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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 REPLY IN SUPPORT OF ITS DEMURRER TO PLAINTIFF'S COMPLAINT

Complaint Filed:	September 14, 2022
Department:	304
Courtroom:	Hon. Ethan P. Schulman
Hearing Date:	March 7, 2023
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

As set forth in Amazon.com, Inc.'s demurrer, the OAG's core allegation that Amazon violates California's antitrust laws through the manner in which it decides "which products to feature (and in what order)" in its store, Compl. ¶ 29, fails to state a claim because those laws only apply to *concerted* action, and the Complaint expressly alleges that Amazon makes such decisions without the agreement (or even the understanding) of its third-party sellers, *id.* ¶¶ 30, 32, 73, 88, 131. In response, the OAG concedes that "the Cartwright Act does not extend to unilateral conduct[.]" Opposition ("Opp.") 8. But rather than end the matter there, the OAG identifies three Amazon policies that it argues "***expressly*** require[] 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." Opp. 3; *see also id.* at 1, 5, 6, 7, 10, 17, 21 (similar). The OAG gives those three policies a contrived name – "Amazon's price parity agreements," *id.* at 3 – and argues that they are *per se* unlawful because they allegedly (i) "maintain price parity," *id.* at 6; (ii) are "price-fixing and price-tampering agreements," *id.* at 12-13; and (iii) are "horizontal boycotts," *id.* at 15-16. None of that is true, and none of it is adequately supported by the allegations of the Complaint or California law.

Not one of the three publicly-available policies that the OAG collectively refers to as "price parity agreements," Opp. 6, imposes the obligations that the OAG claims. The first policy, Amazon's Standards for Brands, contains Amazon's most basic expectation that third-party sellers that operate in its store "consistently maintain our standards for customer experience." Compl. ¶ 116. That policy identifies "price competitiveness" as one of several, non-exclusive criteria (most of which are unrelated to pricing) that Amazon uses to determine whether its standards are being met, and it informs sellers of "several tools," all voluntary, that they can use to help "meet our standards and sell successfully on Amazon." *Id.* The second policy, the Fair Pricing Policy, prohibits fraud, price gouging, and other conduct that abuses customers. *Id.* ¶ 118. It is not, in words or substance, a price parity agreement. *Id.* The third is a Seller Code of Conduct that says nothing at all about pricing, other than that sellers who operate in Amazon's online store must "[n]ot engage in conduct that *violates price fixing laws*." *Id.* ¶ 121.

The three policies challenged by the OAG are not agreements at all, and even if they were, they serve facially lawful, procompetitive purposes. The OAG fails to respond meaningfully to controlling precedents establishing that those policies are not actionable under the Cartwright Act. Its arguments that

other challenged agreements (GMMs, MCPs, and the pre-March 2019 BSA) are anticompetitive under "Quick-Look" or "Rule of Reason" analyses are conclusory, and fail to identify factual or legal support for the OAG's claim. The Opposition's arguments in support of its Unfair Competition Law ("UCL") claim merely identify the existence of a well-known split of authority within the Court of Appeal on the definition of "unfairness" without providing any persuasive reason to follow the minority view on that issue. Regardless of the standard applied, the challenged policies uphold practices that are not remotely unfair or unlawful. The Complaint should be dismissed in full.

II. ARGUMENT

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

1. The alleged "price parity agreements" are nothing of the kind.

The three policies that the OAG collectively identifies as "Amazon's price parity agreements" are reproduced in the Complaint. Because the Court "does not assume the truth of contentions, deductions or conclusions of law," and instead "gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context" (*Bichai v. Dignity Health* (2021) 61 Cal.App.5th 869, 876-877), this Reply begins by identifying the specific alleged conduct to which the OAG attaches that suggestive name.

a) Amazon's Standards for Brands Selling in the Amazon Store.

The first policy that the OAG discusses is Amazon's Standards for Brands ("ASB"). Opp. 6. That policy states that its purpose is to ensure that the third parties that "operate as sellers in the Amazon store . . . consistently maintain our standards for customer experience." Compl. ¶ 116. It then continues:

> We measure customer experience in a number of ways, including high in-stock rates, delivery experience, price competitiveness, and selection completeness. We offer several tools to help you meet our standards and sell successfully in the Amazon store, including tools for inventory management and automated pricing, fulfillment services like Fulfillment by Amazon (FBA), and services to grow and protect your brand like brand registry.

Id. The policy goes on to say that if sellers are unable to maintain Amazon's "standards for customer experience, [they] might lose certain privileges" such as not having their "offers featured on product detail pages" or losing the ability to continue as a third-party seller (while remaining eligible to instead sell their products directly to Amazon, for it to re-sell at retail). *Id.* The only reference to any obligations it may create for sellers in other stores, is a question asking: "[d]oes this policy impact my ability to sell through other retailers?" *Id.* The answer is clear: "No. You are free to sell through other retailers." *Id.*

The OAG's basis for labeling this policy as one that "expressly require[s] . . . price parity," Opp. 6, is that the words "price competitiveness" are included as one of four, non-exclusive criteria that Amazon uses to evaluate the quality of its customers' experience, *id*. Advising sellers that their competitiveness is a factor that could impact their success on Amazon does not require them to raise prices off Amazon (to the extent they even could influence prices at other retailers like Walmart or Macy's). The policy language itself *forecloses* the interpretation that it demands price parity. For instance, the OAG elsewhere concedes that the "tools" that are offered to "help [sellers] meet our standards," Compl. ¶ 116, are *voluntary*.[1] Likewise, the policy defines the consequences for sellers who are unable to meet Amazon's standards for any reason: their products generally will continue to be listed, but they will not be promoted as "featured" offers. *Id.* ¶ 116. And if that still left it ambiguous that the ASB policy is not "prohibiting sellers from offering or allowing lower online prices anywhere off Amazon," Opp. 6, it explicitly says that "No," it does not "impact [sellers'] ability to sell through other retailers." Compl. ¶ 116.

b) Amazon's Fair Pricing Policy.

