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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.	**Case No.: CGC-22-601826** **PLAINTIFF THE PEOPLE OF THE STATE OF CALIFORNIA'S OPPOSITION TO DEFENDANT AMAZON.COM, INC.'S DEMURRER** Action filed: September 15, 2022 Department: 304 Judge: Hon. Ethan P. Schulman Hearing date: March 7, 2023 Hearing time: 9:00 a.m.

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I. INTRODUCTION

Amazon's demurrer ignores and mischaracterizes the facts pleaded in the People's Complaint, and attempts to introduce new facts, all in an effort to recast the People's claims beyond recognition. Indeed, the opening paragraph of Amazon's demurrer reads more like a motion for summary judgment, purporting to introduce unsupported facts about customer shopping habits, Amazon's investments, and claimed procompetitive effects absent from, and contrary to, the facts pleaded throughout the Complaint. Reading the Complaint as a whole, and accepting all facts pleaded as true, together with all inferences that can be derived from those facts, the People have stated viable claims for violation of the Cartwright Act and the California Unfair Competition Law ("UCL").

Contrary to Amazon's mischaracterizations, the Cartwright Act claim is not premised on unilateral conduct; it is well-grounded on specific factual allegations detailing the express agreements Amazon requires third-party sellers and wholesale suppliers to enter. These agreements have both the purpose and effect of interfering with free-market price competition. Further, the Complaint pleads facts demonstrating that these unlawful agreements directly interfere with price competition, giving rise to a *per se* violation of the Cartwright Act under the controlling California Supreme Court decisions in *Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 363 (*Lathrop*) and *Mailand v. Burckle* (1978) 20 Cal.3d 367, 377 (*Mailand*), precedent that Amazon fails to cite or even acknowledge in the demurrer. Moreover, even in the absence of a *per se* violation, the facts pleaded demonstrate that Amazon's unlawful agreements have a substantially anticompetitive effect, creating a price floor that insulates Amazon from price competition. Amazon is thus able to extract higher overall fees and greater margins than in a competitive market free of unlawful restraints, and these higher fees and margins are passed along to consumers resulting in higher prices on and off Amazon. These facts, together with the direct evidence that third-party sellers and wholesale suppliers do raise prices and withhold product selection to comply with Amazon's unlawful agreements, are more than sufficient to state a Cartwright Act claim under any analysis along the "sliding scale" continuum outlined by the California Supreme Court in *In re Cipro Cases I & II* (2015) 61

Cal.4th 116, 147 (*In re Cipro*). For all these same reasons, the Complaint also states a valid claim under the UCL "unlawful" prong.

Separately, even in the absence of a Cartwright Act violation, the Complaint alleges facts sufficient to state a claim for violation of the UCL "unfair" prong. As an initial matter, Amazon's perfunctory argument fails to address two of the three separate tests that California courts apply to analyze "unfair" prong claims as recognized by the California Supreme Court. Under each of these tests, the Complaint states a viable UCL claim. Cobbling together snippets from inapt opinions, taken out of context, Amazon argues "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." (Demurrer at p. 20:10-12.) Not only does this argument inappropriately collapse the UCL "unlawful" and "unfair" prongs, but it contravenes the controlling California Supreme Court decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163 (*Cel-Tech*), which permitted an "unfair" prong claim to proceed after dismissal of a Cartwright Act claim based on the same facts. (*Id*. at p. 188 ["the trial court erred in concluding that the unfair competition law cause of action necessarily failed when the other causes of action failed"].)

For all these reasons, as detailed herein, Amazon's demurrer should be overruled.

II. SUMMARY OF RELEVANT FACTUAL ALLEGATIONS

Amazon is the dominant online retail store in the United States, capturing roughly 50% of relevant online retail sales and 60% of sales among its critical competitors. (Cmpl. ¶¶ 103-104.) Amazon's dominant position gives it substantial market power over both merchants (third-party sellers and wholesale suppliers) and consumers. (*Id*. ¶¶ 35-82, 103-111.) For hundreds of thousands of merchants, Amazon is a critical distribution outlet, representing 20-30% or more of the merchant's total sales, and the access point to 160 million coveted Prime customers. (*Id.* ¶¶ 38-44.) Amazon has used this market dominance to require merchants to enter into agreements that prevent them from offering consumers lower prices on competing online sites, even where the costs of selling on those competing sites may be significantly lower. (*Id*. ¶¶ 1-12, 82, 206-210.) At the same time, while Amazon's agreements insulate it from price competition, Amazon

has dramatically increased the costs for merchants selling on Amazon, which it knows are passed on to Amazon's customers in the form of higher prices. (*Id*. ¶¶ 7-11, 45-64, 113, 175, 206-209.)

Retail price parity. From 2012 to the present, Amazon's Business Solutions Agreement ("BSA") has expressly required every third-party seller to agree that they will not offer products they sell on Amazon for a lower price on any off-Amazon retail website. (*Id*. ¶¶ 4-5, 112-129.) From 2012 through March 2019, this requirement was encapsulated in a section of the BSA titled "Price Parity Provision." (*Id*. ¶¶ 4, 113-114, 125.) Third-party "sellers understood this policy as a prohibition on listing products off Amazon for a lower price than the price posted on Amazon, and sellers refrained from selling their products for less off Amazon because they had agreed not to do so in their BSA with Amazon." (*Id.* ¶ 114.) After drawing scrutiny from various regulators, Amazon removed the Price Parity Provision language from the BSA in March 2019; nevertheless, other provisions of the BSA, including Amazon policies that are expressly incorporated into the BSA, continue to prohibit third-party sellers from offering lower prices off Amazon through today. (*Id*. ¶¶ 5, 115-129.) As Amazon explained at the time, with "the recent removal of the price parity clause in our BSA…our expectations and policies ***have not changed***." (*Id.* ¶ 125, emphasis added.)

Amazon affirmatively counsels third-party sellers to comply with the price parity requirement by imposing higher prices or enforcing minimum resale/advertised prices on competing websites, by charging higher prices on their own direct-to-consumer (DTC) websites and competing online marketplaces, and by withholding selection from competing online stores and their own DTC sites; conduct Amazon euphemistically refers to as "channel management." (*Id*. ¶ 7; see also *id*. ¶¶ 157-158, 161-163, 168, 174.) Amazon also engages in various coercive measures to force compliance from third-party sellers, imposing increasingly severe penalties—which it terms "escalating disincentives"—when it finds lower prices off Amazon. (*Id.* ¶¶ 5, 145-155.) Amazon's own internal documents confirm that third-party sellers generally do not lower prices on Amazon to comply with the price parity requirement. (*Id*. ¶¶ 12, 156.) Instead, as a direct result of Amazon's price parity agreements, and its efforts to coerce enforcement of price

parity, third-party sellers maintain higher prices on their own websites, maintain higher prices on other marketplaces, and set higher price floors for resale. (*Id*. ¶¶ 7, 150, 205-206.)

Wholesale price parity. Amazon employs similarly anticompetitive agreements with wholesale suppliers covering billions of dollars in sales every year. (Cmpl. ¶¶ 6, 175-179; see also *id*. ¶ 203.) These agreements further insulate Amazon from price competition by punishing suppliers who allow their products to be priced lower off Amazon. (*Id*. ¶¶ 175-182.) Unlike a "most-favored-nation" clause, these agreements do not guarantee Amazon the lowest wholesale cost. Rather, Amazon's Guaranteed Minimum Margin ("GMM") agreements require wholesale suppliers to guarantee the minimum profit margin Amazon will make when it sells the product. (*Id*. ¶¶ 6, 175-177.) Amazon's wholesale suppliers guarantee Amazon's margin, even though they know Amazon follows a strict "tit-for-tat" pricing strategy whereby Amazon will always lower its price to match a lower price it finds virtually anywhere else online. (*Id.* ¶ 33, 175, 178, 180, 189-198.) Under these GMM's, if Amazon finds a lower retail price off Amazon, Amazon automatically lowers its retail price to match; if Amazon's profit margin falls below the guaranteed minimum margin, the wholesale supplier is required to pay Amazon a penalty "true-up" payment. (*Id.* ¶¶ 175-177.) Amazon also enters into profitability agreements that function as "informal or de facto" GMM's, requiring Amazon suppliers to make Matching Compensation Program ("MCP") payments when Amazon fails to meet "profitability targets" as a result of matching a lower price off Amazon. (*Id*. ¶ 178-183; see *id*. ¶ 189 [each year, a wholesale supplier "enters into agreements with Amazon that 'set out [the supplier's] suggested retail price for each product, along with an Amazon margin associated with that price'"].) The Complaint refers to Amazon's GMM and de facto GMM/MCP agreements as "minimum margin agreements" (hereafter MMA's). (See *id*. ¶¶ 6, 175-178.) To comply with these MMA's, and avoid true-up/MCP payments, Amazon encourages suppliers to, and suppliers do in fact, engage in "channel management," withholding product from competing retailers or enforcing minimum resale/advertised price policies. (*Id*. ¶¶ 7, 176, 184, 195-198.)

