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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant

AMAZON.COM, INC.,

Cross-Complainant,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Cross-Defendant

Civil Case No.: CGC-22-601826

AMAZON.COM, INC.'S OPPOSITION TO PLAINTIFF'S DEMURRER TO CROSS-COMPLAINT

Hearing Date: October 6, 2023
Hearing Time: 1:30 p.m.
Judge: Hon. Ethan P. Schulman
Department: 304

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I. INTRODUCTION

Plaintiff's complaint broadly asserts that certain of Amazon's innovative and procompetitive policies and practices—designed to foster low prices, varied product selection, a safe and reliable shopping experience, and value to consumers—amount to illegal, anticompetitive agreements with its selling partners to raise consumer prices. The evidence will ultimately show the fallacy of Plaintiff's allegations, and Plaintiff's claims will be resolved in Amazon's favor. But a judgment holding only that Plaintiff has failed to prove its case is not enough. Given the significance of the contested practices to Amazon's business, Amazon needs to know not only whether Plaintiff is able to meet its burden in this case, but also whether the business practices that Plaintiff has put at issue are, in fact, contrary to California competition laws. That issue needs to be adjudicated as to each contested practice, which cannot be accomplished based on Plaintiff's complaint—a document that challenges multiple disconnected policies, practices, and agreements, but asserts only two causes of action. To provide it with certainty concerning the legality of each contested business practice, and to facilitate an efficient adjudication of this case, Amazon has filed a cross-complaint seeking affirmative declarations that the challenged conduct is lawful under California's Cartwright Act and Unfair Competition Law.

In its demurrer, Plaintiff argues, paradoxically, that Amazon's allegations are too similar to the complaint's controversies to merit separate adjudication, and, at the same time, so different that there is no present controversy between the parties. Even absent that logical fallacy, both arguments fail.

First, Plaintiff argues that the Cross-Complaint is "redundant and unnecessary . . . [and] will complicate the resolution of this litigation." (Demurrer at 4.) Plaintiff asserts that the Court should instead exercise its discretion under section 1061 and adjudicate the issues set forth in the Cross-Complaint on the pleadings. But there is no record for the Court to apply its discretion to at this early stage. In particular, there is no assurance that the resolution of Plaintiff's claims will provide Amazon with complete relief. On the contrary, the resolution of Plaintiff's claims does not require the Court to affirmatively rule on the legality of Amazon's business practices. Plaintiff's demurrer underscores this point, arguing for the first time that Amazon may be held liable even if *none* of the challenged practices is individually unlawful. (Demurrer at 8.) That Plaintiff continues to change theories—claiming that some, all, or none of Amazon's policies are illegal—demonstrates the need for declaratory relief. Contrary to Plaintiff's

assertion, it is standard practice in California litigation to request guidance from the courts concerning the lawfulness of contested business practices (*see Mailand v. Burckle* (1978) 20 Cal.3d 367, 372 (Cartwright Act); *Two Jinn, Inc. v. Gov't Payment Serv., Inc.* (2015) 233 Cal.App.4th 1321, 1329–1330 (Unfair Competition Law)), and for courts to provide such clarity by granting declaratory relief (*see, e.g.*, *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 344, 364). Where asserting defenses does not "offer[] more effective relief" than a cross-complaint, and is therefore not "as well suited to the [cross-complainant]'s needs as is declaratory relief," claims for declaratory relief should proceed. *Baxter*, 120 Cal.App.4th at 364. That is especially true at the pleadings stage because the Court does not yet have a developed record to inform its discretion.

Second, as for the argument that the Cross-Complaint fails to allege an existing controversy, there can be no serious dispute that, after a two-year investigation into Amazon's business practices and 213 paragraphs of allegations in Plaintiff's complaint, Plaintiff has put at issue the legality of the agreements, policies, and practices addressed in Amazon's Cross-Complaint. Where Plaintiff alleges that Amazon has entered into unlawful agreements that restrain competition, Amazon alleges that it has not. This is precisely the kind of direct dispute that California courts have routinely found to be ripe for declaratory relief. *See, e.g.*, *City of Hayward v. United Pub. Emps*. (1976) 54 Cal.App.3d 761, 769 (examining declaratory judgment that agreement between city and labor union "is lawful" under public employee collective bargaining statutes); *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design* (6th Cir. 2001) 244 F.3d 521, 526 (affirming summary judgment in plaintiff's favor on declaratory judgment that certain conduct was lawful under federal antitrust laws).

Finally, Plaintiff argues that Amazon's cross-complaint is an improper mechanism to enjoin future law enforcement. This argument is baseless, as Amazon has not requested injunctive relief.

For these reasons, the Court should overrule Plaintiff's demurrer.