The second policy discussed by the OAG is Amazon's Fair Pricing Policy ("FPP"). The OAG says that policy "prohibits pricing that harms customer trust, which includes offering lower prices off Amazon." Opp. 6. But the FPP expressly lists examples of the type of practices that Amazon considers harmful to customer trust, and failure to provide price parity is not one of them. Rather, the FPP prohibits fraud, price gouging, and other similarly unfair business practices:

> Pricing practices that harm customer trust include, but are not limited to:
>
> - Setting a reference price on a product or service *that misleads* customers;
> - Setting a price on a product or service that is *significantly higher* than recent prices offered on or off Amazon; or
> - Selling multiple units of a product for more per unit than that of a single unit of the same product.
> - Setting a shipping fee on a product that is excessive.

Compl. ¶ 118.

In arguing that the FPP imposes an express price parity requirement, the OAG cites to a paragraph of the Complaint in which it quotes a "major ecommerce consultant" as stating on his website that the

[1] *Id.* ¶¶ 28 ("[I]f third-party sellers wish to avoid Amazon's FBA fees, they can fulfill orders themselves"); 34 (alleging that Amazon "encourages" but does not require use of its "pricing tools"); 97 (stating that "third-party sellers *can use*" various "automated pricing tools").

policy applies to prices that are "higher than recent prices offered on or off Amazon." Opp. 6; Compl. ¶ 120 & n.17. But as the Complaint alleges, the actual policy applies to prices that are "*significantly higher*" than other recently offered retail prices. Compl. ¶ 118. That is a classic definition of price gouging, which is prohibited not only by Amazon's FPP, but also by the laws of the State of California. (See Pen. Code § 396(a) [Legislative finding that during periods of disasters, "some merchants have taken unfair advantage of consumers by greatly increasing prices for essential consumer goods and services"]; *id.* § 396(b) [prohibiting the same].) Indeed, conduct that violates California's anti-price gouging statute is by definition also "an unlawful business practice and an act of unfair competition within the meaning of" the UCL. (*Id.* § 396(i).) The OAG is paradoxically arguing that it is a violation of the UCL (and the Cartwright Act), for Amazon to have adopted a policy that forbids violations of the UCL.[2]

c) Amazon's Selling Policies and Seller Code of Conduct.

The third policy that the OAG addresses is Amazon's Selling Policies and Seller Code of Conduct. According to the OAG, that policy violates the Cartwright Act and the UCL because it "requires third-party sellers '*to act fairly,*'" which the OAG then interprets as "prohibit[ing] third-party sellers from offering lower online prices off Amazon." Opp. 6. But here as well, the Code of Conduct says what it means when it requires sellers to "act fairly *and honestly* on Amazon to ensure a safe buying and selling experience." Compl. ¶ 121. The policy requires sellers to "[p]rovide accurate information," and "[n]ot attempt to damage or abuse another Seller." *Id.* It prohibits "send[ing] unsolicited or inappropriate communications[.]" *Id.* It is not until the final example of what it means to "act fairly and honestly" that the policy mentions anything about prices: "All sellers must: . . . [n]ot engage in conduct *that violates price fixing laws*." *Id.* Thus, the OAG is again paradoxically arguing that Amazon violated the Cartwright Act and UCL by adopting a policy that prohibits third-party sellers from engaging in conduct that would independently violate those same statutes.

In its Complaint (but not specifically in its Opposition), the OAG also argues that a November 2021 "clarification" to the Seller Code of Conduct narrowly applicable to the issuance of "Rebates,

[2] In any event, with the benefit of its extensive pre-Complaint discovery, the OAG cannot make out a claim by quoting a third-party's inaccurate recitation of an Amazon policy when the actual policy is in its hands and embedded directly in the Complaint. (*Kalnoki v. First Am. Trustee Servicing Sols., LLC* (2017) 8 Cal.App.5th 23, 38 [when allegations conflict with a complaint's exhibits, the exhibits control].)

Coupons, and other Marketing Incentives," also imposes a price parity requirement. *See* Compl. ¶ 122. But contrary to that characterization, the document merely states that Amazon considers it to be an unfair and abusive practice for sellers to advertise incentives "as a way of driving a purchase in our store" if they subsequently refuse to honor those incentives in Amazon's store. *Id.*

* * * *

In its discussion of the ASB, FPP, and Seller Code of Conduct, the OAG says at least a dozen times that those policies either contain "express," or "expressly" require, price parity commitments, often repeating that claim multiple times on the same page. Opp. 1, 3, 5, 6, 7, 8, 10, 17, 21. It likewise uses the term "price parity agreements" over a dozen times to collectively identify those same policies. *Id.* at 3, 4, 5, 8, 11, 14, 15, 16, 19, 24. Not one of those references is accurate or faithful to the allegations of the Complaint. There is not a single "express" (or even an implied) price parity requirement in any of them.

2. Amazon's unilateral policies are not *per se* illegal under California law.

In an additional attempt to mislabel Amazon's policies to get around the Complaint's deficiencies, the OAG tries to shoehorn them into three forms of conduct that, in other cases, have been deemed *per se* unlawful: "price tampering," Opp. 11-12, "anticompetitive horizontal agreements on price" (i.e., price fixing), *id.* at 14, and "horizontal boycotts," *id.* at 15. Those labels misapply California law, are unsupported by the Complaint, and should be rejected.

