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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

THE STATE OF CALIFORNIA,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

CASE NO. CGC-22-601826

DEFENDANT AMAZON.COM, INC.'S DEMURRER TO PLAINTIFF'S COMPLAINT

REDACTED

Complaint Filed: September 15, 2022
Department: 304
Hearing Date: TBD
Hearing Time: TBD

PLEASE TAKE NOTICE that, on a date to be determined, in Department 304 of the above-captioned Court, located at 400 McAllister Street, San Francisco, California, Defendant Amazon.com, Inc., will, and hereby does, demur to the Complaint filed by Plaintiff State of California, and each cause of action Plaintiff asserts therein, pursuant to Code of Civil Procedure, section 430.10.

The California Attorney General brings two causes of action alleging that Defendant engaged in restraint of trade in violation of the Cartwright Act and the Unfair Competition Law. The Demurrer should be sustained without leave to amend because the Complaint fails as a matter of law and does not allege facts sufficient to entitle Plaintiff to relief under any legal theory.

The Demurrer is based upon this Notice of Demurrer, the accompanying Demurrer, the accompanying Memorandum of Points and Authorities, all matters of which this Court may take judicial notice, the arguments presented to the Court at the hearing, and such other matters as the Court may properly consider.

DATED: December 5, 2022

WILLIAMS & CONNOLLY LLP

By: */s/ Heidi K. Hubbard*
Heidi K. Hubbard (*pro hac vice pending*)
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DEMURRER

Defendant Amazon.com, Inc. ("Amazon" or "Defendant"), demurs to all causes of action in the Complaint of the State of California ("Plaintiff") as follows:

1. Amazon demurs to Plaintiff's First Cause of Action—for Restraint of Trade in Violation of the California Cartwright Act (Bus. & Prof. Code, § 16720, *et seq.*)—on the grounds that Plaintiff fails to state a claim as a matter of law, and fails to state facts sufficient to constitute a cause of action. Code Civ. Proc., § 430.10(e).

2. Amazon demurs to Plaintiff's Second Cause of Action—for Violation of the California Unfair Competition Law, Unlawful and Unfair Prongs (Bus. & Prof. Code, § 17200, *et seq.*)—on the grounds that Plaintiff fails to state a claim as a matter of law and fails to state facts sufficient to constitute a cause of action. Code Civ. Proc., § 430.10(e).

Dated: December 5, 2022

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

By: */s/ Heidi K. Hubbard*
Heidi K. Hubbard (*pro hac vice pending*)
Kevin M. Hodges (*pro hac vice pending*)
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FREQUENTLY USED ABBREVIATIONS AND REFERENCES

This demurrer uses common abbreviations and references, defined as follows:

"Amazon" refers to the Defendant Amazon.com, Inc.;

"OAG" refers to the Office of the California Attorney General;

"Cartwright Act" refers to California's antitrust statute (Bus. & Prof. Code, § 16700, *et seq.*)

"UCL" refers to the Unfair Competition Law (Bus. & Prof. Code § 17200, *et seq*.)

"GMM" refers to Guaranteed Minimum Margin agreements.

"MCP" refers to Matching Compensation Program agreements.

"BSA" refers to the Amazon Business Solutions Agreement.

"SC-FOD" refers to "Select Competitor Featured Offer Disqualification," sometimes also referred to in the Complaint as "Buy Box Suppression."

I. INTRODUCTION

The retail industry is intensely competitive. Every day, consumers make decisions about where to shop among countless retail stores based upon the relative attractiveness of the prices, quality, selection, displays, and other attributes they encounter when they shop there. Customers comparison shop for low, competitive prices, and giving prominent placement to the most competitive product offerings is an obvious and enduring feature of retail competition. In line with this strategy, Amazon has invested heavily to earn the trust of its customers by offering low, competitive prices. Amazon thus aims to feature (i.e., promote) retail offers only when they are priced competitively and meet other customer expectations. It does not feature retail offers when it knows that customers could find a better offer on a competitor's site. It is no less obvious—consistent with any consumer's everyday experience—that this practice is procompetitive because it encourages price and other merits competition, fulfills customers' expectations that they will find competitive prices and good service in Amazon's store, and improves choices for customers. The OAG nonetheless alleges the improbable theory that this basic practice, which Amazon adopts on its own without seeking or receiving the agreement of any other party, violates California law, and the OAG accordingly seeks a Court order requiring Amazon to feature offers that it knows are bad deals for its customers. If the law required this strange result, consumers would be harmed, and their trust in Amazon as a retailer would be damaged. That anti-consumer result is not an outcome that California's antitrust and unfair competition laws require, much less seek to achieve in the robustly competitive retail industry.

The Complaint fails to state facts sufficient to constitute a cause of action on any of the asserted claims for relief because, for the most part, it fails to plead concerted activity, as required under California law, or in the few instances where it does mention an agreement, it fails to plead facts showing a substantially adverse effect on competition. California's antitrust law, the Cartwright Act, prohibits only *concerted* action in restraint of trade, not the unilateral pricing and promotional policies that are the focus of the Complaint. The OAG has elected to proceed solely under California law so that its claims against an out-of-state defendant will be heard in state court. That is its choice. However, under well-established California law, companies like Amazon may decide for themselves the terms under which they will transact business without fear that doing so violates the Cartwright Act. It is only when they act *in concert*

with others to restrain trade that California's antitrust law is implicated, and that fundamental element is missing from the core allegations around which the Complaint is framed.

Critically, there is no allegation that Amazon and third-party sellers *agree* that those sellers should raise their prices, or limit their offerings, in other stores. Instead, the OAG alleges only that some third-party sellers may try to game Amazon's policies to their own benefit by adopting such strategies. There is similarly no allegation that Amazon and third-party sellers agree on which offerings Amazon will choose to feature in its store, or the criteria it will use to make those decisions. To the contrary, the Complaint accuses Amazon of being deliberately opaque about its internal policies that determine when it will promote an offer. That lack of agreement is exactly why the Complaint does not state any violation of California's antitrust law regarding these unilateral policies and practices. The Complaint's unfair competition claims fail for the same reasons, because Amazon's unilateral policies cannot violate the spirit, let alone the letter, of California's antitrust regime, which does not regulate such policies.

Finally, the few allegations that the Complaint does make about agreements between Amazon and third-party sellers—referring to so-called "GMM" (or guaranteed minimum margin) agreements, and a price parity clause that was removed from Amazon's Business Solutions Agreement ("BSA") in March 2019—also fail to state any viable claim. The Complaint's discussion of those agreements is brief, vague, and fails to allege, as the law requires, facts showing that any such agreements had a *substantially adverse effect* on competition in a relevant market. Notwithstanding the OAG's wide-ranging investigatory authority, the Complaint alleges only anecdotal and impressionistic facts without ever specifying the magnitude of any marketplace impact that any agreements between Amazon and third-party sellers allegedly have had in restraining retail competition. There is a reason that the Complaint lacks these pivotal allegations. As the OAG is well aware from its pre-Complaint investigation, GMMs apply to only a miniscule percentage of the products Amazon sells, and they serve the pro-competitive purpose of making products available in the store that might otherwise not be available because they carry a risk of being unprofitable. Likewise, the OAG does not allege that the long-defunct price parity clause had any adverse impact on competition, because it is aware that the parity clause was rarely enforced when it existed and was removed nearly four years ago. But it is not Amazon's burden on a demurrer to prove the pro-competitive or insubstantial nature of the impact of these alleged agreements. Rather, it is the

OAG's burden, following a years-long investigation in which it interviewed dozens of witnesses and received well-over a million documents, to allege detailed facts showing substantial anticompetitive effects from the challenged agreements. The Complaint wholly fails to meet that burden as to any agreement alleged in the Complaint.

