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D.C. Superior Court
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Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
NOTICE OF APPEAL (_____ CROSS APPEAL)
TAX, CIVIL, FAMILY COURT - (EXCEPT JUVENILE CASES), AND PROBATE

Superior Court Case Caption: District of Columbia v. Amazon.com, Inc.

Superior Court Case No.: 2021 CA 001775 B

A. Notice is given that (person appealing) the District of Columbia is appealing an order/judgment from the:

☐ Tax Division ☑ Civil Division ☐ Family Court ☐ Probate Division

1. Date of entry of judgment or order appealed from (if more than one judgment or order appealed, list all):
March 18, 2022 (oral ruling granting motion to dismiss); August 1, 2022 (written ruling denying post-judgment motion)

2. Filing date of any post-judgment motion: April 14, 2022

3. Date of entry of post-judgment order: August 1, 2022

4. Superior Court Judge: Judge Hiram Puig-Lugo

5. Is the order final (*i.e.*, disposes of all claims and has been entered by a Superior Court Judge, not a Magistrate Judge)? ☑ YES ☐ NO

If no, state the basis for jurisdiction: _____

Has there been any other notice of appeal filed in this case: ☐ YES ☑ NO

If so, list the other appeal numbers: _____

6. If this case was consolidated with another case in this court, list the parties' names and the Superior Court case number: N/A

B. Type of Case: ☐ Civil I ☑ Civil II ☐ Landlord and Tenant ☐ Neglect

☐ Termination of Parental Rights ☐ Adoption ☐ Guardianship ☐ Mental Health

☐ Probate ☐ Intervention ☐ Domestic Relations ☐ Mental Retardation

☐ Paternity & Child Support ☐ Other: _____

C. Indicate Status of Case: ☑ Paid ☐ In Forma Pauperis ☐ CCAN
(Government)

Was counsel appointed in the trial court? ☐ YES ☑ NO

(COMPLETE REVERSE SIDE)

D. Provide the names, addresses, and telephone numbers of all parties to be served. For persons represented by counsel, identify counsel and whom the counsel represents. For each person, state whether the person was a plaintiff or defendant in the Superior Court. *Attach additional pages if necessary.

Name	Address	Party Status (Plaintiff, Defendant)	Telephone No.
See attached list			

E. Identify the portions of the transcript needed for appeal, including the date of the proceeding, the name of the Court Reporter (or state that the matter was recorded on tape if no Court Reporter was present), the courtroom number where the proceeding was held, and the date the transcript was ordered, or a motion was filed for preparation of the transcript. *Attach additional pages if needed.

Date of Proceeding/Portion	Reporter/Courtroom No.	Date ordered
March 18, 2022	Courtroom 318	March 24, 2022

☐ **Check this box if no transcript is needed for this appeal.**

F. Person filing appeal: ☐ Plaintiff Pro Se ☐ Defendant Pro Se

☐ Third Party/Intervenor ☑ Counsel for Plaintiff

☐ Counsel for Defendant

ATTACH A COPY OF THE ORDER, JUDGMENT OR DOCKET ENTRY FROM WHICH THIS APPEAL IS TAKEN

Kathleen Konopka		495257
Print Name of Appellant/Attorney	Signature	Bar No.

400 6th Street NW, 10th Floor, Washington, DC 20001	202-724-6610
Address	Telephone Number

*Appellant is responsible for ordering and paying the fee for transcript(s) in the Court Reporting and Recording Division, Room 5500. If appellant has been granted In Forma Pauperis status, or had an attorney appointed by the Family Court, *and* transcript is needed for this appeal, appellant must file a Motion for Transcript in Court Reporting and Recording Division, Room 5500. That office number is (202) 879-1009. If that motion is granted, transcript will be prepared at no cost to appellant.

D. Parties to be served with Notice of Appeal

Name	Address	Party Status	Telephone No.
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,	:	Docket No.: 2021 CAB 001775
Plaintiff,	:	
vs.	:	
AMAZON.COM, INC.,	:	
Defendant.	:	
	:	Friday, March 18, 2022
	:	Washington, D.C.

The above-entitled action came on for hearing before the HONORABLE HIRAM E. PUIG-LUGO, Associate Judge, in Courtroom Number 318.

APPEARANCES:

On Behalf of the District:

PAUL T. GALLAGHER, ESQUIRE

SWATHI BOJEDLA, ESQUIRE

HILARY K. SCHERRER, ESQUIRE

HALLI SPRAGGINS, ESQUIRE

Assistant United States Attorneys

22-00806

APPEARANCES (CONTINUED):

On Behalf of the District (Continued):

DAVID BRUNFELD, ESQUIRE, DCOAG

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On behalf of the Defendant:

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Washington, D.C.

C O N T E N T S

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P R O C E E D I N G S

THE DEPUTY CLERK: Calling the matter of District of Columbia versus Amazon.com, Inc., Case No. 2021 CAB 001775. Parties, can you please state your name for the record, starting with plaintiff attorney first?

(Pause.)

THE COURT: Okay, Mr. Gallagher. Please activate your microphone.

(Pause.)

THE COURT: We still can't hear you.

MR. GALLAGHER: Can you hear me now, Judge?

THE COURT: Yes, sir, can hear you now.

MR. GALLAGHER: Paul Gallagher with Hausfeld on behalf of the District of Columbia.

THE COURT: Morning.

MR. GALLAGHER: Good morning.

THE COURT: Will you be lead counsel for the District today?

MR. GALLAGHER: I will be speaking on behalf the District, Your Honor.

THE COURT: Are there any other colleagues with you whom you would like to introduce for the record?

MR. GALLAGHER: Yes, Your Honor. From my law firm, present also is Hilary Scherrer, Swathi Bojedla, and Halli Spraggins.

And from the Attorney General's Office, Kate Konopka, Adam Gitlin, David Brunfeld, Arthur Durst and Jen Jones.

THE COURT: Thank you, Mr. Gallagher.

Is there a counsel present for Amazon?

MR. ISAACSON: Yes, Your Honor. This is Bill Isaacson with the law firm Paul Weiss. I'll be speaking today for Amazon. Two colleagues are listening on the line: Andrew Topal and Kyle Smith.

THE COURT: Thank you, Mr. Isaacson.

This matter is here for an initial scheduling conference. There is a pending motion to dismiss.

Is there anything that you would like to add to your written request, Mr. Isaacson?

WRITTEN REQUEST ADDITIONS - DEFENDANT

MR. ISAACSON: It's always difficult to say we haven't said something before. So we principally would want to answer any questions that you have. I'm also -- would be happy to summarize the argument if you, if you would like. But I -- I'm not here to tell you that there's something that we haven't written down.

THE COURT: All right. Thank you.

How about you, Mr. Gallagher, anything you would like to add to your written submissions?

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WRITTEN REQUEST ADDITIONS - PLAINTIFF

MR. GALLAGHER: Your Honor, can I confirm that the Court has received the Notice of Supplemental Authority that we filed this week?

THE COURT: Let me double check.

MR. ISAACSON: And there's also a response to that Authority, Your Honor.

THE COURT: Yes, I do have that. Anything else, Mr. Gallagher?

MR. GALLAGHER: There is, there is one point in particular with regard to that Notice of Authority that we would, we would like to emphasize.

The Seattle Federal Court largely agreed with the similar arguments that we're making here as to why Amazon's motion to dismiss should be denied. The one area where it did not agree was with regard to the plaintiff's per se claims in the federal -- federal case.

That decision by the Federal Court does not support a dismissal of the per se claims here in this Court. The Seattle Court specifically concluded that the plaintiffs had not sufficiently pled horizontal competition between the third-party sellers and Amazon.

And in particular, if I can quote two sentences from that opinion. It says, "Plaintiffs are not challenging Amazon's conduct as a competitor to its third-party sellers.

Indeed, plaintiffs provide no factual allegations to support how Amazon and its third-party sellers agree on how they compete with one another in online sales."

Now by contrast, the District has included extensive and detailed factual allegations that indicate how the third-party sellers and Amazon are horizontal competitors: both with, with regard to the online marketplace market and the individual product markets.

So our complaint is significantly more detailed than in the federal case. So the District has satisfied the per se requirements. It has shown an unreasonable agreement to restrain price -- to restrain price competition between horizontal competitors.

And there's two, two legal notes I would, would make at -- which are the last two points on this, on this issue, Judge. Plaintiffs are not even required to allege what standard they are bringing any trust claims on in their complaint.

And in addition, relatedly, Court's discourage any dismissal of per se horizontal claims in situations where other -- well if reason claims are being allowed to move forward, and we would suggest that that's the appropriate approach here, especially because allowing the per se claims to proceed will not impact the litigation overall, at all. Especially discovery. Discovery will be virtually the same

whether or not the per se claims are dismissed or allowed to proceed.