Under both California and federal antitrust law, the *per se* illegality standard is reserved for the limited category of agreements for which courts can say, based on experience, that they always "lack redeeming virtue" and are therefore "conclusively presumed to be unreasonable and illegal." (*Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 540.) "'The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason.'" (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 146 [quoting *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 666].) When the courts "cannot say with reasonable certainty—yet—that [they] have posited every possible justification that might render a [practice] procompetitive," then the *per se* rule is inappropriate, and the rule of reason applies instead. (*Id.* at 158.)

Notably, it is not enough simply to apply the name of a practice considered *per se* unlawful to conduct lacking the elements that make it anticompetitive. "Literalness is overly simplistic and often

overbroad." (*Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.* ("*BMI*") (1979) 441 U.S. 1, 9.) Instead, courts look to the substance of the challenged practice, and evaluate its similarity to practices that have been found *per se* unlawful in the past. (See, e.g., *Morrison*, 66 Cal.App.4th at 542-545 [affirming decision to sustain a demurrer to allegations that conduct was *per se* unlawful "tying" and a "coerced" boycott because the complaint "failed to plead the requisite" elements]; *BMI*, 441 U.S. at 8, 20-25 [concluding that licensing practice which "involve[d] 'price fixing' in the literal sense" was not a "naked restraint of trade with no purpose except stifling of competition" and therefore was not *per se* illegal (quotation omitted)]; *California ex rel. Harris v. Safeway, Inc.* (9th Cir. 2011) 651 F.3d 1118, 1137 (en banc) ["reject[ing] California's attempt to characterize" a revenue-sharing agreement as a *per se* unlawful "market-allocation agreement" because it was not a "garden-variety" version of that form of restraint, and at most mirrored one in limited respects].) "What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint[,]" as well as the court's own "experience with the economics of [the alleged restraint]." (*Cipro*, 61 Cal.4th at 147 [quotation omitted], 161.)

The OAG has not validly alleged the existence of any *per se* unlawful price fixing agreements or agreements tampering with price structures. The challenged policies bear none of the forbidden traits that render those practices *per se* illegal, and do not resemble the conduct at issue in the cases cited in the OAG's Opposition. Opp. 11-15. For example, in *People v. Building Maintenance Contractors Association* (1953) 41 Cal.2d 719, the members of a maintenance association had agreed that, whenever they competed against another member who had an existing contract for a maintenance job, they would "submit bids in excess of the current price" in amounts ranging from 5% to 20% higher depending on the level of the incumbent contractor's price. (*Id.* at 722.) That agreement ensured that any property owner seeking a competitive alternative would find only a fixed higher price, and it forbade members of the association from freely competing against one another. (*Ibid.*)

Likewise, in *Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, the rules of a "bid depository" required a general contractor who was awarded a construction contract to hire only subcontractors who had already proposed their rates through a blind bidding system, without attempting to further solicit lower subcontractor bids either before or after the general contract was awarded. (*Id.* at 358.) The Court found that practice to be *per se* illegal price

tampering because it prohibited contractors from "disclos[ing] the lowest subbids to competing subcontractors and thereby induc[ing] the subcontractors to make still lower subbids." (*Id.* at 362.) Under the rules at issue, "neither general contractors nor interested subcontractors who use the Depository [we]re able to exercise initiative to instigate open price competition among subcontractors[.]" (*Id.* at 363.)

And in *Mailand v. Burckle* (1978) 20 Cal.3d 367, the owner of a brand of gas stations held the contractual right to set the price at which its franchisee re-sold gasoline at retail. (*Id.* at 371.) Citing the then-existing federal *per se* prohibition on re-sale price maintenance agreements, the Court held that the agreement permitting the wholesaler to fix the price of gasoline its franchisee sold at retail was a form of vertical price fixing that was *per se* illegal under the Cartwright Act. (*Id.* at 377 [adopting the holding of *Dr. Miles Medical Co. v. Park & Sons Co.* (1911) 220 U.S. 373]; but see *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* (2007) 551 U.S. 877, 908 [overruling *Dr. Miles* and holding that, as it pertains to federal law, re-sale price maintenance agreements are governed by the rule of reason].)[3]

The policies that the OAG challenges do not resemble any of the agreements found to be *per se* unlawful in those cases. A marketplace announcing to its third-party sellers that (1) it prohibits price gouging, price-fixing, and other kinds of customer abuse; (2) upholds standards for customer experience, the majority of which are not related to pricing; and (3) features competitively priced offers to its customers, Compl. ¶¶ 88, 116, 118, 121, directly encourages open competition among third party sellers and thereby makes the marketplace more competitive against myriad other retail competitors. It is the opposite of a policy that forbids price competition such as the bidding rules in *Lathrop*, and it does not require third-party sellers to set any "fixed" price to access Amazon's marketplace as was the case in *Mailand* or *Building Maintenance*. Likewise, a policy prohibiting sellers from "engag[ing] in conduct that violates price fixing laws," *id.* ¶ 121, plainly is neither price fixing nor price tampering. The OAG's entire argument is based upon applying increasingly distorted labels to the actual alleged conduct – first