II. BACKGROUND

Amazon operates a retail store in which it makes its own ("first-party") offers to consumers, and in which millions of other sellers make their own ("third-party") offers to consumers. See Complaint ("Compl.") ¶ 22.[1] Amazon charges fees to third-party sellers in exchange for providing them access to its store and the supporting infrastructure that Amazon has built, *ibid.*, including the massive annual investments it makes in improving and promoting the store, serving customers, and otherwise creating a marketplace that is attractive to consumers and sellers alike. Sellers also have the option of paying additional fees to Amazon for additional services such as product warehousing, fulfillment, and advertising services. *Id.* ¶¶ 22, 27. Amazon is not alleged to have any direct role in determining the prices, quantities, or other terms and conditions of sale for third-party sellers' products sold in its store. Rather, those terms are set by the third-party sellers who are themselves responsible for offering products at prices that will be desirable to retail consumers. *Id.* ¶ 114.

A. Amazon's Alleged Unilateral Promotion of Competitive Third-Party Offers.

A customer searching for a product in Amazon's store receives a page of "search result[s]" listing both first-party and third-party offerings responsive to the customer's queries, including "sponsored" products (i.e., advertisements) relevant to their searches. *Id.* ¶ 30. Customers can then click on various results to observe a "product detail page" containing more detailed information about the product they are considering purchasing. *Ibid.* On the detail page, one seller's offer for that product will be immediately available for purchase through a portion of the webpage called the "Buy Box" or the "Featured Offer," while other offers for the same product can be identified by clicking on an adjacent weblink for "All Offers." *Ibid.* According to the OAG (albeit alleged without factual support), "[m]ost Amazon shoppers do not even realize" that clicking on the link for "All Offers" would introduce the customer to additional

[1] Many of the Complaint's allegations are inaccurate, but Amazon assumes their truth for purposes of this demurrer.

offers for the same product. *Id.* ¶ 31. The Complaint alleges that these "featured" product offerings are more visible to consumers, and are therefore more likely to be purchased than competing offers for the same product that do not garner featured status. *Ibid.*

The Complaint alleges that Amazon has internal policies that determine whether retail offers are eligible to be "featured" based upon whether those offers are priced competitively, and that Amazon sometimes disqualifies offers from being featured because they are priced uncompetitively. Compl., ¶¶ 30, 166 (describing the "Select Competitor Featured Offer Disqualification ("SC-FOD") policy). Some third-party sellers consider Amazon "their most important distribution channel," *id.* ¶ 39, and allegedly adopt strategies intended to maximize the chances that Amazon will "feature" their offers, *id.* ¶¶ 12, 140-143. The most obvious way for third-party sellers to achieve that goal is for them to lower the prices that they charge in Amazon's store so that their products are priced competitively and, therefore, are more appealing to consumers. However, the OAG alleges an upside-down theory—based upon scattershot anecdotal statements from an unspecified number of sellers of an unidentified range of products—that some third-party sellers seek to game the system and increase the chances of being featured by raising their prices or limiting their product's availability in *other* stores, to create the appearance that their offers in Amazon's store are competitive. *Ibid.*

There is no allegation that Amazon directly or indirectly asks third-party sellers to increase their prices or reduce product availability in stores other than Amazon; that it has reached an agreement with those sellers to take any such action; or otherwise that, by setting policies to encourage competitive pricing in its own store, Amazon has somehow requested that any third-party seller suppress competition elsewhere. To the contrary, the Complaint attributes to third-party "ecommerce consultants" the advice that sellers should "not [] offer or allow lower prices off Amazon" as a strategy to "sell and be successful on Amazon." *Id.* ¶ 12. Indeed, the Complaint faults Amazon for a *lack* of concerted effort, alleging that Amazon failed to send messages to sellers about the implementation of its own alleged policies, and that Amazon "obfuscate[s]" "about the inner workings of how [it] choose[s] competitive prices." *Id.* ¶ 131. Indeed, that alleged lack of clarity is why the sellers that apparently provided the anecdotes described in the Complaint often attribute their decisions to the advice of the consultants they have hired to help them

maximize their chances of obtaining "featured offer" status under those supposedly opaque Amazon policies. *Id.* ¶¶ 12, 142, 147, 151.

B. Agreements Alleged in the Complaint.

In addition to Amazon's alleged unilateral internal policies and certain sellers' alleged unilateral strategies in response to those policies, the Complaint alleges that Amazon and certain third parties have entered into various agreements, including GMMs and the BSA. *Id.* ¶¶ 4, 177. As alleged, GMMs are agreements in which the wholesaler of a product guarantees a certain level of profitability to Amazon, which it ensures by making "true up" payments if Amazon's profits fall short of the agreed-upon minimum. *Id.* ¶¶ 176-177. The Complaint does not deny that similar margin-protection agreements are ubiquitous in the retail industry. Nor does it assert that Amazon's GMMs substantially affect retail or California commerce in the aggregate. Rather, it alleges that, nationwide in [redacted], *id.* ¶ 36, of which [redacted] was for products covered by GMMs, *id.* ¶ 175, resulting in [redacted] in "true up" payments, *id.* ¶ 179. Thus, the Complaint alleges, GMMs affect just [redacted] of Amazon's gross retail sales, and "true up" payments under those agreements contributed an incremental [redacted] of revenue to Amazon.

The Complaint further alleges that a second form of agreement, identified as a Matching Compensation Program ("MCP"), functions as an "informal or de facto" GMM, based upon Amazon and suppliers agreeing that the latter will make "true up" payments when necessary to meet mutually agreed-upon "profitability targets." Compl. ¶ 178. While the Complaint nominally alleges that MCP agreements cover [redacted] in retail sales, *id.* ¶ 179, that allegation appears to be based on a speculative extrapolation from the size of "true up" payments made under that program compared to the alleged payments made under GMMs, *ibid*. Even if the alleged numbers were credited, they would mean that MCP agreements affected approximately [redacted] of Amazon's retail sales in 2020, resulting in an alleged incremental increase of [redacted] of revenue.