II. BACKGROUND

In September 2022, after a two-year investigation, the Attorney General ("AG" or "Plaintiff") filed its lengthy complaint, alleging that a series of Amazon policies and practices constitute illegal agreements between Amazon and its selling partners and result in higher prices. In March 2023, the Court overruled Amazon's demurrer, holding that the complaint's high-level allegations of illegal agreements under

California's Cartwright Act and Unfair Competition Law ("UCL") satisfied California's liberal notice pleading standard. (*See* Mar. 3, 2023 Order on Demurrer at 15.)

For purposes of the present demurrer, it is the allegations in Amazon's Cross-Complaint that must be taken as true. *See, e.g.*, *Cal. Golf, L.L.C. v. Cooper* (2008) 163 Cal.App.4th 1053, 1064. According to the Cross-Complaint, the conduct that the AG challenges in its complaint constitutes *procompetitive* activity that is commonplace in the retail industry and helps to provide consumers with a high-quality and safe shopping experience. (*See* Cross-Compl. ¶¶ 8-10). The Cross-Complaint further alleges that many of the policies and practices the AG challenges are not "agreements" at all, but rather reflect unilateral business conduct. (*Id.* ¶ 22). And none of Amazon's policies and practices require third-party sellers to raise or maintain their prices on or off Amazon. (*Id.* ¶¶ 14-15). Instead, the Cross-Complaint alleges that:

- Amazon imposes unilateral policies to protect and improve the consumer experience in its store, including: (a) the Marketplace Fair Pricing Policy ("MFFP"), which "has the goal of preventing price gouging and ensuring that egregious prices are not offered to Amazon customers" (Cross-Compl. ¶ 24); (b) seller policies and the Seller Code of Conduct, which "require that sellers act fairly and honestly in Amazon's store to ensure a safe buying and selling experience" (*id.* ¶ 28); and (c) the Amazon Standard for Brands ("ASB") policy, "designed to ensure that Amazon customers get the best shopping experience" (*id.* ¶ 31).
- To enhance customers' shopping experience on its store, Amazon chooses to highlight or feature certain offers "based on the combination of features most likely to provide the best experience to customers," including, among other factors, whether an offer is price-competitive (Cross-Compl. ¶¶ 36–39).
- In order to operate in its store, Amazon requires third-party sellers to enter into a Business Solutions Agreement ("BSA"), which specifies the terms and conditions "that govern a third-party seller's 'access to and use of' Amazon's services and articulates an expectation that sellers will seek to "maintain [Amazon's] standards of customer experience," and follow the applicable 'Program Policies'" (Cross-Compl. ¶¶ 21-22).
- Finally, Amazon may negotiate with vendors to enter into Guaranteed Minimum Margin ("GMM") agreements or agreements pursuant to the Matching Compensation Program ("MCP"). Both of these agreements are designed to "increase quantities and preserve selection" of products for consumers, among other consumer-friendly and procompetitive goals (Cross-Compl. ¶¶ 49, 54).

Because Amazon's policies and practices are procompetitive and benefit both consumers and selling partners, Amazon's Cross-Complaint seeks affirmative relief in the form of a judgment declaring that the following Amazon policies, agreements, and practices are lawful under California's Cartwright Act and Unfair Competition Law: (i) seller policies and the Seller Code of Conduct (Cross-Compl. ¶ 69),

(ii) the MFFP (*id.* ¶ 77), (iii) Amazon's GMM agreements (*id.* ¶ 84), (iv) the MCP (*id.* ¶ 91), (v) the ASB policy (*id.* ¶ 98), (vi) Amazon's practices to determine Featured Offer eligibility (*id.* ¶ 105), and (vii) the BSA (*id.* ¶ 112). The Cross-Complaint also seeks a declaration that the AG's claims for damages based on consumers' purchases off-Amazon are fatally indirect and speculative. (*Id.* ¶ 60).[1]

III. LEGAL STANDARD

"Any person . . . who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties . . . ." Code Civ. Proc., §1060. Declaratory relief ensures "that parties can conform their conduct to the law and prevent future litigation." *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 648.

A demurrer to claims for declaratory relief, such as those presented in the Cross-Complaint, may be sustained only on the grounds that "the complaint fails to allege an actual or present controversy," that the claims are not "'justiciable,'" or that "a judicial declaration is not 'necessary or proper at the time under all the circumstances.'" *DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 545 (quoting Code Civ. Proc., §1061). Where, however, "a complaint which is legally sufficient . . . sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction . . . ." *BKHN, Inc. v. Dep't of Health Serv's* (1992) 3 Cal.App.4th 301, 308.

