

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

**DISTRICT OF COLUMBIA’S OPPOSED MOTION FOR RECONSIDERATION, OR IN
THE ALTERNATIVE, FOR LEAVE TO AMEND THE COMPLAINT OR FOR A
WRITTEN ORDER OF DECISION**

Plaintiff the District of Columbia respectfully moves the Court under SCR-Civil 59(e) and 60(b) to reconsider its March 18, 2022 oral Order dismissing in full the District’s Amended Complaint. Reconsideration is warranted because 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. Alternatively, the District requests leave to file its Second Amended Complaint with additional allegations as provided in this pleading and in the attached redline version or for a written Order of decision to facilitate appeal. In support of this Motion, the District relies on the attached Memorandum of Points and Authorities. A proposed order is also attached.

Dated: April 14, 2022

Respectfully submitted,

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12-I(a) CERTIFICATION

On April 13, 2022, undersigned counsel sought consent from opposing counsel to file this Motion for Reconsideration of the Court's Order Granting Amazon.com's Motion to Dismiss. Consent was not obtained.

/s/ Theodore F. DiSalvo
Theodore F. DiSalvo [D.C. Bar 1655516]

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April 2022, a true and correct copy of the foregoing was served on counsel for Amazon by the court's electronic filing service.

/s/ Theodore F. DiSalvo
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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I. Introduction

The Court should reconsider its oral ruling granting Amazon's motion to dismiss because it misapplied the law, ignored important factual allegations in the Amended Complaint ("Complaint"), and engaged in fact-finding contrary to those allegations. Specifically, this is not a case about companies' right to contract or whether it was a rational business decision for them to do so. It is also not about vague allegations of an agreement that may or may not exist based solely on parallel conduct. We know Amazon engaged in explicit written agreements, and it is eminently "rational" for companies to price fix with their rivals. It is also illegal.

Instead, this case is about whether the written agreements acknowledged by the Court's ruling have the potential to or are likely to cause anticompetitive effects. 3/18/22 Hearing Tr. 36:11-23. And, at this stage of the proceeding, the Court is limited to ascertaining whether there is enough factual matter in the Complaint, taken as true, to make it plausible that discovery will ultimately reveal adequate evidence of those anticompetitive effects. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007).

The Complaint alleges the fact that Amazon enforces all three of the challenged agreements by closely monitoring prices on other online marketplaces (including third party sellers' ("TPS") own websites) and threatening sanctions whenever it finds a TPS or first party seller ("FPS") product for a lower price on one of those competing online marketplaces. Compl. ¶¶ 24-25. The Complaint alleges the fact that Amazon's sanctions under these agreements result in TPSs and FPSs either raising prices on competing online marketplaces or removing their products from those marketplaces altogether. *Id.* ¶¶ 62-63. The Complaint further alleges the fact that these actions taken pursuant to the agreements result in the Amazon price, including its high commissions and fees, being the price floor across online marketplaces. *Id.* ¶¶ 50, 62. Finally, the Complaint alleges the fact that the actions taken pursuant to these agreements mean that other online marketplaces

cannot compete with Amazon on price and gain market share, thereby insulating Amazon's monopoly position in the online marketplace market, which enables them to charge the high fees and commissions in the first place. *Id.* ¶ 64. This reduced competition and monopoly maintenance means that consumers pay higher prices on their remote purchases of essential products even as the pandemic continues to make those purchases paramount for many DC residents.

These are factual allegations of common anti-competitive effects: higher prices, less choice for consumers, and insulation of monopoly power. Moreover, these facts are indistinguishable from those found to pass muster in the substantively identical private case against Amazon in federal court, *Frame-Wilson v. Amazon.com, Inc.*, No. 2:20-CV-00424-RAJ, 2022 WL 741878, at *10 (W.D. Wash. Mar. 11, 2022) ("*Frame-Wilson*"), and more fulsome than those that have been sustained in numerous other cases across the country. The Court should follow this ample authority, reconsider its oral ruling, and deny Amazon's motion to dismiss. In the alternative, the Court should grant the District leave to file an amended complaint that offers even more detailed factual allegations and examples of anticompetitive effects that build on the (already sufficient) examples in its original complaint.

II. Standard of Review

Rule 59(e) permits a party to move to alter or amend a judgment no later than 28 days after the entry of a judgment by "seeking relief from the adverse consequences of the original order on the basis of error of law." *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 331 (D.C. 2001) (citation omitted). "[R]econsideration [under Rule 59(e)] is properly granted to correct clear error" and "prevent manifest injustice." *In re Estate of Derricotte*, 885 A.2d 320, 324-25 (D.C. 2005) (citation omitted). A motion for reconsideration is appropriate when the moving party seeks relief "from an improper application of the law to facts found." *Coleman v. Lee Wash. Hauling Co.*, 388 A.2d 44, 46 (D.C. 1978). Rule 60(b) further provides for relief from a final order

based on “(1) mistake, inadvertence, surprise, or excusable neglect; ... or (6) any other reason that justifies relief.” F.R.C.P. 60(b). ““Motions under either rule [59(e) or 60(b)] are committed to the broad discretion of the trial judge.”” *Onyeneho v. Allstate Ins. Co.*, 80 A.3d 641, 644 (D.C. 2013) (quoting *District No. 1 – Pac. Coast Dist. v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 278 (D.C. 2001)). The District respectfully submits that this Court’s ruling constituted clear error.

Alternatively, Superior Court Civil Procedure Rule 15(a) provides that leave to amend a complaint “shall be freely given when justice so requires.” There exists “a virtual presumption that a court should grant leave to amend where no good reason appears to the contrary.” *Johnson v. Fairfax Vill. Condo. IV Unit Owners Ass’n*, 641 A.2d 495, 501 (D.C. 1994) (citation omitted).

III. Procedural History and the Court’s Ruling.

The District filed suit on May 25, 2021, to challenge Amazon’s anticompetitive agreements with TPSs and FPSs and illegal monopoly maintenance. As provided by specific examples and detailed allegations in the Complaint, *e.g.* ¶¶ 10, 11, 34, 62, 64, 71, 73-74, 77, the implementation and enforcement of these agreements result in TPSs and FPSs either raising prices on competing online marketplaces (including their own websites) or removing themselves from those competing online marketplaces altogether to avoid sanctions permitted by the agreements. Thus, Amazon is insulated from competition both as an online marketplace and as a retailer, which illegally maintains its monopoly position over the online marketplace so essential to consumers in the District and elsewhere. The District’s Complaint challenges three agreements: the Price Parity Provision (“PPP”), the Fair Pricing Policy (“FPP”), and the Minimum Margin Agreement (“MMA”).

The PPP, which was in effect until 2019, was an agreement between Amazon and TPSs whereby the “purchase price and every other term of sale [would] be at least as favorable to Amazon Site users as the most favorable terms via” other online marketplaces. Compl. ¶ 20. In

other words, the TPSs, many of which are horizontal competitors of Amazon, agreed *not* to charge *lower* prices on other online marketplaces than what they were charging on Amazon, or conversely, agreed *to charge higher* prices on other online marketplaces than what they were charging on Amazon. Thus, the PPP made the Amazon price the floor and insulated Amazon from price competition from other online marketplaces. *Id.* ¶ 50. Amazon implemented and enforced this agreement by monitoring prices on competing online marketplaces and punishing TPSs found to be selling at lower prices off Amazon. *Id.* ¶ 24. Because other online marketplaces charged lower fees than Amazon, TPSs have affirmatively asserted they could and would have sold their products at lower prices on those sites but for their agreements with Amazon not to do so. *Id.* ¶ 36.

In the face of antitrust scrutiny by governmental regulators, Amazon replaced the PPP with the FPP, which, as implemented and enforced, results in the same reductions in competition and choice and raises in price as the PPP. The FPP pays lip service to regulators' concerns by prohibiting TPSs only from "setting a price on a product or service [on Amazon's platform] that is *significantly higher* than recent prices offered on or off Amazon." *Id.* ¶ 21 (emphasis added). However, as TPSs tell us (*id.* ¶¶ 24-25), the FPP as implemented and enforced imposes the same price floor as the PPP, because Amazon uses it to punish TPSs for charging prices that are lower (by any amount) on other online marketplaces, or conversely, for charging prices that are higher (by any amount) on Amazon. *Id.*

For example, if Amazon's fees are \$1.50 and another site's fees are \$1.00, a TPS must sell a product that costs it \$10 for \$11.51 to be profitable on Amazon but need only sell that same product for \$11.01 on another site to be profitable. But Amazon, pursuant to the FPP, will punish that TPS if it sells for less than \$11.51 on *any* other website. In this way, the FPP operates just as the PPP did. Notably, because Amazon has higher fees than other online marketplaces, the FPP

(and PPP before it) forces TPSs to increase prices elsewhere, rather than decrease prices on Amazon. In the prior example, if the TPS were to sell for \$11.01 on another site, the TPS would have to also sell for \$11.01 on Amazon, which, after accounting for Amazon's fees of \$1.50, would provide a \$.49 loss for every sale. In this way, the PPP and FPP do not lower prices on Amazon, they raise prices elsewhere.

Separately, the MMA requires FPSs to agree to guarantee Amazon a certain minimum profit when Amazon sells the products it purchased from FPSs on Amazon's online marketplace. *Id.* ¶ 11. Again, as FPSs tell us, the result of this agreement is the same as the PPP and FPP: reduction in competition and choice and higher prices. This is so because the profit guarantee means that, if Amazon lowers its price to match a price on a competing online marketplace, the FPS is punished by owing Amazon money. *Id.* Thus, the agreement prompts FPSs to keep the prices for their products higher on competing online marketplaces or to avoid selling on those competing marketplaces at all. *Id.* FPSs have affirmatively stated that they have raised their prices to and on other online marketplaces in order to avoid these payments to Amazon. These common anticompetitive effects are the facts of implementation and enforcement of these agreements. Compl. ¶¶ 24, 63, 72.

The Court mentioned only one of the three agreements, the FPP, in its oral ruling dismissing the entire Complaint. Tr. 18:8-19:15. In its discussion of the FPP, the Court appeared to apply contract analysis rather than antitrust principles. Specifically, the Court articulated concern that the FPP did not include the words "lower" and "[price] floor." *Id.* 20:12-13, 27:9-12. The antitrust laws require an evaluation of the potential real-world impact of the agreements on competition and consumers, as opposed to contract analysis, which focuses on the rights of the parties as manifest within the four corners of a written agreement.