Finally, the Complaint alleges that until March 2019, Amazon and third-party sellers entered into a BSA containing "an explicit 'Price Parity Provision.'" Compl. ¶¶ 113-114. The Complaint describes

[2] This number is alleged via a bar graph, where Amazon's total sales revenue for [redacted] appears as slightly more than halfway between [redacted]. *Id.* ¶ 36.

that provision as a standard term of service that every third-party seller agreed to as a condition of accessing Amazon's marketplace. *Ibid.* The provision allegedly "required sellers to agree that the 'purchase price and every other term of sale [would] be at least as favorable to Amazon Site users as the most favorable terms via Your Sales Channels,' i.e., the seller's own website, as well as other non-Amazon online marketplaces." *Id.* ¶ 114 (alteration in original). However, the Complaint further alleges that "Amazon removed the provision from its BSA" in March 2019, *id.* ¶ 125, "worked with reporters on background" to publicize that change, *id.* ¶ 128,[3] and made a "proactive communication" to sellers about the change through its "Seller Central 'Help' page," *id.* ¶ 129. Notwithstanding those actions, the Complaint alleges that "Amazon did not want its sellers to think that anything had changed," *id.* ¶ 129, and that certain individual sellers believed, incorrectly, "that even though Amazon got rid of the Price Parity Provision in March 2019, 'the policy continued.'" *Id.* ¶ 126 (quoting "One seller"); *id.* (quoting similar statement attributed to "another merchant").

As discussed below, courts have described price parity provisions as a common and procompetitive way for businesses to obtain lower prices. (*Infra*, at § IV.A.2.) While the Complaint nominally alleges otherwise, it does not allege what, if any, effect the parity provision in the BSA had on commerce prior to its removal in March 2019.[4] Rather, the only alleged facts that are even remotely related to that issue are that [redacted]. Compl. ¶ 36.

[3] The Court may take judicial notice that the change was widely reported in such varied news sources as Axios, the Financial Times, and TechCrunch. See, e.g., https://www.axios.com/2019/03/11/amazon-price-practice-antitrust-elizabeth-warren; https://www.ft.com/content/3beea4a6-445b-11e9-b168-96a37d002cd3; https://techcrunch.com/2019/03/11/amazon-reportedly-nixes-its-price-parity-requirement-for-third-party-sellers-in-the-u-s/. (*See* Evid. Code, § 452, subd. (h); *Pereda v. Atos Jiu Jitsu LLC*, No. B313718 (Nov. 23, 2022) -- Cal.App.5th --, 2022 WL 17174558, *1, fn. 1 [judicial notice may be taken of a "website's content—separate and apart from the truth of that content" because it "is something 'not reasonably subject to dispute and [is] capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy'"]; *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751 ["a demurrer may be sustained where judicially noticeable facts render the pleading defective, and allegations in the pleading may be disregarded if they are contrary to facts judicially noticed" (citation omitted)].)

[4] Notably, the Complaint does not describe a single instance in which the former price parity clause was enforced by Amazon, let alone any market-wide effects from any such enforcements.

III. LEGAL STANDARD

A demurrer must be sustained where a "pleading does not state facts sufficient to constitute a cause of action." Code Civ. Proc., § 430.10(e). In evaluating the sufficiency of a complaint, courts "treat as true all material facts properly pleaded," but need not credit "contentions, deductions or conclusions of facts or law." (*Freeman v. San Diego Ass'n of Realtors* (1999) 77 Cal.App.4th 171, 178, fn. 3 (*citing Moore v. Regents of University of California* (1990) 51 Cal.3d. 120, 125)). "Doubt in the complaint may be resolved against [the] plaintiff." (*Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574, 578.) And "facts not alleged are presumed not to exist." (*Ibid.*)

For an antitrust claim to survive a demurrer, it "must plead the formation and operation" of a combination or conspiracy by two or more parties, as well as "the illegal acts done in furtherance of the conspiracy." (*Freeman, supra,* 77 Cal.App.4th at 196.) "The unlawful combination or conspiracy must be alleged with specificity." (*Ibid.* (*citing Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316-317, *superseded by statute on other grounds*)). "Therefore, general allegations of a conspiracy unaccompanied by factual allegations of overt acts in furtherance of conspiracy are insufficient . . . ." (*Ibid.*) "The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient." (*Ibid.*; see also *Chicago Title Ins., supra,* 69 Cal.2d at 316-317 ["facts must be set forth which indicate the existence of such contracts, combinations or conspiracies"].)

IV. ARGUMENT

The OAG's claims under the Cartwright Act and UCL should be dismissed because the Complaint fails to plead any cognizable violation of California law.

A. Plaintiff's Cartwright Act Claim Fails as a Matter of Law.

The Cartwright Act is concerned solely with *coordinated* conduct between two or more parties that negatively impacts competition. (See, e.g., *Asahi Kasei Pharma Corp. v. CoTherix, Inc.* (2012) 204 Cal.App.4th 1, 8 ["A Cartwright Act violation requires 'a combination of capital, skill or acts by two or more persons' that seeks to achieve an anticompetitive end."] (quoting Bus. & Prof. Code, § 16720.)) "Consequently, '[o]nly separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations.'" (*Ibid.* (quoting *Freeman, supra,* 77

Cal.App.4th at 189).) To state a claim, a plaintiff must allege: "(1) the formation and operation of the conspiracy[;] (2) the wrongful act or acts done pursuant thereto[;] and (3) the damage resulting from such act or acts." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 373; see also *In re High-Tech Emp. Antitrust Litig.* (N.D.Cal. 2012) 856 F.Supp.2d 1103, 1126.)

"California requires a 'high degree of particularity' in the pleading of Cartwright Act violations." (*Freeman, supra*, 77 Cal.App.4th at 175 (quoting *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 742).) A demurrer must be sustained if "the complaint makes conclusory allegations of a combination and does not allege with factual particularity that separate entities maintaining separate and independent interests combined for the purpose to restrain trade." (*Freeman, supra*, 77 Cal. App. 4th at 189; see also *In re Netflix Antitrust Litig.* (N.D.Cal. 2007) 506 F.Supp.2d 308, 320.) Moreover, "[t]he antitrust laws do not preclude a party from unilaterally determining the parties with wh[om], or the terms on which, it will transact business." (*Freeman, supra*, 77 Cal.App.4th at 195.)

The OAG fails to sufficiently plead a violation of the Cartwright Act for at least two reasons.

1. Plaintiff's Allegations of Unilateral Conduct Are Not Cognizable Under the Cartwright Act.

"The Cartwright Act . . . does not proscribe independent action." (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 935 (*citing Chavez*, 93 Cal.App.4th at 369, 371); see also *Freeman, supra*, 77 Cal App.4th at 195 ["The antitrust laws do not preclude a party from unilaterally determining the parties with wh[om], or the terms on which, it will transact business."].) Rather, it prohibits only "trusts," which are defined as "a combination of capital, skill or acts by two or more persons" for anticompetitive purposes. (Bus. & Prof. Code, § 16720.) In this respect, California law is quite different from federal law: "[T]he Cartwright Act . . . does not [even] have any provisions parallel to [the] Sherman Act's section 2's anti-monopoly provisions." (*Freeman, supra*, 77 Cal.App.4th at 195, 202; see also *Asahi Kasei Pharma Corp., supra*, 204 Cal.App.4th at 8 [similar].) Accordingly, California courts consistently sustain demurrers to complaints brought under the Cartwright Act when they, at most, allege independent action. (*Freeman, supra*, 77 Cal.App.4th at 202; *Chavez, supra*, 93 Cal.App.4th at 367; see also *Asahi Kasei Pharma Corp., supra*, 204 Cal.App.4th at 4 [affirming summary adjudication of Cartwright Act claim on the same grounds].)