So for that reason, we would suggest that this case is different on the per se claims than the federal Seattle decisions.

THE COURT: How does the federal law involve the, the Seattle litigation compare to D.C. Code Sections 28-4502 and 28-4503?

MR. GALLAGHER: They are virtually identical, Your Honor. And as part of D.C.'s anti-trust statute, it specifically has a provision that urges courts in the District of Columbia to reference federal anti-trust decisions in making its decisions.

THE COURT: All right. Thank you.

Mr. Isaacson, your response to Mr. Gallagher's --

MR. ISAACSON: Yeah. Yes, Your Honor. So a couple points.

First of all, with regards to the issue of per se and rule of reason and the differences between the complaint, it's incorrect that this complaint contains -- different for any allegations as to how these -- how third-party sellers and Amazon compete with respect to the most favored nations clause. In fact, this complaint at Paragraph 39 defines a market of online marketplaces where parties are providing services for hosting. In other words,

a marketplace.

And so here, a third-party seller can be host on this. Amazon and third-party sellers are not alleged to be competing with one another with regards to hosting services. They are alleged to be competing with one another for the -- for purposes of selling products to consumers.

In addition, the, the District of Washington Court did not stop at that point. It made very clear that the relationship that's at stake here is the MFN, which according to the complaints and according to this complaint, is imposed by Amazon on sellers. It says in several points in the complaint, including Paragraph 5, in order to sell their products. Paragraph 9, third-party sellers must agree. There's paragraphs about enforcement. That this is imposed as a condition. These are the words of the complaint. There's a condition for being in the Amazon store. That is precisely the relationship that the District Court in *Frame-Wilson* said is a vertical relationship; therefore, imposing the rule of reason.

And moreover, the District Court in *Frame-Wilson* went on to say even if this is partially vertical and partially horizontal, the case law is very clear in that case that you apply rule of reason standards. That's what Judge Huvelle also said in the *McCormick* case in the District of Columbia in the -- in the District Court for the

District of Columbia, that when you -- and deciding on a motion to dismiss, Judge Huvelle -- and this gets into the second point that Mr. Gallagher raised -- should you decide that, that the motion to dismiss stage, we have cited a number of cases. This would now include the *Frame-Wilson* case, but it also includes Judge Huvelle in the *McCormick* case that says you should resolve this at the motion to dismiss stage.

And the argument that the discovery won't be different -- look. It's going to cost us a lot of money to brief and have expert witnesses on whether this should be a per se or a rule of reason case. It's going to take Court time; it's going to take litigation time. And just going to the standard for a motion to dismiss, you don't get to proceed with an invalid claim because of the argument as to how much incremental discovery will be permitted. That's not a reason for allowing a claim to go forward.

On the *Frame-Wilson* case, we would also point out this *Frame-Wilson* Court does not address the issue raised in the motion to dismiss here, as to that fair pricing policy only applies to prices that are significantly higher on, on -- on the Amazon platform. It is literally not a most favored nation's provision as written.

Sellers under the plain language of this can do what the District wants. They can go sell a product at a

lower price on another site than -- and even if the other site charges the lower commission that's alleged in this complaint, they can do exactly what -- under the fair pricing policy this says it cannot be construed as a most favored nation provision. And that's important because the most -- the only pricing policy that is actually alleged to have -- be based on parity ended in 2019.

So the scope of this case is going to be heavily decided on -- and the number of witnesses, the amount of discovery, the amount of documents, document custodians, will heavily depend upon whether this -- whether they could go forward with a fair pricing policy, but it doesn't say what they say it says.

In addition, we point out there's no concerted action and we would -- and with regards to market definition, the market definition here as briefed by the District has not been satisfied. The legal standard that has been advanced by the District is the *FTC versus Whole Foods* case. And that case requires something that is not only not present here, it is the opposite of what is alleged here.

What is alleged -- they alleged that they can have a market of millions of products and hundreds of millions of consumers and -- and the stores that service all of those. This is the equivalent of saying there is a market for all

brick-and-mortar retail in the United States and that an Old Navy competes with Whole Foods, which competes with your shoe store, which competes with your bookstore.

They haven't plausibly alleged such a thing and it's not possible to because under the legal standard that they offer, the *Whole Foods* case, you must show "A core group of particularly dedicated, distinct customers paying distinct prices for whom only a particular package of goods or services will do."

This complaint alleges the opposite. It's all consumer products and services. Hundreds of millions of consumers, according to the complaint, purchasing millions of third-party sellers "virtually unlimited range of products. This is a market of sellers online of a virtually unlimited range of products."

That's Paragraphs 3, 43 and 57 of the complaint. That cannot be sustained under the -- under the federal law from cases in the District of Columbia that has been offered by the District. So if they can't satisfy the legal standards that they have advanced, there is no reason for this complaint to proceed.

And I guess I should say as a matter of -- in terms of making sure that the record is clear, before the filings on supplemental authority, there was a motion for a sur-reply which was granted. And we had filed an opposition

to that, but said in the alternative, we would like to the Court to consider our response to the sur-reply, which was attached to our motion. And we want to make sure the Court has that.

THE COURT: Yes, sir. Let me ask you -- I'll begin with you, Mr. Isaacson, and then Mr. Gallagher. For our purposes, what is the definition of a monopoly?

MR. ISAACSON: A monopoly would be -- well would be a firm that has the power in a relevant market to increase prices above a competitive level or reduce supply below a competitive level. That would be market power and monopoly also would have -- would have that ability and would have control over the market and have the ability to exclude competitors.

THE COURT: Mr. Gallagher, do you agree or disagree with that definition?

MR. GALLAGHER: I don't know if I would agree with all of it as far as it went. I would say it's a little simpler than it is simply, simply a entity that has market power above a certain threshold in a defined relevant market that gives it the ability to charge super competitive prices.

THE COURT: And what is that threshold, Mr. Gallagher?

MR. GALLAGHER: It varies by Courts, Your Honor.

And there is a distinction between where Courts find that a company has market power as opposed to where the Courts find that a company has monopoly power. In the -- for market power, it's in the range of 30 percent or above. And for monopoly, it can be 50 percent or above. But again, different Courts look at that differently. And you'll get different economists also who will give you different percentages.

MR. ISAACSON: That's a very fair statement that you will get different statements from Courts and economists on that, Your Honor. The, the other factor is to what extent there are barriers to entry in the market. So some Courts will put emphasis on market share, but there's also the issue of whether firms can move in and out of the market easily with -- with -- regardless of market share.

THE COURT: And which definition has been adopted in the District of Columbia since both of you say that it varies between Courts?

MR. GALLAGHER: I don't know if you could say that the District has adopted a specific standard. Generally that's not have I seen Courts approach the issue. They don't only consider the percentage of the market that a particular company dominates, but they also consider what the actual market is. What the -- what the conduct is that the participant is engaged in to protect its monopoly. And

that's why this is such a big concern, because we have to remember what the context of this lawsuit is, you know, we kind of lose the forest for the trees when we get into what the standards are and slicing things very, very thin.

This a case in which Amazon, a $1.6 trillion company, is seeking to choke off any efforts by competitors in the online marketplace to compete with Amazon. And that is why other significant companies' online markets including eBay and Walmart and Target have barely gotten to the, you know, let's call it 5 percent level. And why Amazon, despite any competition or competition that should be occurring, Amazon's market share has been increasing dramatically over the last five years from something in the range of 38 percent to as much as 70 percent now.

And what that enables Amazon to do is --

THE COURT: Okay. I think you're going beyond my question, Mr. Gallagher. My question was whether -- first I asked for the definition of monopoly. And then when you used the word threshold, I inquired about the threshold in the District of Columbia. And from what you're telling me, there doesn't appear to be a specific threshold that's been -- set by the local courts, correct?

MR. GALLAGHER: Correct, Your Honor.

THE COURT: Okay. Now following up on where you were headed, Mr. Gallagher, what was Amazon's -- how much of

the online marketplace did Amazon control at the beginning of 2020?

MR. GALLAGHER: There are different estimates because Amazon itself does not tell the public what its online market share is. So there are different sources who come up with different figures. There are no figures that I have seen that any source has indicated below 50 percent.

And for example, in the House Congressional Subcommittee Report relating to big tech, they said that it was somewhere -- it could be approaching as high as 70 percent.

THE COURT: Okay. And what was the date of that report?

MR. GALLAGHER: It was mid-last year if I'm not mistaken, Your Honor.

THE COURT: So mid-last year would have been mid-2021?

MR. GALLAGHER: Right.

THE COURT: And the question was what was their market share in March 2020. Do you have that information?

MR. GALLAGHER: Not specifically. It would have been slightly below that, but growing.

