest. Car Sound’s lack of response to this e-
13 mail only highlights that Mr. Blanding’s e-mail was a one-way communication that does
14 not establish the existence of any agreement between Allied and Car Sound. Car Sound
15 employee Gennaro Paolone testified in a deposition regarding his response to Mr.
16 Blanding’s e-mail: “I said to Larry [Norris], ‘Did you read that e-mail?’ And he said,
17 ‘Yes.’ And I said, ‘Okay.’ I just laughing about it. I said nothing. We didn’t come up
18 with any kind of decision. We didn’t do nothing. We just laughing about it.”
19 Thomsen Decl. (Dkt. # 84), Ex. 1 at 44:16-20. Allied’s approval of Car Sound’s decision
20 does not transform Car Sound’s decision into an agreement between Car Sound and
21 Allied.

22 **3. Mr. Paolone’s Deposition.**

23 Car Sound’s Gennaro Paolone described the genesis of Car Sound’s refusal to ship
24 to Gorlick in the Northwest:

25 There was a time – what’s happening, Allied open a place there in
26 Washington or Oregon. And for a period of time, Gorlick never bought
27 nothing from us. When Allied start to sell product there, and that’s the time

1 when Gorlick start to ask us if we want to ship to that area there. And
2 that's why we said, "Right now, we have" – "we have other distributor,
3 they're selling that there and we don't" – "right now we don't want to" –
4 anyway, we don't need another distributor in that area. That's why we said
5 we don't ship to them.

6 First Lundsgaard Decl., Ex. A at 138-39. Gorlick's Steve Ferguson testified in a
7 deposition that he heard Mr. Gorlick ask Mr. Paolone about Car Sound's refusal to ship
8 to Gorlick in the Northwest, and that Mr. Paolone answered "I gave my word. I'm going
9 to keep my word. I'm a man of my word," and that that answer suggested to Mr.
10 Ferguson that Car Sound "had an agreement with [Mr. Blanding] that he wasn't going to
11 break his word. He was holding up his end of the agreement . . . [n]ot to ship to Gorlick's
12 in the Northwest." First Lundsgaard Decl., Ex. H at 202:7-15.

13 But Mr. Ferguson's speculation about the meaning of Mr. Paolone's statement
14 squarely contradicts the deposition testimony of Mr. Paolone and Mr. Gorlick — the
15 parties to the conversation. Mr. Gorlick, when questioned about a conversation he had
16 with Mr. Paolone about Car Sound's refusal to ship to Gorlick in the Northwest, said that
17 he told Mr. Paolone that he had talked to Mr. Blanding and that Mr. Blanding "denies
18 having made the agreement with [Car Sound] not to sell [to Gorlick] in the Northwest."
19 Thomsen Decl. (Dkt. # 84), Ex. 3 at 196. According to Mr. Gorlick's testimony, Mr.
20 Paolone answered, "[Mr. Blanding] didn't lie to you. He didn't make the agreement with
21 me. I made the agreement with him." *Id.* Counsel then clarified with Mr. Gorlick: "So
22 Mr. Paolone told you that Mr. Blanding didn't make an agreement with him?" and Mr.
23 Gorlick answered, "Yeah. So – okay, that's good enough." *Id.* Mr. Paolone also
24 testified as follows:

25 Q Did you at any point tell Mr. Gorlick that Car Sound had an
26 agreement with Allied not to ship to Gorlick in the Northwest?

27 A We never had any agreement.

1 Q I'm sorry?

2 A We never had any kind of agreement with Allied.

3 Q But my question, Mr. Paolone, did you ever tell Mr. Gorlick that Car
4 Sound had an agreement with Allied not to ship to Gorlick in the
5 Northwest?

6 A I said we never had any kind of agreement with Allied.

7 Q I take it from that, then, you would not have told Mr. Gorlick that
8 you had such an agreement.

9 A We never had that kind [of] agreement. So how can I say something
10 which doesn't exist.

11 . . .

12 Q What I'm trying to find out was whether you recall at any point in
13 time telling Mr. Gorlick.

14 A Me personally?

15 Q You personally. Mr. Paolone.

16 A No. For sure not.

17
18 Thomsen Decl. (Dkt. # 84), Ex. 1.

19 In light of the testimony of Mr. Gorlick and Mr. Paolone regarding their
20 conversations (or lack thereof), the court cannot credit Mr. Ferguson's speculation about
21 what he overheard regarding an Allied-Car Sound agreement. Because none of the
22 evidence cited by Gorlick, when viewed in the light most favorable to Gorlick,
23 establishes the existence of an Allied-Car Sound agreement, Gorlick's Sherman Act
24 claim fails for lack of evidence of "concerted action."