The Court ultimately found that agreements existed¹ but that the District's allegations of anticompetitive effects were too conclusory. *Id.* 41:20-24 ("So I do find that because the District's complaint fails to allege anti-competitive effects from these policies, assuming from [sic] the sake of argument that they're true, the motion to dismiss should be granted."). However, the Court's ruling addressed only three of the many allegations in the District's 33-page Complaint. The Court did not mention, for example, the allegations in paragraphs 24-26, 50, 62-63, 69-70, and 72 of the Complaint, which detail not only the incentives created by the implementation and enforcement of the agreements, but also how TPSs and FPSs have actually increased prices on competing online marketplaces. The Court did not rule on any of the other issues raised in the parties' papers, including the sufficiency of the allegations relating to the PPP or the MMA, whether the PPP and FPP constitute horizontal agreements between competitors subject to a *per se* analysis, which requires no consideration of anticompetitive effects, or the District's monopoly maintenance claims. Tr. at 41:25-42:3.

Moreover, a week before the Court's oral ruling the federal court in Seattle, Washington issued an opinion sustaining allegations substantively identical to the District's allegations here that the PPP and FPP "establish a price floor based on the seller's price listing on Amazon.com, [and] result in supracompetitive prices." *Frame-Wilson*, 2022 WL 741878, at *10. The District submitted this supplemental authority on March 8, 2022, but the Court never addressed it in its oral findings.

¹ The Court found that "there's no dispute that there was an agreement." Tr. 36:21-22. While the Court only referred to the FPP during its ruling and never discussed the PPP and MMA before summarily dismissing all claims, the same conclusion must apply, as both the PPP and MMA were express, written agreements in the same form as the FPP.

IV. Argument

A. The Court Ignored the District’s Allegations of Anticompetitive Effects and Misapplied the Plausibility Standard.

The Court found that the District’s allegations of anticompetitive effects were too conclusory to be plausible. Tr. 41:3-7. To the contrary, the District’s Complaint is replete with detailed factual allegations of how the implementation and enforcement of the PPP, FPP, and MMA increase prices, stifle innovation and growth in the online marketplace market, and reduce choice for online consumers. Compl. ¶¶ 10, 11, 34, 62, 64, 71, 73-74, 77. The Court failed to mention a single one of these allegations or to explain how these allegations, as opposed to background statements in the Complaint that the Court did mention,² were too conclusory to pass muster under the plausibility standard. Tr. 41:3-7 (characterizing the District’s allegations of price increases resulting from the agreements as “conclusory” without further explanation). Courts caution against the sort of parsing and dismembering of allegations that the Court engaged in here. *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 718 (E.D. Pa. 2011).

1. *Twombly* and *Iqbal* Do Not Impose a Heightened Pleading Standard in Antitrust Cases.

In *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, the Supreme Court clarified the standard of pleading that all plaintiffs must meet to survive a motion to dismiss under Rule 12(b)(6). *Twombly*, 550 U.S. 544; *Iqbal*, 556 U.S. 662. The Court reaffirmed that “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the

² First, the Court pointed to allegations concerning investigations conducted by British and German antitrust regulators and a letter written by U.S Senator Blumenthal concerning Amazon’s PPP. Tr. 40:11-41:2. Those allegations primarily provide background for why Amazon abandoned its prior PPP both in Europe and ultimately in the United States. Compl. ¶¶ 22, 23. The Court also cited a ProPublica article relating to how the Buy Box works, Tr. 40:20-22, which was included in the Complaint to explain how the Buy Box preferences Amazon. That allegation has no bearing on the anticompetitive effects the District alleges its residents have suffered.

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 (quotations and citations omitted). The Court elaborated that 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 (quotations and citations omitted). The Court referred to this clarified Rule 8 standard as “the plausibility standard.” This Court has applied the plausibility standard for more than 14 years to evaluate claims under a wide variety of statutes including the Consumer Protection Procedures Act (CPPA) and the Nonprofit Corporations Act (NCA). “[I]t is inappropriate to apply *Twombly*’s plausibility standard with extra bite in antitrust and other complex cases.” *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 98 (3d Cir. 2010) (reversing district court’s dismissal).

In both *Iqbal* and *Twombly*, the Court was careful to note: “The plausibility standard is not akin to a ‘probability requirement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556); *see also Cardenas v. NBTY, Inc.*, 870 F. Supp. 2d 984, 989 (E.D. Cal. 2012) (“‘Plausibility,’ as it is used in *Twombly* and *Iqbal*, does not refer to the likelihood that a pleader will succeed in proving the allegations.”). A claim is facially plausible when the facts pled in the complaint “raise a reasonable expectation that discovery will reveal evidence” of the misconduct. *Twombly*, 550 U.S. at 545. Importantly, if there are two alternative explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible, the court *cannot* dismiss under Rule 12(b)(6). *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011); *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015) (at the pleading stage, courts are not allowed to determine “whether a lawful alternative explanation appear[s] more likely” from the facts of the complaint). Courts post-*Twombly* have often been overturned by appellate courts for “mistakenly engag[ing] in this sort of premature weighing exercise in antitrust cases.” *SD3, LLC v. Black & Decker (U.S.)*

Inc., 801 F.3d 412, 425–26 (4th Cir. 2015) (citing *Evergreen Partnering Grp. v. Pactiv Corp.*, 720 F.3d 33, 50 (1st Cir. 2013); *Erie Cnty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 868–69 (6th Cir. 2012); *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 189 (2d Cir. 2012)). Instead, a plaintiff’s complaint may be dismissed only when a defendant’s alternative explanation is so convincing that plaintiff’s theory is rendered *implausible*. *Baca*, 652 F.3d at 1216-17.

Both *Twombly* and *Iqbal*, as well as the decisions of lower courts applying those cases, reject the notion that the plausibility standard imposes a heightened pleading standard in antitrust cases. *Twombly*, 550 at 569 n.14; *Iqbal*, 556 U.S. at 685. Plaintiffs need not plead “specific facts, like the ‘who, where, or when’ of a claim” to survive a motion to dismiss. *In re Polyurethane Foam Antitrust Litig.*, 799 F. Supp. 2d 777, 791-92 (N.D. Ohio 2011); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam). In other words, neither *Iqbal* nor *Twombly* impose on antitrust claims the ultra-specific pleading standards required for claims of fraud under Rule 9 of the Federal Rules of Civil Procedure. *In re Dental Supplies Antitrust Litig.*, No. 16 CIV. 696 (BMC), 2016 WL 5415681, at *3 (E.D.N.Y. Sept. 28, 2016).

Nothing in *Twombly* and *Iqbal* changed that courts are required to accept well-pled factual allegations as true and draw all inferences in the plaintiff’s favor. *See Twombly*, 550 U.S. at 555-56; *Iqbal*, 556 U.S. at 678. *Twombly* and *Iqbal* simply clarified that legal conclusions, unlike factual allegations, are not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 664. A court can distinguish between factual allegations and legal conclusion by considering that “[a] factual allegation’s veracity can be demonstrated on its own terms. A legal conclusion, by contrast, would require the analysis of underlying facts, if any, to determine whether the asserted legal determination is appropriate, *i.e.*, whether a defendant negligently manufactured a product.” *Polyurethane Foam*, 799 F. Supp. 2d at 794. In other words, an allegation that TPSs and FPSs

raise their prices to avoid sanctions under the PPP, FPP, and MMA are factual allegations entitled to the presumption of truth. An allegation that the agreements violate the Antitrust Act would be a legal conclusion not entitled to the presumption of truth.

2. The District’s Detailed Allegations of Anticompetitive Effects Easily Meet the *Twombly* and *Iqbal* Pleading Standard.

The District’s allegations, when considered in total, amply meet the plausibility standard. For example, the District alleges that TPSs regularly increase their prices on other online marketplaces to avoid violating the PPP and FPP, Compl. ¶ 24, and that Walmart routinely fields requests from TPSs to raise prices on its online marketplace because TPSs want to avoid punishment by Amazon pursuant to the agreements. *Id.* ¶ 62. The Complaint also explains how Amazon has higher fees than its competitors, and TPSs that could otherwise sell profitably at a lower price on other online marketplaces with lower fees (including their own websites) must incorporate these higher fees into their prices on competing online marketplaces. *Id.* ¶¶ 27, 33-34, 36. An Amazon competitor has publicly attested that “as Amazon raises the costs to sellers, and requires that Amazon have the lowest prices available [via the PPP and FPP], for a seller to be able to make significant sales on [Amazon’s] marketplace, these sellers will raise the price on competitor sites to match Amazon’s price.” *Id.* ¶ 63. Price increases are quintessential anticompetitive effects. *2301 M Cinema LLC v. Silver Cinemas Acquisition Co.*, 342 F. Supp. 3d 126, 137 (D.D.C. 2018). The Complaint also explains how preventing TPSs from offering their goods at lower prices on competing online marketplaces chokes off the ability of those online marketplaces to compete against Amazon on price. Compl. ¶ 64.

With respect to the MMA, the Complaint similarly alleges that 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.* ¶ 11. The Complaint also alleges that FPSs’ actions based on this agreement keep prices on competing online marketplaces higher than they would have been without the agreement, thereby reducing those competing online marketplaces’ ability to competing with Amazon on price. *Id.* ¶ 62.

The District has alleged that Amazon’s agreements with TPSs and FPSs *actually* raise prices and reduce competition both among online marketplaces (i.e., Amazon, Target, Walmart, eBay, and TPS websites) and among retailers (Amazon and its TPSs). These factual allegations are corroborated by economic and scholarly writings on the incentives that these agreements logically create, and legislative and regulatory findings of anti-competitive effects flowing from these agreements and those similar to them. *Id.* ¶¶ 72-73. The District’s allegations of anticompetitive effects are thus a far cry from the “threadbare legal recitals of a cause of action’s elements” in *Iqbal*. Tr. 41:18-20.

Courts interpreting *Twombly* and *Iqbal* regularly find that allegations explaining how challenged restraints limit competition and cause prices to increase are sufficient to defeat a motion to dismiss. In *United States v. Charlotte-Mecklenburg Hospital Authority*, for example, the government’s allegations that consumers “pay higher prices for health insurance coverage, have fewer insurance plans from which to choose, and are denied access to consumer comparison shopping and other cost-saving innovative and more efficient health plans that would be possible” absent the restraints were sufficient under *Twombly* and *Iqbal*. 248 F. Supp. 3d 720, 729 (W.D.N.C. 2017) (“Defendant contests the truth of these factual allegations—and may be correct in doing so—but at the pleading stage, a judge must accept as true all of the factual allegations contained in the complaint and ‘will assume that the plaintiffs can prove the facts that they allege in their complaint....’”) (quoting *Est. Const. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir.

1994)). *See also Robertson v. Sea Pines Real Est. Cos.*, 679 F.3d 278, 291 (4th Cir. 2012) (where defendant sought to dismiss complaint because it did not allege facts to show whether prices actually went up, denial of motion to dismiss upheld because “[i]t is sufficient that the alleged anticompetitive effects are economically plausible in light of the... restrictions recounted in the complaint”).