THE COURT: How much slightly?

MR. GALLAGHER: Slightly by a few percentage points.

THE COURT: Okay. Thank you. Let me check in with Mr. Isaacson.

Mr. Isaacson, what was, to your knowledge, Amazon's share of the online marketplace as of March 2020?

MR. ISAACSON: I have not looked at that for purposes of this hearing, Your Honor. And I would not want to give you a number off, off the top of my head. I've -- I've certainly read things at different points, but I'm not prepared for that.

THE COURT: Now Mr. Gallagher, as I understand it, the District is making four claims in its complaint. Claims 1 and 2 relate to D.C. Code Section 28-40 -- 4502. And Claims 3 and 4 relate to D.C. Code Section 28-4503; is that correct?

MR. GALLAGHER: Yes, Your Honor, that's correct.

THE COURT: The first one alleges agreements in -- in restraint of trade based on the -- and arrangements set up with the third-party suppliers initially through the price parity provision and subsequently through the fair pricing policy. Is that correct?

MR. GALLAGHER: That's correct. Count 1 deals with the (indiscernible).

THE COURT: Okay. And Count 2 deals with the minimum margin agreement that Amazon uses with the -- I guess that would be their, their suppliers, right?

MR. GALLAGHER: That's correct.

THE COURT: All right.

MR. GALLAGHER: The first-party sellers. Correct.

THE COURT: Fist-party sellers, okay. Now Claim 3 alleges maintenance of -- the legal maintenance of monopoly, and Claim 4 attempted monopolization. Is that correct?

MR. GALLAGHER: That's correct, Your Honor.

THE COURT: Okay. Bear with me. Now gentlemen, let's take a look at the Amazon Fair Market -- Amazon Marketplace Fair Pricing Policy. And it is Exhibit D, page 65 of the motion to dismiss. And I'll read in its entirety beginning with the title.

"Amazon Marketplace Fair Pricing Policy. Sellers are responsible for setting their own prices on Amazon marketplaces. In our mission to be" -- or "its most customer centric company, Amazon strides to provide our customers with the largest selection at the lowest price and with the fastest delivery the sellers play an important role.

"Amazon regularly monitors the prices of items on our marketplaces, including shipping cost and it compares them with other prices available to our consumers. If we see pricing practices on a marketplace offer that harms customers' trust, Amazon can remove the buy box, remove the offer, then the ship option. Or in serious or repeated

cases, the spending or terminating selling privileges.

"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 are significantly higher than recent prices offered on or off Amazon, or selling multiple units of a product perform more per unit than that of a single unit of the same product; setting a shipping fee on a product that is excessive.

"Amazon considers current public carrier rates reasonable handling charges, as well as buyer perception when determining whether a shipping price violated our fair pricing policy."

Is that the entirety of the fair pricing policy, Mr. Gallagher or is there more?

MR. GALLAGHER: No, Your Honor. I believe you've gotten all of it.

THE COURT: Where does that policy say that there's an agreement to set a minimum price?

MR. GALLAGHER: So the second bullet is what we're focused on where it says setting a price on a product or service that is significantly higher. So consistent with, for example, the *Delta Dental* case, the fact that third-party sellers are required to agree to this in order to do business with Amazon removed any independence from the

parties. They are now cooperating. They have reached an agreement.

And with regard to the, the use of the word significantly, that is -- that word is different from the previous price parity provision that required that the prices be the same or no lower than. Here Amazon has added a single word to modify what the old provision was. But the, the bottom line is still the same. Amazon and the third-party sellers are reaching an agreement to restrain -- restrain price competition between them. And they are horizontal competitors.

THE COURT: Well let me ask you something. Does the word "lower" appear anywhere in this document?

MR. GALLAGHER: Well I think the -- the opposite of lower does. I don't see "lower," Your Honor. But "higher" does. And our complaint contains detailed allegations indicating that Amazon doesn't implement this policy only when prices are significantly higher. Amazon implements this policy when third-party sellers are selling at any level below the price that they sell on Amazon when they're selling on another platform.

THE COURT: I'm sorry, but it says "significantly higher." I don't see the word "lower" in there.

MR. GALLAGHER: It's the -- it's the converse of that, Your Honor.

THE COURT: Okay. Well speaking about third-party suppliers, I, I believe it's -- I don't know if it's your pleading, but you say that Amazon competes with more than 50 percent of its third-party suppliers, correct?

MR. GALLAGHER: That's correct.

THE COURT: Which means that it does not compete with less than 50 percent of its third-party suppliers.

MR. GALLAGHER: That's correct.

THE COURT: So when we're talking about concerns regarding third-party suppliers being competitors with Amazon, it's more than 50 percent of suppliers, but we don't have -- you don't have, in your complaint, any more definitive information than that, correct?

MR. GALLAGHER: That's correct, Your Honor.

COURT'S RULING

THE COURT: So now that we've looked at the -- at the Amazon Marketplace Fair Pricing Policy, which would apply to entities selling their products through the Amazon Marketplace, whether or not they're engaging in direct competition with Amazon, let's take a look at what the Supreme Court has said is the standard that we use in the circumstances.

And I'm reading from the text of *Ashcroft versus Iqbal*, I-q-b-a-l, Section 4(a) of the Supreme Court's opinion. Just bear with me, I'm pulling it up.

(Pause.)

THE COURT: All right. And I will read beginning with the second sentence in that portion of the Supreme Court opinion. And I will not mention citations along the way, although I might refer to case names as I read this.

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. As the Court held in *Twombly*" -- I don't know if I'm saying that right, but the spelling is T-w-o-m-b-l-y -- "the pleading standard, Rule 8 announces, does not require detailed factual allegations, but demands more than an unadorned the defendant unlawfully harmed the accusation.

"A pleading that offers labels and conclusions for a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint set off a (indiscernible) naked assertions devoid of factual" -- "of further factual enhancement.

"To survive a motion to dismiss, a complaint must contain a sufficient factual matter accepted as true. To state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a

probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

"Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility. Two working principles underlie our decision in *Twombly*. First, the tenet that a Court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitations of the elements of a cause of action support it by mere conclusory statements do not suffice.

"Also for purposes of a motion to dismiss, you must take all of the factual allegations in the complaint as true. We are not bound to accept as true a legal conclusion couched as a factual allegation. Rule 8 marks a notable and generous departure from the hyper-technical code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

"Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the review in Court to draw on its judicial experience and common sense.

"But where the well-pleaded facts do not permit the Court to infer more than the mere possibility of misconduct the complaint has alleged, but it has not shown, that the pleader is entitled to relief.

"In keeping with these principles, a Court considering a motion to dismiss may choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, the Court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.

"Our decision in *Twombly* illustrates the two-pronged approach. There we consider the sufficiency of a complaint alleging that incumbent telecommunications providers that entered an agreement not to compete and to forestall competitive entry in violation of the Sherman Act.

"Recognizing that Section 2 enjoins only anti-competitive conduct effected by a contract, combination or conspiracy, the plaintiffs in *Twombly* flatly pleaded that the defendants had entered into a contract, combination or conspiracy to prevent competitive entry, and had agreed not to compete with one another.

"The complaint also alleged the defendant's

parallel course of conduct to prevent competition and inflate prices were indicative of the unlawful agreement alleged.

"The Court held the plaintiff's complaint deficient under Rule 8. In doing so, it first noted that the plaintiff's assertion of an unlawful agreement was a legal conclusion, and as such, was not entitled to the assumption of truth. Had the Court simply credited the allegation of the conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce.

"The Court next addressed the nub of the plaintiff's complaint, the well-pleaded conclusory" -- "the well-pleaded non-conclusory factual allegations of parallel behavior to determine whether it gave to a plausible suggestion of a conspiracy. Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed, was more likely explained by the lawful unchoreographed free market behavior. Because the well-pleaded facts of the parallel conduct accepted as true did not plausibly suggest an unlawful agreement, the Court held the plaintiff's complaint must be dismissed."

So with that framework, let's revisit what the

Amazon Market Fair -- Marketplace Fair Pricing Policy says. "Sellers are responsible for setting their own prices on Amazon Marketplaces." That is the seller's decision. There are limits regarding higher prices.

Let me go back to the policy. "In our mission to be Earth's most customer-centric company, Amazon strives to provide our customers with the largest selection at the lowest price and with the fastest delivery. Sellers play an important role. Amazon regularly monitors the prices of items on our marketplaces, including shipping costs, and compares them with other prices available to our customers.

"If we see pricing practices on the marketplace that harms customer trust, Amazon can provide" -- "can remove the buy box, remove the offer, suspend the ship option, or in serious or repeated cases, suspending or terminating selling privileges.

"Pricing practices that harm customer trust include, but are not limited to: setting a reference price on a product 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.