IV. ARGUMENT

A. The Cross-Complaint Seeks Necessary and Appropriate Declaratory Relief.

As Amazon alleges in its Cross-Complaint, "Amazon is in genuine doubt as to its legal rights, duties, and responsibilities" with respect to several aspects of its retail business. This uncertainty arises from Plaintiff's allegations that each of the challenged agreements, policies, or practices amount to anticompetitive agreements in violation of the Cartwright Act and UCL. Plaintiff's allegations call into question policies and practices that are not only commonplace in the retail industry, but also provide

[1] The Cross-Complaint also seeks a declaration that since at least March 2019, when Amazon removed any price-parity requirement from its BSA, its third-party seller pricing policies have been in compliance with California law. (Cross-Compl. ¶ 118.)

significant procompetitive benefits. Amazon must, at the end of the case, have an adjudication whether such conduct remains legal so that it may carry on with its retail business.

Plaintiff's proposed course of action—to resolve these issues exclusively in connection with the claims asserted in its complaint and the defenses that Amazon has asserted in its answer—ignores that the AG may fail to prove its case for any number of reasons that would not ultimately resolve the legality of the challenged policies and practices. For example, Plaintiff may fail to meet its burden of proof, or Amazon may prevail on an affirmative defense that ultimately does not resolve the lawfulness of the conduct at issue. Plaintiff therefore ignores a fundamental benefit of declaratory relief: allowing Amazon and others to "conform their conduct to the law and prevent future litigation." *Meyer*, 45 Cal.4th at 648; *see also Two Jinn*, 233 Cal.App.4th at 1329–1330 (affirming declaratory judgment on cross-complaint that plaintiff lacked UCL standing and that defendant's "conduct," which included "common industry practices," "does not violate the UCL"); *Mailand*, 20 Cal.3d 367 (noting that antitrust defendants had sought in a cross-complaint a "determination that they had not violated the Cartwright Act"); *cf. Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901, 906–908 (declaratory relief appropriate even though bookseller could have raised same statutory interpretation and constitutional arguments as defenses in criminal prosecution). By contrast, proceeding only on Plaintiff's complaint would not assure that this goal is met.

A finding by this Court that Plaintiff has failed to prove that Amazon's policies, practices, and agreements are *unlawful* offers less effective relief, and is therefore not "as well suited" to Amazon's needs, as a declaratory judgment that Amazon's conduct is *lawful* under the Cartwright Act and UCL. *See Baxter*, 120 Cal.App.4th at 364 ("[I]t is only where an alternative remedy offers more effective relief, or is as well suited to the plaintiff's needs as is declaratory relief, that the court is justified in refusing a declaration because of the availability of another remedy."); *see also Californians for Native Salmon Ass'n v. Dep't of Forestry* (1990) 221 Cal.App.3d 1419, 1429–1430 ("Declaratory relief is a cumulative remedy [citation], and a proper complaint for declaratory relief cannot be dismissed by the trial court because the plaintiff could have filed another form of action."); *Warren v. Kaiser Found. Health Plan, Inc.* (1975) 47 Cal.App.3d 678, 683–684 (declaratory relief is more effective than other remedies where it "may guide . . . future conduct"); *Zeitlin*, 59 Cal.2d at 906–908 (declaratory relief is more effective where it provides guidance to litigants and third parties regarding lawfulness of conduct); *Columbia Pictures Corp.*

v. DeToth (1945) 26 Cal.2d 753, 761 (declaratory relief appropriate unless it "clearly appear[s] that the asserted alternative remedies are available to the plaintiff and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief").

The Court of Appeal's decision in *Baxter* is instructive. There, the plaintiff Baxter, a medical device manufacturer, was subject to statutory requirements that it disclose the risk of carcinogenic exposure from its devices, unless it could show there was no significant risk. *See Baxter*, 120 Cal.App.4th at 344–347. After unsuccessfully appealing to the proper agency for permission to omit the warning from its device, Baxter sought a declaratory judgment that its devices did not pose significant risks and were thus not subject to the warning requirement. The court held that declaratory relief was necessary and proper and—addressing the very argument that Plaintiff presses here—stated that requiring Baxter to litigate its obligations to warn of cancer risks as a "defense in an enforcement action" that "had been filed against [it]" was "not a more effective remedy because this would not provide Baxter with global relief concerning all of its products." *Id.* at 364. The *Baxter* court thus rejected the argument "that declaratory relief was not necessary or proper" under section 1061 simply because Baxter could have asserted defenses in an action brought by the government. *Id*.