Harm to competition. Amazon's retail and wholesale price parity agreements cause third-party sellers and wholesale suppliers to charge higher prices on their own DTC websites and

other online marketplaces than they would otherwise charge on these less expensive distribution channels, to adopt and enforce minimum advertised/resale price policies against competing online retailers, and to raise their prices to, and withhold products from, competing online retailers so that those Amazon competitors cannot offer the same products for less than the Amazon price. (Cmpl. ¶¶ 2, 7, 8, 12, 114-115, 140, 150, 152-154, 156-158, 160, 164-169, 171-173, 177, 184, 187-194, 197-198, 202, 205, 207-210.) While Amazon attempts to characterize the effects as *de minimis*, the facts pleaded establish that the agreements at issue cover the majority of all sales on Amazon impacting tens of billions of dollars in sales in California alone. (*Id*. ¶¶ 7, 23-24, 175, 178-179, 203, 213.) Further, by enlisting its merchants to abstain from and prevent online discounting off Amazon, Amazon interferes with the ability of its rivals to compete for customers by offering lower prices. (*Id.* ¶¶ 82, 202, 206-210.) Insulated from free-market price competition, Amazon can and does charge substantially higher seller fees and demand larger profit margins, which it knows are passed along to consumers through higher prices on Amazon, and which translates into higher prices off Amazon as a result of its price parity agreements. (*Id.* ¶¶ 11, 55-62, 206-210.)

III. THE COMPLAINT PLEADS FACTS SUFFICIENT TO STATE A CLAIM FOR VIOLATION OF THE CARTWRIGHT ACT

A. The Complaint Affirmatively Pleads That Amazon Enters into Unlawful Agreements with Third-Party Sellers and Wholesale Suppliers

The Cartwright Act "'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices.'" (*In re Cipro*, *supra*, 61 Cal.4th at p. 136, quoting *Pac. Gas & Elec. Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1147.)[1] As detailed above, Amazon enters into express agreements with every third-party seller, and generally with wholesale suppliers, with the purpose and effect of protecting Amazon from price competition. (Cmpl. ¶¶ 1-6, 113, 175-179, 205-206, 208-211.) Further the Complaint alleges that while

[1] Amazon suggests in a footnote that the Cartwright Act has a "relatively narrower scope" than the federal Sherman Act. (Demurrer at p. 9:26-28, fn. 5.) But the California Supreme Court expressly recognized the opposite in the *In re Cipro* decision cited extensively by Amazon: "[T]he Cartwright Act is broader in range and deeper in reach than the Sherman Act. [citation]" (*In re Cipro*, *supra*, 61 Cal.4th at pp. 160-161.)

Amazon altered the explicit language of its agreements with third-party sellers in 2019, those agreements continue to expressly prohibit third-party sellers from offering or allowing lower online prices off Amazon through today. (*Id*. ¶¶ 4-5, 113-130, 157-158, 161-162.) Amazon's demurrer ignores these allegations, attempting to improperly dissect the Complaint, then recharacterize select allegations as targeting only unilateral conduct. In fact, the Complaint targets Amazon's unlawful agreements with third-party sellers and wholesale suppliers together with Amazon's conduct to coerce compliance with and otherwise enforce those agreements.

1. Third-Party Sellers Expressly Agree to Price Parity

Amazon's unilateral conduct argument ignores the factual allegations establishing that the BSA has expressly required all third-party sellers to agree to maintain price parity continuously from 2012 to the present. (Cmpl. ¶¶ 4-5, 113-130.) Although Amazon deleted certain price parity language from the BSA in March 2019, as alleged in the Complaint, the BSA nonetheless continues to expressly require third-party sellers to agree to price parity—prohibiting sellers from offering or allowing lower online prices anywhere off Amazon—through incorporation of the Amazon Standards for Brands ("ASB"), the Marketplace Fair Pricing Policy, and the Seller Code of Conduct. (*Id*. ¶¶ 115-125.) For example, the ASB requires third-party sellers to maintain "price competitiveness," which is defined as price parity (prohibiting lower online prices off Amazon). (*Id*. ¶¶ 116-117; see also *id*. ¶¶ 145-147.) Similarly, the Fair Pricing Policy prohibits pricing that harms customer trust, which includes offering lower online prices off Amazon. (*Id*. ¶¶ 118-120; see also *id*. ¶ 162.) Likewise, the Seller Code of Conduct requires third-party sellers to "act fairly," which again prohibits third-party sellers from offering lower online prices off Amazon. (*Id*. ¶¶ 121-122.) Amazon's demurrer ignores these factual allegations.

Further, as alleged in the Complaint, Amazon's documents confirm that the March 2019 change to the BSA did not in fact alter the requirements imposed on third-party sellers, and Amazon continued to tell third-party sellers they had to maintain price parity. (Cmpl. ¶¶ 4-5, 125-130, 142, 157-158, 162, 172.) Moreover, while the demurrer quotes from the Complaint to suggest that Amazon "'worked on background with reporters' to publicize the change," (Demurrer at p. 6:6-7), the Complaint actually pleads the opposite: "Amazon worked with

reporters on background at the time it retired the Price Parity Provision from the BSA to make clear that [its] expectations and policies ***have not changed***." (Cmpl. ¶ 128, emphasis added.)[2] As alleged in the Complaint, third-party sellers share this same, correct understanding that the BSA continues to require price parity, prohibiting lower online prices off Amazon. (*Id*. ¶¶ 4-5, 120, 122, 125-126, 129, 140-143.)

The express agreements alleged in the Complaint are more than sufficient to establish a combination or agreement under the Cartwright Act. (See, e.g., *In re Cipro, supra*, 61 Cal.4th at pp. 132-133, 151 [evaluating express agreement].) Amazon's lengthy discussion of the decisions in *State ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147 (*Texaco*) and *Freeman v. San Diego Association of Realtors* (1999) 77 Cal.App.4th 171 (*Freeman*) do nothing to undermine the People's claim that the express agreements pleaded in the Complaint violate the Cartwright Act. (Demurrer at pp. 9:1-10:7.) *Texaco* held only that a merger cannot give rise to a Cartwright Act claim because the parties to the merger cease to exist as separate, independent entities. (*Texaco*, at p. 1163.) Of course, that is not the case here. Likewise, in *Freeman*, the Cartwright Act claim failed because the alleged concerted action depended on ignoring the separate corporate form of the challenged listing service. (*Freeman*, at pp. 192-193.) The People's claim here does not turn on ignoring Amazon's corporate form or that of its third-party sellers or wholesale suppliers. There is no question that Amazon and its third-party sellers and wholesale suppliers are separate entities. Finally, the decision in *Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363 (*Chavez*) does not help Amazon. First, *Chavez* did not involve express agreements like those alleged here. (*Id*. at p. 367.) Further, as set forth below (see Section III.A.2., *infra*), *Chavez* affirmatively recognized that an unlawful combination could arise under the Cartwright Act where the defendant seeks acquiescence to its policies through coercion. Such is the case here.

[2] Notably, Amazon's request for judicial notice only further supports the People's allegations. As reported, Amazon refused to make any public comment confirming that the BSA no longer required third-party sellers to maintain price parity. This is consistent with the factual allegations in the Complaint that Amazon did not go on the record because it had competing strategic interests; namely, Amazon's agreements continued to require price parity. (Cmpl. ¶¶ 128-129.)