[3] The OAG cites *Lathrop* and *Mailand* on the opening page of its Opposition and chides Amazon for "fail[ing] to cite or even acknowledge" those cases in its demurrer. Opp. 1; *id.* at 12 (same). But Amazon had no reason to address those cases preemptively. They are not factually analogous to the facts alleged here, and whether or not they are still "good law," *id.* at 13, their reasoning has been repudiated in significant respects. (See *Cipro*, 61 Cal.4th at 146-47 [placing *Lathrop* in context with other opinions]; *Ben-E-Lect v. Anthem Blue Cross Life and Health Ins. Co.* (2020) 51 Cal.App.5th 867, 872-873 [contrasting *Lathrop* against "the modern approach [which] is more nuanced"].)

by saying that the policies require price parity, which they do not, then by reasoning that if they require price parity, they necessarily tamper with competition or fix prices. Opp. 11-16; but see Dem. at 14-15 & fn. 7 (citing cases that find price parity clauses are "not exclusionary" as a matter of law). That sort of reasoning by hyperbole and exaggeration does not state a *per se* claim, particularly not where the policies at issue have obvious procompetitive aims. (Cf. *People's Choice Wireless, Inc. v. Verizon Wireless* (2005) 131 Cal.App.4th 656, 666 [applying "skepticism" to a "forced analogy" between dissimilar cases].)[4]

Amazon's policies also do not constitute a *per se* unlawful boycott, Opp. 15-16, which occurs when "a group of competitors with separate and independent economic interests, or a single competitor with sufficient leverage, [] force[s] another to boycott a competitor at the same level of distribution." (*Freeman v. San Diego Ass'n of Retailers*, (1999) 77 Cal.App.4th 171, 195.) The OAG incorrectly contends that the policies it challenges "constitute a ***classic***, *per se* unlawful 'direct boycott[.]'" Opp. 15 (quoting *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 932.) *Palsson*, however, rejected the application of the *per se* illegality standard to a facially exclusionary policy, insisting that courts must consider the potential effect or justification for the policy. The policy at issue in *Palsson* precluded membership in a board of realtors to anyone that was not "primarily engaged" in that line of trade, and then directly forbade "an active member sharing offices with or employing a person denied membership in the board." (*Id.* at 924.) The Court "hesitate[d] before mechanically applying a *per se* rule" to that conduct, observing that by doing so it "would establish the activities of the board to be illegal without any regard to their economic effects or possible justification." (*Id.* at 931.)

The OAG's argument that Amazon *requires* third-party sellers to boycott other retailers is baseless. It points to allegations that it says show some third-party retailers have "withh[eld] their products from competing online retailers, or suppl[ied] them conditioned on adherence to minimum advertised/resale

[4] The OAG's insistence that Amazon's relationship with sellers is "horizontal" because it also acts as a retailer, Opp. 13, 17-18, is wrong. The Complaint squarely alleges that third-party sellers pay Amazon "referral fees" to gain access to its marketplace, Compl. ¶ 24, subject to their compliance with the policies at issue. For that reason, the policies govern the vertical aspects of Amazon's relationship with third-party sellers, and are properly analyzed as alleged vertical, not horizontal, conduct. (See *AT&T Corp. v. JMC Telecom, LLC* (3d Cir. 2006) 470 F.3d 525, 531 ["Vertical restraints are generally not *per se* violations of the Sherman Act, even where a distributor and manufacturer also compete at the distribution level, i.e., have some form of horizontal relationship (a/k/a/ dual distributor arrangement), as is the case here."].) Indeed, the Complaint even illustrates the vertical nature of the relationship with a graph. Compl. ¶ 24.

prices." Opp. 15 (citing Compl. ¶¶ 3, 114-126, 150, 157-169, 175-178, 184). But none of the cited paragraphs identifies any conduct of Amazon that *forces* or *requires* sellers to take any such actions, or that these sellers have agreed to cease doing business with anyone. (*Freeman*, 77 Cal.App.4th at 197.) Instead, the Complaint alleges that any such acts were taken on their own or from the advice of third-party "consultants" – advice that would be unnecessary if Amazon were forcing sellers into those practices. See, e.g., Compl. ¶ 159 (allegation that an "ecommerce consultant" "always recommend[s] that [his] client" request price increases in other stores). The OAG implausibly seeks to diminish its own allegations about the role of these consultants as just "a single statement out of context," Opp. 9 fn. 3, but there are many other examples. Compl. ¶¶ 12 ("Ecommerce consultants . . . *tell their clients* not to offer or allow lower prices off Amazon"); see also *id.* ¶¶ 31, 120, 142, 147, 151, 185, 186 (each describing advice of "ecommerce consultant[s]" either to raise prices off Amazon or to withhold products from other retailers). Amazon is not responsible for any alleged "horizontal boycott" arising from the advice that third-party consultants give to Amazon's upstream, third-party sellers.[5]

3. Amazon's unilateral policies are not actionable under the Cartwright Act

The OAG devotes less than a single full page of argument to addressing the precedents that are fatal to the majority of its Cartwright Act claim. Opp. 7. Even then, it says nothing that constitutes a reasoned basis for distinguishing the controlling decisions.

The OAG's argument that *Freeman*, *supra*, is inapposite because the OAG is not "ignoring Amazon's corporate form," Opp. 7, is superficial and fails to address the heart of the issue in that case. The corporate form issue arose in *Freeman* because the Cartwright Act does not "permit judicial oversight of *unilateral* price decisions," and in an effort to get around that limitation, the plaintiff alleged that the corporation responsible for the challenged conduct, Sandicor, was a sham to conceal an agreement among competing brokerages. (77 Cal.App.4th at 192, 201.) After rejecting that argument, the Court of Appeal held that the complained-of conduct was not actionable *precisely* because it was a unilateral pricing decision made by a single independent entity. (*Id.* at 202-203.) This case is even easier because no one doubts that Amazon is a single independent entity. The Court can therefore proceed directly to applying

[5] The OAG attempts to distinguish two of Amazon's citations as involving "vertical boycotts." Opp. 13. But even if it had alleged the elements of a boycott here – which it has not – that too would be vertical.

the principle that "the antitrust laws do not preclude a party from unilaterally determining the parties with which, or the terms on which, it will transact business." (*Id.* at 195.)