The Cross-Complaint also serves valuable case-management purposes and promotes judicial efficiency. The complaint, which the Court quoting Henry James aptly called a "large, loose, baggy monster," challenges multiple disconnected policies, practices, and agreements, but asserts only two overarching causes of action: one under the Cartwright Act and one under the UCL. The result of Plaintiff's decision to plead its claims this way is to make it difficult for both the Court and the parties to disaggregate and adjudicate the multiple claims that are being advanced. For example, Plaintiff states for the first time in its demurrer that it has *not* alleged "the independent unlawfulness of each Amazon policy or practice," but instead alleged that Amazon's conduct is unlawful when "viewing all of the facts and circumstances as a whole." (Demurrer at 8.)[2] In other words, the AG appears to be arguing that although

[2] This is a surprising admission by Plaintiff. Plaintiff is apparently alleging that there is an overarching *illegal* agreement between Amazon and third parties to use a series of independent, *lawful* agreements to raise California retail prices. Yet Plaintiff has not included in its complaint any series of facts to support this contention with respect to any single third party. That Plaintiff waited until after Amazon's demurrer to raise this theory of liability underscores the weakness of its claims.

every Amazon policy taken individually may be lawful, in the aggregate they are somehow unlawful. That Amazon is learning of this "zero plus zero equals one" theory for the first time after nearly a year of litigation underscores the ongoing ambiguity and confusion around Plaintiff's allegations and the tangible concern that the AG will litigate the case in a way that will continue to leave doubt about whether any particular policy or practice is lawful.

The Cross-Complaint remedies this issue by separating the specific matters that form the basis for the parties' dispute and presenting them for separate adjudication. In particular, it creates the potential for summary adjudication motions aimed at the specific business conduct at issue, as well as the distinct elements of Plaintiff's claims, the resolution of which could streamline the litigation. For example, Count 1 of the Cross-Complaint seeks a declaratory judgment that Plaintiff's claims for damages based on purchases of products off-Amazon—*i.e.*, purchases for which Amazon was not the manufacturer, supplier, distributer, or seller—are too indirect and speculative to provide Plaintiff with antitrust standing or establish proximate causation. (Cross-Compl. ¶¶ 57–61.) Courts routinely reject such theories of harm, *see, e.g.*, *In re Am. Express Anti-Steering Rules Antitrust Litig.* (2d Cir. 2021) 19 F.4th 127, 135, and thus the early resolution of this issue has the potential to narrow, or completely eliminate, Plaintiff's claims.

In similar circumstances, courts have not hesitated to allow cross-complaints seeking declaratory relief to proceed, including over the AG's objections. In the highly comparable *People v. Vitol Inc.*, No. CGC-20-584456, an antitrust case pending in Department 613 related to allegedly anticompetitive activities in California's wholesale gasoline market, the AG brought a similarly loquacious complaint, the defendants asserted a cross-complaint alleging the legality of the challenged practices, and the AG brought a similar demurrer. Judge Cheng rightly overruled the demurrer, and defendants were subsequently able to present summary adjudication motions on discrete, manageable issues pleaded through the claims in the cross-complaint. (*See* Declaration of Jeffrey M. Davidson, Ex. A.) While not precedential, this similar case is informative of the efficiencies that can be created, and substantial inefficiencies avoided, using declaratory judgment cross-complaints.

B. The Court Cannot Conclude Based on the Pleadings that Declaratory Relief Is Unwarranted.

In its demurrer, Plaintiff asks the Court to decline to hear Amazon's declaratory relief cross-claims,

arguing those claims are somehow too similar to Amazon's affirmative defenses to proceed. But mere similarity between a party's request for declaratory relief and its defenses is not a sufficient basis for declining jurisdiction. Indeed, it would be common for claims and cross-claims to have certain similarities. But a complete refusal to adjudicate a claim for declaratory relief is justified "*only* where an alternative remedy offers more effective relief, or is as well suited to the plaintiff's needs as is declaratory relief." *Baxter*, 120 Cal.App.4th at 364 (emphasis added); *see also Californians for Native Salmon*, 221 Cal.App.3d at 1429–1430; *Warren*, 47 Cal.App.3d at 683–684; *Zeitlin*, 59 Cal.2d at 906–908; *DeToth*, 26 Cal.2d at 761.

The cases on which Plaintiff relies are not to the contrary. In each case, all of the cross-complainant's claims for declaratory relief would necessarily be resolved in the adjudication of the plaintiff's claims, rendering cross-claims for declaratory relief unnecessary. *See C.J.L. Constr., Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 380–381, 386, 389–392 (in the "highly regulated and specialized" context of workers' compensation claims under the Labor Code, holding that adjudication of the plaintiff's workers' compensation claims would necessarily duplicate the amount to which a non-employer co-defendant may be entitled by a damages offset); *Leach v. Leach* (1959) 172 Cal.App.2d 330, 333 (party's rights under a provision of a specific property settlement agreement could be litigated in separate, parallel action pending in divorce court); *Shane v. Superior Court* (1984) 160 Cal.App.3d 1237, 1249–1250 (declaratory relief regarding a specific settlement agreement could necessarily be obtained in separate action in which settlement agreement was already being litigated); *General of Am. Ins. Co. v. Lilly* (1968) 258 Cal.App.2d 465 (whether the driver was an agent of the company that owned the car he was driving could necessarily be litigated and determined in separate, pending action); *Welfare Inv. Co. v. Stowell* (1933) 132 Cal.App. 275, 276–278 (defense raised in answer would defeat plaintiff's claim in same manner as cross-complaint for declaratory relief). Here, by contrast, Amazon's claims for declaratory relief will not necessarily be resolved by the Court's adjudication of Plaintiff's claims. *See supra* at 5-6. Accordingly, Amazon's Cross-Complaint seeks to clarify the rules that apply to its conduct *prospectively* so that it can continue its business operations secure that they comply with relevant laws. Where a cross-complaint is filed for this purpose, courts routinely permit claims for declaratory relief to proceed. *See, e.g.*, *Baxter*, 120 Cal.App.4th at 364; *Malish v. City of San Diego* (2000) 84 Cal.App.4th