Thompson v. 1-800 Contacts, Inc. is also instructive. Plaintiffs’ complaint merely “identif[ied] the agreements and the key provisions, explain[ed] how the agreements work, and explain[ed] that, under their theory, they paid overcharges.” No. 2:16-CV-1183-TC, 2018 WL 2271024, at *4 (D. Utah May 17, 2018). Critically, the court found the complaint sufficient even though it lacked the detail about particular agreement participants’ responses and actions—detail that the District, in contrast, does provide here. The *Thompson* court made clear that “an economic analysis that requires specific data and expert testimony” is, as a legal matter, “too much to expect of Plaintiffs at this [pleading] stage.” *Id.*

The court in *Emulex Corp. v. Broadcom Corp.* similarly denied defendant’s motion to dismiss where the allegations of anticompetitive effects were far less fulsome than those alleged here. No. 8:09-cv-01310-JVS-RNB, 2010 WL 11595718, at *8 (C.D. Cal. June 7, 2010). In *Emulex*, the plaintiffs made a single allegation concerning anticompetitive effects: “(a) competition in the 10Gbe Controller market is being and will be suppressed or eliminated; (b) new technology will be substantially delayed; and (c) customers will be deprived of choice in products, will pay higher prices, will receive inferior quality products and will have no choice but to continue to employ older and less efficient technologies.” First Amended Complaint, *Emulex Corp. v. Broadcom Corp.*, No. 8:09-cv-01310-JVS-RNB (C.D. Cal. Jan. 4, 2010), ECF No. 19 at ¶ 72. The court found that “[t]hese allegations, coupled with the allegations detailing the market conditions

and barriers facing a new entrant, plausibly plead antitrust injury under *Twombly*.” *Emulex*, 2010 WL 11595718, at *8. The District here far exceeds this standard. *See, e.g.*, Compl. ¶¶ 24-26, 50, 62-63, 69-70, 72.

Most recently, the court in *Frame-Wilson* denied Amazon’s motion to dismiss Sherman Act Section 1 and 2 claims that are substantively identical to the District’s claims here. There, like here, plaintiffs contended Amazon’s PPP and FPP agreements with TPSs “establish a price floor based on the seller’s price listing on Amazon.com, [and] result in supracompetitive prices.” 2022 WL 741878, at *10. *Frame-Wilson* rejected Amazon’s contention that the complaint failed to “allege plausible anticompetitive harm” under *Twombly*. *Id.* at *7. The complaint’s allegations, like the District’s, contended that “Amazon’s pricing policy requires sellers to add Amazon’s fees to the cost of their products when they sell them on all external platforms” and thus the product cost is “based on the price of the product itself—as set by the seller—*plus* the cost of Amazon-set fees, which are built into the product cost on the Amazon.com platform.” *Id.* at *11. *Compare* Compl. ¶ 36 (“Amazon’s MFNs force TPSs to incorporate Amazon’s inflated fees into their prices on other online marketplaces, including the TPS’s own online marketplace.”). Amazon thus “suppresses competition from its sellers on external platforms,” raising consumers’ prices, making the conduct alleged there (and here) anticompetitive, if the complaint’s allegations are taken as true. *Frame-Wilson*, 2022 WL 741878, at *11.

To the extent that the Court may have found the Complaint inadequate because it did not name any specific sellers who raised their prices. Tr. 38:8-9; *see also* Tr. 37:21-23 (“[T]here 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.”), that determination is also contrary to law. Such level of detail is not required by *Twombly* or its progeny. *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 325 (2d Cir. 2010) (court

rejected defendant’s contention that *Twombly* required the plaintiff identify the “specific time, place, or person related to each conspiracy allegation”); *Polyurethane Foam*, 799 F. Supp. 2d at 791-92; *Erickson*, 551 U.S. at 93 (after *Twombly*, “[s]pecific facts are not necessary; the statement need only ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’”) (quoting *Twombly*, 550 U.S. at 555) (quotations omitted). That is particularly so where, as here, market participants have a credible fear of retaliation from a dominant firm. *E.g.* House Antitrust Subcommittee, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations (Oct. 6, 2020), at p. 27 (noting that sellers’ fear of retaliation prevented them from speaking out against Amazon).³

3. The Court Improperly Engaged in Fact Finding.

The Court indicated that 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 retain channels.” Tr. 41:13-17. To the extent the Court’s statement finds that prices are not being raised on other online marketplaces, it is a fact contrary to the Complaint. It is established law that a court cannot make factual findings at the pleading stage. *Twombly*, 550 U.S. at 556 (“Rule 12(b)(6) does not countenance ... dismissals based on a judge’s disbelief of a complaint’s factual allegations”) (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). *See also* 2301 *M Cinema*, 342 F. Supp. 3d at 138 (denying motion to dismiss where defendant disputed economic consequences of challenged agreement, because court refused to “make factual determinations regarding *actual* economic effects at the motion to dismiss stage”).

Further, the fact that other online marketplaces charge lower fees says nothing about the

³ https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

creation of a price floor for the products sold on those sites. The fees and commissions are charged to *TPSs*; the price floor is created for products sold to *consumers*. The fact that competing online marketplaces charge lower fees and commissions would otherwise enable *TPSs* to profitably sell on those sites for lower prices than they sell those products for on Amazon, but the agreements challenged in this case prohibit those lower prices. That is why the agreements are anticompetitive.

Additionally, the Court appears to have based its decision in part on its own determination that *TPSs* can simply avoid the agreements at issue by electing not to sell on Amazon. Tr. 41:9-17. The Court's finding that *TPSs* could forsake Amazon directly contradicts the District's factual allegations that Amazon's market dominance makes it unsustainable for many small businesses forgo selling on Amazon's marketplace. Compl. ¶¶ 3, 54. In making a contrary fact determination, the Court again failed to take the allegations in the Complaint as true, as required at this stage of the litigation. *Twombly*, 550 U.S. at 555-56; *Iqbal*, 556 U.S. at 678.

Similar allegations that the PPP and FPP create a price floor compelled the denial of Amazon's motion to dismiss antitrust claims in *Frame-Wilson*, where the court concluded, "Amazon's pricing policy requires sellers to add Amazon's fees to the cost of their products when they sell them on all external platforms. . . . Such a pricing provision could—and as Plaintiffs allege, does in fact—raise the cost of products on external platforms that charge lower fees than Amazon." *Frame-Wilson*, 2022 WL 741878, at *11. This Court was required to accept similar factual allegations as true and draw all inferences in the District's favor here. *Am. Nat. Ins. Co. v. F.D.I.C.*, 642 F.3d 1137, 1139 (D.C. Cir. 2011).

4. An Analysis of Anticompetitive Effects is Not Limited to the Plain Text of the Agreement.

There is a reason each of the decisions discussed above denied dismissal where the allegations explained how the challenged conduct reduced competition, without hewing slavishly

to the agreement's text (where one existed): when a contract forms the basis of an antitrust claim, courts must "look past the terms of the contract to ascertain the relationship between the parties and the effect of the agreement in the real world." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012) (citation omitted); *see also United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005) ("economic realities rather than a formalistic approach must govern review of antitrust activity"). Courts take this broader view because antitrust laws are focused on "consumer welfare and price competition" as a whole—what the parties may have intended by contracting neither begins nor ends the antitrust analysis, and rather it is the agreement's economic impact on the market that matters. *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993); *Yagoozon, Inc. v. Kids Fly Safe*, No. CA 14-040 ML, 2014 WL 3109797, at *7 (D.R.I. July 8, 2014). Looking at effects on consumers in the real world, not just the text or the parties' relationship, is also important for a practical reason: antitrust violators rarely write out their anticompetitive agreements; the public relies on antitrust enforcers and the courts to ferret out those contracts that harm consumers by reducing competition. Adopting a view of "rationality" that "defer[s] to the parties' rights to enter into contracts" (Tr. 29:24-25) notwithstanding their reduction of competition, as the Court did here, would nullify most of antitrust law. The fact that rational market participants agree to certain terms in a contract says nothing about whether those terms are illegal under the antitrust laws because they have the potential to reduce competition and raise prices. This is particularly the case where, as here, Amazon enjoys monopoly power.

At the hearing, however, the Court focused on the explicit terms of the FPP:

And I will again note that based on what [the FPP] 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 [price] policy agreement that refers to a floor. And I know that [the District] is arguing that significantly higher implies the opposite; it's not there.

Tr. 27:4-12.⁴ The Court’s focus on the four corners of the written agreement in evaluating potential anticompetitive effects is contrary to law. *ZF Meritor*, 696 F.3d at 270; *Dentsply*, 399 F.3d at 189. The agreements at issue (of which the Court only considered the FPP) need not have the magic words “price floor” or “lower prices” where, as here it is alleged that the effect of the agreements in the real world was to prevent lower prices on other online marketplaces, thereby creating a price floor. *Accord Starr*, 592 F.3d at 323 (finding complaint plausibly alleged that defendants used MFNs to institute a “price floor”, even though the phrase “price floor” never appeared in the agreements at issue).

Because it did not look past the contract language, the Court erred in ignoring the District’s detailed, plausible allegations concerning the implementation and enforcement of the agreements in analyzing whether the District had pled anticompetitive effects. The Complaint’s allegations, as detailed above, demonstrate how all three agreements operate to cause TPSs and FPSs to raise prices on competing online marketplaces or to remove their products from competing marketplaces altogether.⁵ Consumers are deprived of lower prices and their choices are reduced as to where they can obtain TPS and FPS products. *Id.* ¶¶ 6, 11 Additionally, price competition is reduced among online marketplaces. *Id.* ¶ 11, 26, 36. That is why *Frame-Wilson* denied Amazon’s motion to dismiss claims that the PPP and FPP violated the Sherman Act. 2022 WL 741878, at *12.

⁴ The Court’s discussion of the FPP and its lack of reference to “lower” prices on other online marketplaces wholly ignores that the PPP explicitly prohibited TPSs from selling at lower prices on those marketplaces. Compl. ¶ 5. To the extent that the Court based its dismissal on the plain language of the FPP, that decision cannot be reconciled with a decision to also dismiss claims related to the PPP.

⁵ See also Compl. ¶ 24 (Amazon constantly crawls the internet to search for any instances in which a TPS or FPS offers a product for a lower price than it does on Amazon, and TPSs and FPSs report Amazon alerting them with threats of punishment when it finds a deviation), 62 (TPSs increase their prices on Walmart and other online marketplaces to avoid these sanctions, as reported by Walmart).

B. Where, As Here, an Agreement Is Alleged by Direct Evidence, a Court Need Not Address Whether “Lawful, Unchoreographed Free Market Behavior” Provides an Alternative Explanation.