Likewise, *Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363 held that *unilateral* minimum resale price policies and actions to enforce retailers' compliance with those policies did not constitute an "agreement" within the meaning of the Cartwright Act. (*Id.* at 373.) The OAG's argument that *Chavez* is distinguishable because it "did not involve express agreements like those alleged here," Opp. at 7, is circular and ignores the core holding in that case. As the Court of Appeal explained:

> Just as the announcement of a resale price policy and refusal to deal with dealers who do not comply is permissible, measures to monitor compliance that do not interfere with the dealers' freedom of choice are permissible. To hold otherwise would render the manufacturer's announced policy ineffective and undermine rights protected by the *Colgate* doctrine.

(*Chavez*, 93 Cal.App.4th at 373 [citing *U.S. v. Colgate & Co.* (1919) 250 U.S. 300 ("*Colgate*")].) "'Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply.'" (*Id.* at 370 [quoting *Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 761].) "'And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.'" (*Ibid.*) "Thus, a manufacturer's announcement of a resale price policy and its refusal to deal with dealers who do not comply coupled with the dealers' voluntary acquiescence in the policy does not constitute an implied agreement or an unlawful combination as a matter of law." (*Id.* at 373.)

Freeman and *Chavez* are on point and controlling. As in those decisions, the OAG's "price parity" allegations describe nothing more than *unilateral* policies made by a single entity, Amazon, to which upstream third-party sellers then allegedly react. *Supra*, §§ II.A.(1), (2). The OAG agrees that the "Cartwright Act does not extend to unilateral conduct," Opp. 8, but entirely ignores the implications of that concession for its challenge to Amazon's ASB, FPP, or Seller Code of Conduct policies. Compl. ¶¶ 116, 118, 121-122. Viewed in the light most favorable to the OAG, the Complaint alleges that Amazon unilaterally dictates its own standards for when it will (and will not) promote third-party products based upon its assessment of their value to consumers, *id.*, and that third-party sellers – either independently or on the advice of third-party ecommerce consultants – then decide how to respond to those policies in order to maximize their chances of making a sale. That is not a basis to find concerted action under the Cartwright Act. (See *Freeman*, at 196 ["facts must be set forth which indicate the existence of such

contracts, combinations, or conspiracies."]; *Chavez*, 93 Cal.App.4th at 370 ["[T]he conduct from which an agreement can be inferred is circumscribed as a matter of law in order to protect a company's right to select with whom to do business and on what terms."].)[6]

The OAG's alternative argument that Amazon's policies create an agreement because they are "coercive," Opp. at. 8-10, was rejected in *Chavez* for reasons that likewise compel its rejection here. In that case, the plaintiff – a purchaser of one of Whirlpool's dishwashers – alleged that the company violated the Cartwright Act and the UCL by "coerc[ing] retailer[s] to comply involuntarily with minimum resale prices" which created a price floor and prevented retailers from discounting Whirlpool products. (*Chavez*, 93 Cal.App.4th at 368.) It further alleged that Whirlpool (1) communicated a policy prescribing minimum resale prices for its products; (2) monitored retailers' compliance with that policy; and (3) informed retailers that it would refuse to sell products to them if they did not comply. (*Id.* at 373.) To ensure compliance with the price policy, Whirlpool allegedly enlisted "mystery shoppers" to check the prices in stores, reviewed retailers' advertised list prices, and collected sales receipts. (*Ibid.*) Chavez alleged that Whirlpool employed these tactics, as well as other "threats, coercion, intimidation and boycott," to cause retailers to comply with the minimum resale price policy. (*Ibid.*) The Court of Appeal held that those alleged facts were "*insufficient* to establish a coerced agreement in violation of the Cartwright Act and allege only behavior permitted under the *Colgate* doctrine." (*Ibid.*)

Here, the OAG makes the nearly identical argument that Amazon "coerces" sellers into raising prices at, or withholding selection from, other retailers by (1) announcing a policy that third-party offers in its store would be evaluated on the basis of price competitiveness, among other attributes; (2) further announcing (or disclosing through its actions) that the policy would deny "featured" placement in the "buy box" to offers that Amazon considers uncompetitive; and (3) carrying out those intentions. Opp. 3, 8-9; see also Compl. ¶¶ 88, 97, 116, 132, 145, 149, 155. The major distinction between the instant Complaint and the allegations in *Chavez* is that Whirlpool explicitly required sellers to meet a price floor, and flat out refused to do business with sellers who were charging *too little*. (93 Cal.App.4th at 373.) This case is even less compelling for the obvious reason that, while sellers may have no ability to control prices in

[6] Amazon has also explained why the price parity clause that formerly was in its BSA until March 2019, is not actionable under the *Colgate* doctrine. Dem. at 12. The OAG has not responded.

Target or Walmart, they can always satisfy Amazon's standards by *lowering* their prices in Amazon's store. See Compl. ¶ 159 ("Amazon is indifferent between a seller lowering its price on Amazon, and raising its price on competing websites").[7] Alternatively, those sellers can keep their prices uncompetitive in Amazon's store and continue to have their products listed, just without the further advantage of being a "featured" offer displayed in the "Buy Box." *Id.* ¶ 30 ("[A]ll of the other offers that Amazon has not selected for the Buy Box are listed on the 'All Offers Display[.]'"). The existence of those alternatives makes the OAG's coercion argument even less viable than the one that was rejected in *Chavez*.