2. Amazon Coerces Third-Party Sellers to Comply with De Facto Price Parity Agreements

The Complaint separately alleges facts from which price parity agreements between Amazon and its third-party sellers can be inferred or implied—referred to in the Complaint as de facto agreements—even if the express agreements on their own were ultimately found insufficient. (Cmpl. ¶¶ 5, 127, 129.) While the Cartwright Act does not extend to unilateral conduct, it is well settled that use of "coercive tactics to impose restraints on otherwise uncooperative businesses" is sufficient to satisfy the combination or agreement element of a Cartwright Act claim. (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 268 (*G.H.I.I.*); accord *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 (*Kolling*) ["[T]he 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntarily adhere."].) An illegal combination exists where the defendant "secures compliance with announced policies in restraint of trade by means which go beyond mere announcement of policy and the refusal to deal," where "for example, the [defendant] takes 'affirmative action' to bring about the involuntary acquiescence" with its policies. (*Kolling*, at p. 721; see also *Chavez*, *supra*, 93 Cal.App.4th at p. 372 [unlawful combination may arise where defendant goes beyond mere refusal to deal but compels compliance through coercion]; *R.E. Spriggs Co. v. Adolph Coors Co.* (1979) 94 Cal.App.3d 419, 425-426 (*Spriggs*) [unlawful combination arises under the Cartwright Act where alleged conduct goes beyond announcement of policy and refusal to deal].) In *Spriggs*, the Court found sufficient evidence to support an agreement or combination in violation of the Cartwright Act where "[defendant's] ideas about proper prices at the wholesale and retail level may only have been couched in terms of suggestions, but having in mind [defendant's] relative economic clout, particularly its power to cancel valuable distributor franchises almost at will, it seems clear that there is evidence that [defendant] engaged in price maintenance through suggestions which the distributors could not refuse." (*Spriggs*, at pp. 425.)

As alleged in the Complaint, Amazon not only affirmatively seeks and obtains agreement from third-party sellers that they will comply with its policies through explicit terms in the BSA

(Cmpl. ¶¶ 113-124), it uses its "relative economic clout" to force their acquiescence and compliance. (*Id*. ¶¶ 31, 38-44, 65-69, 127, 135, 145-150, 152-155.) Further, if Amazon finds lower online prices off Amazon, it punishes third-party sellers through a series of increasing penalties (referred to as "escalating disincentives") in an effort to coerce price parity. (*Id*. ¶¶ 31, 127, 135, 140, 145-150.) These penalties include removing the "Buy Box" on the product detail page (the box containing the button customers click to add the product to their cart)—causing sales to plummet—as well as demoting sellers' product offers in search results and prohibiting them from operating as third-party sellers. (*Id.* ¶¶ 30-31, 132-48.) Contrary to Amazon's assertion that price parity was "rarely enforced" (Demurrer at pp. 2:25-26, 15:15-17), the Complaint alleges that since as early as 2016 and 2017—well before Amazon removed the Price Parity Provision language—Amazon has used Buy Box suppression and the ASB policy to force compliance with price parity when it identified lower online prices off Amazon. (*Id*. ¶¶ 135, 145; see also *id*. ¶ 149.) Amazon's escalating disincentives to coerce compliance with price parity have real teeth, because Amazon is an indispensable distribution channel for third-party sellers. (*Id*. ¶¶ 10, 31, 38-44, 107.)

The Complaint further alleges that Amazon "counsels its third-party sellers" to comply with price parity by employing what it refers to as "channel management": "to impose higher prices or enforce minimum advertised price policies on Amazon's rivals, to charge higher prices on their own websites and on competing marketplaces, and to withhold selection from these competing online stores and their own sites." (*Id*. ¶ 7; see also *id*. ¶¶ 150, 158, 161-163, 174.)[3] An Amazon executive confirmed in sworn testimony that sellers interpret Buy Box suppression notifications as "asking them to adjust their prices externally." (*Id.* ¶ 133.) Amazon's assertion in its demurrer that "[t]here is no allegation that Amazon directly or indirectly asks third-party

[3] Attempting to sidestep the facts alleged, Amazon references a single statement out of context to suggest that the Complaint attributes its continuing advice that merchants control their channels and not to allow discounts off Amazon to ecommerce consultants. (Demurrer at p. 4:21-23.) Not true. The Complaint alleges that Amazon itself counsels merchants to manage their channels so their products are not found for less anywhere off Amazon (See Cmpl. ¶¶ 7, 157-158, 162-163, 195-198). The allegations regarding ecommerce consultants only buttress that Amazon's price parity requirement is well known and widely followed under coercion. (See, e.g., *id*. ¶¶ 142, 147, 151, 176.)

sellers to increase their prices or reduce product availability in stores other than Amazon" is simply incorrect. (Demurrer at p. 4:17-18; see also *id*. at p. 12:11-12.) In response to Amazon's coercive tactics, third-party sellers raise prices on their own DTC websites and on other marketplaces, and also raise prices to and withhold products from competing online retailers, all to prevent lower prices off Amazon. (Cmpl. ¶¶ 150-154, 157-158, 160-169, 171-173.) In other words, they comply.

These facts, alongside sellers' express acquiescence to price parity in their written agreements with Amazon, are more than sufficient to satisfy the circumstances under which Amazon concedes "an unlawful combination *could* hypothetically arise"—"if a manufacturer communicated and sought a dealer's agreement of compliance by coercive means." (Demurrer at p. 11:5-6, citing *Chavez*, *supra*, 93 Cal.App.4th at pp. 372-373; accord *G.H.I.I.*, *supra*, 147 Cal.App.3d at p. 268; *Kolling*, *supra*, 137 Cal.App.3d at p. 720; *Spriggs*, *supra*, 94 Cal.App.3d at pp. 425-426.) Indeed, the tactics employed by Amazon to coerce agreement to, and compliance with, price parity go far beyond the unilateral conduct at issue in *Chavez*, where the defendant merely announced a minimum resale price policy and refused to deal with distributors who failed to comply. (*Chavez*, at p. 373.) In sum, the "coercive tactics" Amazon employs "to impose restraints on otherwise uncooperative businesses" are more than sufficient to establish a de facto combination or agreement under the Cartwright Act. (See *G.H.I.I.*, at p. 268; *Kolling*, at p. 720.)

B. The Facts Pleaded Constitute a *Per Se* Violation of the Cartwright Act

In its demurrer, Amazon argues that the Court must apply the "rule of reason—and not the *per se* standard" to evaluate the People's Cartwright Act claim. (Demurrer at p. 13:6-8.) Amazon's argument fails for multiple reasons. First, Amazon presents the issue as a choice between a *per se* and rule of reason dichotomy. But the California Supreme Court has made clear that "[t]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment." (*In re Cipro*, *supra*, 61 Cal.4th at p. 147 [rejecting "the choice between per se and rule of reason analysis as a necessary threshold inquiry involving rigidly distinct analytic boxes"].) Indeed, rejecting the dichotomy presented by Amazon, the Court referenced the traditional *per se*

analysis, the "quick look" analysis, and the rule of reason analysis as points along a continuum or "sliding scale" in antitrust analysis. (*Ibid*. ["categories of analysis of anticompetitive effect are less fixed than the terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear"].) Second, none of the cases cited by Amazon require this Court to determine the appropriate antitrust analysis to apply at the demurrer stage. Again, the California Supreme Court's decision in *In re Cipro* is instructive. In that case, the Court confirmed that determining the appropriate antitrust analysis in any particular case is not "a necessary threshold inquiry" but requires "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." (*Ibid*.) Accordingly, it would be premature to conclude the ultimate analysis to apply absent a more fully developed factual record. While the Court need not determine now whether the agreements at issue here warrant *per se* treatment, the People have adequately pleaded a *per se* violation of the Cartwright Act.

1. Amazon's Agreements with Third-Party Sellers and Wholesale Suppliers Are *Per Se* Unlawful Price-Tampering Agreements

As alleged in the Complaint, Amazon's agreements with third-party sellers and wholesale suppliers interfere with the normal free-market forces by which online retail prices would otherwise be set. In particular, Amazon's retail price parity agreements prohibit third-party sellers from offering or allowing lower online prices off Amazon, even where the costs of selling through other online channels would support lower prices in a free market. (Cmpl. ¶¶ 1-4, 7, 11-12, 82, 114-125, 150-154, 206, 205-206, 209.) Likewise, Amazon's MMA's force wholesale suppliers to maintain and enforce higher prices off Amazon to avoid making true-up payments to Amazon. (*Id*. ¶¶ 1-4, 7, 176-177, 184, 202, 205-206, 208.) In effect, through these agreements, Amazon requires third-party sellers and wholesale suppliers to agree that the prices offered on Amazon will constitute a price floor, and products offered anywhere else online will be priced the same or higher. Under controlling California Supreme Court precedent applying the Cartwright Act's express statutory prohibition against combinations which "directly or indirectly unite any interests" connected with product sales so that "price might in any manner be affected" (Bus. & Prof. Code 16720(e)(4)), such agreements "fixing or tampering with prices are illegal per se."

(*Lathrop*, *supra*, 4 Cal.3d at p. 363; accord *In re Cipro*, *supra*, 61 Cal.4th at p. 146, citing *Lathrop*.) Further, following *Lathrop*, the California Supreme Court has confirmed that such price-fixing and price-tampering agreements are illegal *per se* whether they are horizontal or vertical in nature. (*Mailand*, *supra*, 20 Cal.3d at p. 377; see also *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1244 (*Cellular Plus*) [under *Lathrop* and *Mailand* price fixing and price tampering are illegal *per se* whether horizontal or vertical]; *Kolling*, *supra*, 137 Cal.App.3d at p. 721 [same].)