The Court additionally appeared to engage in an analysis of whether the allegations were implausible because they could be explained by “parallel conduct.” Tr. 29:16-30:14. The Court referred to *Twombly* and *Iqbal*’s discussion of “lawful, unchoreographed free market behavior” and attempted to categorize the conduct alleged in the Complaint as such:

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 [sic] whether it’s legal or not. My focus is on the latter part of that analysis that the Supreme Court decides in *Iqbal*. Specifically, where it could be “explained by lawful, unchoreographed free market behavior.”

Tr. 36:20-37:1. *See also* Tr. at 36:13-18 (“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 [*Twombly*], the Court found that the agreement could be explained by lawful... unchoreographed free market behavior.”). These statements are contrary to law; the “unchoreographed free market behavior” goes solely to whether there is an agreement or unilateral conduct, not whether there are anticompetitive effects.

On this point, *Twombly* is instructive (*Iqbal* is not an antitrust case and is silent about unilateral versus concerted conduct). The *Twombly* court dismissed the complaint because it failed to provide sufficient allegations to explain why the higher prices were the result of agreement rather than independent unilateral conduct. *Behrend v. Comcast Corp.*, 532 F. Supp. 2d 735, 741 (E.D. Pa. 2007). *Twombly* addressed an issue in antitrust cases where plaintiffs allege agreement based solely on suspiciously timed parallel price increases, even though those price increases are fully consistent with an independent price leader and follower. 550 U.S. at 554 (“The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and

competitive business strategy unilaterally prompted by common perceptions of the market.”). The question *Twombly* answered is not present here; the Court has found agreements to exist.

To be clear, if the District here had offered no evidence of the actual agreements between Amazon and TPSs and FPSs, but instead alleged only that TPSs and FPSs priced higher on Walmart.com and eBay, and concluded that the price increases must be the result of agreements among Amazon and the sellers—whether reduced to writing or not—*Twombly*’s concerns about condemning merely parallel conduct might apply. The Complaint, however, includes not only the direct evidence of written agreements but also explains how they work—exactly the “independent allegation of actual agreement” that *Twombly* said differentiates it from cases premised solely on “parallel conduct.” *Id.* at 564.

A claim based on direct evidence of agreement (like the written documents here) need only provide “enough fact to raise a reasonable expectation that discovery will reveal evidence” of illegality, *id.* at 556, because the agreement itself “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); *see also In re Se. Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008) (noting it dispositive “that rather than simply alleging facts from which an inference of an agreement can be drawn, [plaintiffs] allege, and defendants concede, that actual agreements exist”). Next, the Court must consider whether it is plausible that the agreement resulted or could result in anticompetitive effects, meaning higher prices, less choice or quality for consumers, or less innovation. The Complaint plausibly alleges all of these anticompetitive effects in spades.

Critically, *Twombly* did not speak to the adequacy of anticompetitive effects allegations so the Court can find no support for its ruling in that case. As explained *supra*, the Court should instead look to the many cases applying *Twombly* (and *Iqbal*) to allegations of anticompetitive

effects, all of which demonstrate that the District's allegations here are sufficient. *Supra* pp. 9-14.

C. In the Alternative, the District Seeks Leave to Amend the Complaint to Add Additional Allegations of Anticompetitive Effects.

If the Court does not grant reconsideration, it should grant the District leave to file a Second Amended Complaint to add even more specific allegations of anticompetitive effects. Specifically, the District will supplement the Complaint with details from further investigation, including interviews of those with direct knowledge, detailing the anticompetitive impact of the implementation and enforcement of the PPP, FPP, and MMA. The District's amended allegations will detail:

- how Amazon's web-scraping program immediately identifies any prices that are lower (by any amount) than prices charged on Amazon by TPSs and sends alerts to the violators;
- how TPSs closely monitor pricing on other online marketplaces to avoid running afoul of the PPP and FPP; and
- specific examples of TPSs and FPSs who have been forced to price higher across the internet as a result of the PPP, FPP, and MMA to avoid sanctions by Amazon which could be devastating to their business given Amazon's monopoly power.

A proposed Second Amended Complaint, with additional allegations included in redline, is attached as Exhibit A hereto.

V. Conclusion

For the foregoing reasons, and in the interests of justice, the District respectfully requests that the Court reconsider its Order granting Amazon's Motion to Dismiss or, in the alternative, grant the District leave to file its Second Amended Complaint.

Dated: April 14, 2022

Respectfully submitted,

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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

ORDER

Upon consideration of the District's Motion for Reconsideration of the Court's Order Granting Amazon.com's Motion to Dismiss, and the entire record in this case, it is hereby

ORDERED that the District's Motion for Reconsideration is **GRANTED** and Amazon.com's Motion to Dismiss is **DENIED**.

Date: _____

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

Copies to: all counsel of record

EXHIBIT A

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA,
a municipal corporation,
400 6th Street N.W., 10th Floor
Washington, D.C. 20001,

Plaintiff,

v.

AMAZON.COM, INC.,
410 Terry Ave. North,
Seattle, WA, 98109,

Defendant.

JURY TRIAL DEMANDED

FIRST-SECOND AMENDED COMPLAINT

Plaintiff District of Columbia (the “District”), by and through the Office of the Attorney General, brings this action against Defendant Amazon.com, Inc. (“Amazon”) for violations of the District of Columbia Antitrust Act, D.C. Code §§ 28-4501, *et seq.* In support of its claims, the District states as follows:

INTRODUCTION

1. Amazon is by far the largest online marketplace in the United States. As a multi-seller online marketplace, Amazon competes with other multi-seller online marketplaces, like Walmart.com and eBay, to sell hosting and other services to Third Party Sellers (“TPSs”) that want to sell their products online to consumers. Amazon also competes with both multi-seller and single-seller online marketplaces (for example, TPSs’ own websites where a TPS has self-supplied access to online consumers) to attract consumer traffic and sales from its marketplace.

2. In addition to competing as an online marketplace, Amazon also competes with its TPSs and others as a retailer of a wide variety of products that it sells directly to consumers through its online marketplace. In a recent survey, 53% of TPSs reported that Amazon sells its own products as a retailer in direct competition with the products sold by that TPS. Thus, not only is Amazon the gatekeeper to its dominant online marketplace, it is also a significant competitor for retail sales of many products sold by the TPSs who utilize Amazon's online marketplace. In its capacity as a retailer, Amazon sells goods that it buys from manufacturers and wholesalers that Amazon refers to as First Party Sellers ("FPSs").

3. The dominance of Amazon's online marketplace is clear. It hosts millions of TPSs on its marketplace; its closest competitor multi-seller online marketplaces host only a fraction of this number, despite charging lower fees and commissions than Amazon. Most TPSs believe that to successfully sell online, it is imperative that they have a presence on Amazon's online marketplace. Moreover, Amazon accounts for between 50-70% of all online sales in the United States. Amazon's share of sales is even larger among only multi-seller online marketplaces, such as Walmart.com and eBay. Most Americans overwhelmingly turn to Amazon as the first place they buy anything online.

4. Amazon's dominance among online marketplaces is protected by substantial barriers to entry, many created by Amazon itself. Amazon's dominance also is protected by its anticompetitive business practices. These business practices include: (1) Amazon's former Price Parity Provision; (2) Amazon's current Fair Pricing Policy; and (3) Amazon's new Minimum Margin Agreement. Far from enabling consumers to obtain the best products at the lowest prices, these practices instead cause prices across online marketplaces to be artificially inflated, both for products sold through Amazon's marketplace and through its competitors'

marketplaces. These practices also cause commissions and fees to TPSs to be higher, and profits for TPSs and FPSs to be lower, than they would be in a competitive market, thereby harming these sellers. These practices cause harm to competition among online marketplaces and in the retail markets of multiple products sold by both Amazon and TPSs. They also harm consumer choice and innovation.

5. The Price Parity Provision. In order to sell their products through Amazon's marketplace, TPSs execute Amazon's Business Solutions Agreement ("BSA"). Until at least 2019 in the United States, TPSs agreed through the BSA that they would not offer their products through other online marketplaces, including TPS's own websites, at a lower price or on better terms than TPSs offered their products through Amazon's marketplace. This term of the agreement was called the "Price Parity Provision" ("PPP").

6. Through this anticompetitive restraint, Amazon insulated its dominance by forcing TPSs to charge the same prices on other online marketplaces. This reduces the ability of those other online marketplaces to gain consumer traffic and sales by offering TPSs lower fees and commissions that allow TPSs to charge lower prices to consumers and still maintain their same profits on those marketplaces. This restraint artificially raised the price of goods to consumers across online marketplaces, because TPSs were forced to incorporate Amazon's high fees and commissions into their product prices not only when selling through Amazon's marketplace, but also when selling through competing online marketplaces. These price restrictions resulted in less competition and innovation among online marketplaces, and higher prices and less choice for consumers.

7. The PPP also served to protect Amazon from competition as a retailer in individual product markets. Amazon and TPSs 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). The PPP ensured that the high commissions and fees that Amazon charged to TPSs were incorporated in the price everywhere that the TPS offered their products online, thereby reducing the price competition on Amazon's retail offerings that competed with these products.

8. Prior to 2013, TPSs in Europe agreed to this same PPP when utilizing Amazon's European online marketplaces. Around 2012, competition authorities in the United Kingdom and Germany initiated investigations to determine whether Amazon's PPP was anticompetitive and increased consumers' prices for products purchased through online marketplaces. While these investigations were pending, Amazon abandoned the PPP in Europe, but maintained the PPP in the United States and elsewhere.

9. The Fair Pricing Policy. In 2019, under intense scrutiny from Congress and U.S. government regulators, Amazon removed the PPP from its BSA in the United States. However, Amazon quickly replaced the PPP with an effectively identical substitute, its Fair Pricing Policy ("FPP"). TPSs must now agree, through the BSA, 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. These sanctions can include cancellation of listings, suspension or forfeiture of payments, and even banishment of the TPS from the Amazon online marketplace, which can result in devastating economic consequences for the TPS.

10. The effect of both the PPP and the FPP (referred to collectively hereafter at times as "the most-favored nation agreements" or "MFNs") is the same: 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. These restrictions 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 it could in a truly competitive market.

11. The Minimum Margin Agreement. Amazon employs a different anticompetitive agreement with its FPSs to insulate it from competition from other online marketplaces. FPSs sell their products to Amazon for Amazon to sell, either as its own brand or otherwise, as a retailer through its online marketplace. In their sales agreements, FPSs and Amazon agree that the FPS guarantees Amazon a certain minimum profit when Amazon sells the products it purchased from the FPS on Amazon's online marketplace ("Minimum Margin Agreement" or "MMA"). If Amazon ultimately sells the product for a price that results in Amazon achieving less than the agreed minimum profit, the FPS must compensate Amazon for the difference. This agreement can at times result in a FPS incurring millions of dollars in "true up" costs to Amazon. As a practical effect of this agreement, FPSs have an incentive to maintain higher prices on other online marketplaces to ensure that Amazon does not drop its price based on lower prices elsewhere, thereby triggering the FPS's "true up" requirements. Indeed, 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. These agreements reduce other online marketplaces' ability to compete with Amazon by offering lower prices to consumers. Thus, like the MFNs imposed on TPSs, the MMA results in reduced competition among online marketplaces and higher prices to consumers.

