IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA, Plaintiff, **v.** **AMAZON.COM, INC.**, Defendant.	**CASE NO: 2021 CA 001775 B** **Judge Hiram Puig-Lugo** **Next Event: Feb. 11, 2022, 10am** **Event: Initial Conference**

PLAINTIFF DISTRICT OF COLUMBIA'S MOTION FOR LEAVE TO FILE A SURREPLY IN OPPOSITION TO DEFENDANT AMAZON.COM, INC.'S MOTION TO DISMISS AMENDED COMPLAINT

Plaintiff District of Columbia ("District"), respectfully moves for leave to file a surreply in opposition to Defendant Amazon.com, Inc.'s ("Amazon") January 21, 2022 reply brief in support of its Motion to Dismiss ("Reply"). The District believes there is good cause to grant the requested relief. In its Reply, Amazon raises the new argument that the District failed to properly plead the application of a *per se* standard of review to the District's restrain of trade claims. Should the Court consider Defendant's newly raised argument on pleading the *per se* standard, the District respectfully requests that the Court grant the District an opportunity to file a surreply.

Defendant's Reply attempts to raise an issue regarding the *per se* pleading standard for the first time. Reply at 7-9. It is well understood that a party "may not use the reply brief to raise new issues." *Johnson v. District of Columbia*, 728 A.2d 70, 75 n.1 (D.C. 1999). "It is the longstanding policy of [District of Columbia] court[s] not to consider arguments raised for the first time in a reply brief." *Stockard v. Moss*, 706 A.2d 561, 566 (D.C. 1997). In these circumstances, if the Court

intends to consider Amazon's argument relating to the *per se* standard of review, the Court should permit the District to file a surreply addressing Amazon's newly raised argument.

On January 27, 2022, the District informed Amazon that the District intended to seek leave to file a surreply to Amazon's Reply. The parties conferred on January 28, 2022. Amazon takes no position on this motion but maintains that it has not provided new arguments in its reply and reserves its rights to seek leave for a sur-surreply.

The District's Surreply and proposed order are attached for the Court's consideration.

Dated: January 28, 2022.

Respectfully submitted,

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Attorney General for the District of Columbia

KATHLEEN KONOPKA
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RULE 12-I STATEMENT

The undersigned certifies that on January 27, 2022, prior to filing this Motion, the District contacted counsel for Defendant Amazon.com, Inc. and counsel took no position on the relief sought in the District's Motion.

/s/ Swathi Bojedla
Swathi Bojedla
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January 2022, a true and correct copy of the foregoing Motion for Leave to File a Surreply in Opposition to Defendant Amazon.com, Inc.'s Motion to Dismiss Amended Complaint was served on counsel for Amazon by the court's electronic filing service.

Dated: January 28, 2022

/s/ Swathi Bojedla
Swathi Bojedla [D.C. Bar 1016411]

Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA, Plaintiff, **v.** **AMAZON.COM, INC.**, Defendant.	**CASE NO: 2021 CA 001775 B** **Judge Hiram Puig-Lugo** **Next Event: Feb. 11, 2022, 10am** **Event: Initial Conference**

ORDER

Upon consideration of the District's Motion for Leave to File a Surreply in Opposition to Defendant Amazon.com, Inc.'s Motion to Dismiss Amended Complaint, the District's Surreply attached thereto, and the entire record in this case, it is hereby:

ORDERED that the District's Motion for Leave to File a Surreply is **GRANTED**.

Date: _____

_____
Judge Hiram E. Puig-Lugo
Superior Court of the District of Columbia

Copies to: all counsel of record

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA, Plaintiff, **v.** **AMAZON.COM, INC.**, Defendant.	**CASE NO: 2021 CA 001775 B** **Judge Hiram Puig-Lugo** **Next Event: Feb. 11, 2022, 10am** **Event: Initial Conference**

PLAINTIFF DISTRICT OF COLUMBIA'S SURREPLY IN OPPOSITION TO DEFENDANT AMAZON.COM, INC.'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Amazon's reply brief asserts an entirely new argument—that this Court should prematurely rule out application of a *per se* standard to the District's restraint of trade claims. Amazon otherwise doubles down and adds on to the factual mischaracterizations in its opening brief. These arguments, along with Amazon's heavy reliance on cases decided after the development of full evidentiary records, only highlight that dismissal at this early stage is inappropriate. Despite Amazon's hyperbolic warning that no court has held that policies such as those challenged here violate the antitrust laws, this Court can rest assured that courts routinely review and find similar pricing restraints unlawful. Opp. 19-20 and n.22.[1]

A. The Court Should Not Prematurely Foreclose the *Per Se* Standard of Review.

Count I of the Complaint—challenging Amazon's MFNs as agreements in restraint of trade—alleges that Amazon is a horizontal competitor to its TPSs and that Amazon has reached an agreement on price with these TPS competitors. Compl. ¶¶ 76-77. In its opposition, the District demonstrated how its claims could be sustained under either a *per se* or rule of reason standard. Opp. at 8-17. That is all that is required at the motion to dismiss stage. *PBTM LLC v. Football Nw., LLC*, 511 F. Supp. 3d 1158, 1178 (W.D. Wash. 2021) (while "courts typically need not decide which standard to apply at the pleading stage," they must determine "whether the complaint has alleged sufficient facts to state a claim under at least one" standard of review).