Notably, Amazon's demurrer does not even reference the California Supreme Court decisions in *Lathrop* and *Mailand*, nor the Cartwright Act's express prohibition against agreements which "directly or indirectly unite any interests" such that "price might in any manner be affected." (Bus. & Prof. Code 16720(e)(4).) Moreover, while Amazon cites the recent federal district decision in *Frame-Wilson v. Amazon.com, Inc.* (W.D. Wash. 2022) 591 F.Supp.3d 975 (*Frame-Wilson*) as support for the position that *per se* analysis does not apply to vertical restraints under the Cartwright Act (Demurrer at p. 13:15-20), the opposite is true. Indeed, *Frame-Wilson* expressly recognized that while the alleged agreements were not *per se* illegal under federal law, *per se* analysis was mandated under the Cartwright Act "'whether the price-fixing scheme is horizontal or vertical; that is, whether the price is fixed among competitors…or businesses at different economic levels.'" (*Frame-Wilson*, at p. 993, quoting *Mailand*, *supra*, 20 Cal.3d at p. 377.)[4]

Ignoring the controlling California Supreme Court authority, Amazon's demurrer cites a handful of appellate court decisions for the proposition that California courts "have consistently held that the rule of reason governs vertical restraints of trade." (Demurrer at p. 13:9-10.) However, none of these cases involved vertical price-fixing or price-tampering agreements:

[4] While the *Frame-Wilson* court did dismiss the parade of various state law claims alleged in that case without prejudice under the federal pleading standard, it did so only after characterizing the state law allegations as a "cursory listing" of State statutes. (*Frame-Wilson*, *supra*, 591 F.Supp.3d at p. 994 & fn. 3 [reiterating the court's rejection of Amazon's argument that *per se* treatment was inappropriate under the Cartwright Act].) Of course, the Complaint here goes far beyond merely identifying the Cartwright Act or restating the elements of a Cartwright Act claim.

Flagship Theatres and *Redwood Theatres* both involved vertical "circuit-dealing" agreements[5] and *Ben-E-Lect* and *Marsh* both involved non-price-related vertical boycotts.[6] Further, none of these cases suggest that *Lathrop* and *Mailand* are no longer good law, or otherwise indicates that agreements fixing or tampering with prices (whether horizontal or vertical) are not *per se* illegal under the Cartwright Act. In sum, applying controlling California Supreme Court precedent, the People have stated a viable *per se* Cartwright Act claim, and Amazon's demurrer should be overruled on this basis alone.

2. Amazon's Agreements with Third-Party Sellers and Wholesale Suppliers Are *Per Se* Unlawful Horizontal Restraints

Amazon's argument that the *per se* rule does not apply here is based on its characterization of the alleged restraints—directly contrary to the facts pleaded in the Complaint—as purely "vertical," or "existing between participants at different levels in the chain of distribution." (Demurrer at p. 13:9-10.) As detailed above, Amazon's argument fails under controlling California Supreme Court precedent holding price-fixing and price-tampering claims such as those alleged here are *per se* violations whether characterized as horizontal or vertical. Amazon's argument separately fails because, as alleged in the Complaint, Amazon's third-party sellers and wholesale suppliers, in addition to being direct horizontal competitors with other merchants, are also direct horizontal competitors with Amazon and other online retail stores. (Cmpl. ¶¶ 9, 212.) As such, the agreements impose horizontal restraints not to compete on price and to boycott or otherwise limit horizontal competition—nakedly anticompetitive agreements "that can be said to always lack redeeming value and thus qualify as *per se* illegal." (*In re Cipro*, *supra*, 61 Cal.4th at p. 146.) Moreover, Amazon's argument that its agreements cannot be *per se* illegal under the Cartwright Act because federal courts have considered "parity clauses and margin guarantees" as generally lawful and procompetitive falls far short. (Demurrer at p. 14:23-24.) This argument not only ignores controlling precedent that price-fixing and price-tampering

[5] *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2020) 55 Cal.App.5th 381, 400 (*Flagship Theatres*); *Redwood Theatres v. Festival Enters.* (1988) 200 Cal.App.3d 687, 695 (*Redwood Theatres*).

[6] *Ben-E-Lect v. Anthem Blue Cross Life and Health Ins. Co.* (2020) 51 Cal.App.5th 867, 873; *Marsh v. Anesthesia Servs. Med. Group, Inc.* (2011) 200 Cal.App. 480, 494 (*Marsh*).

agreements and horizontal price restraints and boycotts are *per se* unlawful but relies on resolution of underlying factual issues not appropriate at this stage.

Horizontal Price Restraints. As alleged in the Complaint, Amazon's third-party sellers and wholesale suppliers are direct horizontal competitors with Amazon. (Cmpl. ¶¶ 9, 212.) For example, Amazon third-party seller Nutpods—a manufacturer of coffee creamer—operates its own online DTC store, www.nutpods.com, which competes directly with Amazon for sales to consumers. (Cmpl. ¶ 141.) Likewise, Amazon wholesale supplier Spalding—a manufacturer of basketballs—operates its own DTC site, www.spalding.com, which competes directly with Amazon for sales to consumers. (*Id.* ¶ 199.) There are thousands of Amazon third-party sellers and wholesale suppliers like Nutpods and Spalding that either can or do operate their own DTC online retail stores in direct competition with Amazon. (*Id.* ¶¶ 9, 24, 69, 87-88, 137, 212.) Indeed, the relevant market in which Amazon competes expressly includes these third-party sellers' and wholesale suppliers' own DTC websites. (*Id.* ¶ 85.) Moreover, Amazon itself expressly recognizes that its third-party sellers and wholesale suppliers are its actual and potential horizontal competitors. (*Id.* ¶¶ 9, 60, 87-88, 119, 137, 212.) The fact that these merchants also have a vertical relationship with Amazon does not negate this clearly pleaded coexistent horizontal relationship. Because the relationship has "some horizontal component," the rule of reason does not automatically apply, providing a separate rationale for application of the *per se* rule in this case. (*Flagship Theatres*, *supra*, 55 Cal.App.5th at p. 407; see also *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1045-1046 ["per se violations have been found in several cases involving ostensibly 'vertical' restrictions that were determined to be 'primarily horizontal in nature,'" especially where "the motivating factor" was to protect the defendant "from price competition"], disapproved on another ground in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 390-391 & 394, fn. 2.)

Because Amazon's third-party sellers and wholesale suppliers are Amazon's direct horizontal competitors, their price parity agreements with Amazon—in which they agree that the prices in their own online stores will not be lower than the Amazon prices for the same products—are naked anticompetitive agreements between horizontal competitors on price.

(See, e.g., Cmpl. ¶ 160 [seller reporting he "keeps prices on our own website the same as the prices on Amazon" because of price parity]; *id.* ¶¶ 9, 114-126, 140-143, 150, 152-154, 184, 192, 202, 206, 208-212.) Such "a horizontal combination (an anticompetitive agreement among competitors who are at the same level of distribution) is ordinarily illegal per se." (*Marsh*, *supra*, 200 Cal.App.4th at p. 493; see also *Knevelbaard Dairies v. Kraft Foods, Inc.* (9th Cir. 2000) 232 F.3d 979, 986 [horizontal agreements eliminating a form of competition between rivals, including horizontal price fixing and other horizontal restrictions on price and output, are *per se* illegal under the Cartwright Act], *People v. Building Maintenance Contractors' Ass'n* (1953) 41 Cal.2d 719, 722-723 [holding agreement among contractors not to quote a lower price to a customer than the price the customer was already paying to a co-conspirator contractor *per se* unlawful].)

Horizontal Boycott. In their price parity agreements with Amazon, merchants agree that Amazon will not find a lower price not only in these merchants' own competing online stores, but also on other online retail websites, such as Walmart.com and eBay.com. (Cmpl. ¶¶ 3, 114-126, 150, 157-169, 171-173, 175-178, 184.) As alleged, Amazon's merchants carry out these agreements by withholding their products from competing online retailers, or supplying them conditioned on adherence to minimum advertised/resale prices. (*Ibid.*). Because these Amazon merchants' DTC online stores also compete in the same market with these other online retailers like Walmart.com and eBay.com (*id.* ¶ 85), Amazon's retail and wholesale price parity agreements therefore also operate as horizontal boycotts—refusals to deal or to deal on the same terms—with competing online stores that try to discount or lower their own prices. On this separate basis they are *per se* illegal. (*See Freeman*, *supra*, 77 Cal.App.4th at p. 196, fn. 26 [*per se* illegal "horizontal boycotts involve entities at the same level combining to deny a competitor at their level the benefits enjoyed by the members of the group"].) Indeed, the restraints constitute a classic, *per se* unlawful "direct boycott"—a concerted refusal to deal "aimed at coercing parties"—namely, other online retail stores—"to adopt noncompetitive practices"—that is, to limit discounting—with the "purpose [of] coerc[ing] the trade policy of [these other online retail stores] to secure their removal from competition." (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 932 (*Palsson*).)