725, 728 (declaratory relief appropriate where challenged ordinances and threat of prosecution affected plaintiff's operations); *Am. Meat Inst. v. Leeman* (2009) 180 Cal.App.4th 728, 742 (declaratory relief "crucial" where businesses faced imminent private enforcement and "serious financial consequences" from possible future violations).[3]

It is particularly inappropriate for the AG to seek to preempt Amazon's claims at this early stage of the case. Declaratory relief is equitable in nature and must be determined based on all of the relevant circumstances. *See, e.g.*, *In re Claudia E.* (2008) 163 Cal.App.4th 627, 633–634. It therefore is rarely appropriate for a court to adjudicate the availability of declaratory relief in a demurrer posture, especially on discretionary grounds such as supposed duplication. Thus, although section 1061 affords trial courts discretion with respect to the ultimate resolution of declaratory relief claims, that discretion is "not unlimited." *BKHN*, 3 Cal.App.4th at 308. On the contrary, where, as here, "a complaint which is legally sufficient . . . sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction . . . ." *Id.* (emphasis added) (internal quotation marks omitted). If there were any doubts regarding the propriety of declaratory relief at the pleading stage, the claims should proceed and be resolved once a more developed record is available. *See Californians for Native Salmon*, 221 Cal.App.3d at 1427; *La Hue v. Dougherty* (1949) 34 Cal.2d 1, 6 (party "should be afforded the opportunity" to pursue declaratory relief where propriety of such relief turned on matters that court could not resolve without fact-finding); *Sunset Scavenger Corp. v. Oddou* (1936) 11 Cal.App.2d 92, 95 (exercising section 1061 discretion only after trial).[4] Taking the facts as

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[3] *Cal. Ins. Guar. Ass'n. v. Superior Court* (1991) is completely inapposite to the present issue. The court there was concerned not with the propriety of a suit for declaratory relief but with the proper sequencing of that suit and another, which shared common facts. *See* 231 Cal.App.3d at 1628.

[4] Plaintiff's reliance on *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 322–324 confirms that Plaintiff's request is both premature and unfounded. The *Hood* court rejected a party's transparent attempt to add a declaratory relief claim to its original complaint to overcome the denial of the party's first summary adjudication motion. As California courts have since explained, *Hood*'s "plain lesson" concerns not the propriety of declaratory relief in principle, but a prohibition on using declaratory relief claims to circumvent a ruling that a summary adjudication motion is procedurally improper. *See, e.g.*, *S. Cal. Edison Co. v. Superior Ct*. (1995) 37 Cal.App.4th 839, 846. Here, by contrast, Amazon is asserting declaratory relief claims—at its first opportunity—to clarify its legal obligations and streamline adjudication of discrete issues in the case, not to overcome the denial of summary adjudication.

Amazon has presented them—*i.e.*, that it maintains a number of lawful, procompetitive policies and practices that accomplish specific procompetitive business objectives, including increasing third-party seller sales on Amazon and reducing prices of consumer goods—it is perfectly plausible that declaratory relief will be warranted at the time Amazon moves for a declaration.

C. An Actual, Present, and Concrete Controversy Exists Among the Parties.

Plaintiff next argues that its demurrer should be sustained because there is no "actual, present controversy" between the parties. (Demurrer at 6.) This argument is meritless. For declaratory relief to be available, there must be a "real dispute between parties" that involves "justiciable questions relating to their rights and obligations." *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1012 (quotation marks and citations omitted). A two-part test is used to determine whether a dispute is ripe: "(1) whether the dispute is sufficiently concrete that declaratory relief is appropriate; and (2) whether withholding judicial consideration will result in the parties suffering hardship." *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540 (citing *Pacific Legal Found. v. Cal. Coastal Comm'n* (1982) 33 Cal.3d 158, 171–173; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59). It is hard to imagine a more concrete dispute than the one between the Plaintiff and Amazon, as reflected in the live and active litigation between the parties.