For the first time on reply, Amazon now asks the court to decide now that *per se* treatment could not possibly apply to the challenged conduct.[2] But the decision on whether to apply *per se*

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[1] *E.g.*, *United States v. Apple, Inc.*, 791 F.3d 290, 320 (2d Cir. 2015); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 619 (1975); *Staley v. Gilead Scis., Inc.*, 446 F. Supp. 3d 578, 610-12, (N.D. Cal. 2020); *Sitts v. Dairy Farmers of Am., Inc.*, 417 F. Supp. 3d 433, 472-76 (D. Vt. 2019); *Nat'l Recycling Inc. v. Waste Mgmt. of Mass., Inc.*, No. 03-12174-NMG, 2007 WL 9797531 at *7 (D. Mass. July 2, 2007).

[2] In its opening brief, Amazon erroneously assumed that the District dropped its *per se* claim. Having been disabused of this error, Amazon now claims the Court must summarily deny any

or rule of reason should not be made on a motion to dismiss, and "is more appropriate on a motion for summary judgment." *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012). Even on substance, Amazon's arguments against *per se* treatment fail. First, Amazon argues that it is not a horizontal competitor to TPSs in the online marketplace market, but that purposely misses the point—Amazon is a horizontal competitor with TPSs in each individual retail product market. Reply at 9; Compl. ¶ 76. Second, and notwithstanding Amazon's additional arguments on concerted action discussed *infra*, the District's opposition details how Amazon's PPP and FPP constituted concerted action in restraint of trade, thus meeting all of the elements to demonstrate *per se* unlawful conduct in violation of the Antitrust Act. Opp. at 8-10.

Amazon also argues that courts apply the rule of reason where both vertical and horizontal relationships are alleged. But, unlike Amazon's single cited case, in which the plaintiff alleged "both a vertical and a horizontal relationship," the District has alleged only a horizontal relationship between Amazon and its TPSs, no matter how Amazon wishes to recast those allegations. *Beyer Farms, Inc. v. Elmhurst Dairy, Inc.*, 35 F. App'x 29 (2d Cir. 2002) ("Had Beyer alleged a purely horizontal relationship between Elmhurst and Bartlett, Beyer would have alleged a per se violation of § 1 of the Sherman Act.").

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future argument for *per se* analysis on the simplistic argument that the Complaint does not use the words "*per se*". This position is unsupported by any case law in Amazon's brief and is contrary to pleading requirements. *Mowatt v. Nationwide Gen. Ins. Co.*, No. CIV.A. 87-0229, 1987 WL 11704, at *1 (D.D.C. May 21, 1987) (where defendant sought to dismiss plaintiff's claims for failure to plead the correct legal standard, the court found "defendant's argument lacks merit and borders on frivolous" because "[t]here is no requirement that a plaintiff plead the correct legal standard in a complaint"); *Noecker v. S. California Lumber Indus. Welfare Fund*, No. CV0905922DMGSSX, 2010 WL 11479344, at *4 (C.D. Cal. Mar. 23, 2010) (denying motion to dismiss for failure to describe the appropriate standard of review because "there is no requirement that Plaintiff plead the standard of review at all").

B. The Challenged Restraints Constitute Concerted Action.

Amazon misleads the Court that it would be "astounding" to construe contracts between Amazon and its TPSs or FPSs—express, written agreements relating to price—as concerted action. Reply at 10 (citing *Gulf States Reorg. Grp., Inc.* v. *Nucor Corp.*, 822 F. Supp. 2d 1201, 1217–21 (N.D. Ala. 2011)). But Amazon mistakenly relies on case law concerning allegations of *conspiracy,* whereas the District's claims turn on written *contracts.* That distinction is significant: in an antitrust action alleging a contract, "[t]here is no need to show a common purpose in order to prove the absence of independent action" because the contract "amply demonstrates that there was no independence of action." *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81, 92 (S.D.N.Y. 1995). *Compare Gulf States*, 822 F. Supp. at 1224 (N.D. Ala. 2011) (where plaintiff alleged *conspiracy* as concerted action, contract alone did not establish conspiracy).