As the foregoing makes clear, Amazon's restraints bear no resemblance to the purely vertical arrangements at issue in the federal cases under the Sherman Act cited by Amazon.[7] Indeed, in stark contrast to this case, *Lewis* and *AAA Liquors* (which were decided on full evidentiary records) involved a *single* supplier agreeing to wholesale cost discounts to enable a *single* dealer to charge lower prices to the dealer's customers. (See *Lewis*, *supra*, 714 F.2d at p. 843; *AAA Liquors*, *supra*, 705 F.2d at p. 1204.) If anything, these cases actually support the People, not Amazon. The allegations here establish that Amazon's agreements prevent Amazon's third-party sellers and wholesale suppliers from engaging in the exact type of discounting and promotions that *AAA Liquors* and *Lewis* concluded made the vastly different agreements at issue in those cases procompetitive. (See *Lewis*, at pp. 847-848; *AAA Liquors*, at pp. 1206-1207.) Nothing in these federal cases applying the Sherman Act compels or even suggests that the *per se* rule does not apply here under California law.[8]

Not Standard or Presumptively Procompetitive Agreements. Amazon's argument that certain types of parity clauses and margin guarantees in other settings have not been struck as *per se* illegal relies on resolution of underlying factual issues not appropriate on demurrer and directly at odds with those pleaded in the Complaint. (Demurrer at p. 14:23-24.) For example, nothing in the Complaint, or the Demurrer, establishes that Amazon's price parity agreements and MMA's are equivalent to "most-favored-nation" clauses. To the contrary, as the federal authority relied on by Amazon sets forth, typical most-favored-nation clauses are purely vertical arrangements providing that a purchaser of products or services will itself pay no more than the lowest price charged by the supplier to anyone else. (See Demurrer at pp. 14:22-27, 15:1-2 & fn. 7, citing *Blue Cross*, *supra*, 65 F.3d at p. 1415; *Ocean State*, *supra*, 883 F.2d at p. 1110.) Such

[7] See Demurrer at pp.14:23-15:2 & fn. 7, citing *Blue Cross & Blue Shield United v. Marshfield Clinic* (1995) 65 F.3d 1406, 1415 (*Blue Cross*), *Lewis Serv. Ctr. Inc. v. Mack Trucks, Inc.* (8th Cir. 1983) 714 F.2d 842, 844, 848 (*Lewis*), *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island* (1st Cir. 1989) 883 F.2d 1101, 1110 (*Ocean State*), and *AAA Liquors, Inc. v. Joseph E. Seagrams and Sons, Inc.* (10th Cir. 1982) 705 F.2d 1203, 1206-1208 (*AAA Liquors*).

[8] As set forth by the California Supreme Court, "the Cartwright Act was not modeled on federal antitrust statutes" and federal decisions interpreting federal antitrust law "are not conclusive, when construing the Cartwright Act." (*In re Cipro*, *supra*, 61 Cal.4th at p. 142 [holding even where federal cases may be dispositive on federal antitrust issues, such authority "would not dictate how the Cartwright Act must be read"].)

agreements are materially different from Amazon's agreements with third-party sellers as pleaded here, which do not involve the prices Amazon itself pays, but expressly control third-party pricing off Amazon. (See generally Cmpl. ¶¶ 4-5, 114-126.) Likewise, Amazon's minimum margin agreements are not equivalent to such most-favored-nation clauses. Indeed, under Amazon's MMA's, wholesale suppliers are required to make "true-up"/MCP payments to Amazon even where the wholesale suppliers have already given Amazon their lowest wholesale prices. (See *id*. ¶¶ 6, 175-178.) In other words, Amazon's MMA's are not about wholesale cost control, but rather retail price control. (See also *Frame-Wilson*, *supra*, 591 F.Supp.3d at pp. 991-992 [rejecting Amazon's reliance on the same federal cases].)

Amazon argues the restraints are not eligible for *per se* treatment because the Complaint supposedly "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." (Demurrer at p. 15:4-6). But the Complaint does include such allegations. For example, the Complaint alleges that other major marketplaces do not enforce retail price parity (Cmpl. ¶ 144) and that "Amazon's online store competitors generally do not use minimum margin agreements." (*Id*. ¶ 203; see also *id.* ¶ 201 [former Amazon executive describes Amazon's GMM's as "crazy," "basically like writing Amazon a blank check," and generally "a pretty bad idea"].) Likewise, not only is Amazon's assertion regarding the intent of the agreements a factual argument not appropriate on demurrer, it is directly at odds with the facts alleged in the Complaint that the intent of these agreements is to "insulate Amazon from price competition," "entrenching Amazon's dominance," and "preventing effective competition." (*Id*. ¶ 2; see also *id*. ¶¶ 112, 175, 205-206.)

Amazon's claim that "no California court has addressed the competitive effects of an alleged price parity clause, and likewise no court has addressed the competitive effects of GMM's or MCP payments (Demurrer at p. 14:17-19) is irrelevant. The labels Amazon has given its restraints do not alter their fundamental nature as naked horizontal price restraints and boycotts that have long been condemned as *per se* unlawful. (See *In re Cipro*, *supra*, 61 Cal.4th at p. 146 [courts have identified "categories of agreements or practices that can be said to always lack

redeeming value and thus qualify as per se illegal"]; *Marsh*, *supra*, 200 Cal.App.4th at p. 494; *Flagship Theatres*, *supra*, 55 Cal.App.5th at pp. 399, 402.)

C. Amazon's Agreements with Third-Party Sellers and Wholesale Suppliers Violate the Cartwright Act Even If the *Per Se* Rule Does Not Apply

As detailed above, controlling California Supreme Court precedent compels application of the *per se* rule based on the facts as pleaded. Nonetheless, even if the *per se* rule did not ultimately apply, Amazon's demurrer still fails. First, the California Supreme Court has made clear that the appropriate analytic approach involves "a continuum, with the circumstances, details and logic of a particular restraint dictating how the courts that confront the constraint should analyze it." (*In re Cipro*, *supra*, 61 Cal.4th at p. 147.) "In lieu of an undifferentiated one-size-fits all rule of reason, courts may devise rules for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones." (*Ibid*.) Amazon does not, and cannot at this early stage, establish that as a matter of law the Court must apply a full-blown rule of reason analysis. Second, assuming the facts pleaded as true, the People have pleaded a viable Cartwright Act claim under the quick look, rule of reason, or any other analysis along the "sliding scale" continuum outlined in *In re Cipro*. (See *ibid*.)

"Quick-Look" or Other Similar Analysis – Based on Amazon's market dominance and the inherently horizontal nature of Amazon's price restraints, which have the effect of creating an online price floor, Amazon's ability to impede the free play of market forces and create anticompetitive effects for consumers is clear. (See generally Cmpl. ¶¶ 1-3, 7-12, 205-212.) These facts are sufficient to state a prima facie case under the "quick look" analysis. (See, e.g., *In re Cipro*, *supra*, 61 Cal.4th at pp. 146-147 [describing the "quick look approach, applicable to cases where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets,'" under which "a defendant may be asked to come forward with procompetitive justifications for a challenged restraint without the plaintiff having to introduce elaborate market analysis first"], quoting *Cal. Dental Ass'n v. Fed. Trade Comm'n* (1999) 526 U.S. 756, 769-770; see also *Nw.*

Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co. (1985) 472 U.S. 284, 294-295 [modified *per se* rule applies where dominant dealer coerces suppliers to "deny relationships the [dealer's] competitors need in the competitive struggle"].)