The OAG is well aware of this limitation to California's antitrust law, as it has tried unsuccessfully to stretch the law's boundaries in prior cases.[5] Indeed, the first modern decision establishing that the Cartwright Act applies "only to entities that 'combine,' in the sense of those who *perdure* (i.e., continue as separate, independent, competing entities during and after their collusive action)," was the California Supreme Court's decision rejecting the OAG's attempt to block, under a monopolization theory, the merger of two oil companies. (*State ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1163 [emphasis in original].) In that case, the OAG argued that the Cartwright Act and the federal Sherman Act were co-extensive, allowing it to enjoin a merger under state law using monopolization principles derived from federal law. (*Id.* at 1164.) The Court comprehensively reviewed the statute's history, and concluded that, to the contrary, the Act was derived from the antitrust laws of other states which, at the time of enactment, had already been judicially construed as extending only to "combinations" in the sense of a conspiracy, and not to other combinations (such as mergers) that might instill market power in a single actor. (*Id.* at 1161-1163.) Moreover, the Court noted, while some states reacted to those early judicial interpretations by enacting "newer, more expansive models of antitrust statutes, [California's] Legislature opted for the simpler, judicially construed format first enacted by Texas in 1889." (*Id.* at 1163.) As a result, "the drafters of the Cartwright Act must have known the limitations of what they were adopting" (*id.* at 1163), and the OAG was held unable to challenge the pending merger under the Act.

While *Texaco* was a merger case, the Court's core holding that the Cartwright Act applies only to "combinations" in the sense of "collusive action" has been applied in other cases with fact patterns alleging unilateral policies like this one. In *Freeman*, a real estate agent filed antitrust claims against local brokers' associations that had formed an entity to operate a countywide multiple listing service ("MLS") through which real estate agents could exchange information on properties for sale. (77 Cal.App.4th at 178-179.) The MLS was organized under the control of a single entity, Sandicor, which charged a monthly fee for use of its MLS. (*Id.* at 180-181.) Critically, for purposes of this case, Sandicor's MLS was alleged to be "an *essential tool* for real estate agents," used by "nearly all real estate agents actively engaged in buying

[5] As discussed above, the OAG has elected to proceed exclusively under California law in this case so that its Complaint would not be removable to a federal forum. Whatever procedural rationale the OAG might have had, it comes with the substantive and foreseeable consequence that the relatively narrower scope of California's antitrust law will be applied, not that of the federal Sherman Act.

or selling real estate in San Diego County . . . ." (*Ibid.* [emphasis added].) A real estate agent, Freeman, challenged Sandicor's operation and pricing of the MLS under both federal and state antitrust principles. The complaint asserted that Sandicor's actions were anticompetitive in multiple ways, including that it was engaged in tying, price-fixing, market exclusion, and a group boycott. (*Id.* at 181-182.) While the latter three claims nominally involved allegations of multiple actors, they all depended upon disregarding Sandicor's corporate form, and treating its actions as the *de facto* conduct of the multiple brokerage associations that had formed Sandicor to operate the MLS.

The Superior Court sustained a demurrer to Freeman's claims, and the Court of Appeal affirmed. The court determined that Sandicor's corporate form could not be disregarded, such that all of the decisions about how real estate agents could access the "essential" MLS were made unilaterally by a single entity, Sandicor. (77 Cal.App.4th at 194, 198.) That finding "doom[ed] Freeman's Cartwright Act claim" (*id.* at 200 fn.32), because California courts do not "constru[e] the Cartwright Act to permit judicial oversight of unilateral price decisions" (*id.* at 201.) The court squarely rejected the proposition that "a monopolist's allegedly excessive price, without more, gives rise to antitrust liability merely because the plaintiff alleges that price unreasonably restrains trade." (*Id.* at 203.)

Two years after *Freeman*, the Court of Appeal reinforced this principle by again affirming the dismissal of antitrust claims, this time in a case brought against appliance manufacturer Whirlpool. (*Chavez*, *supra*, 93 Cal.App.4th 363.) In *Chavez*, the plaintiff alleged that the resale price maintenance agreement that Whirlpool imposed on retailers carrying Whirlpool dishwashers violated California antitrust laws because (1) "Whirlpool coerced retailers to comply with the price policy, creating an unlawful combination under the Cartwright Act;" and (2) Whirlpool's minimum price policy was "unlawful" under the UCL because the harm to consumers outweighed the benefits. (*Id.* at 368.) The Court of Appeal disagreed and affirmed the dismissal of both claims. (*Id.* at 367.) Specifically, the *Chavez* court held that Whirlpool's resale price maintenance policies were permitted under the *Colgate* antitrust doctrine, which holds that "[t]he conduct from which an agreement can be inferred is circumscribed as a matter of law in order to protect a manufacturer's right to select with whom to do business and on what terms." (*Id.* at 370 (citing *United States v. Colgate & Co.* (1919) 250 U.S. 300.) *Chavez* also recognized a heightened standard of proof required to establish an *implied* agreement on resale prices. (*Chavez*, 93

Cal.App.4th at 372.) The court ultimately held that "a manufacturer's announcement of a resale price policy and its refusal to deal with dealers who do not comply [with that policy] coupled with the dealers' voluntary acquiescence in the policy does not constitute an implied agreement or an unlawful combination as a matter of law." (93 Cal.App.4th at 372.)

The *Chavez* court recognized that an unlawful combination *could* hypothetically arise if a manufacturer communicated and sought a dealer's agreement of compliance by coercive means. (*Id*. at 372-373.) But, in affirming the trial court's decision to sustain a demurrer to both antitrust causes of action against Whirlpool, the court found that Whirlpool's (1) alleged conduct of communicating its pricing policy to resellers; (2) monitoring reseller pricing policy compliance with "mystery shoppers" and other methods; and (3) complete refusal to deal with retailers who did not comply with its pricing policy, were all insufficient to establish a coerced agreement in violation of the Cartwright Act. (*Id*. at 373.)