"Amazon considers current public carrier rates,

reasonable handling charges, as well as buyer perception when determining whether a shipping price violated our fair pricing policy."

And I will again note that based on what the policy says, sellers are free to set prices within the marketplace provided that those prices -- the only limit is that they cannot set a price that is significantly higher than recent prices offered on or off Amazon.

There's nothing in there -- this fair policy agreement that refers to a floor. And I know that Mr. Gallagher is arguing that significantly higher implies the opposite; it's not there.

MR. GALLAGHER: May I respond, Your Honor?

THE COURT: I'm in the process of ruling, Mr. Gallagher. If you want to add something, you may add it, but I'm in the process of ruling.

MR. GALLAGHER: Okay.

THE COURT: You may proceed, sir.

MR. GALLAGHER: Thank you, Judge.

THE COURT: You may proceed, sir.

MR. GALLAGHER: Your Honor, I think that you're correct, that it is implied. Implicit in this agreement is the fact that if you cannot sell for significantly higher on Amazon, then you cannot sell for -- and, and we'll, we'll, we'll say significantly lower --

THE COURT: Okay, wait a second. I am not -- I am not -- that is your interpretation. That's not what I'm reading here. You're implying that stating a limit on significantly higher prices implies a limit on significantly lower. I don't agree with that. And I don't see that in the text. But you may proceed, sir.

MR. GALLAGHER: Okay. And, and I think it's for this reason that the, the policy itself clearly, by its language, even though it doesn't expressly say so, what it means, a reasonable interpretation of this is you cannot sell for less elsewhere. And that's why, for example, the Federal Court in Seattle allowed the case other than the per se claims to move forward because it found the same claims as we have made here plausible based on the same fair price policy and price parity policy that we, we previously -- that Amazon previously invoked.

So the language of the agreement plus all of the detailed allegations that the District has included in its complaint from third-party sellers that indicate how Amazon implements this policy, that it implements it in an even more restrictive way than the language in the policy, all of that needs to be looked at together to determine whether or not there is a plausible claim of agreement here.

And if I can make one other point. Your, Your Honor quoted extensively from *Ashcroft versus Iqbal*. That

was a conspiracy case. And the question, the, the -- the question about plausibility in that case is whether it is plausible that there was an agreement or is it equally plausible that there was not an agreement. There was not a conspiracy.

Here there is no question that there is an agreement. This is Amazon's policy; the third-party sellers agree to it. The only question is whether or not it should be considered an unreasonable restraint of trade. There is no question there is an agreement here.

THE COURT: Well the Supreme Court also notes the Court and, and in it's -- just so we're clear, the Court we're talking about in -- in that portion of *Iqbal* is *Twombly*, right?

MR. GALLAGHER: Understood, Your Honor.

THE COURT: Okay. It says, "Acknowledging that a parallel conduct was consistent with an unlawful agreement." You say that there's no disagreement here regarding an -- an agreement. And I have no reason to doubt that representation. The Court nevertheless concluded that it did not possibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by lawful and choreographed pre-market behavior.

That is a deference to the parties' rights to enter into contracts and to the acknowledgement that there

are market factors that affect these situations. Yourself has told me that Walmart, Costco, eBay, Target provide online marketplaces. Yourself had told me that a lot of these third-party sellers, separate and apart from selling through Amazon, have their own online marketplaces.

You repeat the conclusion over and over and over again, that there's an agreement to set a floor. I've gone over the policy twice. That language does not appear anywhere on that policy. The word "lower" doesn't appear anywhere on that policy.

So you state a conclusion and then rely on the conclusion that you state to reach another conclusion which is contrary to what *Iqbal* says must be plead to survive a motion to dismiss.

What would you like to say in that regard, Mr. Gallagher?

MR. GALLAGHER: Your Honor, the, the *Ashcroft Iqbal* case arises in a completely -- and *Twombly* as well -- arise in a completely different context where --

THE COURT: The context -- I'm relying on the standard.

MR. GALLAGHER: But --

THE COURT: The fact that this has to do with people who are being held somewhere for whatever reason, does not change in any way, shape or form, the standard that

the Court sets out, which I must use here.

MR. GALLAGHER: Your Honor, I agree with you with regard to the plausibility standard which we believe that we have met and the Court in -- the Federal Court in Seattle found that the plaintiff there met as well.

What I'm saying is that regardless of that language in *Ashcroft* and *Iqbal*, that case arose in a situation where a Court was trying to determine whether plaintiffs who had made allegations of a conspiracy based mostly or entirely on parallel conduct, not a -- not a written agreement, no evidence of agreement at all, other than parallel conduct between competitors.

For example, everybody rosed -- raised their price by $20 within three minutes of each other, okay? That's parallel conduct. And *Ashcroft* and *Iqbal* says where the line is to determine whether or not that parallel conduct can go over and be sufficient to state a conspiracy claim under the anti-trust laws.

THE COURT: I understand that, Mr. Gallagher. And I understand the first time that you made that argument. And I explained to you that --

Is there somebody else trying to pipe in here?

MS. KONOPKA: Your Honor, I'm sorry. Kathleen Konopka. I'm the deputy attorney general over at the public advocacy division of the District of Columbia's Attorney

General's Office.

I was wondering if I could chime in here for a moment. Because I think I might be --

THE COURT: Well no, I'm, I'm -- I'm sorry. This is not a free for all. I'm sorry. We've been at this for about an hour now. And now you decide to insert yourself into this conversation? Is this standard procedure? Please educate me if it is.

MS. KONOPKA: Your Honor, I don't know if it's standard procedure, but I also obviously represent the District of Columbia. Mr. Gallagher is our outside counsel. But I did have some comments on his point that I thought could assist the Court in moving forward on this, particularly in terms of the standard that you're talking about in *Twombly* and *Iqbal*.

So if I could be permitted, I would like to make a couple of comments.

THE COURT: Mr. Isaacson, do you have any objection?

MR. ISAACSON: I don't. I'm used to the procedure if there's counsel making an argument. And if Ms. Konopka was going to be making that argument, that was perfectly fine. If this -- if she's allowed to argue, I don't know how many other people are arguing, so --

THE COURT: I think -- that's the thing. There's

at least eight people here representing the District and it's not like each of you is going to have your two cents.

MS. KONOPKA: I understand that, Your Honor. But everyone else for the District reports to me. So I, I promise you that there won't be --

THE COURT: That, that does not -- it does not make a difference, Ms. Konopka.

MS. KONOPKA: I understand that. I, I promise I'll be the only one chiming in here. But if you could permit me to make a couple of comments on the standard that you indicated.

THE COURT: Please proceed.

MS. KONOPKA: Thank you, Your Honor. Yeah, I wanted to comment on the standard because what *Iqbal* and *Twombly* were both wrestling with was not the free market ability of folks to contract, but rather the difference between unilateral conduct and concerted conduct because the two of those are dealt differently under the anti-trust laws.

And so the question in both of those was whether there was sufficient evidence of an agreement, period. Not whether that, that agreement was subject to free market forces or otherwise. The first question is whether there's an agreement, because that means that it'll be subject to Section 1 of the anti-trust laws rather than Section 2.

And so what the struggle there was, was whether there was sufficient evidence of an agreement. As Mr. Gallagher has indicated, that's not a question here. And I think the Court is agreeing with that; that there is clearly an agreement here between Amazon and the third-party sellers to commit to this policy that specifically indicates that the third-party sellers cannot sell for significantly higher on Amazon than they sell for those products on other competing marketplaces. That means, as a truism, that they can't sell on those other marketplaces for significantly lower, even though those other marketplaces have lower fees, so they could profitably do so.

We also have to think about the detailed factual allegations in our complaint about the implementation of this policy. We have detailed factual allegations that third-party sellers have received sanctions based on any lower price on any other vehicle in the marketplace. Not even anything that's significantly lower, but anything that's lower, period. They are alerted and they are -- they are basically told that they can't do that, and that they will receive sanctions if they continue to do that.

And we also have detailed factual allegations that those sanctions and those warnings by Amazon have prompted third-party sellers to raise prices on those other vehicles. And what that does essentially mean, Your Honor, is that

there is a price floor across these marketplaces. It means that whatever the Amazon price is, and that includes the higher fees and commissions that Amazon charges due to its market power, that means that that price becomes the floor. Because if any third-party seller tries to sell their products on another marketplace for lower, they are going to be warned and then sanctioned by the 800-pound gorilla that is Amazon.

And so I do think that what we have here is we have detailed factual allegations of not only a written agreement, but a written agreement that is implemented in a way that creates a price restraint that is clearly anti-competitive.

I also think that at the very least, the detailed factual allegations that we have supplied entitle us to discovery because we have clear indication of horizontal competition here. We know that Amazon competes with at least 50 percent of its third-party sellers, but we actually think they compete with a lot more.