Rule of Reason Analysis – Even under a full-blown rule of reason analysis, the Complaint alleges facts more than sufficient to support a finding of harm to competition. The Complaint expressly alleges that Amazon's price parity agreements and MMA's have caused third-party sellers and wholesale suppliers to charge higher prices on their own DTC sites and other online marketplaces than they would in the absence of Amazon's unlawful restraints. (Cmpl. ¶¶ 7, 12, 140-143, 150, 152-154, 160, 164, 171-173, 184, 191, 199, 202, 206, 208, 210.) Likewise, the facts pleaded establish that Amazon's agreements have caused third-party sellers and wholesale suppliers to impose minimum advertised/resale price conditions on their supply of products to Amazon's competitors in order to prevent online retailers from offering lower prices than available on Amazon. (*Id*. ¶¶ 7, 12, 150, 158, 165-168, 184, 187-194, 202, 206, 208, 210.) Amazon's price parity agreements and MMA's also cause third-party sellers and wholesale suppliers to withhold product selection from competing online retailers to prevent them from offering lower prices than available on Amazon. (*Ibid*.; see also *id*. ¶¶ 169, 198.) By insulating Amazon from free-market price competition, the price parity agreements and MMA's permit Amazon to command higher, supra-competitive fees and margins that are passed along to consumers through higher prices. (*Id*. ¶¶ 11, 45-48, 53-56, 63, 209.) These factual allegations are supported by extensive direct evidence obtained from Amazon's own files and executives, third-party sellers, wholesale suppliers, ecommerce consultants, and other online retailers. (*Id*. ¶ 12; see also, e.g., *id*. ¶¶ 7, 48, 142-143, 150, 153-154, 158, 160, 164, 166-169, 171-172, 187-191, 193-194, 198.) The facts pleaded further establish that Amazon's unlawful price parity agreements and MMA's cover the majority of all sales on Amazon, including tens of billions of dollars annually in California. (See *id*. ¶¶ 7, 23-24, 175, 178-179, 203, 213.)

Taken as true, these facts demonstrate harm to competition more than sufficient to establish violation of the Cartwright Act under the rule of reason analysis, and none of the cases cited in the demurrer come close to supporting dismissal of a Cartwright Act claim in the face of

such extensive, detailed allegations. To the contrary, the facts pleaded here far exceed the types of allegations deemed sufficient to state a claim for violation of the Cartwright Act. (See, e.g., *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 50-51 [reversing dismissal of Cartwright Act claim]; *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.* (1971) 4 Cal.3d 842, 855 [same]; *Cellular Plus*, 14 Cal.App.4th at pp. 1239-1240 [same]; *G.H.I.I.*, *supra*, 147 Cal.App.3d at p. 270 [same]; see also *Redwood Theatres*, *supra*, 200 Cal.App.3d at p. 713 [finding facts sufficient to reverse entry of summary judgment on Cartwright Act claim and holding the question whether "a restraint of trade is reasonable is a question of fact to be determined at trial"].)

In the face of the People's extensive and detailed factual allegations, Amazon's arguments that the Complaint fails to plead "a market-wide anticompetitive effect" (Demurrer at p. 15:15-17), and that the impact of the alleged conduct is "*de minimis*" (*id*. at p. 16:5-8), are not well founded. First, the cases cited by Amazon hold only that allegations demonstrating harm to a single competitor, absent harm to the competitive process, are insufficient; none require pleading the quantitative impact of the alleged anticompetitive harm. (See, e.g., *Flagship Theatres*, *supra*, 55 Cal.App.5th at pp. 418-419.) As set forth above, the extensive factual allegations here detail the considerable harm to competition caused by Amazon's unlawful agreements.

Amazon's effort to parse the allegations in the Complaint, and cabin off each unlawful agreement it enters, ignoring their overall effects, also fails. As an initial matter, Amazon does not, and cannot, point to any decision that applies the Cartwright Act so narrowly in light of its clear purpose to protect against restraints that harm competition. The decision in *Redwood Theatres*, cited by Amazon to support this argument, held only that each individual distributor's *market share* could not be aggregated to calculate their "collective *market power*." (*Redwood Theatres*, *supra*, 200 Cal.App.3d at pp. 704-705, emphasis added.) Indeed, the *Redwood Theatres* court went on to discuss the potential anticompetitive evils of the multiple individual "exclusive dealing agreements" at issue in that case in the aggregate, suggesting if anything that aggregation here is similarly appropriate. (See *id.* at pp. 707-708.) While Amazon also cites to the split decision in *Dickson v. Microsoft Corp.* (4th Cir. 2002) 309 F.3d 193, 210 to support this

argument, not only is *Dickson* a distinguishable federal decision applying the Sherman Act, but the federal courts have long held that it is necessary and appropriate to aggregate the types of agreements alleged here to evaluate their overall impact—exactly opposite of the contention for which Amazon cites *Dickson*. (See, e.g., *Toys "R" Us, Inc. v. FTC* (7th Cir. 2000) 221 F.3d 928, 930, 936-937 [affirming finding that, in the alternative even absent any horizontal agreement, dominant toy retailer's "network of vertical agreements" with toy manufacturers considered in the aggregate were anticompetitive].)[9]

In making its market impact argument, Amazon focuses only on GMM's, MCP's, and the pre-March 2019 BSA (see Demurrer at p. 15:15-17), but ignores the factual allegations that Amazon's express and de facto agreements with third-party sellers continue to prohibit third-party sellers from offering lower prices off Amazon (Cmpl. ¶¶ 5-6, 115-145, 155), and the fact that these third-party seller agreements cover the majority of all sales on Amazon. (See *id*. ¶¶ 23-24). Likewise, while Amazon attempts to redirect the Court's attention to the meaningless calculation of the total size of "true-up"/MCP payments under the alleged MMA's divided by the volume of covered sales, the facts alleged establish that these agreements cover billions of dollars of sales on Amazon alone (*id*. ¶¶ 175, 179), and have broad anticompetitive impacts, including higher consumer prices on and off Amazon and reduced product selection from Amazon's competitors. (*Id*. ¶¶ 184, 187-194, 197-198, 202-203, 208.)[10]

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[9] See also *Standard Oil Co. v. United States* (1949) 337 U.S. 293, 313 [considering the aggregate effect of 5,939 separate vertical agreements to determine that a prohibited effect on competition had occurred, even though no individual vertical agreement was alleged to have had an anticompetitive effect]; *United States v. Microsoft Corp.* (D.C. Cir. 2011) 253 F.3d 34, 70-71 [aggregating the effects of the defendant's many separate vertical agreements to conclude plaintiff had shown substantial "harm to competition"]; *Twin City Sportservice, Inc. v. Charles O. Finley & Co.* (9th Cir. 1982) 676 F.2d 1291, 1302 [the court "may look to the overall effects of a defendant's conduct in the relevant market," not just "the market implications of the one contract"]; *Orchard Supply Hardware LLC v. Home Depot USA* (N.D. Cal. 2013) 967 F. Supp. 2d 1347, 1360-1363 [following *Twin City* to holding that "aggregating the effect" of separate vertical agreements "is appropriate for the purpose of showing [defendant's] conduct was anticompetitive"]. By contrast *Dickson* analyzed the two agreements at issue there separately because plaintiff affirmatively pursued claims based on two "separate vertical conspiracies." (*Dickson*, *supra*, 309 F.3d at pp. 204, 211); see *Sitts v. Dairy Farmers of America, Inc*. (D. Vt. 2019) 417 F.Supp.3d 433, 467-468 & n.17 [distinguishing *Dickson* on these same grounds].

[10] Amazon's meaningless calculation also ignores that the effects of the MMA's would remain even if every wholesale supplier complied fully and thereby never made any "true-up" payment. At best, Amazon's argument raises a factual question that cannot be resolved on demurrer.

Given that the Cartwright Act rests "on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress," the facts pleaded here are more than sufficient to establish anticompetitive harm under the Cartwright Act. (*Palsson*, *supra*, 16 Cal.3d at p. 935 [reversing lower court decision after non-jury trial, finding Cartwright Act violation under the rule of reason, and remanding for determination of damages]; see also *People v. Nat'l Ass'n of Realtors* (1981) 120 Cal.App.3d 459, 478 [same].) In sum, Amazon's assertion that the Complaint plainly alleges the conduct at issue impacts "only a miniscule fraction of sales in the alleged market" (Demurrer at p. 16:17-18) is completely at odds with any fair reading of the Complaint and the detailed factual allegations regarding the anticompetitive harm caused by Amazon's conduct. For these reasons, the Complaint pleads sufficient facts to state a viable Cartwright Act claim anywhere along the *In re Cipro* sliding scale continuum from *per se* to rule of reason. Accordingly, the demurrer to the Cartwright claim should be overruled.