1. The Disputes Are Sufficiently Concrete.

For two years before filing its complaint, Plaintiff investigated a number of Amazon's business practices and policies, which it is now challenging under California law. In its Cross-Complaint, Amazon seeks a declaration that the policies and practices that Plaintiff is challenging are *not* unlawful and instead pass muster under the Cartwright Act and UCL. By filing a lawsuit over specific Amazon policies and practices, Plaintiff has created a dispute over those policies and practices that is eminently concrete, as opposed to "conjectural and hypothetical." *Cf. Dominguez v. Bonta* (2022) 87 Cal.App.5th 389, 418–419.

Plaintiff alleges that specific Amazon practices, policies, and agreements are unlawful; Amazon alleges that the detailed conduct at issue, in fact, is procompetitive and commonplace in the industry and seeks a declaration that the conduct is lawful under the Cartwright Act and UCL. Specifically:

- Plaintiff and Amazon dispute the lawfulness of Amazon's selling policies and Seller Code of Conduct (*compare* Compl. ¶¶ 5, 102, 122–125 *with* Cross-Compl. ¶¶ 14, 21–22, 28–30, 62–69, 115–118 & Prayer ¶ B);
- Plaintiff and Amazon dispute the lawfulness of Amazon's Marketplace Fair Pricing Policy (*compare* Compl. ¶¶ 5, 118–20, 124–25, 162 *with* Cross-Compl. ¶¶ 14, 25–27, 70–77 & Prayer ¶ C);
- Plaintiff and Amazon dispute the lawfulness of Amazon's Guaranteed Minimum Margin Agreements (*compare* Compl. ¶¶ 6, 177, 179, 197, 199–201 *with* Cross-Compl. ¶¶ 15, 44–51, 78–84 & Prayer ¶ D);
- Plaintiff and Amazon dispute the lawfulness of Amazon's Matching Compensation Program (*compare* Compl. ¶¶ 178–182, 193–94, 200 *with* Cross-Compl. ¶¶ 15, 52–55, 85–91 & Prayer ¶ E);
- Plaintiff and Amazon dispute the lawfulness of Amazon's Standards for Brands policy (*compare* Compl. ¶¶ 5, 9, 116, 125, 145, 157 *with* Cross-Compl. ¶¶ 14, 31–34, 92–98 & Prayer ¶ F);
- Plaintiff and Amazon dispute the lawfulness of Amazon's policies to determine Featured Offer eligibility (*compare* Compl. ¶¶ 5, 30–31, 34, 88, 97, 104, 118, 120, 132–144, 149, 151, 153, 156–164, 169–171 *with* Cross-Compl. ¶¶ 22, 35–43, 99–105 & Prayer ¶ G);
- Plaintiff and Amazon dispute the lawfulness of Amazon's Business Solutions Agreement (*compare* Compl. ¶¶ 4–5, 113–18, 121, 124–25 *with* Cross-Compl. ¶¶ 13–14, 20–23, 106–118 & Prayer ¶ H);
- Plaintiff and Amazon dispute the lawfulness of Amazon's third-party seller pricing policies since March 2019, after the removal of the Price Parity Provision of the BSA (*compare* Compl. ¶¶ 5, 125–28 *with* Cross-Compl. ¶¶ 113–18 & Prayer ¶ I);
- Finally, Plaintiff and Amazon dispute the ability of Plaintiff to recover damages for purchases made off Amazon (*see* Cross-Compl. ¶¶ 57–61 & Prayer ¶ A).

In similar circumstances, courts applying both California law and the counterpart federal Declaratory Judgment Act have not hesitated to find such claims for declaratory relief ripe for review, including claims seeking declarations that certain conduct is lawful. *See Gopher Oil Co. v. Bunker* (8th Cir. 1996) 84 F.3d 1047, 1051 (reversing dismissal of plaintiff's declaratory judgment claim on ripeness grounds where government had filed action to hold plaintiff liable under federal environmental law); *City of Hayward*, 54 Cal.App.3d at 769 (reviewing declaratory judgment that agreement between city and labor union "is lawful" under public employee collective bargaining statutes); *Found. for Interior Design*, 244 F.3d at 526 (affirming summary judgment in plaintiff's favor on declaratory judgment that certain conduct was lawful under federal antitrust laws); *Fair Hous. Justice Ctr., Inc. v. Pelican Mgmt*. (S.D.N.Y. July 24, 2020) 2020 U.S. Dist. LEXIS 131534, at *3 (denying motion to dismiss declaratory judgment

counterclaim that challenged policy was lawful). Even the mere "*threat* of a lawsuit," let alone a lawsuit itself, "can satisfy the actual controversy requirement for a declaratory relief action." *Tashakori*, 196 Cal.App.4th at 1012 (citing *American Meat Institute*, 180 Cal.App.4th at 743–744); *see also, e.g.*, *Zeitlin*, 59 Cal.2d at 905 (finding actual controversy concerning constitutionality of obscenity statute where plaintiff established "possibility of prosecution"); *Baxter*, 120 Cal.App.4th at 364 (affirming declaratory relief where plaintiff "could be subjected to multiple enforcement actions").