We also know that not only do they compete as a retailer with their third-party sellers, but they compete as a marketplace because a lot of those third-party sellers have their own marketplaces.

And so what we have here is a significant horizontal relationship with these two entities with Amazon

and their third-party sellers. And we have a price restraint. And that specifically is sufficient evidence to meet both the Section 1 Claim and then the Section 2 Claim based on Amazon's market power.

Thank you, Your Honor. And I do apologize for the out of order procedure.

MR. ISAACSON: Your Honor, do you want me to respond or -- I don't know what you want at this point.

THE COURT: Just a second, please. I'll be right with you.

Let me just address the first point that Ms. Konopka makes because apparently, I'm not being clear in what I see in *Ashcroft v. Iqbal*. I understand that there is no dispute here that there was an agreement. But the fact that there was an agreement is not dispositive because in *Twomby* -- *Twombly*, the Court found that the agreement could be explained by lawful, uncaragraphed -- unchoreographed free market behavior. And the Supreme Court said it was okay for the Court to have done that.

So my focus here is not on whether or not there was an agreement, lawful or otherwise, because there's no dispute that there was an agreement. Some people might agree whether it's legal or not. My focus here is on the latter part of that analysis that the Supreme Court decides in *Iqbal*. Specifically, whether it could be "explained by

lawful, unchoreographed free market behavior."

So regarding the second point that Ms. Konopka makes, Mr. Isaacson, what would you like to say in that regard?

MR. ISAACSON: The second point being that the factual -- factual information, is that what you're referring to, Your Honor?

THE COURT: Well --

MR. ISAACSON: I didn't, I didn't number her responses.

THE COURT: Well she was talking about that there are allegations that third-party suppliers receive notice that they would be sanctioned if they -- if they went below a certain price level, even if though the policy doesn't say that.

MR. ISAACSON: I --

THE COURT: Even though the District does not identify other than a -- in a generally -- in a general conclusive way that concern.

MR. ISAACSON: Gotcha.

THE COURT: They -- there's no -- there is no identification of who that is, or to what extent, or how it happened, or when it happened, or how it came to be about. So what would you like to say in that regard, Mr. Isaacson?

MR. ISAACSON: Yes. I was -- I was surprised by

-- I was surprised by both statements, and they relate to one another. I was surprised by the statement that there's specific allegations if any third-party seller, who was told under the third-party -- I was told under the -- at the fair pricing -- fair pricing policy that you can't charge at the same price. That it was not significantly -- as, as the rule.

There is not a seller named on this, there's not a (indiscernible) named in this. All there is, is conclusion -- is -- are conclusory allegations that that's going on. And that goes back to then *Iqbal* interpreting the prior Supreme Courts cases that you were -- that you were talking about.

And I was surprised to hear counsel say that those cases would be confined by the facts. They are universally accepted as setting the standard for pleading in both -- in anti-trust cases, in all types of anti-trust cases and in non-anti-trust cases.

Conclusory allegations are insufficient. And the fair pricing policy says what it says. They want it to say something different. And that policy was not interpreted in the *Frame-Wilson* decision. In fact, the *Frame-Wilson* decision pointed to an allegation in that case that's not here that somehow Amazon was requiring sellers to add commissions for sales off of Amazon. That's not an

allegation that's made here, and I think it's literally not -- not made here because everybody knows that's not true and wouldn't be plausible.

The fair pricing policy does not, as the Court has said, do what this complaint suggests it would do. Therefore, the allegations in the complaint are not plausible when they say this is not -- that this is not competitive. It would be -- we make the same argument if you remove the word significant. It still would not require, because this is talking about consumer prices, and not in a situation like *Delta Dental* where a firm is bargaining for its own prices, we're talking about consumer prices. It falls into the cases that we have cited, such as *Cartel*, and, and then Judge Breyer. These are, these are within the scope of what firms are allowed to freely negotiate and do.

THE COURT: Thank you, Mr. Gallagher (sic). Anything else, Mr. Isaacson at this point?

MR. ISAACSON: No, Your Honor.

THE COURT: Okay. Just a second, please.

MR. ISAACSON: Oh, Your Honor, can I say one thing? Just for the record.

THE COURT: Yes, sir.

MR. ISAACSON: It's been said several times that everyone agrees there's an agreement. And I have not

spoken. There are agreements between individual third--party sellers and Amazon when they entered the business solutions agreement.

There aren't agreements amongst the third-party sellers. There aren't agreements among Amazon and many third-party sellers. So I don't -- I didn't want that language somehow -- someday to be quoted against me.

THE COURT: Understand. Okay. Just give me a second, please.

(Pause.)

THE COURT: Let me just say a couple of things. Because I know that there's that citation to the ProPublica article. There's a letter that Senator Blumenthal wrote to the -- I believe it was the anti-trust subcommittee. And there's some reference to some statements made at the European Commission that date back to 2013.

Let me start with the last one. Those statements had to do with an opinion. A legal conclusion reached in that forum based on British and German law. A legal conclusion is not a fact. ProPublica reports that Amazon prioritizes profits over customer service. That is their conclusion. That is their opinion. That is not a fact.

Senator Blumenthal expresses some reservations about that -- that may require an investigation under the Sherman Act. May sounds more like possibly than plausibly

what is the language that *Iqbal* discusses in the Supreme Court discusses in the *Iqbal* opinion.

I do not see, other than conclusions, where in its complaint the District of Columbia alleges an anti-competitive effect. It claims that the real-world impact of the MFN relationship is higher prices; that is a conclusory allegation. It points out that other stores charge lower fees and commissions than Amazon.

That's how the market works. If there are other stores, website and marketplaces that charge lower commission, then they can go to those stores, websites, and markets. Nobody's forcing them to do business through Amazon. The fact that Amazon's competitors charge lower fees and commissions underscores the fact that there's a marketplace behavior involved here, and it contradicts the claim that Amazon's policies are creating a floor for products sold through other retail channels.

Other than the conclusion that that's happening, there's no fact presented to support that claim sufficient to survive the standard in *Ashcroft versus Iqbal*. So I do find that because the District's complaint fails to allege anti-competitive effects from these policies, assuming from the sake of argument that they're true, the motion to dismiss should be granted.

I will not rule on the other basis for the motion

to dismiss since I conclude that dismissal is, is appropriate based on that factor, I don't need to reach them.

Have a good day. Parties are excused.

MR. GALLAGHER: Thank you, Your Honor.

MR. ISAACSON: Thank you, Your Honor.

THE COURT: Thank you.

Call the next matter on the calendar, please.

(Thereupon, this concludes these proceedings.)

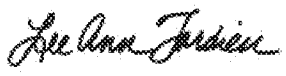
* * * * *

CERTIFICATE OF TRANSCRIBER

I, LEE ANN TARDIEU, do hereby certify that in my official capacity, I prepared from electronic recordings the proceedings had and testimony adduced in the matter of: DISTRICT OF COLUMBIA v. AMAZON.COM, INC., Docket Number: 2021 CAB 001775, in said Court on the 18th day of March, 2022.

I further certify that the foregoing 42 pages were transcribed to the best of my ability from said recordings.

In witness whereof, I have subscribed my name this the 21st day of March, 2022.



LEE ANN TARDIEU

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA	:	
	:	
v.	:	Case Number: 2021 CA 001775 B
	:	Judge Hiram E. Puig-Lugo
AMAZON.COM, INC.	:	

ORDER

This order addresses the newest chapter of anti-trust litigation between the District of Columbia and Amazon.com, Inc. It began on April 14, 2022, when the District of Columbia filed Plaintiff's Opposed Motion for Reconsideration, or in the Alternative, For Leave to Amend the Complaint or for a Written Order of Decision ("Motion for Reconsideration"). It gathered momentum on April 27, 2022, when the non-party U.S. Department of Justice submitted a Statement of Interest of the United States of America in Support of Plaintiff's Motion for Reconsideration. It became ripe after the Defendant lodged its opposition to reconsideration on April 28, 2022, and the District countered with a reply on May 5, 2022. For reasons below, the Motion for Reconsideration is denied.

Background

On March 25, 2021, the Plaintiff District of Columbia filed its original Complaint against Defendant Amazon.com, Inc. *See* Compl. On July 20, 2021, the Defendant filed an Opposed Motion to Dismiss Plaintiff District of Columbia's Complaint ("First Motion to Dismiss"). On September 10, 2021, the District filed a First Amended Complaint in response to the Defendant's motions. As a result, Defendant's First Motion to Dismiss was denied as moot. *See* Sept. 16, 2021 Order.