12. Amazon's PPP, FPP, and MMA effectively insulate the marketplace giant from competition as both an online marketplace and a retailer. These agreements also cause prices on online marketplaces to be artificially inflated, enable Amazon to charge higher fees and commissions to TPSs, reduce profits to TPSs and FPSs, and suppress innovation and reduce investment in potentially competing online marketplaces.

13. The District brings this case seeking to have this Court: enjoin Amazon from engaging in these and similar anticompetitive practices in violation of D.C. Code §§ 28-4502 and 28-4503; provide other appropriate injunctive relief; order relief for harmed consumers; impose civil penalties to deter future misconduct by Amazon and others; and award attorneys' fees and costs.

JURISDICTION

14. This Court has subject matter jurisdiction over this case pursuant to D.C. Code §§ 1-301.81, 11-921, 28-4507, and 29-214.20(a). This Court has personal jurisdiction over Amazon pursuant to D.C. Code §§ 13-422 and 13-423(a).

THE PARTIES

15. Plaintiff District of Columbia, a municipal corporation empowered to sue and be sued, is the local government for the territory constituting the permanent seat of the government of the United States. The District is represented by and through its chief legal officer, the Attorney General for the District of Columbia. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest. D.C. Code § 1-301.81(a)(1). The Attorney General is specifically authorized to enforce the District's antitrust laws, including D.C. Code §§ 28-4502 and 28-4503.

16. Defendant Amazon.com, Inc. (“Amazon”) operates an online marketplace and acts as an online retailer. Amazon’s marketplace sells access to its online vehicle to TPSs for them to sell their products to consumers. Millions of TPSs in the U.S. sell their products through Amazon’s online marketplace, which directly competes with other online marketplaces. Amazon also sells its own Amazon-branded products and products purchased from FPSs directly to consumers through its online marketplace in individual retail product markets. In these markets, Amazon directly competes with other retailers, including its TPSs. Amazon maintains its principal headquarters in Seattle, Washington. At all times material to this Complaint, Amazon advertised, marketed, promoted, offered for sale, and sold goods and services in the District of Columbia.

AMAZON’S ANTICOMPETITIVE CONDUCT

A. AMAZON IS THE DOMINANT U.S. ONLINE MARKETPLACE.

17. Amazon operates the world’s largest online marketplace. Since its early days, founder Jeff Bezos made clear that Amazon intended to ignore short-term profitability and instead grow market share in, and dominate, this market. Amazon is estimated to account for between 50-70% of the total sales through online marketplaces. By contrast, the next two largest online marketplaces—Walmart.com and eBay—have online marketplace shares in the single digits. Amazon accounts for an even larger percentage of sales on multi-seller online marketplaces.

18. Millions of TPSs sell their products through Amazon’s online marketplace, while far fewer do so on competing online marketplaces. For example, only 110,000 TPSs sell on Walmart’s online marketplace.

19. Amazon is, by far, the most-visited online marketplace by consumers, with 2.6 billion visits in a single month. Sixty-six percent of consumers start their search for new

products on Amazon, and a staggering 74% go directly to Amazon when they are ready to buy a specific product. Given its ubiquitous presence among online marketplaces, Amazon's business practices and decisions have an outsized effect on the U.S. economy.

B. AMAZON PROTECTS ITS DOMINANT ONLINE MARKETPLACE AND RETAIL BUSINESS WITH MOST FAVORED NATION AGREEMENTS.

20. In order for a TPS to sell its products through Amazon's online marketplace, it must execute Amazon's BSA. Prior to 2019, the BSA included the PPP, through which TPSs agreed that the "purchase price and every other term of sale [would] be at least as favorable to Amazon Site users as the most favorable terms via Your Sales Channels" "Your Sales Channels" included the TPS's own website, as well as other non-Amazon online marketplaces.

21. In response to scrutiny from U.S. regulators, Amazon replaced the PPP with the FPP in 2019, which similarly requires TPSs to agree that:

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 a marketplace offer that harms customer trust, Amazon can remove the Buy Box, remove the offer, suspend the ship option, or, in serious or repeated cases, suspending [sic] or terminating [sic] selling privileges.

Pricing practices that harm customer trust include, but are not limited to: . . . setting a price on a product or service [on Amazon's platform] that is significantly higher than recent prices offered on or off Amazon.

22. Amazon's MFNs have elicited antitrust scrutiny from international and U.S. regulators. Antitrust investigations in the United Kingdom and Germany prompted Amazon to abandon its PPP in Europe in 2013. German authorities were especially concerned that Amazon's price parity provisions constituted price-fixing agreements between horizontal competitors.

23. In December 2018, U.S. Senator Richard Blumenthal (D-CT) wrote to the U.S. Department of Justice and the Federal Trade Commission expressing concern over the continued application of Amazon's PPP in the U.S.:

Amazon's price parity provisions may raise prices for consumers both in the short term and in the long run. In the short term, these clauses prohibit third-party merchants who sell on online marketplaces from passing on any savings to consumers. For example, if a competitor to Amazon charges lower commission fees to third-party merchants operating on its site, Amazon's price parity provision will prohibit sellers from reducing their prices to reflect the lower cost of selling through Amazon's competitor. In the long run, these provisions may permit Amazon to steadily raise the transaction fees it charges third-party merchants, secure in the knowledge that sellers will either have to accept the higher fees or charge all its online customers higher prices across all sales channels.

Senator Blumenthal concluded that U.S. regulators could "easily establish that Amazon has the high market share typically necessary to bring successful litigation under Section 2 [of the Sherman Act.]" A few months later, in March 2019, Amazon eliminated the PPP from its BSA and replaced it with the FPP, with the same anticompetitive objective and effects.

24. Amazon aggressively enforces its MFNs. Amazon uses an extensive network of electronic surveillance and employees to monitor the prices of products offered by TPSs through other online marketplaces. When Amazon discovers that a TPS is offering the same or similar product through another online marketplace at a lower price, it sends the TPS a pricing alert that warns the TPS that its product is no longer eligible for the "Buy Box", which is the featured offer on any product page. TPSs report regularly receiving these types of alerts. Given the importance of the Buy Box feature, this punishment can be devastating for TPSs. One TPS who reported receiving these alerts confirms that removal of the Buy Box results in a loss of 70-80% of sales.

25. Amazon also punishes TPSs not complying with its MFNs in additional ways, including freezing TPSs' inventory, placing holds on TPSs' accounts and payments from

Amazon online marketplace sales, and suspending or revoking the TPSs' accounts entirely. A TPS consultant confirms that he is in regular contact with Amazon TPSs complaining that Amazon has suspended their product listings as a punishment for pricing their products lower on competing platforms. TPSs regularly increase their prices on other online marketplaces in order to avoid these sanctions.

26. Amazon also punishes a TPS if a different seller obtains and sells the TPS's products for less on competing online marketplaces. In this way, Amazon further controls pricing on other online marketplaces by incentivizing a TPS to monitor whether its products are being sold online by other sellers for less than the price offered on Amazon's marketplace. TPSs devote enormous amounts of time and spend thousands of dollars each month on electronic marketplace "scraping" services to monitor the prices of their products on other online marketplaces in order to adhere to their agreements with Amazon and avoid the marketplace giant's punishment and sanctions. A TPS who sells on Amazon reports that it goes to great lengths to ensure that its prices are not lower on other platforms, so as not to run afoul of the MFNs. This requires a substantial investment in programming to monitor pricing across the internet. Worse still, Amazon will punish a TPS if Amazon discovers what it considers to be a product "similar" to that of the TPS being sold by another company for less through another online marketplace, even though these "similar" products are often distinguishable in quality or function from the TPS's product.

26-27. One TPS reveals how Amazon's state-of-the-art price-scraping software constantly trawls the internet to monitor pricing—not just pricing that is "significantly" lower, but any price that deviates from the price a TPS lists on Amazon. That TPS sells his products on both Amazon and a competing online marketplace. In one example, when the competing

online marketplace lowered the price on his product by a few dollars (listed on Amazon for \$44 and on the competing website for \$39.99), Amazon sent him a notice within minutes that he was in violation of the FPP and was no longer eligible for the Buy Box. The TPS had to increase its price on the competing marketplace or face further sanctions from Amazon.

27-28 The MFNs also insulate Amazon from competition as a retailer. Amazon directly competes with over 50 percent of its TPSs to sell similar and substitutable products at retail to online consumers. Amazon's MFNs and high fees and commissions ensure that TPS products are offered at artificially high prices not only on Amazon's marketplace, but also on competing marketplaces, including the TPSs' own websites. This reduces TPSs' ability to compete with Amazon's substitutable products. Absent the MFNs, TPSs could offer their products for lower prices or on better terms through competing marketplaces, thereby providing consumers with alternatives to Amazon products at lower prices.

C. AMAZON'S INFLATED SELLING FEES FURTHER RAISE PRICES FOR CONSUMERS ON AMAZON'S AND OTHER ONLINE MARKETPLACES.

28-29 After a TPS executes the BSA and agrees to the pricing restrictions in the PPP and FPP, it may begin selling on Amazon's online marketplace subject to certain fees and commissions.

29-30 Amazon charges TPSs high fees to sell their products through Amazon's online marketplace. Over the past five years, Amazon has continuously increased its fees such that it has added an extra 11% to its cut of TPS sales. Amazon's basic fee, its "referral fee," is 15% on most products, while its referral fee on some products, such as clothing, is higher. Amazon's basic referral fee has stayed at approximately the same level since Amazon launched its online marketplace in 2000. Given Amazon's massive growth, and its ability to spread costs across far more transactions, Amazon's referral fees should (in a competitive market) have declined

substantially. They have not, demonstrating the lack of competitive pressure on Amazon's online marketplace from other online marketplaces.

~~30-31~~ Sellers can either fulfill their own orders or they can select "Fulfillment by Amazon" ("FBA"). When a TPS selects FBA, Amazon charges the TPS additional fees to handle inventory, ship the product to the consumer, collect payments, process returns, and credit the seller's account. It is estimated that, including FBA charges on top of all other fees, many TPSs pay Amazon a 40% sales commission.

~~31-32~~ TPSs have little choice but to select FBA and pay these high fees, because it is the primary way for a TPS's products to become eligible for the "Buy Box" and obtain profitable sales levels. When Amazon and one or more TPSs offer the same or similar products on Amazon's online marketplace, Amazon combines all of the offers onto one product page, with one of the products being awarded the "Featured Offer" or "Buy Box." This product becomes the offer most visible to consumers on the product detail page and the product easiest for consumers to purchase through Amazon's online marketplace. Sellers not winning the Buy Box are relegated to a far-less prominent location on the listing page.