IV. THE COMPLAINT ALLEGES A VIABLE CLAIM UNDER CALIFORNIA'S UNFAIR COMPETITION LAW

The UCL has three distinct prongs, broadly prohibiting conduct that is "unlawful," "unfair," or "fraudulent." (Bus. & Prof. Code § 17200 ["unfair competition shall mean and include any *unlawful*, *unfair* or *fraudulent* business act or practice"], emphasis added); see also *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 311 [under the UCL "there are three varieties of unfair competition: practices which are unlawful, unfair or fraudulent"].) The unlawful prong's "coverage is 'sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law.'" (*Cel-Tech*, *supra*, 20 Cal.4th at p. 180, quoting *Rubin v. Green* (1993) 4 Cal.4th 1187, 1200.) Likewise, the "unfair" prong has been interpreted to be "intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud." (*State Farm Fire & Cas. Co. v. Superior Court* (1996) 45 Cal. App. 4th 1093, 1103.) As articulated by the California Supreme Court in *Cel-Tech*, the "'Legislature…intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur.'" (*Cel-Tech*, at p. 181, quoting *Am. Philatelic Soc. v.*

Claibourne (1935) 3 Cal.2d 689, 698 (*Claibourne*).) Indeed, the UCL "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive.'" (*Ibid*.)

A. The Complaint Alleges a Valid "Unlawful" Prong Claim

The Complaint asserts a violation of the California UCL under both the "unlawful" and "unfair" prongs. As detailed above, the People have pleaded facts sufficient to state a claim for violation of the Cartwright Act. This is sufficient to establish a claim under the "unlawful" prong. (See *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370 (*Zhang*) ["By proscribing any 'unlawful' business act or practice, the UCL 'borrows' rules set out in other laws and makes violations of those rules independently actionable"], quoting *Cel-Tech*, *supra*, 20 Cal.4th at p. 180.) For this reason alone, Amazon's demurrer to the UCL claim should be overruled, and the Court need not consider the separate arguments made under the UCL "unfair" prong.

B. The Complaint Alleges a Valid "Unfair" Prong Claim

Even in the absence of the Cartwright Act claim, the People have pleaded a viable UCL claim under the "unfair" prong. The UCL's statutory language "makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." (*Cel-Tech*, 20 Cal.4th at p. 180; see also *Zhang, supra*, 57 Cal.4th at p. 370 ["a practice may violate the UCL even if it is not prohibited by another statute"].) "Whether a practice is…unfair is generally a question of fact which requires consideration and weighing of evidence from both sides' and which usually cannot be made on demurrer." (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1376 (*Klein*).) At the pleading stage, a court "cannot presume that [the] alleged harms are not 'substantial' or are otherwise outweighed by benefits that consumers derive." (*Ibid*., citing *Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403 (*Camacho*); accord *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1473 ["[T]he determination [as to] whether [a business practice] is unfair is one of fact which requires a review of the evidence from both parties. [citation] It thus cannot usually be made on demurrer."], citing *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1166.)

As summarized above, (see *supra*, Section II), the People have pleaded facts regarding Amazon's retail and wholesale price parity agreements, Amazon's efforts to coerce compliance with and enforce price parity, and the considerable harms caused by Amazon's conduct. (See generally, e.g., Cmpl. ¶¶ 2-12, 114-125, 127-130, 135, 140-150, 175-182, 205-212.) Amazon argues that its price parity agreements are similar to most-favored-nation agreements, and asserts that minimum margin agreements are common. However, these arguments are contrary to the facts alleged and raise factual issues that cannot be resolved on demurrer. Indeed, the Complaint alleges that Amazon uses price parity and MMA's to control prices. (See, e.g., *id*. ¶ 2 ["The intent and effect of these agreements is to insulate Amazon from price competition], ¶ 82 ["other competitors generally cannot draw customers away from Amazon with lower prices, because Amazon *compels* suppliers and sellers to cause prices on those competing websites to be the same or higher than the prices for the same products on Amazon"], ¶ 113 ["A key tactic Amazon employs to insulate its online store from competition and perpetuate its ability to charge supra-competitive prices is coercing third-party sellers to enter into anticompetitive price parity agreements."], ¶ 200 ["Amazon demands minimum margin agreements and MCP funding as a penalty for facilitating lower prices at Amazon's competitors."].) In the face of these allegations, under any of the three tests applied to evaluate "unfair" prong claims, Amazon cannot establish that the People's UCL claim fails as a matter of law.

1. The People's "Unfair" Prong Claim Is Not Dependent on Violation of the Cartwright Act

Amazon generally argues that because the Cartwright Act claim fails, any UCL claim based on the same facts must also fail. (Demurrer at p. 20:8-12; see also *id*. at pp. 2:10-12, 18:18-19.) But this argument improperly collapses the distinct "unlawful" and "unfair" prongs of the UCL into one another, directly contravening the California Supreme Court's controlling decision in *Cel-Tech* that an "unfair" prong claim is not prohibited "merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct." (*Cel-Tech*, *supra*, 20 Cal.4th at pp. 182-183.) To the contrary, "acts may, if otherwise unfair, be challenged

under the unfair competition law even if the Legislature failed to proscribe them in some other provision." (*Id*. at p. 183.)

In *Cel-Tech* itself, the California Supreme Court found that the "unfair" prong claim could proceed even after the trial court found, and the appellate court affirmed, that the plaintiff had failed to prove its Cartwright Act claim at trial. (*Cel-Tech*, *supra*, 20 Cal.4th at pp. 170, 191 [affirming reversal of non-jury trial decision that "unfair" prong claim necessarily failed with Cartwright Act and Unfair Practices Act claims].) In fact, as detailed in the appellate court decision, the Cartwright Act claim in *Cel-Tech* was rejected on exactly the same grounds that Amazon now urges the Court to dismiss the People's Cartwright Act claim: the absence of an agreement. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1997) 69 Cal.Rptr.2d 207, 214 ["On the second cause of action, alleging agreements between L.A. Cellular and its exclusive agents, constituting a combination in restraint of trade in violation of section 16720, there was no evidence of any conspiracy or coercive activity by L.A. Cellular."]. But, again, even absent a combination or agreement sufficient to establish a violation of the Cartwright Act, the California Supreme Court still permitted the "unfair" prong claim to proceed. (*Cel-Tech* at pp. 170, 191.) The recent decision in *Epic Games, Inc. v. Apple Inc.* (N.D. Cal. 2022) 559 F.Supp.3d 898, cited by Amazon, recognizes that under *Cel-Tech* an "unfair" prong claim may proceed even if the conduct at issue does not give rise to violation of the Cartwright Act. (*Id*. at pp. 1051, 1053-1054.) While Amazon attempts to characterize the *Epic Games* decision as an aberration, it is not only consistent with, but compelled by, the California Supreme Court's holding in *Cel-Tech*. Moreover, multiple other decisions have allowed such UCL claims to proceed even in the absence of a separate antitrust violation. (See *Sun Microsystems, Inc. v. Microsoft Corp.* (N.D. Cal. 2000) 87 F.Supp.2d 992, 1000 [granting injunction under "unfair" prong even absent any antitrust violation]; *Korea Kumho Petrochemical v. Flexsys America LP* (N.D. Cal., Mar. 11, 2008, No. C07-01057 MJJ) 2008 WL 686834 at *9 [dismissing Cartwright Act claim but allowing "unfair" prong claim to proceed].)

The cases Amazon relies on to argue that an "unfair" prong claim cannot proceed where a Cartwright Act claim falls short cannot save its argument. *RLH Industries, Inc. v. SBC*

Communications, Inc. (2005) 133 Cal.App.4th 1277, 1286 affirmatively acknowledges that "some unfair competition causes of action can survive independently of an actual antitrust violation…." In *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 92 the court held that the plaintiff gave "only passing reference to" his UCL cause of action, thereby waiving that claim. The cursory discussion cited by Amazon that follows is dicta, quoting *Chavez* out of context. (*Id.* at 93.) The *Chavez* court explicitly rejected the argument that "unlawful" and "unfair" were coextensive: "We do not hold that in all circumstances an 'unfair' business act or practice must violate an antitrust law to be actionable under the unfair competition law." (*Chavez*, *supra*, 93 Cal.App.4th at p. 375.) Finally, as detailed above, to the extent these cases could be read as suggested by Amazon, they run afoul of the California Supreme Court's decision in *Cel-Tech*.

2. The Facts Alleged Establish an "Unfair" Prong Claim under Any of the Three Tests Recognized by the California Supreme Court

There are three tests commonly used to determine whether conduct violates the UCL under the "unfair" prong. In cases between competitors, the California Supreme Court's decision in *Cel-Tech* mandates what is known as the *Cel-Tech* tethering test. (*Cel-Tech*, 20 Cal.4th at pp. 186-187.) But the California Supreme Court has declined to require application of this test to claims beyond those brought between competitors. Instead, the Supreme Court has recognized a split of authority regarding the proper standard for evaluating "unfair" prong claims in other situations, with appellate courts applying three different tests: the balancing test, the *Cel-Tech* tethering test, and the Federal Trade Commission Act ("FTC Act") test. (*Nationwide Biweekly Admin., Inc. v. Superior Court* (2020) 9 Cal.5th 279, 303 & fn. 10; see also *Zhang*, *supra*, 57 Cal.4th at p. 380, fn. 9 [collecting cases].)