The Plaintiff's First Amended Complaint raised four claims against the Defendant. These claims were (1) Agreements in Restraint of Trade (MFNs) In Violation of the D.C. Code § 28-4502, (2) Agreements in Restraint of Trade (MMA) In Violation of the D.C. Code § 28-4502, (3) Illegal Maintenance of Monopoly in Violation of D.C. Code § 28-4503, and (4) Attempted Monopolization in Violation of D.C. Code § 28-4503.

The First Amended Complaint triggered a series of filings from both sides. On October 25, 2021, the Defendant lodged an Opposed Motion to Dismiss Plaintiff District of Columbia's Amended Complaint ("Second Motion to Dismiss"). On December 15, 2021, the District countered with a written opposition. At that point, the parties respectively filed replies and sur-replies on January 21, 2022, February 10, 2022, and February 8, 2022. Subsequently, at a hearing held on March 18, 2022, Defendant's Second Motion to Dismiss was granted and this matter dismissed.

Now, Plaintiff moves the Court to reconsider the dismissal entered on March 18, 2022, grant Plaintiff leave to file a Second Amended Complaint, or to issue a written order of decision to memorialize the Court's March 18, 2022 ruling. The Court will discuss each request separately.

Reconsideration

I. Legal Standard

"Although the trial court rules do not expressly provide for motions to reconsider . . . we have observed that they are in fact entertained from time to time" and filed pursuant to Rule 59 or Rule 60. *Williams v. Vel Rey Properties, Inc.*, 699 A.2d 416, 419 (D.C. 1997).

D.C. Super. Ct. Civ. R. 59(e) allows a party to file a "motion to alter or amend judgment" within 28 days of the entry of judgment. Generally, a motion made pursuant to D.C. Super. Ct.

Civ. R. 59(e) is appropriate where the movant "is seeking relief from the adverse consequences of the original order on the basis of error of law." *Allstate Ins. Co. v. Ramos*, 782 A.2d 280, 285 n.5 (D.C. 2001). However, a trial court may grant a Rule 59(e) motion only to correct "manifest errors of law or fact." *In re Estate of Derricotte*, 885 A.2d 320, 324 (D.C. 2005); Dist. No. 1 – Pac. Coast Dist., Marine Engineers' *Ben. Ass'n v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 278-79 (D.C. 2001). Such motions are committed to the court's broad discretion. *Wallace v Warehouse Employees Union No. 730*, 482 A.2d 801, 810 (D.C. 1984).

D.C. Super. Ct. Civ. R. 60(b) states in relevant part that an order or judgment may be vacated for "(1) mistake, inadvertence, surprise, or excusable neglect; . . . [or] (6) any other reason justifying relief from the operation of the judgment." D.C. Super. Ct. Civ. R. 60(b) (emphasis added). Determining whether a party's neglect is excusable is at bottom an equitable one, taking into account all relevant circumstances surrounding the party's omission. *See In re Estate of Yates*, 988 A.2d 466, 468 (D.C. 2010) (citations omitted). "The disposition of a D.C. Super. Ct. R. Civ. P. 60(b) motion lies within the sound discretion of the trial court. However, because courts universally favor trial on the merits, even a slight abuse of discretion in refusing to set aside a judgment may justify reversal. Each case must be evaluated in light of its own particular facts taking into consideration whether the movant: (1) had actual notice of the proceedings; (2) acted in good faith; (3) took prompt action; and (4) presented an adequate defense. Prejudice to the non-moving party is also relevant." *See Starling v. Jephunneh Lawrence & Associates*, 495 A.2d 1157, 1159 (D.C. 1985) (citations omitted).

"Whether a motion is properly classified as a Rule 59(e) motion or a Rule 60(b) motion 'is determined by the relief sought, not by its label or caption.'" *Amatangelo v. Schultz*, 870 A.2d 548, 553 (D.C. 2005) (quoting *Wallace v. Warehouse Employees Union #730*, 482 A.2d

801, 804 (D.C. 1984) (internal citations omitted)). While Rule 59(e) and Rule 60(b) overlap, the difference lies in

> whether, for the first time, the movant is requesting consideration of additional circumstances; if so, the motion is properly considered under Rule 60(b), but if the movant is seeking relief from the adverse consequences of the original order on the basis of error of law, the motion is properly considered under Rule 59(e).

Wallace, 482 A.2d at 803. Here, Plaintiff is seeking review under both rules, as well as under Rule 15(a). Pl. Mot. at 3.

II. Discussion

In its request for reconsideration, Plaintiff argues that the Court erred by "(i) misinterpreting and misapplying the plausibility standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); (ii) ignoring or failing to accept as true detailed factual allegations in the complaint; and (iii) incorrectly applying *Twombly* and *Iqbal* where there was direct evidence of agreement." Pl. Mot. at 1.

A. Plausibility Standard

First, Plaintiff argues that the Court incorrectly found that Plaintiff's allegations in the First Amended Complaint were too conclusory to be plausible. Pl. Mot. at 7. Plaintiff asserts that the First Amended Complaint "is replete with detailed factual allegations of how the implementation and enforcement of the PPP, FPP, and MMA increases prices, stifle innovation and growth in the online marketplace market, and reduce choice for online consumers." *Id.* (citing to Pl. First Amended Compl. ¶¶10, 11, 34, 62, 64, 71, 73-74, 77). Plaintiff contends that the allegations suffice to defeat a motion to dismiss pursuant to the standards laid out in *Twombly* and *Iqbal*, which Plaintiff claims the Court misinterpreted and misapplied.

The Supreme Court in *Twombly* stated that "Federal Rule of Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal quotations and citations omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds is his entitlement to relief requires more than labels and conclusions . . ." *Id.* (internal quotations and citations omitted). The Supreme Court in *Iqbal* clarified that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotations and citations omitted). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This requirement has become known as the "plausibility standard," which the Supreme Court distinguishes from a "probability requirement." *See id.* The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," but is not akin to a probability requirement. *Id.*

The Supreme Court notes that although a court must accept as true all the allegations contained in a complaint, that acceptance does not extend to legal conclusions nor to "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* Specifically, the Supreme Court states that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678-79. Additionally, the Supreme Court explains that "determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. However, "where the well-

pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.*

"When a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint. Post-*Twombly* appellate courts have often been called upon to correct district courts that mistakenly engaged in this sort of premature weighing exercise in antitrust cases." *SD3, LLC v. Black Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015). The issue of confusing probability and plausibility arose in *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85 (3rd Cir. 2010). In that case, the Third Circuit reviewed a decision where the trial court "opined that judges presiding over antitrust and other complex cases must act as gatekeepers and must subject pleadings in such cases to heightened scrutiny." *Id.* 627 F.3d at 98 (internal quotations omitted). The court in *UPMC* declared that the trial court's "gloss on Rule 8, however, is squarely at odds with Supreme Court precedent," and pointed out that "[a]lthough *Twombly* acknowledged that discovery in antitrust cases can be expensive, it expressly rejected the notion that a heightened pleading standard applies in antitrust cases." *Id.* Indeed, the court interpreted *Iqbal* to "ma[k]e clear that Rule 8's pleading standard applies with the same level of rigor in all civil actions." *Id.*

Closer to home, the District of Columbia Circuit has proclaimed that "[t]o survive a 12(b)(6) motion to dismiss a claim in an antitrust case, plaintiffs must do more than simply paraphrase the language of the antitrust laws or state in conclusory terms that the non-movant has violated those laws." *WAKA, LLC v. DC Kickball*, 517 F.Supp.2d 245, 249 (D.D.C. 2007). However, "because the proof is largely in the hands of the alleged conspirators, dismissal procedures should be used sparingly in complex antitrust litigation until the plaintiff is given

ample opportunity for discovery." *Id* (citing to *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)).

Here, it is essential to review the factual allegations within Plaintiff's First Amended Complaint and determine whether they satisfy the plausibility standard consistent with the pleading requirements set forth in Rule 8.

(1) Count I

In Count I, Plaintiff asserts the presence of Agreements in Restraint of Trade (MFNs) In Violation of D.C. Code §28-4502. *See* First Amended Compl. Section 28-4502 states that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce all or any part of which is within the District of Columbia is declared to be illegal." D.C. Code § 28-4502. To survive a motion to dismiss, Plaintiff "must allege that defendants entered into some contract, combination, conspiracy, or other concerted activity that unreasonably restricts trade in the relevant market." *WAKA, LLC* 517 F.Supp.2d at 250. There is no prohibition on "unilateral or independent conduct by one organization, no matter how anticompetitive it might be." *Id.* "Moreover, an organization cannot conspire with its own officers nor can officers within one organization conspire to restrain trade." *Id.*

Here, Plaintiff alleges that Defendant's Price Parity Provision ("PPP") and Fair Pricing Policy ("FPP"), collectively the Most-Favored Nation agreements ("MFNs"), are agreements with Third-Party Sellers ("TPSs"). Specifically, Plaintiff alleges that the PPP is an agreement that TPSs "would not offer their products through other online marketplaces, including TPS's [*sic.*] own websites, at a lower price or on better terms than TPSs offered their products through Amazon's marketplace." First Amended Compl. ¶5. Plaintiff alleges that TPSs agree to "abide by the FPP, which permits Amazon to impose sanctions on a TPS that offers a product for a

lower price or on better terms through a competing online marketplace." *Id.* ¶9. Plaintiff summarizes that "Amazon and TPSs agree that the TPS will not sell their products through any other online marketplace—including TPSs' *own* websites—for lower prices, or on better terms, than offered through Amazon's online marketplace." *Id.* ¶10.