~~32-33~~ Being awarded Amazon's Buy Box is critical: 82% of all TPSs' sales through Amazon's online marketplace occur through the Buy Box, and the percentage is even higher for mobile purchases. Most people searching for a product on Amazon's online marketplace will not even see a TPS's product unless it appears in the Buy Box, putting those non-Buy-Box TPSs at a significant competitive disadvantage. The Buy Box is *not* reserved for the best-priced product. Instead, Amazon's selection methods for the Buy Box winner consider factors that further reinforce the dominance of Amazon's online marketplace.

~~33-34~~ A ProPublica investigation into Amazon's Buy Box practices confirms that Amazon cares more about enriching itself than offering its customers competitive prices. The investigation looked at 250 frequently purchased products over several weeks to see which ones were selected for the Buy Box. About three-quarters of the time, Amazon awarded the Buy Box to its own products and those of companies that pay for its auxiliary online marketplace services even when there were substantially-less-expensive product offerings from other TPSs.

~~34-35~~ By contrast, Amazon's online marketplace competitors charge much lower fees and commissions for sellers to sell through their marketplaces. For example, Walmart.com charges no setup, subscription, or listing fees, only a referral fee on each sale. TPSs who choose to use Walmart.com's Fulfillment Services program are charged a fixed monthly storage fee and fulfillment/delivery fees that are significantly less than what Amazon charges. Another competitor, eBay, generally offers at least 50 free product listings before charging its \$0.35 product listing fees, and generally sets its commissions well below Amazon's. Amazon has seen little seller attrition as a result of maintaining and increasing its fees. The fact that Amazon can charge significantly higher fees without losing TPSs is further evidence of its market power.

~~35-36~~ Additionally, many TPSs sell their products on their own websites, self-supplying their access to online purchasers in a way that incurs far lower fees. Thus, selling on Amazon is substantially more expensive for TPSs than selling through other competing online marketplaces. Through Amazon's MFNs, these high fees are ultimately passed on to consumers through higher prices not only on Amazon, but also on other online marketplaces.

~~36-37~~ Molson Hart, owner of TPS Viahart, has written an article detailing how his company is forced to charge higher prices on its own website and elsewhere as a result of the

FPP. Mr. Hart explains that Amazon takes a 15% commission on every product Viahart sells on Amazon, and also then forces Viahart to sell for at least as much on its own website (where it obviously does not have to pay such a commission). This means that, while the TPS could reduce its price by 15% and make roughly the same profit on its own website, it must inflate the cost on its website to avoid running afoul of the FPP.

	Amazon	Website
Price	\$150.00	\$113.20
Commission (15%) /Payment Processing (2.9%)	\$22.50	\$3.28
Search Advertising	\$17.58	\$0.00
Cost of Product Sold	58.88	58.88
Profit Per Unit Sold	\$51.04	\$51.04

A \$150 item sold on Amazon makes the same money as an item sold for \$37 less on our website

37-38. And Mr. Hart points out that, given Amazon's dominance in the online marketplace market, his company would face financial ruin if it chose not to sell on Amazon—forcing Viahart to abide by the FPP and set its prices artificially high everywhere it sells. He also explained that, because Amazon is more expensive to sell on than other online marketplaces, TPSs don't lower their prices on Amazon—they raise their prices everywhere else.¹ Mr. Hart made clear that: “[W]e have nowhere else to go and Amazon knows it.”

38-39. The high fees Amazon charges its TPSs are a substantial source of revenue for Amazon. Between 2014 and 2020, Amazon's revenue from TPS fees and charges grew from \$11.75 billion to over \$80 billion. Indeed, Amazon's third-party services were recently valued at more than \$250 billion. Seller fees now account for 21% of Amazon's total corporate

¹ Molson Hart, *How Amazon's Business Practices Harm American Consumers: Why Amazon Needs a Competitor and Why Walmart Ain't It*, Medium, <https://medium.com/swlh/amazon-needs-a-competitor-and-walmart-aint-it-5997977b77b2>.

revenue. Amazon's profit margins on seller fees from its online marketplace are about 20%, four times higher than its margins on its own retail sales.

~~39-40~~ Amazon's MFNs force TPSs to incorporate Amazon's inflated fees into their prices on other online marketplaces, including the TPS's own online marketplace. For example, one TPS who sold on its own website also sold on Amazon, because it was necessary to do so given Amazon's dominant market position; without selling on Amazon, the TPS could not be competitive. But because of the FPP, the TPS always made sure to sell its products through its own channels at the same price as it did on Amazon, even though it cost more to sell on Amazon, thus resulting in higher prices on its own websites than it would have charged absent the FPP.

~~40-41~~ Absent this restraint, many TPSs would be able to sell their products through their own or other online marketplaces for less than they sell them on Amazon's online marketplace, making the products available to consumers at lower prices. Absent this restraint, many TPSs would be able to sell their products through their own or other online marketplaces for less than they sell them on Amazon's online marketplace, making the products available to consumers at lower prices. Removal of this restraint would also entice buyers and sellers to utilize competing online marketplaces and incentivize new competing online marketplaces.

D. AMAZON'S MMA SIMILARLY REDUCES COMPETITION AND INCREASES PRICES TO CONSUMERS.

~~41-42~~ Amazon also enters into anticompetitive agreements with its FPSs. Amazon and FPSs agree in the MMA that, if Amazon fails to realize the agreed profit when it resells the FPS's products at retail to consumers through its online marketplace, the FPS will pay Amazon the difference. This can result in a FPS owing millions of dollars in "true up" payments to Amazon.

42-43. The typical scenario triggering the MMA is when Amazon lowers its retail price for a product on its online marketplace because it has identified a lower price for the product on a competing online marketplace. One FPP reported that it has received emails from Amazon identifying lower prices for that FPP's products on Wal-Mart and Target, and Amazon has asked him to ask those sites to increase the prices they are charging. The FPP has done so in order to avoid true-up payments under the MMA. Thus, the practical effect of this agreement, like the MFNs, is that the FPS is penalized if it sells, or allows others to sell, its products on a competing online marketplace at a lower price. The purpose and effect of the MMA is the same as the TPS MFNs: to prevent sellers from offering their products on competing online marketplaces at lower prices or on better terms than the products are offered on Amazon's online marketplace, thereby reducing other online marketplaces' ability to compete with Amazon's online marketplace for consumer traffic and sales by offering lower prices. These agreements insulate Amazon's online marketplace from the competitive threat that competitors will successfully lure consumers away from Amazon and grow market share.

E. AMAZON'S MFNs AND MMA REDUCE COMPETITION IN THE RELEVANT MARKET OF ONLINE MARKETPLACES.

1. Amazon's Marketplace Competes in the U.S. with Other Online Marketplaces.

43-44. Amazon is the dominant player among U.S. online marketplaces, accounting for between 50-70% of all online sales and an even greater share of multi-seller online marketplace sales. Amazon's marketplace competes with other multi-seller online marketplaces such as e-Bay and Walmart.com to sell hosting and other services to TPSs to enable TPSs to access online consumers and sales. Amazon has millions of TPSs on its online marketplace, despite its high fees and commissions—far more than its closest competitors. For example, Walmart.com has only 110,000 sellers on its marketplace.

~~44-45~~ Amazon competes with both multi-seller and single-seller online marketplaces, including the TPSs' own websites to attract consumer traffic and sales. A single-seller online marketplace is one where a particular seller has self-supplied access to online consumers. Amazon's MFNs and MMA are designed to and have successfully reduced competition in this online marketplace market and protected Amazon's dominant position.

~~45-46~~ Online marketplaces are separate and distinct from brick-and-mortar marketplaces ("physical marketplaces"). The FTC has recognized that a relevant market may be divided by channel of sale, resulting in separate markets for brick-and-mortar marketplaces and online marketplaces.

~~46-47~~ The U.S. House of Representatives' Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary ("House Antitrust Subcommittee") recently conducted an extensive investigation of anticompetitive practices in the tech industry—including by Amazon—concluding that online marketplaces are a distinct market from physical marketplaces. The U.S. Department of Commerce tracks online marketplace sales as a separate category, acknowledging its distinction from physical marketplaces.

~~47-48~~ Consumers do not consider online marketplaces and physical marketplaces to be substitutes. Consumers using online marketplaces can shop for a virtually-unlimited range of products, without limitation to what products are available in their individual geographic area. Consumers can shop online with no limitation as to the time of day or day of the week. Online marketplace consumers can quickly identify competing offers and more easily compare different alternatives before buying, with lower search costs than physical marketplaces. As a result of the enormous amount of data collected by online marketplaces about consumer buying habits, a consumer can receive product suggestions based on a comprehensive analysis of what

the consumer is and is not likely to buy. The degree to which a retailer selling through an online marketplace can tailor and personalize the shopping experience to a specific consumer is different in kind from the methods available to retailers selling through physical marketplaces, precisely because the type of behavioral data that online marketplaces can track is far more detailed and nuanced.

~~48-49~~ Economists and academics recognize consumers' distinction between online marketplaces and physical marketplaces and, therefore, the lack of substitutability between the two. For example, one study of consumer perceptions discovered that consumers expect lower pricing from online marketplaces, in consideration of the perceived difference in overhead costs between online and physical marketplaces. Another economic paper applied econometric analysis to sales data and found that consumers shopping online are generally more price sensitive than those shopping in physical stores. A third study noted that online marketplaces have a major difference from the traditional way of shopping with respect to terms of distribution and logistics.

~~49-50~~ Sellers generally do not consider online marketplaces and physical marketplaces to be close substitutes. As do consumers, sellers recognize the superiority of online marketplaces because of the unlimited geographic scope and hours of service. Economists recognize that online shopping represents a fundamentally different environment from physical shopping malls. This perception is confirmed by research showing that sellers' cost savings between online marketplaces and physical marketplaces include the reduction of handling costs within a physical marketplace (unpacking, stocking, and maintaining shelves), theft (which can easily account for 3% of the sale of a retailer), rent (low-cost distribution centers replace expensive urban or suburban real estate) and selling costs (automated and tele-sales replace

relatively expensive in-store salespeople). The U.S. Bureau of Labor Statistics also notes that retailers selling through online marketplaces typically maintain lower margins than those selling through physical marketplaces due to lower overhead costs. The vast majority of TPSs on online marketplaces are small-to-medium-sized businesses, which do not have the resources or ability to pay for their own physical marketplaces.

~~§0-51~~ Online marketplaces also differ from physical marketplaces because online marketplaces have access to vastly more and different information about their potential or existing customers. For example, whereas physical stores and malls are generally only able to collect information on actual sales, online marketplaces track what shoppers are searching for but cannot find, which products they repeatedly return to, what they keep in their shopping cart, and what their mouse hovers over on the screen. Indeed, Amazon believed as far back as 1998 that personalization of the shopping experience would be one of the *insurmountable advantages* that online marketplaces would have over physical marketplaces. Not only is vastly more information about individual customer shopping habits available through online marketplaces, but online marketplaces are also better able to analyze overall demand for a product or products based on this data.