Applying this precedent to the facts alleged here requires dismissal of the OAG's Complaint. No matter how "important" Amazon allegedly may be to third-party sellers, Compl. ¶¶ 39-44, California's antitrust law does not regulate any policies that Amazon adopts unilaterally to govern the operation of its store. (See *Texaco*, 46 Cal.3d at 1163 [the Cartwright Act applies "only" to "collusive action"]; *Freeman*, 77 Cal.App.4th at 194 & fn. 25 [defendant's unilateral pricing of an "essential competitive tool" was not actionable under the Cartwright Act]; *Asahi Kasei Pharma Corp.*, *supra*, 204 Cal.App.4th at 8 [single firm conduct "is not cognizable under the Cartwright Act"].) There are no allegations in the Complaint to support a finding that Amazon's unilateral decisions as to which product offerings to "feature" or to disqualify from being "featured" are the product of any combination or collusion with others. Quite the opposite, the Complaint alleges that third-party sellers possess only "limited information" about how Amazon decides which offers to feature, causing them to "interpret" Amazon's actions incorrectly. Compl. ¶¶ 131-132. Indeed, the advice that some sellers receive "not to offer or allow lower prices off Amazon" is attributed not to Amazon, but to "Ecommerce consultants . . . who advise third-party sellers and wholesale suppliers on how to sell and be successful on Amazon." *Id.* ¶ 12. The allegations of the Complaint are thus even further removed from alleging an agreement than was the case in *Chavez*, where retailers were at least alleged to have reacted to a known policy of Whirlpool. (93 Cal.App.4th at 372 [such conduct does not "constitute . . . an unlawful combination as a matter of law"].)

The OAG implicitly acknowledges this obvious flaw in its claim by rebranding Amazon's unilateral policies as "*de facto* retail price parity agreement[s]." Compl. ¶ 4. But the use of "de facto" does not create an agreement where there is none. And it simply reinforces that the Complaint alleges that sellers *respond* to Amazon's unilateral policies by *independently* adopting strategies that ostensibly increase their chances of having their offers "featured" in Amazon's store. *Id.* ¶¶ 5, 127, 129. Those unilateral actions are not agreements and California courts reject litigants' attempts to characterize them as such within the meaning of the Cartwright Act. (See *Chavez*, *supra*, 93 Cal.App.4th at 370 ["conduct from which an agreement can be inferred is circumscribed as a matter of law in order to protect a manufacturer's right to select with whom to do business and on what terms"] (citing *Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 761, 763).)

Likewise, there is no allegation that Amazon directly or indirectly asked third-party sellers to raise prices or decrease selection in other stores, much less that Amazon reached an *agreement* with third-party sellers to take any such action. Rather, the Complaint alleges only that Amazon, by setting its own policies to promote competitive pricing in its store, somehow implicitly induces third-party sellers to raise prices and suppress competition elsewhere. Courts have repeatedly rejected such efforts to conflate unilateral pricing policies with unlawful combinations. (See *Chavez*, *supra*, 93 Cal.App.4th at 370; *Freeman*, *supra*, 77 Cal.App.4th at 193.)

For the same reasons, the alleged price parity provision that formerly existed in the BSA (discussed in greater detail in the following section IV.A.2), is not a combination within the meaning of the Cartwright Act. As the Complaint alleges, that was formerly a term that Amazon unilaterally required all sellers to agree to as a condition of accessing Amazon's marketplace. Compl. ¶¶ 113-114. The policy was designed to encourage lower, competitive prices for Amazon's customers, and Amazon's unilateral decision not to do business with sellers who would not agree to that term does not give rise to a combination within the meaning of the Cartwright Act. (*Chavez*, *supra*, 93 Cal.App.4th at 372.) Federal decisions under the analogous provisions of section one of the Sherman Act concur. (See, e.g., *The Jeanery, Inc. v. James Jeans, Inc.* (9th Cir. 1988) 849 F.2d 1148, 1160 [manufacturer's refusal to sell to distributors who would not adhere to its resale pricing strategy "was unilateral, independent action taken [] to maintain the resale price of its goods. And it did not violate section 1 of the Sherman Act."].)

2. The OAG's Allegations of Vertical Restraints of Trade Fail To Allege Facts Capable of Establishing a Violation of the Cartwright Act.

The remaining few allegations that relate to purported express agreements between Amazon and third-party retailers and vendors—alleged GMMs, MCPs, and a long-defunct parity clause—likewise fail to state a claim, because they do not allege facts sufficient under the applicable "rule of reason" standard, which requires the OAG to allege that these agreements had a substantial anticompetitive effect on the market. The rule of reason—and not the *per se* standard—applies to the OAG's allegations for two reasons.

First, California (and federal) courts have consistently held that the rule of reason governs vertical restraints of trade (i.e., those allegedly existing between participants at different levels in the chain of distribution), such as those purported to be alleged here. (See, e.g., *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2020) 55 Cal.App.5th 381, 406 ["California Courts of Appeal generally analyze vertical restraints under the rule of reason."].)[6] The OAG alleges that the terms and conditions under which Amazon makes its marketplace available to third-party sellers constitute horizontal agreements between competitors that are illegal *per se*. Compl. ¶¶ 9, 212. But as a federal district court correctly held when analyzing similar allegations of the relationship between Amazon as a "platform provider" and the sellers as participants, "[t]his allegation connotes a vertical relationship, one in which Amazon is not competing with third-party sellers, but rather setting requirements as a condition for platform access." (*Frame-Wilson v. Amazon.com, Inc.* (W.D.Wa. 2022) 591 F.Supp.3d 975, 987 [rejecting claim for alleged *per se* illegality]; see also *Freeman, supra*, 77 Cal.App.4th at 194 [an unlawful combination exists only when the "conduct complained of operates to restrain competition *at the same level* at which these actors previously had been actual or potential competitors." (emphasis added)].) If anything, that conclusion is even more obvious for the two forms of agreements (GMMs and MCPs) that are alleged to exist in contracts under which Amazon *purchases* products from an upstream manufacturer

[6] (See also, e.g., *Ben-E-Lect v. Anthem Blue Cross Life and Health Ins. Co.* (2020) 51 Cal.App.5th 867, 873 ["Rule of reason analysis applies to determine whether a vertical boycott unreasonably restrains competition."] (citing *Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 495); *Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 712-713; *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.* (2007) 551 U.S. 877, 891; *Theme Promotions, Inc. v. News America Marketing FSI* (9th Cir. 2008) 546 F.3d 991, 1001.)

or distributor in order to resell them at retail. Compl. ¶¶ 175-178. Any alleged restraints existing in those agreements plainly relate to a vertical relationship, and they are therefore governed by the rule of reason. (*Flagship Theatres, supra*, 55 Cal.App.5th at 406.)

Second, the OAG's claims are subject to the rule of reason because they do not fit into the narrow category of conduct that courts have enough experience with to deem illegal *per se*. As the California Supreme Court has definitively held, the *per se* mode of illegality is restricted to that rare class of cases (such as horizontal price-fixing or bid-rigging conspiracies) in which courts can state with confidence and based on experience that a given practice "always lack[s] redeeming value[.]" (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 146.) Most recently, the Court explained that it "has taken direction from the common law in establishing a reasonableness standard for determining whether an agreement violates the Cartwright Act." (*Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1159.) "That standard asks whether an agreement 'promotes or suppresses competition' by considering the 'circumstances, details, and logic of a restraint.'" (*Ibid.* [quoting *Cipro*, 61 Cal.4th at 137, 146 (additional quotation omitted)].)