Thus, Plaintiff contends the MFNs "insulate Amazon from competition as both an online marketplace and as a retailer of products that compete with TPS products, cause prices to consumers across all online marketplaces to be higher than they would be otherwise, and enable Amazon to charge TPSs higher commissions and fees" than would be possible in a competitive market. *Id.* ¶10.

On March 18, 2022, the Court read the FPP on the record to show that its contents did not align with the District's allegations. The language clearly stated that "[s]ellers are responsible for setting their own prices." Def. Mot., Ex. B at 1. The Court explained that "based on what the policy says, sellers are free to set prices within the marketplace . . . the only limit is that they cannot set a price that is significantly higher than recent prices offered on or off Amazon." Mar. 18, 2022 Hearing at 11:12:35-59. The Court explicitly rejected Plaintiff's counsel's argument that the FPP implies a prohibition on TPSs setting lower prices on other online marketplaces. In response, Plaintiff's counsel stated that the

> Language of the agreement, *plus* all of the detailed allegations that the District has included in its complaint from TPSs that indicate how Amazon implements this policy, that it implements it in an even more a restrictive way than the language in the policy, all of that needs to be looked at together to determine whether or not there is a plausible claim of agreement here.

Id. at 11:15:04-36.

Plaintiff's counsel stated that "Amazon doesn't implement this policy only when prices are *significantly* higher, Amazon implements this policy when TPS are selling at *any* level below

the price that they sell on Amazon, when they're selling on another platform." Mar. 18, 2022 Hearing at 10:59:32-55. Interestingly, Plaintiff's counsel's commentary suggested that the agreement is not what results in the alleged price floor, rather it is Defendant's incorrect implementation of the policy.

Next, Plaintiff's counsel recalled the Court's reading of *Iqbal* during the hearing, and distinguished the instant dispute from that in *Iqbal*, arguing that "here, there is no question that there is an agreement, this is Amazon's policy, the TPSs agree to it, the only question is whether or not it should be considered an *unreasonable* restraint of trade. There is no question there is an agreement here."[1] *Id.* 11:16:05-25. The Court responded that "in *Twombly*, the court found that the agreement could be explained by lawful, unchoreographed, free-market behavior. And the Supreme Court said that it was okay for the court to have done that." 11:27:20-28:05. Indeed, *Iqbal* states that even when "[a]cknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that the alleged agreement did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 567).

Here, a plain reading of the FPP and lack of factual details in the complaint do not make plausible, on its face, Plaintiff's claim that MFNs are agreements between Defendant and TPS that TPS "will not offer their products through other competing online marketplaces at prices lower than the prices they offer them on Amazon's online marketplace, setting a price floor below which the product will not be sold online." First Amended Compl. ¶77. It is equally

[1] Defendant's counsel maintains that while there are agreements between individual TPSs and Defendant when the Business Solutions Agreement ("BSA") is signed, there are not agreements amongst TPSs nor among Defendant and "many TPSs." Mar. 18, 2022 Hearing at 11:32:54-33:15.

likely the prices are the result of lawful, unchoreographed free-market behavior. If other online marketplaces charge lower fees than Defendant, including charging lower commission, sellers may simply choose not to sell on Defendant's marketplace. Moreover, the fact that competing online marketplaces offer lower fees or commissions than Defendant only underscores the notion that there is a free market in effect, and further contradicts the claim that Defendant's policies create a price floor. Simply put, the District's repeated assertion of probable facts does not turn them into plausible propositions for purposes of satisfying pleading requirements.

As explained by the Court on March 18, 2022, Plaintiff's reliance on the ProPublica article, Senator Blumenthal's letter to the U.S. Department of Justice and Federal Trade Commission, and statements from European regulators prior to 2013, are misplaced. Mar. 28, 2022 Hearing at 11:33:48-36:04. The ProPublica reports regarding Defendant's prioritization of profits over customer service represents that entity's opinions and conclusion. *Id.*; *see* First Amended Compl. ¶32. Similarly, Senator Blumenthal's opinion that the Sherman Act "may" require investigations is speculative and does not arise to a factual assertion for pleading purposes. *See* Mar. 28, 2022 Hearing at 11:33:48-36:04; *see* First Amended Compl. ¶23. Finally, the statements of European investigators amount to legal conclusions premised on British and German legal frameworks which may or may not be consistent with the legal, procedural and evidentiary requirements applicable in the United States. *See* Mar. 28, 2022 Hearing at 11:33:48-36:04; *see* First Amended Compl. ¶22.

Plaintiff argues in the instant motion that the factual allegations "are indistinguishable from those found to pass muster in the substantively identical private case against Amazon in federal court, *Frame-Wilson v. Amazon, Inc.*, No. 2:20-CV-00424-RAJ, 2022 WL 741878, at *10 (W.D. Wash. Mar. 11, 2022) ("*Frame-Wilson*")." Pl. Mot. at 2. A review of the *Frame-Wilson*

decision does not support the District's contention. Specifically, the allegations in the *Frame-Wilson* Amended Complaint directly quote language from a policy allegedly stating that "any single product or multiple products packages must have a price that is equal to or lower than the price of the same item being sold by the seller on other sites or virtual marketplaces." *Frame-Wilson*, Dkt. #15 ¶7. In contrast, the FPP here contains different language regarding "significantly higher" prices and makes no mention of setting a pricing floor. Thus, the allegations in Count I do not satisfy the plausibility standard required to survive a motion to dismiss under *Twombly* and *Iqbal*.

The Court did not analyze Counts II, III, and IV during the hearing on March 18, 2022 because each claim requires allegations of anti-competitive policies and effects. The claims were dismissed because that condition had not been met. However, for the sake of thoroughness, those pointes are addressed below.

B. Factual Allegations in the Complaint

Plaintiff argues that the Court failed to accept as true the "detailed" factual allegations of anticompetitive effects described in the Complaint. The District misrepresents the ruling it continues to dispute. The problem with the Complaint was that the District recited conclusory statements while failing to identify information which supported the conclusions it reached. The mere repetition of conclusions does not convert conclusions into facts. Nevertheless, the Court finds that all claims should be dismissed due to insufficient factual allegations beyond the failure to allege anticompetitive effects.

(2) Count II

Plaintiff's Count II alleges Agreements in Restraint of Trade (MMA) In Violation of D.C. Code §28-4502. *See* First Amended Compl. Plaintiff alleges that Defendant's Minimum

Margin Agreement ("MMA") are agreements with First-Party Sellers ("FPSs"). Plaintiff explains that FPSs "sell their products to Amazon to sell, either as its own brand or otherwise, as a retailer through its online marketplace." *Id.* ¶11. Plaintiff asserts that the MMA is an agreement "that the FPS guarantees Amazon a certain minimum profit when Amazon sells the products it purchased from the FPS on Amazon's online marketplace." *Id.* Plaintiff points out that if Defendant sells an FPS product at a lower price than would garner the agreed-upon minimum profit, "the FPS must compensate Amazon for the difference," which "can at times result in a FPS incurring millions of dollars in "true up" costs to Amazon." *Id.* Effectively, Plaintiff claims that the MMA incentivizes FPS to "maintain higher prices on other online marketplaces," and "FPSs have raised their prices to competing online marketplaces to prompt the maintenance of higher prices on those marketplaces and even asked those marketplaces to raise prices to online consumers to avoid triggering Amazon's minimum margin protection." *Id.* Plaintiff contends that the "MMA results in reduced competition among online marketplaces and higher prices to consumers." *Id.*

Although Plaintiff's previous oral arguments and instant motion repeatedly assert that the First Amended Complaint is replete with "detailed factual allegations," **the Court could not find (1) the name of any TPS or FPS; (2) the name of any TPS or FPS sale item: (3) the price point for any TPS or PFS item, on either Defendant's marketplace or another online marketplace; or (4) any language of warning from Defendant to a TPS or FPS mentioned in, or appended to, the complaint.** *See* Mar. 18, 2022 Hearing at 11:24:43-57 ("We also have detailed factual allegations that those sanctions and those warnings by Amazon have prompted TPSs to raise prices on those other vehicles."); *id.* at 11:25:31-56 ("We have detailed factual allegations of not only a written agreement, but a written agreement that is implemented in a way

that creates a price restraint that is clearly anticompetitive. . . At the very least, the detailed factual allegations that we have supplied entitle us to discovery."); *id.* at 11:24:18-35("We have detailed factual allegations that TPSs have received sanctions based on any lower price on any other vehicle in the marketplace, not even anything that is significantly lower, but anything that is lower period"). The District simply repeated vague conclusion after vague conclusion devoid of facts to support the vague conclusions it repeatedly stated.