~~§1-52~~ Business and industry experts similarly recognize that online marketplaces and physical marketplaces are not close substitutes. Industry reports studying trends in commerce regularly compare Amazon's online marketplace exclusively to other online marketplace competitors. A 2019 study of consumer behavior compared activity on Amazon's online marketplace only to that on other online marketplaces as competitors. A commonly-cited marketing research company, eMarketer, similarly determines Amazon's market share based only on the shares of other online marketplace sales.

~~§2-§3~~ The U.S. Census Bureau also noted that physical marketplaces typically engage in less advertising than online marketplaces, with the latter spending nearly three times as much on advertising and promotions per dollar of sales. Online marketplaces have additional unique characteristics, including in the marketing and distribution of products. Online marketplaces allow for more efficient information dispersion, unique communication methods, increased flexibility in digesting consumer information, and enhanced consumer interactivity and search capability.

~~§3-§4~~ Amazon acknowledges the distinction between online and physical marketplaces. For example, Amazon has identified eBay's online marketplace as Amazon's main competitor. Tellingly, Amazon's MFNs have only dictated what TPSs can do on other *online* marketplaces; they do not apply to physical marketplaces. This is because Amazon's intent with these anticompetitive agreements is to protect its monopoly in the distinct market of online marketplaces.

2. Amazon's Market Power Is Demonstrated by Its Control over Online Marketplace Pricing.

~~§4-§5~~ Market power exists where a market participant has the power to control prices or exclude competition. Amazon's market power in the market for online marketplaces is demonstrated by its ability through its MFNs to control prices on other online marketplaces and prevent those prices from being lower than they are on Amazon's online marketplace. These agreements effectively create a price floor across online marketplaces, resulting in the "Amazon price" spreading across online marketplaces, despite TPSs' ability and desire to sell their products for less through other online marketplaces.

~~§5-§6~~ Similarly, the MMA enables Amazon to constrain the price for FPS products on other online marketplaces. The MMA induces FPSs to maintain higher prices on other online

marketplaces in order to prevent triggering the MMA and the FPS's requirement to make a "true up" payment to Amazon. Absent this agreement, FPS products could be sold on competing online marketplaces for less.

3. Amazon's Market Power Is Demonstrated by Its Dominant and Durable Market Share.

~~§6-§7~~ Amazon accounts for as much 70% of all online marketplace sales, and an even larger percentage of sales through multi-seller online marketplaces. Amazon's percentage of online sales among U.S. online marketplaces has grown substantially in recent years. In 2016, Amazon's percentage of online sales was estimated to be 38.1%. More recent estimates place Amazon's percentage of online sales at more than 50%. The House Antitrust Subcommittee estimated that Amazon controls 65% to 70% of U.S. online marketplace sales. By comparison, Amazon's nine closest online marketplace competitors individually have far smaller market shares. For example, Walmart.com and eBay, Amazon's closest online marketplace competitors, have just single-digit shares of the market. Other online marketplace competitors of Amazon have referred to it as an 800-pound tech gorilla.

~~§7-§8~~ Amazon has millions of TPSs on its online marketplace. Other multi-seller online marketplaces, like Walmart.com, have only a fraction of this number despite lower fees and commissions.

~~§8-§9~~ Amazon's dominance among online marketplaces is overwhelming. One industry group, the Institute for Local Self-Reliance, noted that online sellers that once drew sufficient consumer traffic to their own self-supplied online websites are now compelled to become sellers on Amazon's online marketplace, or forego access to a majority of online shopping traffic.

~~59-60~~ Amazon's dominance as an online marketplace is not fleeting; instead, as the House Antitrust Subcommittee concluded, Amazon has significant and durable market power among U.S. online marketplaces.

4. Amazon's Dominance Is Protected by Barriers to Entry.

~~60-61~~ Amazon's dominance is protected by significant barriers to entry, many of which Amazon itself created. For example, Amazon was willing to invest massive sums of money and incur years of staggering financial losses as a first and dominant mover developing an online marketplace. Meaningful entry into the market for online marketplaces with scope and scale similar to Amazon is improbable (or impossible) given the barriers to entry that Amazon has created. Amazon acknowledges that entry by new multi-seller online marketplace participants requires significant incremental investments in brand development, inventory, and marketing/customer acquisition. Commentators recognize that practical barriers to successful and sustained entry as a multi-seller online marketplace are very high, given the data collection and network effects that Amazon enjoys.

~~61-62~~ The most significant barrier to entry in this market is network effects. According to the House Antitrust Subcommittee, digital markets tend to be characterized by strong network effects, making them prone to concentration and monopolization. Because the value of an online marketplace to buyers and sellers increases as more of each of them utilize the marketplace, new entrants into the market find it extremely difficult to gain traction when going up against a large, well-established incumbent like Amazon with hundreds of millions of buyers and millions of sellers. Buyers are more likely to choose Amazon than a competitor because it has amassed millions of sellers from whose products a buyer can choose. Sellers are more

likely to choose Amazon to gain access to the hundreds of millions of customers to whom they can sell.

~~62-63~~ Amazon reinforces these network effects in a variety of ways. For example, Amazon's massive customer base is in part the result of its Amazon Prime program, on which Amazon historically has been willing to incur massive financial losses to create barriers against competition. Amazon Prime is a paid annual membership service available to Amazon's customers, which entitles them to certain benefits, including free one or two-day shipping on Prime products. Prime was first offered in 2005, priced at \$79/year. The explicit purpose of pricing Prime so low was to change people's mentality so they would not shop on any other online marketplace. Over the years, Prime has expanded to include other benefits, including an e-book lending library, Prime Video (with original programming and access to movies and tv shows), and Prime Music, all of which further lock-in customers to Amazon (referred to as "consumer viscosity"). While Amazon has lost money on Prime, Prime has enabled Amazon to build a massive customer base, enhancing the network effects that favor Amazon's online marketplace. Amazon was willing to incur those substantial losses on Prime in exchange for acquiring substantial market power as an online marketplace.

~~63-64~~ It is estimated that there are 126 million Prime members in America – virtually one per each of the 128.5 million households in the U.S. A survey found that an astonishing 96% of all Prime members are more likely to buy products from Amazon's online marketplace than any other online marketplace.

~~64-65~~ Another barrier to entry is the massive quantity of data about its buyers and sellers that Amazon collects through its online marketplace. Amazon collects detailed pricing and revenue data, along with customer reviews, information on what customers viewed but did

not purchase, and how long they viewed items. Amazon uses this data to target products for individual users, enticing customers to spend more on Amazon's online marketplace. Faced with such an insurmountable barrier to entry, market entrants find it difficult to compete.

~~65-66~~ Another barrier to entry is Amazon's use of its delivery and logistics services to entrench its online marketplace dominance. Sellers need access to the huge number of regular buyers who are members of Amazon Prime. Sellers generally cannot be successful without access to those buyers. The easiest way to become "Prime eligible" is for sellers to pay Amazon for its FBA logistics and delivery services. Eighty-five percent of the top 10,000 TPSs use FBA, up from 56% in the last four years. Amazon now delivers nearly two-thirds of the products purchased through its online marketplace. It is the fourth-largest package delivery company in the United States. The market power it has in the delivery services market provides Amazon with another barrier to entry against current or potential online marketplace competitors. Jeff Bezos stated in 2015 that "FBA is so important because it is glue that inextricably links Marketplace and Prime. Thanks to FBA, Marketplace and Prime are no longer two things. Their economics . . . are now happily and deeply intertwined."

5. Amazon's Anticompetitive Agreements Reinforce and Maintain Its Dominant Market Position.

~~66-67~~ Amazon's MFNs and MMA entrench Amazon as the dominant online marketplace. While TPSs, absent Amazon's pricing constraints, would be incentivized to avail themselves of alternative online marketplaces—like Walmart.com, eBay, and their own online marketplaces, which have significantly lower or no fees, and in turn provide their products for lower prices to consumers to increase sales, they are unable to sell their products for less through those other online marketplaces. For example, Walmart routinely fields requests from TPSs to raise prices on Walmart's online marketplace because TPSs worry that a lower price on

Walmart's online marketplace will jeopardize their status on Amazon's marketplace. Fear of Amazon may even cause sellers to remove listings from other online marketplaces entirely. The MMA similarly enables Amazon to maintain dominance among online marketplaces by creating a disincentive for FPSs to sell their products (or allow them to be sold by others) through competing online marketplaces for less than they are sold on Amazon's online marketplace.

~~67-68~~ Competing online marketplaces have vocally condemned Amazon's anticompetitive practices. For example, one of Amazon's competitors told the House Antitrust Subcommittee that "as Amazon raises the costs to sellers, and requires that Amazon have the lowest prices available, for a seller to be able to make significant sales on [Amazon's] marketplace, these sellers will raise the price on competitor sites to match Amazon's price."² Given that price is online shoppers' most important criteria for purchasing, this severely handicaps the ability of other online marketplaces to gain market share.

~~68-69~~ Amazon's anticompetitive agreements with TPSs and FPSs ensure that existing or potential online marketplace competitors cannot effectively gain market share or enter, which in turn reinforces Amazon's monopoly and ability to dictate fees, commissions, and prices. The House Antitrust Subcommittee's investigation confirms that Amazon's "history of using MFN clauses" ensures that none of its "TPSs can collaborate with an existing or potential competitor to make lower-priced or innovative product offerings available to consumers."³ Similarly, European investigators noted that when sellers cannot offer lower prices to Amazon's online marketplace competitors, "it can be difficult for other internet marketplaces

² House Antitrust Subcommittee, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, 296 (Oct. 6, 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

³ *Id.* at 295.

that compete with Amazon, especially new platforms entering the market, to reach a large number of customers.”⁴

F. AMAZON SUPPRESSES PRICE COMPETITION IN ONLINE RETAIL PRODUCT MARKETS THROUGH ITS MFNS.

~~69-70~~ Amazon also competes with more than 50 percent of its TPSs to sell products directly to online consumers at retail.

~~70-71~~ For example, Amazon sells its own brand of batteries in competition with TPSs that sell their own batteries through Amazon’s and other online marketplaces. Amazon-branded batteries are reasonable substitutes for batteries sold by TPSs on Amazon’s and other online marketplaces. Thus, given these products’ substitutability and online purchasers’ price sensitivity, consumers would likely purchase more TPS batteries if they were offered on an online marketplace for a lower price or on better terms than the Amazon retail products.