25 **4. In the Alternative, Gorlick's Sherman Act Claim is Time-Barred.**

26 Though the court has found, in the previous section, that Gorlick has failed to
27

1 present evidence establishing the existence of concerted action between Allied and Car
2 Sound, the court finds, in the alternative, that Gorlick’s Sherman Act claim fails as time-
3 barred.

4 Sherman Act § 1 claims are subject to a four-year statute of limitations. There are
5 several exceptions to this rule, including cases where the plaintiff alleges a continuing
6 violation such as the “active enforcement of an illegal contract.” *Aurora Enters., Inc. v.*
7 *Nat’l Broadcasting Co., Inc.*, 688 F.2d 689, 694 (9th Cir. 1982). For an act to be
8 considered a continuing violation that will restart the statute of limitations, “(1) [i]t must
9 be a new and independent act that is not merely a reaffirmation of a previous act; and (2)
10 it must inflict new and accumulating injury on the plaintiff.” *Pace Indus., Inc. v. Three*
11 *Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987).

12 In this case, Mr. Gorlick testified that Car Sound “made the agreement with Allied
13 not to sell [to] us in the Northwest” “[p]rior to 2000, to the best of my knowledge.”
14 Thomsen Decl. (Dkt. # 84), Ex. 3 at 64. This lawsuit was not filed until 2007, but
15 Gorlick contends that two 2004 Car Sound deliveries to Gorlick’s Seattle location show
16 that the Allied-Car Sound agreement was not permanent, but instead could have been
17 rescinded at any time. Therefore, under *Hennegan v. Pacifico Creative Serv. Inc.*, 787
18 F.2d 1299, 1301 (9th Cir. 1979), Gorlick argues that every time Car Sound refused to
19 ship to Gorlick in the Northwest — as recently as 2007 — the limitations period
20 restarted.

21 The court finds this case to be distinguishable from *Hennegan*, where the
22 defendants apparently took action during the limitations period to extend the terms of a
23 previous (pre-limitations period) agreement, and instead analogous to *Orgell, Inc. v.*
24 *Geary’s Stores, Inc.*, 640 F.2d 936 (9th Cir. 1981). In *Orgell*, a plaintiff retailer alleged
25 that the defendant had agreed with the plaintiff’s competitor that the defendant would not
26 sell any product to the plaintiff. The original agreement, which the court characterized as
27

1 “irrevocable, immutable, permanent and final,” was reached before the limitations period,
2 and the defendant continued to refuse to sell to the plaintiff throughout the limitations
3 period. The court found that because during the limitations period, the defendant had
4 merely reaffirmed an agreement reached before the limitations period, the Sherman Act
5 claim was time-barred. *See Orgell*, 640 F.2d at 938.


6 The court finds that the evidence here shows that Car Sound decided before 2000
7 not to ship to Gorlick in the Northwest. Two 2004 order slips indicating delivery at
8 Gorlick’s Seattle location do not suggest that Car Sound’s decision was not final; the one-
9 part purchases are too insignificant to indicate anything about Car Sound’s general
10 policy. *See Gorlick Decl.* (Dkt. # 93), Ex. A. Furthermore, those “delivery notes” do not
11 even necessarily establish that delivery actually occurred in Seattle, given that Car Sound
12 refused to honor orders requesting Seattle delivery. *See Heffron Decl.* (Dkt. # 94), Ex. B
13 (letter from Car Sound explaining that the orders placed for Seattle delivery will not be
14 filled, given Car Sound’s refusal to ship to Gorlick there). Gorlick’s evidence about Car
15 Sound selling to other Northwest locations during the limitations period is irrelevant to
16 Car Sound’s alleged agreement with Allied regarding Gorlick. *See First Lundsgaard*
17 *Decl.* (Dkt. # 96), Ex. H at 201.

18 Thus, because the evidence shows that Car Sound’s pre-2000 decision to not ship
19 to Gorlick was reaffirmed throughout the limitations period, the court finds that Gorlick’s
20 Sherman Act claim is time-barred.

1 **IV. CONCLUSION**

2 For the reasons stated above, the court GRANTS IN PART and DENIES IN
3 PART Defendant's motion (Dkt. # 83).

4 DATED this 26th day of October, 2010.

5 
6 The Honorable Richard A. Jones
7 United States District Judge