The OAG's "coercion" argument should be rejected for the further reason that the Complaint fails to plead facts from which it can be concluded that Amazon is responsible for coercing sellers at all. In *Chavez*, the price floor expectation was communicated through a clearly worded policy. (93 Cal.App.4th at 373.) Here, the Complaint alleges that an expectation to raise prices in other stores arises from sellers' "interpret[ation]" of notices stating that an offer was disqualified from eligibility for the "Buy Box," Compl. ¶ 132-133, or as discussed above, from the advice of third-party ecommerce consultants. *Supra* § II.A.(2). In its Opposition, the OAG attempts to rewrite its own alleged narrative by saying that "Amazon affirmatively counsels" sellers to engage in that conduct through a practice called "channel management." Opp. 3-4. But the allegations it identifies in support of that suggestion are either entirely conclusory, *e.g.*, Compl. ¶ 7, unsupportive, *id.* ¶¶ 195-198, or even outright contradictory, *id.* ¶¶ 161-163.

In one of the alleged instances of "channel management," Amazon is described as having been "very cryptic" in its communications with a seller, leaving her to "pretty much figure[] it out on her own." Compl. ¶ 161. In another, an Amazon witness is quoted as testifying "under oath" that Amazon did not consider itself to "'have authority' to 'tell sellers anything, really, about how they should operate in channels outside of Amazon.'" *Id.* ¶ 163. That contradictory statement is cited as support for Amazon's allegedly coercive "channel management," Opp. 3, apparently because the same paragraph also references an Amazon executive stating in an internal document that a seller "might get the *hint*" if he was asked whether sales in other stores were "putting him and us at a relative competitive disadvantage." Compl.

[7] That alleged "indifference" is bogus (basic economics are enough to know that Amazon prefers for third-party sellers to lower their prices in its store). But as an alleged fact taken as true for purposes of the demurrer, Amazon's "indifference" to one action versus another contradicts any suggestion that it "coerces" sellers into one specific means of satisfying its price competitiveness expectations.

¶ 163. Elsewhere, the Complaint describes Amazon as communicating its policies "using language that is vague and . . . euphemistic," *id.* ¶ 115, and that it "deliberately provides limited information" because "such obfuscation helps Amazon send its message that it is monitoring all website prices, everywhere, all the time," *id.* ¶ 131. The Complaint even alleges that when Amazon disqualifies an offer from having the Buy Box, it will send that seller a "nudge . . . to *lower* its price." *Id.* ¶ 97. A finding of "coercion" to raise prices in other stores cannot be made upon allegations that Amazon is "indifferent" to how sellers satisfy its standards, and that it communicates that indifference using "vague" and "cryptic" hints, limited information about what it wants, and "nudge[s]" to lower prices.

For all of those reasons, the Complaint fails to state a claim for a violation of the Cartwright Act based upon Amazon's alleged unilateral policies encouraging fairness and competitiveness in its store.

4. The remaining Cartwright Act allegations fail to state a claim.

The OAG also says next to nothing in defense of the three other forms of agreement alleged in the Complaint: GMMs, MCPs, and the pre-March 2019 BSA. Opp. 21-22. Most of the OAG's arguments about these three alleged agreements are really just arguments about the magnitude of sales affected by the unilateral policies discussed above. *Supra*, § II.A.(1). The OAG has not alleged (and could not allege) that "the majority of all sales on Amazon," Opp. 21, are impacted by margin guarantees or the defunct former price parity clause. To the contrary, the Complaint expressly alleges that the former are involved in only a small fraction of Amazon's sales, Compl. ¶¶ 36, 175, 179, and its only allegations about the magnitude of the latter are that Amazon's gross sales and profits were both more than 50% larger in 2020 than they were in the last full year before its removal, *id.* ¶ 36. For all of the reasons that the Complaint fails to allege a basis to find that Amazon's unilateral policies are agreements prohibited by the Cartwright Act, their impact cannot be used to swell the perceived impact of the remaining alleged conduct.[8]

The arguments that the OAG directs specifically to these three types of alleged agreements are meritless. First, the OAG argues that the two forms of margin guarantees, GMMs and MCPs (which it refers to collectively in the Opposition as "MMAs," Opp. at 4, 11), are *per se* illegal price fixing

[8] The cases cited by the OAG to argue that the effects of separate contracts may be aggregated, Opp. 21 & fn. 9, are inapposite. Each aggregated contracts to evaluate claims of exclusive dealing, because the legality of an exclusive agreement depends upon how much of the market remains available to other competitors. Such cases are irrelevant here, as the OAG does not allege that Amazon requires exclusivity.

agreements. *Id.* at 11. But it is fundamental that "price fixing" does not include agreements "whereby one party merely agrees to supply goods or services to another at a given price[.]" (*Bldg. Maintenance, supra*, 41 Cal.2d at 728.) The GMMs and MCPs are specifically alleged to be agreements whereby a wholesale supplier's price for the products it supplies to Amazon changes depending upon Amazon's profitability in re-selling those products. Compl. ¶¶ 175-178. Therefore, by definition, these vertical agreements setting the price that Amazon pays for certain goods are incapable of being classified as vertical price fixing agreements because they do not fix the price that Amazon charges to consumers. (See *Bldg. Maintenance*, 41 Cal.2d at 728.)