Baxter is again instructive. There, the defendant state agency argued that the declaratory judgment sought by Baxter was improper because there was no pending enforcement action and thus no justiciable controversy. *See id.* at 349. The Court of Appeal rejected this argument. *See id*. at 357–364. The Court found that there was a concrete, demonstrable dispute over the safety of the device, which was sufficient to show an "irreconcilable controversy," *see id.* at 361–362, even where the agency itself was not tasked with enforcement of the notice requirements at issue, *see id.* at 355–359. Here, Amazon and Plaintiff dispute the lawfulness and procompetitive effects of particular agreements and policies. There is thus an "irreconcilable controversy" for the Court to adjudicate.

The two primary cases cited by Plaintiff—*Stonehouse Homes* and *Pacific Legal Foundation*—do not support a holding that there is no controversy in the present matter. Both involved declaratory judgment claims challenging the legality of legislation and/or regulations that had yet to be enacted or applied to the plaintiffs. *See Stonehouse Homes*, 167 Cal.App.4th at 541 (no actual, judiciable controversy where legislature *may* be—but had not been—adopted that would impact the plaintiff); *Pacific Legal Found.*, 33 Cal.3d at 171 (no ripe controversy where plaintiffs "attempt[ed] to obtain review of the propriety of administrative regulations prior to their application to the party challenging them"). Here, by contrast, Amazon seeks declarations about the lawfulness of the policies and practices that Plaintiff has *actually* challenged in a lawsuit that Plaintiff has *actually* filed against Amazon. Amazon is therefore not asking the Court to "speculate on the resolution of hypothetical situations," *Stonehouse Homes*, 167 Cal.App.4th at 540, but rather to resolve the existing dispute as to the legality of its conduct.[5]

[5] The remaining cases cited by Plaintiff fare no better. Several of Plaintiff's cases similarly involve challenges to laws that had not yet been invoked against or applied to the plaintiffs. *See Wilson v. Transit*

Further, Plaintiff's concern as to how Amazon's "requested relief could be interpreted" is unfounded and premature. (Demurrer at 10.) Plaintiff posits that a declaration that the specific policies and practices identified in Amazon's Cross-Complaint are lawful could be interpreted to mean that "Amazon policies and practices are permissible under (apparently) all potential federal and state laws that might conceivably apply in the future." (Demurrer at 9-10.) This interpretation is baseless. Plaintiff challenged the legality of a number of Amazon business practices under two California competition laws and Amazon seeks a declaration that each of those challenged practices is legal under the same California laws. Plaintiff's argument that Amazon is asking the Court to declare its conduct in compliance with various environmental laws, or Louisiana state usury law, or various other laws that Plaintiff has not invoked in its lawsuit, is unserious. Amazon has requested declaratory relief regarding the present controversy between it and Plaintiff: that specific Amazon business practices do not violate the Cartwright Act or the UCL. As discussed above, parties commonly seek declaratory judgment that certain conduct "is lawful" when an opposing party threatens or has instituted litigation calling that conduct into question. And in any event, questions as to the scope of proper declaratory relief are properly resolved later in the litigation, rather than on demurrer. *See supra* Part IV.B.

2. Amazon Will Suffer Significant Hardship Absent Declaratory Relief.

Amazon's claims for declaratory relief are also ripe for review because Amazon will suffer significant hardship in the absence of judicial consideration of its cross-claims. As explained above, absent resolution of its cross-claims, Amazon could litigate against Plaintiff for years and win, only to

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Auth. of City of Sacramento (1962) 199 Cal.App.2d 716, 724 (no justiciable controversy where the alleged dispute was over a *proposed* contract provision); *Cal. Dep't of Consumer Affairs v. Superior Ct.* (2016) 245 Cal.App.4th 256, 260 (plaintiffs lacked standing where they had concerns that *if* they purchased a car that was a "lemon," the manufacturer would invoke illegal regulations); *Sanctity of Human Life Network v. Cal. Highway Patrol* (2003) 105 Cal.App.4th 858 (no actual controversy where plaintiffs sought relief enjoining the California Highway Patrol from interfering with the display of signs because the legitimacy of interference would depend on the circumstances of each future, potential event). Other cases were resolved on standing, preclusion, and/or non-justiciability grounds. *Monterey Coastkeeper v. Cent. Reg'l Water Quality Control Bd.* (2022) 76 Cal.App.5th 1, 18 (declaratory relief unavailable when the request amounted to "us[ing] the courts to tell an administrative agency how to do its job"); *Dominguez*, 87 Cal.App.5th at 415 (no actual controversy where plaintiffs were challenging statutes that did not presently apply to them); *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 747 (no actual controversy where a prior, binding court decision resolved dispute).

walk away without an affirmative determination that its policies and practices are lawful under the Cartwright Act and UCL. *See supra* Part IV.A.