In *Cipro*, the Supreme Court declined to condemn as *per se* unlawful an arrangement under which a monopolist paid a competitor not to challenge its patent monopoly for a period of years, explaining "we cannot say with reasonable certainty—yet—that we have posited every possible justification that might render a particular reverse patent settlement procompetitive." (*Id.* at 158.) By the same token, to Amazon's knowledge, no California court has addressed the competitive effects of an alleged price parity clause, and likewise no court has addressed the competitive effects of GMMs or MCPs. The "logic" of GMMs and MCPs (*Ixchel Pharma*, *supra*, 9 Cal.5th at 1159), is that they are alternative pricing arrangements that allow a manufacturer and retailer to divide some of the risk of selling potentially unprofitable products. They accordingly serve the procompetitive purposes of facilitating greater product selection and competitive discounting. And federal courts that have considered parity clauses and margin guarantees have overwhelmingly described them as lawful and procompetitive. (See, e.g., *Blue Cross & Blue Shield Utd. of Wis. v. Marshfield Clinic* (7th Cir. 1995) 65 F.3d 1406, 1415 (Posner, J.) ["'Most favored nations' clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers."]; *Lewis Svce. Ctr. Inc. v. Mack Trucks, Inc.* (8th Cir. 1983) 714 F.2d 842, 844, 848 [sales program that credited funds back to a "dealer

[who] obtained a profit less than the minimum guaranteed" could not "be characterized as anything other than procompetitive"].)[7]

For present purposes, the relevant point is that there is not a sufficient basis in law to characterize the challenged agreements as always irredeemable and therefore subject to *per se* condemnation. The Complaint does not deny, for example, that similar agreements are ubiquitous in the retail industry and that they are intended to facilitate retailer discounting and increase product selection. So the OAG must allege, and ultimately must prove, facts establishing the agreements' *substantial* anticompetitive effects under the rule of reason. (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2020) 55 Cal.App.5th 381, 399 (citing *FTC v. Indiana Fed. of Dentists* (1986) 476 U.S. 447, 458-459 (italics omitted)); *Marsh, supra*, 200 Cal.App.4th at 495; *Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1681; see also *Theme Promotions, Inc. v. News America Marketing FSI* (9th Cir. 2008) 546 F.3d 991, 1001 (applying the rule of reason to claim under the Cartwright Act); *FTC v. Qualcomm Inc.* (9th Cir. 2020) 969 F.3d 974, 990-991 [requiring allegations of "substantial anticompetitive effect that harms consumers in the relevant market" to satisfy the rule of reason test].)

The Complaint fails the rule of reason test because it does not, and could not, allege a market-wide anticompetitive effect caused by Amazon's limited use of GMMs, MCPs, or the long-defunct (and rarely enforced) price parity clause in the BSA. Rather, the Complaint contains only conclusory allegations regarding sellers' responses to Amazon's pricing policies, based on a few anecdotal examples. (Compl. ¶¶ 12, 140-143.) Any one of the agreements between Amazon and a particular vendor would of course be too small to create an antitrust issue. The fact that Amazon has entered into a number of similar agreements does not change things: Contrary to the OAG's pleading, a plaintiff cannot just aggregate the individual effects of a series of agreements, each covering too little commerce to be unlawful, absent a valid allegation of horizontal conspiracy among the third-party sellers and wholesale suppliers. (*Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 704-705 ["In the absence of any

[7] Accord *Ocean State Phys. Health Plan, Inc. v. BCBS of R.I.* (1st Cir. 1989) 883 F.2d 1101, 1110 ("[A] policy of insisting on a supplier's lowest price—assuming that the price is not 'predatory' or below the supplier's incremental cost—tends to further competition on the merits and, as a matter of law, is not exclusionary"); *AAA Liquors, Inc. v. Joseph E. Seagrams and Sons, Inc.* (10th Cir. 1982) 705 F.2d 1203, 1206-1208 (upholding as procompetitive "Seagram's guarantee of the gross margin of [its] wholesaler").

allegation or evidence of collusion among the distributors, the market shares cannot be aggregated to determine the defendants' collective market power."]; see also *Dickson v. Microsoft Corp.* (4th Cir. 2002) 309 F.3d 193, 210 [similar].) And at the same time, the Complaint fails to allege that any of these agreements, standing alone, foreclose a substantial share of competition.

Even if the effects of these agreements across different customers could be aggregated, the allegations of the Complaint demonstrate that such provisions affect only a *de minimis* share of retail commerce that cannot plausibly meet the OAG's burden of alleging a substantially adverse effect on the market as a whole. (*Marsh, supra*, 200 Cal. App. 4th at 495.) As discussed above, "true up" payments under the GMMs allegedly contribute a mere [redacted] of Amazon's retail sales revenue, Compl. ¶¶ 36, 179, while such payments under the MCPs allegedly contribute just [redacted] of its retail sales revenue, *id.* ¶¶ 178-179. That would be a *de minimis* effect [redacted] when considering Amazon alone. But since Amazon is further alleged to control less than half of the sales in the OAG's alleged relevant product market, *id.* ¶ 103, the *market-wide* effect of these alleged provisions is smaller still—representing less than [redacted] of all online retail sales.

Thus, even if the Court were to look past the obvious procompetitive nature of these provisions (to permit Amazon to offer products that otherwise might be unprofitable, and to facilitate Amazon discounting to meet or beat the competition), the Complaint plainly alleges that they influence only a miniscule fraction of sales in the alleged market. Nothing in the Complaint plausibly explains how provisions with such inconsequential reach nevertheless could have the requisite *substantial* adverse effect on competition necessary to state a claim. (*Marsh, supra*, 200 Cal.App.4th at 495; see also *Gerlinger v. Amazon.com. Inc.* (N.D.Cal. 2004) 311 F.Supp.2d 838, 855 ["As a matter of law, 'foreclosure of a *de minimis* share of the market will not tend "substantially to lessen competition."'" (quoting *Brown Shoe Co. v. United States* (1962) 370 U.S. 294)]; *id.* at 855 [concluding that allegations of foreclosure of "about 1% of all book sales through online sales channels" represented a *de minimis* amount that could not support an antitrust claim].)[8]

[8] The Complaint contains no allegations at all about any market-wide effects of the defunct price parity provision that was removed from the BSA in March 2019. During a pre-filing meet and confer, representatives of the OAG asserted that certain of the alleged seller anecdotes quoted in the Complaint

For all of these reasons, no cognizable claim has been alleged, and the OAG's Cartwright Act claim fails as a matter of law.

B. The Complaint Fails to State a Claim Under the Unfair Competition Law.

The OAG's Second Cause of Action alleges that Amazon has violated California's Unfair Competition Law. (Compl. ¶¶ 219-222.) To state a claim for violation of the UCL, the OAG must allege that the defendant engaged in "unfair competition," meaning "any unlawful, unfair or fraudulent business act or practice . . ." (Bus. & Prof. Code, § 17200; see *McCann v. Lucky Money, Inc.* (2005) 129 Cal.App.4th 1382, 1387.) Courts have recognized that "unlawful" and "unfair" must be rooted in administrable legal principles. As relevant here, a plaintiff must allege an "unlawful" practice, meaning one that violates a different law, or an "unfair" practice that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 186-187.) A plaintiff must state with reasonable particularity the facts supporting the statutory elements of the violation. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.)