Such agreements cannot be characterized as *per se* unlawful for a second reason: they are dissimilar to any agreement upon which California state or federal courts have ever previously ruled, and the courts therefore lack the judicial experience to declare them *per se* illegal. (See *Cipro*, *supra*, 61 Cal.4th at 158 ["the Court looks to whether its experience with [a challenged practice] is sufficient to allow it, yet, to require particular modifications to rule-of-reason analysis"].) The OAG argues that the margin agreements it challenges are "not equivalent" to margin agreements addressed in the federal cases cited by Amazon, Opp. 17, and calls it "irrelevant" that no California case has previously addressed comparable agreements, *id.* But it identifies no other decisions condemning any similar form of agreement as *per se* unlawful, and thus asks this Court to prohibit as *per se* illegal practices that other courts have upheld as presumptively pro-competitive and that no California court has ever before found unlawful under any standard. *Cipro* forbids any such result.

The OAG also does not meaningfully address its failure to allege that these vertical agreements had a "substantially adverse effect on competition in the relevant market." (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2020) 55 Cal.App.5th 381, 399 [citations omitted].) Contrary to the OAG's suggestion, Opp. 20, a plaintiff's failure to allege the complete elements of a rule of reason violation is more than enough basis to sustain a demurrer. (See *Marsh v. Anesthesia Svces. Med. Grp., Inc.* (2011) 200 Cal.App.4th 480, 499) [affirming an order sustaining a demurrer to Cartwright Act claims on the basis that "the pleading fails to sufficiently allege damage to the relevant marketplace"]; *Morrison*, 66 Cal.App.4th at 542-545 [upholding demurrer to antitrust claims that "failed to plead the requisite" elements]; see also *Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1682 [ruling as a matter

of law that summary adjudication was proper where plaintiff did not meet his "initial burden" of alleging "that the restraint is likely to be of significant magnitude" in the relevant market].)

The OAG twice says without explanation that it is "meaningless" that the alleged amount of true-up payments made under GMMs and MCPs are miniscule compared to Amazon's alleged sales revenue and the size of the alleged relevant market as a whole. Opp. 21 & n.10. Amazon relied on those statistics because the true-up payments are alleged to "hurt[] sellers' profits" and create a "disincentive to lower prices off Amazon," Compl. ¶ 176, and it is the OAG's burden to allege that any such effect is of a "significant magnitude." (*Exxon*, 51 Cal.App.4th at 1682.) Shirking that burden, the OAG instead points to the alleged "volume of covered sales" that take place under a contract with one or both of these provisions. Opp. 21.[9] But that is not a measure of the magnitude of the alleged *restraints*. Rather, it is explicitly a measure of the amount of commerce that took place pursuant to those agreements, and standing alone that figure is incapable of showing that absent GMMs or MCPs competition would have been greater or prices would have been lower. If the "true up" statistics alleged in the Complaint are as "meaningless" as the OAG now says that they are, Opp. 21, then the Complaint contains no allegations of any kind that could satisfy the OAG's burden of alleging "damage to the relevant marketplace" (*Marsh*, 200 Cal.App.4th at 499), of a "significant magnitude." (*Exxon*, 51 Cal.App.4th at 1682.)

B. The OAG's Unfair Competition Law Claim Fails as a Matter of Law.

1. The Complaint does not allege a viable claim under the "unlawful" prong.

The only law that the OAG argues is relevant to its claim under the "unlawful" prong of the UCL is the Cartwright Act. Opp. 23. For the reasons stated above, that portion of the UCL claim fails as well.

2. The Complaint does not allege a viable claim under the "unfair" prong.

a) The Court should apply the *Cel-Tech* tethering test.

Contrary to the OAG's assertions, Opp. 24, Amazon's demurrer does not "collapse[] the distinct 'unlawful' and 'unfair' prongs of the UCL into one another." *Id.* The definition of unfairness cited in the demurrer comes directly from controlling California Supreme Court and Court of Appeal decisions

[9] As Amazon pointed out, the OAG's allegation about the volume of sales involving MCPs is a speculative extrapolation from the size of the "true up" payments made under those agreements, when compared to the "true up" payments made under GMMs. Dem. at 5; Compl. ¶ 179. This speculative allegation need not be credited. (*Freeman*, 77 Cal.App.4th at 178 fn. 3.)

recognizing that while the UCL's "scope is sweeping, it is not unlimited." (*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 182, 185-187; see also *Graham v. Bank of Am., N.A.* (2014) 226 Cal.App.4th 594, 613 [same]; *Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1239 [same]; *Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 853-854 [same].)

In response to these citations, the OAG points out the existence of a well-known split of authority within the Court of Appeal on the definition of "unfairness" in cases brought by consumers, and reminds the Court that decisions from every District are ordinarily binding. Opp. 26. But "where there is more than one appellate court decision, and such appellate decisions are in conflict," this Court "can and must make a choice between the conflicting decisions." (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal. 2d 450, 456.)[10] That is why Amazon did not argue that the Court was *obligated* to follow the First District's consistent practice of applying the *Cel-Tech* "tethering" test; rather, it argued that the Court "should" follow those decisions for several reasons, none of which are rebutted by the OAG. *See* Dem. at 19.)

First, the *Cel-Tech* "tethering test" was developed in response to concerns that the then-existing balancing tests were "too amorphous and provide too little guidance to courts and businesses." (20 Cal.4th at 185.) It also was developed with express reference to Section 5 of the FTC Act, taking principles from that statute and re-stating them in terms consistent with the UCL. (*Id.*) Although the Court left open the possibility that other tests might be used in cases involving different plaintiffs (*id.* at 187 n.12), it nevertheless articulated a standard that is tailor-made for cases like this one. As the OAG states, this case is about alleged "*harm to competition*," Opp. 27, and *Cel-Tech* provides the definition of when such harm constitutes an "unfair" act under the UCL. (20 Cal.4th at 187.)