Plaintiff asserts that Amazon would not suffer hardship because there are no "active or threatened enforcement proceedings" apart from Plaintiff's complaint. (Demurrer at 11.) This statement misunderstands the reality of Amazon's situation. Plaintiff's sweeping allegations that many of Amazon's essential and commonplace business practices are illegal throws Amazon's business into a state of uncertainty that, absent the declaratory relief that Amazon seeks, may very well may remain unresolved at the end of this litigation. This makes it exceedingly difficult for Amazon to conduct its business; for example, there is heightened risk around Amazon's continual implementation of its unilateral business policies as well as its decision to enter into mutually-beneficial agreements with sellers.

3. The Counterclaim Is Not Seeking to Impair Law Enforcement.

Plaintiff asserts that Amazon's request for relief amounts to an improper "attempt to . . . immunize the company" from law enforcement, citing code provisions addressing injunctions that would "prevent the execution of a public statute by officers of the law for the public benefit." (Demurrer at 12.) Amazon requests nothing of the sort. The Cross-Complaint does not request an injunction, and Plaintiff does not explain how the requested declaratory relief could "prevent public officers from executing their statutory duties." (Demurrer at 13.) That Plaintiff must defend against a Cross-Complaint does not prejudice—let alone "enjoin"—Plaintiff in any manner. Amazon's requested relief is not tantamount to an injunction. After all, the Cross-Complaint does not ask the Court to invalidate the Cartwright Act or UCL or to annul any government action. *Cf. Agric. Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401 (reasoning that a declaratory judgment that regulation is unconstitutional or otherwise invalid has injunctive effect to prevent enforcement; concluding regulation lawful and vacating declaratory judgment).

Again, *Baxter* offers guidance. There, in affirming declaratory judgment, the Court found the judgment did not enjoin law enforcement but rather properly "quiet[ed]" and "stabiliz[ed]" a dispute between the plaintiff and a government agency. This was true even where the judgment sought by Baxter would expressly bar the defendant from "subject[ing] Baxter to an enforcement action" over the disputed issue relevant to the declaratory judgment action. *See Baxter*, 120 Cal.App.4th at 361. Judge Cheng's

non-binding decision in *Vitol* likewise rejected the AG's argument that defendants' claims for declaratory relief were "tantamount to enjoining law enforcement," noting that "allowing declaratory relief" does not "enjoin[] the People's existing case, or any future enforcement actions the Attorney General might bring." (Davidson Decl., Ex. A, at 6).

The cases on which Plaintiff primarily relies are inapposite. *Honeywell, Inc. v. State Board of Equalization* (1975), for example, involved a statutory provision, Rev. & Tax. Code, § 6931, that, unlike the laws at issue here, bars injunctions and "other legal or equitable process[es]" that prevent or enjoin tax collection. *See* 48 Cal.App.3d 907, 912–913. Given such limitations, it was not even clear that the *Honeywell* plaintiff could bring a claim for declaratory relief. Even so, *Honeywell* did not hold claims for declaratory relief are inappropriate in the context of government litigation. Instead, *Honeywell* held only that a *particular* type of declaratory relief—*i.e.*, a declaration that a certain tax was "not legally collectible"—was impermissible because it was tantamount to an injunction. *See id*. at 912.[6] The relief Amazon seeks here does not have the same type of injunctive effect.

V. CONCLUSION

The Court should overrule Plaintiff's demurrer to Amazon's Cross-Complaint.

[6] Plaintiff's other cited cases all involve material circumstances not present here. *See Samuels v. Mackell* (1971) 401 U.S. 66, 72 (addressing the troubling federalism implications of a federal court preventing a state criminal court from "hear[ing] evidence and decid[ing] any matter for itself") (internal quotation marks omitted); *Cal. Chamber of Com. v. Becerra* (E.D.Cal. Mar. 3, 2020) 2020 WL 1030980, at *1, *4 (similar, citing *Samuels*). Plaintiff's remaining cases are even less relevant; they did not pass on the propriety of declaratory relief at all. *See Jamison v. Dep't of Trans.* (2016) 4 Cal.App.5th 356, 360, 363–367 (vacating preliminary injunction); *People v. Superior Ct.* (1976) 248 Cal.App.2d 276, 282–284 (overturning discovery order); *People v. Hy-Lond Enter. Inc.* (1979) 93 Cal.App.3d 734, 748–749 (opining on district attorney's authority to enter into stipulated judgment); *Abbott Labs. v. Superior Ct. of Orange Cnty.* (2020) 9 Cal.5th 642, 648–649 (holding that geographic scope of authority for district attorneys under the UCL is not "limited to the county's borders"); *Donaldson v. Lungren* (1992) 2 Cal.App.4th 1614, 1623 (holding that a "court may not enjoin public officers from performing official acts that they are required by law to perform").

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