The OAG claims liability under the "unlawful prong" and the "unfair prong" of the UCL. (Compl. ¶¶ 219-220.) The allegations fail to state a claim under either approach.

1. The UCL Claim Fails Under the "Unlawful Prong" Because There Is No Cartwright Act Violation.

The OAG's failure to state a claim under the Cartwright Act dooms its theory of liability under the UCL's "unlawful prong." In defining an "unlawful" business practice, the UCL "borrows violations of other laws and treats these violations, when committed pursuant to business activity," as "independently actionable." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 846, 851 (internal quotation marks

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pertained specifically to that clause prior to its removal. Counsel for Amazon asked the OAG to clarify its Complaint by identifying the specific alleged seller statements purporting to describe actions taken in response to that provision. Amazon received no such clarification prior to the deadline for filing its demurrer. In any event, individual anecdotes would fail to establish the requisite *market-wide* anticompetitive effect. (*Flagship Theatres, supra*, 55 Cal.App.5th at 418-419 ["Insisting on proof of harm to the whole market fulfills the broad purpose of the antitrust law that was enacted to ensure competition in general, not narrowly focused to protect individual competitors." (quoting *Capital Imaging v. Mohawk Valley Med. Assoc.* (2d Cir. 1993) 996 F.2d 537, 543].)

omitted).) A plaintiff thus must show a violation of another law as "a predicate for stating a cause of action under the UCL's unlawful prong." (*Berryman v. Merit Prop. Mgmt., Inc.* (2007) 152 Cal.App.4th 1544, 1554.)

In the Complaint, the OAG cites to Amazon's alleged violation of the Cartwright Act as the only predicate violation. (Compl. ¶ 220.) Given the OAG's failure to state a claim for such a violation, *see supra* at Section IV.A.1, this theory of liability under the UCL is also not actionable. If there were any doubt, California courts have routinely sustained demurrers for claims of "unlawful" activity under the UCL that were based only on deficient Cartwright Act claims. (See, e.g., *Chavez*, *supra*, 93 Cal.App.4th at 374 [finding that "unlawful" UCL claim failed because "[t]he complaint does not allege a valid Cartwright Act violation to establish an 'unlawful' act or practice"]; see also *Scripps Clinic v. Superior Ct.* (2003) 108 Cal.App.4th 917, 938; *Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1234-1236.) This Court should do the same.

2. The UCL Claim Fails Under the "Unfair Prong" for Similar Reasons.

The Complaint's conclusory statement that Amazon has engaged in "acts or practices . . . which are unfair, irrespective of the violation of any other law, and which constitute unfair competition" does not rescue its UCL claim. (Compl. ¶ 221.) A UCL claim relying on the "unfair prong" that complains of anticompetitive conduct must be sufficiently tethered to an actual legislatively declared antitrust violation, and it must inflict some actual or threatened harm to competition. Because the complaint relies solely on its flawed application of the Cartwright Act, it fails to state a claim based on the unfair prong.

a) The *Cel-Tech* "Tethering" Standard of Liability Applies Here.

As established by the California Supreme Court, "any finding of unfairness to competitors under section 17200 [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." (*Cel-Tech*, *supra*, 20 Cal.4th at 186-187.) Under this standard, a plaintiff must allege an "unfair" practice that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id.* at 187.) Although some courts have continued to apply pre-*Cel-Tech* standards for claims brought by *consumers* suing businesses for unfair practices, the First District has consistently applied the *Cel-Tech* "tethering test" to

all actions under the "unfair prong" relating to alleged anticompetitive conduct—regardless of the identity of the plaintiff that brings them. (See *Graham v. Bank of Am., N.A.* (2014) 226 Cal.App.4th 594, 613; *Belton*, *supra*, 151 Cal.App.4th at 1239; *Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 991; see also *Lozano v. AT&T Wireless Servs., Inc.* (9th Cir. 2007) 504 F.3d 718, 736 ["In the First District Court of Appeal[], the court extended the *Cel-Tech* definition to consumer cases."].)[9]

Indeed, the First District has correctly recognized that it makes little sense to apply a different standard for actions brought by competitors than consumers. (See *Gregory*, *supra*, 104 Cal.App.4th at 854.) In *Cel-Tech*, the basis for the Supreme Court's holding was that it found balancing tests for unfair conduct to be "too amorphous" and furnishing "too little guidance to courts and businesses" as to what conduct is "unfair" under the law. (*Cel-Tech*, *supra*, 20 Cal.4th at 184-185.) An overly vague standard "of what is 'unfair' fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair." (*Ibid.*) That concern is just as operative when another plaintiff—be it a consumer or the OAG—sues, rather than a competitor; whether the illegality of a business practice is sufficiently foreseeable should not change depending on who happens to bring a lawsuit challenging the conduct. Thus, while other courts have departed from the First District's approach, this Court should follow the First District's sensible directive to apply the tethering test for all "unfairness" claims under the UCL arising from alleged anticompetitive conduct, including this one.

b) The Allegations Fail To State a Claim.

Cel-Tech identified three ways in which competitive conduct can be "unfair" under the UCL: (1) if it amounts to an "incipient violation" of the antitrust laws, (2) if it violates the "policy or spirit" of those laws, or (3) if it "otherwise significantly threatens or harms competition." (*Cel-Tech*, *supra*, 20 Cal.4th

[9] Even if this Court were to assess whether this is a "competitor" or "consumer" action to determine whether the *Cel-Tech* standard applies—which it need not—this case is still best viewed as one necessarily involving arising under that standard. The OAG sues here in its *parens patriae* capacity, but the crux of the complaint concerns Amazon's allegedly unfair actions toward other businesses. The Ninth Circuit has applied the *Cel-Tech* test in an action with similar allegations, *Levitt v. Yelp! Inc*, explaining that "the crux of the business owners' complaint is that Yelp's conduct unfairly injures their economic interests to the benefit of other businesses who choose to advertise with Yelp." 765 F.3d 1123, 1136 (9th Cir. 2014) (emphasis and citation omitted). The same principles apply to the facts alleged here.

at 187.) The concept of "incipient" violations derives from cases interpreting Section 5 of the Federal Trade Commission Act as permitting regulators to "stop in their incipiency acts and practices which, when full blown, would violate [the antitrust laws]." (*FTC v. Motion Picture Adv. Serv. Co.* (1953) 344 U.S. 392, 394-395.) Such budding violations still require proof of "threatened impact on competition" in a relevant market. (*Cel-Tech, supra*, 20 Cal.4th at 186-187.) Similarly, to "come within the letter or policy of [the antitrust] laws," the allegations must still assert conduct that "had an adverse effect on competition." (*Gregory, supra*, 104 Cal.App.4th at 856.)