Second, the test should be applied because it provides businesses with clearer rules to govern their conduct. It makes no sense that the fairness of a contemplated action should be determined by the unknown identity of the party who might later challenge it. Companies that want to compete fairly and consistent with the law should have some idea of how to do so, and the *Cel-Tech* tethering test best

[10] The existence of the conflict here is well-documented; even the Supreme Court has acknowledged it without providing a resolution. (See *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 380 fn. 9 ["The standard for determining what business acts or practices are 'unfair' in consumer actions under the UCL is currently unsettled." (collecting cases)].)

provides that because it is the standard companies know will be used in any competitor cases, and that may be used in consumer cases as well.

Third, the test should be applied because it represents both the majority, and the most stable, viewpoint among the Districts that have split on the issue, with the First and Fourth Districts consistently applying it, while other Districts have been inconsistent.[11]

Fourth, and finally, although the Court is not obligated to follow the First District's precedents on the issue, it nevertheless may take into consideration where this case would first go on appeal. (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315 ["As a practical matter, a superior court ordinarily will follow an opinion emanating from its own district even though it is not bound to do so."].)

In contrast to those reasons, the OAG does little more than identify the existence of two competing standards, without making an affirmative case that either of them provides a better rule of decision. All that is said of the balancing test is that Amazon did not show it was "not appropriate," Opp. 27, without further explanation as to why it should apply in this case. And of the FTC Act test, the OAG only said that a "handful of California appellate courts have applied" it, *id.* at 29, again without support for application of this alternative minority test in this case. But the mere fact that some courts have used those tests, when many others have not, does not provide any reason to use them here. The Court has to decide between the competing standards (*Auto Equity Sales*, 57 Cal. 2d at 456), and for the reasons noted above, the Court should apply the *Cel-Tech* tethering test.

b) The OAG has not alleged "unfair" conduct under any test.

The OAG's arguments under all three standards of "unfairness" have a common thread: they all have as their starting point the assumption that the Complaint adequately demonstrates that Amazon currently uses price parity agreements to insulate itself from competition, causing prices to rise marketwide. Opp. 27 (arguing that the balancing test is satisfied "through the detailed facts alleged in the Complaint" that "Amazon imposes retail and wholesale price parity"); *id.* at 28-29 (tethering test is met because "Amazon enforces price parity" with "unprecedented" consequences for those who refuse to

[11] (Compare *Belton*, 151 Cal.App.4th at 1239, and *Graham*, 226 Cal.App.4th at 613 [First and Fourth District decisions describing their consistent adherence to the *Cel-Tech* tethering test], with *Davis v. Ford Motor Credit Co.* (2009) 179 Cal.App.4th 581, 595 [Second District decision disagreeing with that District's own prior decision to apply a balancing test, and ultimately adopting FTC Act test].)

comply); *id.* at 29 (FTC Act test is satisfied by allegations that "Amazon's agreements" protect it from "price competition from competing websites"). Once the OAG's misleading labels are set aside, there is no basis for saying that Amazon's policies are unfair under any definition.

A policy that directs sellers not to mislead customers and to refrain from price gouging, Compl. ¶ 118, like one that requires sellers to "act fairly and honestly" by providing accurate information and refraining from antitrust violations, *id.* ¶ 121, cannot possibly tip the scales of any balancing test that weighs the "gravity of the harm to the alleged victim" against the utility of the conduct. Opp. 27. Those policies do not have any victims in the ordinary sense of that term; their express purpose is to prevent the creation of victims from among Amazon's customers. Neither do those policies violate the spirit or threaten incipient violation of any antitrust laws, Opp. 28, nor run afoul of section 5 of the FTC Act, *id.* at 29-30, neither of which say anything that requires Amazon to allow abusive practices in its store.

As for ASB, the Complaint alleges that the policy has been around by one name or another since at least 2017, Compl. ¶ 145, so its existence in 2023 plainly does not threaten any "incipient violation of an antitrust law," Opp. 28. Neither does it violate the "spirit" of those laws or the FTC Act to tell sellers that they will be evaluated on measures of their competitiveness, and to thereby encourage them to be more competitive. Compl. ¶ 116. To the contrary, the "spirit" of the ASB and antitrust law are one and the same: to ensure Amazon customers receive the benefit of robust competition. (*Marsh*, 200 Cal.App.4th at 495.) Stripped of the OAG's false characterization that ASB promotes competition on Amazon by requiring its reduction elsewhere, *supra* §§ II.A.(1)-(3), all that is left is the allegation that Amazon acts unfairly by encouraging sellers to be more competitive. That does not satisfy any definition of "unfairness." Moreover, just as the OAG's allegations about Amazon's policies do not support a Cartwright Act violation, neither can they establish a UCL violation. (*Chavez*, 93 Cal.App.4th at 375 ["[A]s a matter of law [] conduct that [is] permissible under the *Colgate* doctrine cannot be deemed 'unfair' under the [UCL]."]; *People's Choice Wireless*, 131 Cal.App.4th at 667-668 [citing *Colgate* to uphold a demurrer to a UCL claim on the basis that "the right to refuse to deal remains sacrosanct."].)

III. CONCLUSION

The Complaint fails to state a claim. Amazon's demurrer should be sustained.

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