Amazon argues that this Court must apply the *Cel-Tech* tethering test, ignoring the other two entirely. As support for this position, Amazon asserts that the "First District has consistently applied the *Cel-Tech* 'tethering test' to *all* actions under the 'unfair prong'…." (Demurrer at pp. 18:28-19:1, emphasis in original.) But unlike the federal appellate courts, "the decisions of every division of the District Court of Appeal are binding on all superior courts of this state." *Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 353, citing *Auto Equity Sales, Inc. v.*

Superior Court of Santa Clara County (1962) 57 Cal.2d 450, 455.) Thus, Amazon cannot ignore decisions applying the balancing or FTC Act tests simply because they originate from other appellate districts. Likewise, while Amazon quotes certain language from *Cel-Tech* criticizing earlier appellate definitions of "unfair" as amorphous, the California Supreme Court neither expressly considered nor rejected use of the balancing test in other situations. (*Cel-Tech*, *supra*, 20 Cal.4th at pp. 184-185.) And the Court expressly turned to Section 5 of the FTC Act for guidance. (*Id*. at p. 185-186; see also *Nationwide Biweekly Admin., Inc. v. Superior Court*, *supra*, 9 Cal.5th at pp. 303-304 & fn. 10.) Because the facts alleged are sufficient to find that Amazon's conduct is "unfair" under any of the three tests articulated by the appellate courts, the Court need not decide which test should apply to overrule Amazon's demurrer.

a. Amazon's Alleged Conduct Is "Unfair" under the Balancing Test

The balancing test requires the Court to determine whether a business practice is unfair by examination of the impact of the practice or act on its victim balanced against the reasons, justifications, and motives of the alleged wrongdoer. "In brief, the court must weigh the utility of defendant's conduct against the gravity of the harm to the alleged victim." (*Progressive W. Ins. Co. v. Superior Court*, (2005) 135 Cal.App.4th 263, 285.) The balancing test continues to be applied in consumer cases. (See, e.g., *id*. at p. 286.) The People are prosecuting this action to rectify the direct harm to competition caused by Amazon's conduct, including higher consumer prices. Accordingly, Amazon's demurrer fails to establish that the balancing test is not appropriate as a matter of law.

The People satisfy the balancing test through the detailed facts alleged in the Complaint. These facts include allegations that Amazon imposes retail and wholesale price parity on its merchants, and this conduct results in higher consumer prices on and off Amazon, limits the availability of products off Amazon, and insulates Amazon from competition, allowing it to command higher fees and margins. (See e.g., Cmpl. ¶¶ 74-79, 117-120, 150-173.) Amazon's attempt to suggest its conduct has procompetitive benefits improperly introduces factual issues that cannot be evaluated without "'consideration and weighing of evidence from both sides' and which usually cannot be made on demurrer." (*Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156,

1164, quoting *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 134-135.) Further, even the claimed procompetitive benefits are a mirage. Nothing Amazon argues demonstrates that its conduct actually results in lower prices for consumers, only that consumers will not see lower prices elsewhere. (Cmpl. ¶¶ 1-2.) Thus, even Amazon's inappropriate efforts to introduce factual arguments only reinforce that any claimed "benefits" accrue to Amazon and its profits at the expense of free-market price competition and consumers.

b. Amazon's Alleged Conduct Is "Unfair" under the *Cel-Tech* Tethering Test

Under the *Cel-Tech* tethering test, "unfair" means "conduct that [1] threatens an incipient violation of an antitrust law or [2] 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 [3] otherwise significantly threatens or harms competition." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 187; see also Demurrer at pp. 19:20-20:1, citing *Cel-Tech* at p. 187.) California's antitrust laws are designed to ensure "the preservation of fair business competition" (*id*. at p. 180), and to prevent "injury to competition." (*Id*. at p. 186.) In other words, the policy and spirit underlying the antitrust laws are "to foster and encourage competition" by prohibiting "practices by which fair and honest competition is destroyed or prevented." (*Ibid*.) Further, under *Cel-Tech*, conduct that significantly harms competition, or even just threatens such harm, gives rise to a UCL violation under the "unfair" prong. (*Id*. at 187.)

Here, the facts pleaded establish violation of the policy and spirit of California's antitrust laws as well as significant harm to competition. The Complaint includes extensive, detailed factual allegations establishing harm to competition and Amazon's affirmative efforts to interfere in fair and honest price competition. More specifically, the facts alleged establish that Amazon's conduct has led to higher consumer prices on and off Amazon, limits on availability of products off Amazon, and interference with the ability of Amazon's competitors to effectively compete on price. (See e.g., Cmpl. ¶¶ 74-79, 117-120, 150-173; see also generally Section II, *supra*, [Harm to competition].) As alleged in the Complaint, Amazon enforces price parity through an expansive pricing surveillance program, which relies on proprietary, automated tools and hundreds of

employees to conduct real-time price monitoring across the internet, and automatically punishes merchants who fail to comply. (Cmpl. ¶¶ 32-34, 180-182.) The speed and magnitude with which Amazon operates these tools, and the immediacy of consequences third-party sellers and wholesale suppliers face if they fail to comply with Amazon's directives, are unprecedented. (See *id*. ¶¶ 32-34, 135-138, 148, 154.) In sum, the facts alleged establish that Amazon's conduct has caused exactly the type of harm to competition, including interference with fair and honest price competition, that the antitrust laws were designed to prevent. (*See Cel-Tech*, *supra*, 20 Cal.4th at p. 180-181, 186-187.)

In *Cel-Tech*, the failure to satisfy the formalities of a Cartwright Act claim was not fatal to the plaintiff's "unfair" prong claim because the alleged conduct was nonetheless sufficient to establish a violation of the policy and spirit of the antitrust laws or otherwise harm competition. (See generally Section IV.B.1, *supra*.) Likewise, the facts pleaded here are more than sufficient to establish violation of the policy and spirit underlying the Cartwright Act and harm to competition. Accordingly, Amazon cannot establish that the People's "unfair" prong claim fails the *Cel-Tech* tethering test as a matter of law.

c. Amazon's Alleged Conduct is "Unfair" under the FTC Act Test

A handful of California appellate courts have applied a test based on evaluation of allegedly unfair conduct under Section 5 of the FTC Act, 15 U.S.C. § 45(n)—which prohibits unfair methods of competition—when interpreting the UCL. As articulated in these cases, under this analysis, "a business practice is 'unfair' if (1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury could not reasonably have been avoided by the consumers themselves." (*Klein*, *supra*, 202 Cal.App.4th at p. 1376, citing *Camacho*, *supra*, 142 Cal.App.4th at p. 1403.) The People's allegations of harm to consumers through higher prices on and off Amazon, and limited product selection on Amazon competitors, satisfy the first prong of the FTC test. Second, as set forth in the Complaint, the only benefit of Amazon's agreements is to Amazon, providing it the ability to maintain high fees and margins without being subject to price competition from competing websites. There is no clear benefit to consumers or competition from these policies, which

artificially stabilize high prices across the internet, and limit the selection of products available to consumers. Third, because Amazon's conduct causes higher prices on and off Amazon, consumers cannot avoid the harm simply by choosing to shop on websites other than Amazon. The Complaint withstands scrutiny under this test as well.

V. CONCLUSION

For the foregoing reasons, the Court should overrule Amazon's demurrer.

Dated: January 27, 2023

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PROOF OF SERVICE

Case Name: ***The People of the State of California v. Amazon.com, Inc.***

Agency No.: **CGC-22-601826**

I declare:

I am a citizen of the United States and employed in the City and County of San Francisco, California by Shartsis Friese LLP at One Maritime Plaza, Eighteenth Floor, San Francisco, California 94111. I am over the age of eighteen years and am not a party to the within-entitled action.

On January 27, 2023, I served the attached PLAINTIFF THE PEOPLE OF THE STATE OF CALIFORNIA'S OPPOSITION TO DEFENDANT AMAZON.COM, INC.'S DEMURRER on the interested parties by transmitting a true copy via: (1) electronic mail from the email address vkiley@sflaw.com to the email addresses listed below, and (2) E-Service in conjunction with E-Filing through File & ServeXpress, an e-filing vendor approved by this Court. The name of the vendor and the transaction receipt I.D. are given in the vendor's emailed Notification of Service.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on January 27, 2023, at San Francisco, California.

Virginia A. Kiley
Declarant

Signature

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