This is why courts have found contracts standing alone to constitute concerted action where the contract is, itself, the challenged "contract, combination, or conspiracy." *Eskofot*, 872 F. Supp. at 92 (S.D.N.Y. 1995) ("In order to state a cause of action under section one, plaintiff simply needs to allege that there was a contract or combination and that contract or combination resulted in an unreasonable restraint of trade. . . . Plaintiff has alleged specific contracts and combinations that were entered into, and has further alleged that these actions resulted in an unreasonable restraint of trade. Accordingly, defendants' motion to dismiss plaintiff's Sherman Act § 1 claim, pursuant to Fed. R. Civ. P. 12(b)(6), must be denied."); *In re Androgel Antitrust Litig. (No. II)*, No. 1:09-CV-955-TWT, 2018 WL 2984873, at *8 (N.D. Ga. June 14, 2018) (where contract "specifically address[es] the conduct the Plaintiffs argue is unlawful," it constituted concerted action, and distinguishing a conspiracy claim where "contracts were merely *indirect* evidence of a conspiracy" and thus a contract standing alone would not suffice).

C. Amazon's Factual Disputes Cannot Sustain Its Motion to Dismiss.

1. The PPP and FPP Are Not "Categorically Lawful".

The Complaint plausibly alleges that each of the challenged restraints raise prices to consumers. ¶¶ 9, 20, 21, 23, 33, 36, 70; Opp. at 3. Notwithstanding that this is a motion to dismiss where these allegations must be taken as true, Amazon disputes these allegations, claiming that its "policies, on their face, are directed at ensuring that consumers (rather than Amazon) are charged lower prices" such that "the policies are *per se* lawful [and] no further inquiry into their effects is warranted." Reply at 2. Amazon urges the Court to take an approach—granting immunity without any further analysis—that is directly contradicted by Amazon's own cases, where full evidentiary records were developed and examined to determine whether the restraints were lawful. *Kartell v. Blue Shield of Mass.*, 749 F.2d 922, 930-31 (1st Cir. 1984) ("[T]he prices at issue here are low prices, not high prices."); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1111 (1st Cir. 1989).

Amazon misleadingly cites to *FTC v. Qualcomm* (a case decided after trial, not on the pleadings) to claim that allegations of increased price and reduced choice, standing alone, do not sufficiently alleged injury. 969 F.3d 974, 990 (9th Cir. 2020); Reply at 2-3. Amazon omits the next sentence in *Qualcomm*, which explains that "diminished consumer choices and increased prices [that] are the result of a less competitive market due to either artificial restraints or predatory and exclusionary conduct" *do* constitute injury. *Id.* That is exactly what the District has pled. Compl. ¶¶ 69-74. Importantly, in *Qualcomm*, the trial court required full discovery and a ten-day trial to determine whether injury was proven, underscoring the fact-intensive nature of the inquiry.[3]

[3] Amazon also disputes the District's allegations explaining how the MMA causes FPSs to raise prices on competing marketplaces. Compl. ¶ 11. Again, Amazon hopes to avoid analysis of the actual effects of its action by challenging the District's well-pled allegations about the effects of its restraint on prices for consumers, creating a factual dispute not resolvable at this stage. Reply

2. Amazon's Labeling of Its FPP as a Price-Gouging Policy Does Not Confer Antitrust Immunity.

Amazon argues that the FPP is a simple price-gouging policy, but price-gouging policies are not somehow *per se* lawful. To the extent Amazon claims the FPP is narrowly tailored to avoid price-gouging, that is at most a proffered pro-competitive justification not resolvable on a motion to dismiss. *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1133 (N.D. Cal. 2005) (defendant sought to dismiss a case based on proffered pro-competitive justification and court ruled that "[w]hatever the merits of these [procompetitive] arguments, they are intrinsically factual, contrary to plaintiffs' pleading and inappropriate for resolution at the motion to dismiss stage").

3. The District's Product Markets Are Plausibly Alleged.

The remainder of Amazon's brief furthers the same factual disputes as were raised in Amazon's opening brief and already addressed in the District's opposition. First, Amazon continues to raise factual disputes about whether online and physical retail are substitutes, ignoring the District's well-plead allegations explaining why they differ in kind (Opp. at 12, Compl. ¶¶ 41-49) and the numerous courts who have found online and physical retail distinct markets. Opp. at 13. Second, Amazon disingenuously argues that it does not know the retail markets in which it operates, and ignores that market power allegations are not required to state *a per* se agreement on price between Amazon and its TPS competitors. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000). Finally, Amazon pushes the Court to ignore the District's allegations regarding the anticompetitive effects of the MMA on the online marketplace market, claiming that only effects in the buyer market would "count" for purposes of antitrust violations. There is no basis for this absurd proposition and Amazon provides none.

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at 6-7. Amazon uses the MMA to control pricing on competing online marketplaces and raise rivals' costs, which is anticompetitive. Opp. at 21.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January 2022, a true and correct copy of the foregoing Surreply in Opposition to Defendant Amazon.com, Inc.'s Motion to Dismiss Amended Complaint was served on counsel for Amazon by the court's electronic filing service.

Dated: January 28, 2022

/s/ Swathi Bojedla
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Attorney for Plaintiff