As noted in the Defendant's Opposition, the First Amended Complaint "contained no allegation that any specific product was available at a supra-competitive price in Amazon's store, or in any competing retailer's store, as a result of the parity provision, Fair Pricing Policy, or margin agreements." Def. Opp'n at 3. Further, Plaintiff "failed to plead that any individual wholesaler supplier had the market power to require major retail competitors—e.g., Walmart, Costco, and Target—to raise their retail prices or refrain from matching Amazon's prices." *Id.*

The Court agrees with Defendant, and finds that where Plaintiff *did* name specific products, its assertions were vague and conclusory. First, Plaintiff states that "Amazon and TPS compete to sell certain products directly to consumers (*e.g.*, Amazon sells its own brand of batteries against TPSs who sell Duracell and Energizer batteries on Amazon's and other online marketplaces)." First Amended Compl. ¶7. Second, Plaintiff states that "Amazon sells its own brand of batteries in competition with TPSs that sell their own batteries through Amazon's and other online marketplaces." *Id.* ¶66. "Similarly, Amazon also sells its own brand of mattresses, light bulbs, cookware, computer accessories, luggage, exercise equipment, and motor oil in competition with TPSs." *Id.* ¶67. Plaintiff does not name the TPS allegedly selling these items, does not state on which other online marketplace these items are being sold, and does not even describe the price differentials for the items.

In contrast, the *Frame-Wilson* Amended Complaint provides numerous examples of the detailed factual allegations in comparison to the insufficient allegations made here:

> For example, Amazon competes with third-party seller Adorama, not only when it sells on the Amazon.com platform, but also when Adorama sells on its own website and through Walmart.com, eBay, and Newegg. In keeping with the previous example, when Adorama prices an Apple watch for sale on the Amazon.com platform, it must take into account the seller fees associated with Amazon's platform. Even though it can sell the same watches profitably at a lower price on other platforms, Adorama must raise the price of these watches on Walmart.com, eBay, Newegg, and its own website to comply with Amazon's price constraint.

Frame-Wilson, Dkt. #15 ¶9. Another instance reads, "Amazon third-party seller Molson Hart reports that a $150 item sold on Amazon would make his company the same profit as an item sold for $37 less on his company website." *Id.* ¶12. The seller's company website is then quoted as saying,

> We designed, manufactured, imported, stores, shipped the item, and then we did customer service. Amazon hosted some images, swiped a credit card, and for $40 for a $150 toy.
> This is a core problem. Were it not for Amazon, this item would be $40 cheaper.
> And this is how Amazon's dominance of the industry hurts consumers.

Id.

The FPP in this case does not include analogous language. Similarly, the allegations made in this case do not contain comparable assertions. In fact, the FPP here actually contradicts the language the District ascribes to it, rendering the complaint vague and conclusory.

(2) Counts III and IV

Plaintiff's Count III alleges Illegal Maintenance of Monopoly in Violation of D.C. Code § 28-4503, and Plaintiff's Count IV alleges Attempted Monopolization in Violation of D.C. Code § 28-4503. *See* First Amended Compl. Section 28-4503 states, "[i]t shall be unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person

or persons to monopolize any part of trade or commerce, all or any part of which is in the District of Columbia."

In support of Count III, Plaintiff alleges that Defendant "has possessed monopoly power among online marketplaces in the United States," that the "monopoly power is protected though barriers to entry," and that Defendant has "willfully maintained and enhanced its market power through its anticompetitive and exclusionary conduct." First Amended Compl. ¶¶85, 86, 87. "Through Amazon's agreements with TPSs and FPSs to price their products at artificially high levels on other online marketplaces, Amazon forecloses its online marketplace competitors' . . . ability to compete and gain market share," resultantly harming "consumers, TPSs, FPSs, and competition in the Disrict." *Id.* ¶¶88, 89.

At the hearing, Plaintiff acknowledged the existence of competitive online marketplaces from strong corporate entities such as Walmart, Target and eBay. Still, it quibbled with the percentage of the online market which Amazon.com controls in comparison to its competitors. However, merely controlling a dominant share of the market does not satisfy pleading requirements for anti-trust actions, particularly in pandemic times when online delivery sales have increased. In any event, sellers are free to migrate to other online platforms as market dynamics continue to unfold. This possibility undercuts arguments that probable allegations satisfy the plausibility standard for pleading purposes.

Finally, in support of Count IV, Plaintiff alleges that "Amazon accounts for between 50-70% of all online sales," and has "engaged in anti-competitive conduct, including through its institution, implementation, and enforcement of its MFNs and MMAs." *Id.* ¶¶92, 93. Plaintiff concludes that "there is a dangerous possibility that Amazon will be successful in achieving its goal of obtaining monopoly power among online marketplaces," and that its anti-competitive

conduct has directly and proximately harmed District Residents. *Id.* ¶¶94, 95. This statement is speculative and lacks sufficient factual information to satisfy the plausibility requirement. Indeed, it represents an admission that thirty to fifty percent of the market is beyond Amazon's control and undercuts the plausible conclusion that Amazon is liable for monopolistic practices.

In sum, Plaintiff's complaint provides repeated and conclusory statements devoid of factual information to support its claims of anticompetitive conduct and harm. Therefore, the request to reconsider dismissal of Counts III and IV is denied.

Leave to Amend Complaint

I. Legal Standard

D.C. Super. Ct. Civ. R. 15(a) provides that a party "may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or 21 days after service of a motion under 12(b). D.C. Super. Ct. Civ. R. 15(a)(1)(A)-(B). Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party… the court should freely give leave when justice so requires." *Id.* at 15(a)(3). In determining whether "justice so requires," the Court considers the following non-exhaustive list of factors: "(1) the number of requests to amend; (2) the length of time that the trial has been pending; (3) the presence of bad faith or dilatory reasons for the request; (4) the merit of the proffered amended pleading; and (5) any prejudice to the non-moving party." *See Johnson v. Fairfax Vill. Condo. IV Unit Owners Ass'n.*, 641 A.2d 495, 501 (D.C. 1994) (internal citations omitted).

II. Discussion

Plaintiff moves for leave to amend the First Amended Complaint to add revisions for claims previously dismissed on March 18, 2022, and for which a motion to reconsider is being denied here. "A dismissal pursuant to Rule 12(b)(6) is a resolution on the merits and is

ordinarily prejudicial." *District of Columbia v. Precision Contr. Solutions, LP*, No. 2019 CA 005047 B, 2020 D.C. Super. LEXIS 31, at *12 (D.C. Super. Ct. Jun. 25, 2020) (Park, J.).

Plaintiff's First Amended Complaint was dismissed with prejudice pursuant to D.C. Super. Ct. Civ. R. 12(b)(6). *See* Mar. 18, 2022 Hearing. Since a judgment on the merits as to Counts I, II, III, and IV has issued, and been affirmed here, Plaintiff may not amend the First Amended Complaint to add the additional of modified claims. For these reasons, the motion to file an amended complaint is denied.

Written Order

I. Legal Standard

D.C. Super. Ct. Civ. R. 58 states that "[e]very judgment and amended judgment must be set out in a separate document, but a separate document is not required" in certain circumstances. D.C. Super. Ct. Civ. R. 58(a). For example, an order is not required for judgment under Rule 50(b); to amend or make additional findings under Rule 52(b); for attorney's fees under Rule 54; for a new trial, or to alter or amend the judgment, under Rule 59; or for relief under Rule 60. D.C. Super. Ct. Civ. R. 58(a)(1)-(5).

II. Discussion

The instant Order provides extensive explanation on the Court's March 18, 2022 ruling. Therefore, the request for a written order is moot.

Accordingly, it is this 1st day of August 2022, hereby:

ORDERED that Plaintiff's Opposed Motion for Reconsideration, or in the Alternative, For Leave to Amend the Complaint or for a Written Order of Decision is **DENIED**.

IT IS SO ORDERED.

Honorable Hiram Puig-Lugo
Associate Judge
Signed in Chambers

Copies via CaseFileXpress to all counsel of record.