None of the approaches to a UCL unfairness claim permit a plaintiff to stray materially from pleading and proving an actual antitrust law violation. Indeed, the case law's concept of "tethering," requires as much. For that reason, courts have recognized that if a plaintiff fails to state a claim for a Cartwright Act violation, a UCL claim for "unfair" competition based on the same alleged misconduct will necessarily fail as well. (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 93 ["In that plaintiff cannot allege a Cartwright Act violation or a cause of action for intentional interference with prospective economic advantage, the cause of action for a violation of the UCL also cannot stand."]; *Distance Learning Co. v. Maynard* (N.D.Cal. June 4, 2020) 2020 WL 2995529, at *11 ["Because Plaintiff's factual allegations do not rise to a violation of the Sherman Act or the Cartwright Act, those same factual allegations cannot give rise to a UCL claim based on the 'unfair' prong."]; *see also* William L. Stern, Business & Professions Code Section 17200 Practice, Ch. 3-G (Second Substantive Prong of § 17200—"Unfair" Business Practices) (2022) [noting that appellate courts have read the antitrust statutes and Section 17200's unfair prong to be "more or less congruent"].)

Even where plaintiffs have explicitly pushed for their unfairness claims under the UCL to survive defeat of their antitrust claims, courts have swiftly rejected that possibility. In *RLH Industries v. SBC Communications*, for example, plaintiff RLH—a maker of high-voltage protection (HVP) devices—alleged that the defendants violated the Cartwright Act through a tying arrangement that required their local telephone service customers to obtain HVPs from suppliers other than RLH. (*RLH Indus., Inc. v. SBC Commc'ns, Inc.* (2005) 133 Cal.App.4th 1277, 1281.) The court rejected the tying claim as to defendant PacBell because RLH did not dispute that PacBell offered its customers a choice between leasing PacBell's HVP services or buying their own devices from two independent suppliers—and this

arrangement did not threaten competition. (*Id.* at 1283-1286.) RLH contended on appeal that PacBell's HVP policy could still constitute an unfair business practice under the UCL, even if it did not violate the Cartwright Act. (*Id.* at 1286.) The court applied the *Cel-Tech* standard, and it noted that "RLH did not nip an illegal tying arrangement in the bud," as contemplated by the standard's reference to an "incipient" violation. (*Ibid.*) Nor did the conduct violate the "policy or spirit" of the Cartwright Act or "otherwise threaten[] competition" given that the court had just rejected the notion that PacBell's HVP policy was anticompetitive under the Cartwright Act. (*Ibid.*) In short, the conduct did not violate the UCL for the same reasons that it did not violate the Cartwright Act.

Similarly, in *Synopsys, Inc. v. ATopTech, Inc.* (N.D.Cal. Aug. 7, 2015), software designer ATopTech filed a counterclaim against its competitor Synopsys for allegedly violating the Clayton Act, Sherman Act, Cartwright Act, and UCL. (2015 WL 4719048, at *10.) The court determined that ATopTech failed to state a claim for its various charges that Synopsys attempted to monopolize the market and restrain trade. (*Id.* at *4-*9.) The court then addressed ATopTech's UCL claim, dismissing any violation under the "unlawful" and "unfair" prongs. (*Id.* at *9-*10.) On the latter, the court applied *Cel-Tech*, and explained that ATopTech did not show "any 'unusual' aspect of the alleged conduct that would make th[e] conduct something that violates the 'policy and spirit' of the antitrust laws without violating the actual laws themselves. Rather, the conduct [it challenged] either is anticompetitive and thus simultaneously violates both the antitrust laws and their 'policy and spirit,' or it violates neither." (*Id.* at *10.)[10]

[10] Only one case has ever imposed UCL liability for conduct that was not anticompetitive under the antitrust laws, but that nonbinding decision is on appeal and should not drive any analysis here. In *Epic Games, Inc. v. Apple Inc.* (N.D.Cal. 2021), the Northern District of California ruled that anti-steering provisions of Apple's license agreements did not violate antitrust laws as anticompetitive, but the court nonetheless found that they "'threaten[ed] an incipient violation of an antitrust law' by preventing informed choice among users" and violated the "'policy [and] spirit' of the[] laws because anti-steering has the effect of preventing substitution among platforms for transactions." (559 F.Supp.3d 898, 1055-1056 (second alteration in original).) But that decision conflicts with California case law that recognizes that a failure to plead or prove an antitrust violation dooms an unfairness claim based on the same factual allegations (*see Liebert*, *supra*, 162 Cal.App.4th at 93), and it misapplies Ninth Circuit law, which also holds that a finding that conduct is not an antitrust violation precludes a finding that it constitutes unfair competition (*LiveUniverse, Inc. v. MySpace, Inc.* (9th Cir. 2008) 304 F.App'x 554, 557). Regardless, the relevant allegations in *Epic* involving Apple imposing anti-steering provisions that blocked app developers from telling consumers about opportunities to purchase items off Apple's platform—and thus

So too here. The OAG's failure to plead an antitrust violation under the Cartwright Act dooms its unfairness claim based on the same factual allegations. There is no "incipient" antitrust violation to be found in Amazon's alleged unilateral promotional practices, because no matter how long they occur, they cannot violate California's antitrust law absent coordination with other parties that is nowhere alleged to have occurred or to be on the precipice of occurring. Moreover, central to the OAG's claims is the allegation that Amazon's price parity provision operated as early as 2012 and then continued "de facto" even after Amazon removed the actual provision from BSA in 2019. (Compl. ¶¶ 4, 114, 125-126, 140.) Thus, the OAG cannot simultaneously claim these allegedly anticompetitive practices are longstanding *and* that its suit "nip[s] an illegal [antitrust] arrangement in the bud." (*RLH Indus.*, *supra*, 133 Cal.App.4th at 1286.) The same is true of the alleged GMMs or MCPs, which as stated above, are *de minimis* in scale and have been in place long enough to identify any anticompetitive effect if it were to exist. (See *supra* at Section IV.A.1.) Nor has the OAG tried to plead any way that Amazon's practices violate the "policy or spirit" of the Cartwright Act with "effects . . . comparable to or the same as a violation," but one that is, for a technical reason, not actionable here. (*Cel-Tech*, *supra*, 20 Cal.4th at 186-187.) The Complaint's Cartwright Act claim does not, for example, fail on statute-of-limitations grounds or because of a lack of statutory standing, such that there could still be an arguable violation of the "spirit" of the Cartwright Act if not its letter. Rather, as in *Synopsys*, the viability of the UCL claim under the "unfair prong" rises and falls with the antitrust claims.

Quite the opposite from violating the spirit of the Cartwright Act, Amazon's alleged actions are all explicitly lawful under California law or are facially procompetitive by promoting lower and competitive prices to consumers. (See, *supra*, at 8-16.) Such allegations fail to support an antitrust violation and equally fail to support a UCL claim grounded in antitrust principles.

V. CONCLUSION

The Court should sustain Amazon's demurrer.

blocking competitors' "commercial speech" (*Epic*, *supra*, 559 F.Supp.3d at 1055)—are totally unlike the pro-competitive pricing policies at issue here.

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