~~71-72~~ Similarly, Amazon also sells its own brand of mattresses, light bulbs, cookware, computer accessories, luggage, exercise equipment, and motor oil in competition with TPSs that sell their own mattresses, light bulbs, cookware, computer accessories, luggage, exercise equipment, and motor oil through Amazon’s and other online marketplaces. Each one of these Amazon-branded products are reasonable substitutes for other brands of each one of these products sold by TPSs on Amazon’s and other online marketplaces. Thus, given these products’ substitutability and online purchasers’ price sensitivity, consumers would likely purchase more of each of these products sold by TPSs if they were offered on an online marketplace for a lower price or on better terms than the Amazon retail products.

⁴ European Commission, *Germany and United Kingdom: Antitrust Cases against Amazon formally closed*, https://ec.europa.eu/competition/ecn/brief/05_2013/amaz_deuk.pdf.

~~72-73~~ Amazon's MFNs insulate Amazon's retail products from this competition and consumer switching by fixing and maintaining the prices of TPS competing products across online marketplaces. Absent the MFNs, TPSs could and would offer their products that compete with Amazon retail products for lower prices on competing online marketplaces, because they could profitably do so and gain additional volume and sales.

G. AMAZON'S ANTICOMPETITIVE CONDUCT HARMS CONSUMERS, TPSs, FPSs, AND COMPETITION THROUGH HIGHER CONSUMER PRICES, HIGHER TPS FEES, LOWER FPS PROFITS, LESS CHOICE AND LESS INNOVATION.

~~73-74~~ Amazon's MFNs penalize TPSs for selling their products for lower prices or better terms on other online marketplaces, even when TPSs could profitably do so and gain volume. These restrictions also cause customers to pay higher prices for a wide variety of goods purchased through online marketplaces. In setting their prices on other online marketplaces, TPSs must incorporate Amazon's high fees and commissions into their sales prices. The real-world impact of Amazon's MFNs is higher prices for online consumers.

~~74-75~~ TPSs also are harmed because the MFNs entrench and maintain Amazon's monopoly, enabling Amazon to continue charging high fees and commissions and reducing competing online marketplaces' incentive and ability to attract TPSs with lower fees and commissions and consumers (and market share) with lower prices. TPSs also must devote substantial resources to monitoring online marketplaces to be sure that their products are not being sold by another seller for less than TPSs are selling their products on Amazon, in order to avoid sanctions by Amazon on its online marketplace.

~~75-76~~ These price controls also disincentivize new entry and innovation in online marketplaces to the detriment of competition and consumers.

~~76-77~~ A recent article by two highly respected economists explains this anticompetitive conduct and its effects:

The potential competitive dangers from platform MFNs call for antitrust scrutiny. . . . The setting we analyze has vendors selling goods or services through online platforms. The vendors set the sales price for their customers and pay the platform a transaction fee built into the price. The platform in turn requires vendors not to sell for less on other sites or platforms. This platform MFN prevents the vendor from allowing its product to be offered at a lower price on its own website (if any) or on a rival platform. As a result, entrants are excluded, allowing the platform . . . imposing the MFN to charge supra-competitive prices.⁵

~~77-78~~ It is exactly this impact on pricing that caused the British and German regulators to investigate Amazon’s MFNs in 2013. In their investigations, those European authorities noted that Amazon’s MFN clause “soften[s] competition between Amazon and other internet marketplace operators, leading to increased seller fees and generally higher retail prices with insufficient countervailing benefits, to the detriment of consumers.”⁶ The German Cartel Office went on to say that it found the MFN to “constitute[] a horizontal trade cooperation between Amazon and third party sellers that has as its object and effect various restrictions of competition.” Amazon’s MFN in the United States has the same effect, allowing Amazon to maintain high TPS fees, increasing prices on online marketplaces, reducing choice for consumers, and stifling competition and innovation among online marketplaces and for a number of retail products.

~~78-79~~ Amazon’s MMA similarly harms FPSs, consumers and competition. The MMA penalizes FPSs for selling their products—or allowing their products to be sold—through other online marketplaces at lower prices than offered on Amazon. Thus, FPSs are incentivized to

⁵ Jonathan Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 Yale L. J. 2176 (2018).

⁶ European Commission, *Germany and United Kingdom: Antitrust Cases against Amazon formally closed*, https://ec.europa.eu/competition/ecn/brief/05_2013/amaz_deuk.pdf.

and do raise and maintain higher prices to and on competing marketplaces than would otherwise exist absent these agreements in order to avoid triggering the requirement to pay “true-up” payments to Amazon. These higher prices harm consumers. FPSs’ profits and ability to maintain and grow their businesses are reduced by virtue of their requirement to ensure and supplement Amazon’s profits. FPSs also devote substantial resources to aggressively monitor the prices of their products on other online marketplaces to avoid triggering the MMA’s terms. The MMA reduces competition among online marketplaces, increasing consumer prices, limiting consumer choice, and decreasing competitive innovation.

COUNT I

AGREEMENTS IN RESTRAINT OF TRADE (MFNs) IN VIOLATION OF D.C. CODE § 28-4502

~~79-80~~ The District hereby incorporates each preceding and succeeding paragraph as though fully set forth herein.

~~80-81~~ Amazon sells access to its online marketplace and related services to TPSs to sell their products online, but Amazon’s online marketplace ultimately competes directly against other multi-seller and single-seller online marketplaces, including TPSs’ own websites to attract consumer traffic and sales. Amazon also directly competes with the majority of its TPSs as a retailer to sell goods to consumers that directly compete with goods that many of its TPSs offer through Amazon’s online marketplace and on competing online marketplaces. These products include at least batteries, mattresses, light bulbs, cookware, computer accessories, luggage, exercise equipment, and motor oil.

~~81-82~~ Through the MFNs, Amazon and its TPSs unlawfully agree that TPSs 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. This conduct causes prices to District residents to be higher than they otherwise would be, inhibits TPSs' ability to compete at retail with Amazon products, reduces entry and growth of competitor online marketplaces, and decreases innovation and consumer choice.

~~§2-83~~ As a direct and proximate cause of these agreements, District residents have been injured because they have been denied competitive online marketplaces and paid higher prices for products purchased online than they would have paid absent Amazon's anticompetitive agreements. District consumers are deprived of choosing from a full, competitive range of online marketplaces which would have offered lower prices.

~~§3-84~~ Amazon's MFNs violate D.C. Code § 28-4502.

COUNT II

AGREEMENTS IN RESTRAINT OF TRADE (MMA) IN VIOLATION OF D.C. CODE § 28-4502

~~§4-85~~ The District hereby incorporates each preceding and succeeding paragraph as though fully set forth herein.

~~§5-86~~ Amazon purchases products from FPSs that it sells at retail directly to consumers through its online marketplace. Amazon and FPSs execute the MMA, by which FPSs agree to guarantee Amazon a certain minimum profit margin on those products. If Amazon elects to sell the products at a lower price than anticipated at the time it purchased them from the FPSs because Amazon has identified a lower price on a competing online marketplace, the FPS agrees to compensate Amazon for any lost anticipated profits. These agreements cause FPSs to either raise their prices to and on other online marketplaces or not to offer their products to other online marketplaces at all in order to avoid owing "true up" payments to Amazon.

~~86-87~~ As a direct and proximate cause of Amazon's anticompetitive conduct, District residents have been injured because they have been denied competitive online marketplaces and paid higher prices for products than they would have paid absent Amazon's anticompetitive acts. District consumers are deprived of choosing from a full, competitive range of online marketplaces which could have offered lower prices.

~~87-88~~ Amazon's MMAs violate D.C. Code § 28-4502.

COUNT III

ILLEGAL MAINTENANCE OF MONOPOLY IN VIOLATION OF D.C. CODE § 28-4503

~~88-89~~ The District hereby incorporates each preceding and succeeding paragraph as though fully set forth herein.

~~89-90~~ At all relevant times, Amazon has possessed monopoly power among online marketplaces in the United States. Amazon's online marketplace accounts for between 50-70% of all online sales. Amazon accounts for an even larger share of multi-seller online marketplace sales. Amazon's online marketplace also hosts millions of TPSs on its online marketplace, substantially more TPSs than any other online marketplace. Amazon's monopoly power is further demonstrated by its ability to control prices on competing online marketplaces, its ability to charge its TPSs high fees for access to its online marketplace, and its ability to negotiate the MMA with FPSs that cause the FPSs to bear the risk of sales price deviations.

~~90-91~~ Amazon's monopoly power is protected through barriers to entry, including the network effects created by its massive number of customers and sellers; its unparalleled collection of buyer and seller data; and its delivery and logistics capabilities.

~~91-92~~ Amazon has willfully maintained and enhanced its market power through its anticompetitive and exclusionary conduct. Amazon has used its MFNs to ensure that TPSs will

not offer products for a lower price or on better terms on a competing online marketplace.

Amazon similarly uses the MMA to ensure that FPSs do not sell their products for less through online marketplaces that compete with Amazon. Amazon's MFNs and MMA effectively reduce and foreclose competition from other online marketplaces.

~~92-93~~ Through Amazon's agreements with its TPSs and FPSs to price their products at artificially high levels on other online marketplaces, Amazon forecloses its online marketplace competitors' (including TPSs' self-supplied online marketplaces) ability to compete and gain market share, enabling Amazon to maintain its dominance among online marketplaces.

~~93-94~~ Amazon's conduct has harmed and continues to harm consumers, TPSs, FPSs, and competition in the District. As a direct and proximate cause of Amazon's anticompetitive conduct, District residents have been injured because they have been denied competitive online marketplaces and paid higher prices for products than they would have paid absent Amazon's anticompetitive agreements. District consumers are deprived of choosing from a full, competitive range of online marketplaces in which prices could have been lower. TPSs and FPSs have been injured because they have been required to expend significant resources to monitor prices on online marketplaces and could have made and kept more profits and a greater ability to maintain and grow their businesses (many of which compete in individual retail product markets with Amazon) if they had the ability to adjust prices on other online marketplaces to implement their individual sales strategies.

~~94-95~~ Amazon's anticompetitive conduct constitutes unlawful monopoly maintenance in violation of D.C. Code § 28-4503.

COUNT IV

**ATTEMPTED MONOPOLIZATION
IN VIOLATION OF D.C. CODE § 28-4503**

~~95-96~~ The District hereby incorporates each preceding and succeeding paragraph as though fully set forth herein.

~~96-97~~ Amazon accounts for between 50-70% of all online sales. Amazon accounts for an even larger percent of sales through multi-seller online marketplaces. By comparison, Amazon's closest competitor online marketplaces control only single-digit percentages of online sales.

~~97-98~~ Amazon has engaged in anti-competitive conduct, including through its institution, implementation, and enforcement of its MFNs and MMA. Through those restraints, Amazon has demonstrated its intent to monopolize the market for online marketplaces, control prices, exclude competitors, and suppress competition and innovation among online marketplaces.

~~98-99~~ There is a dangerous probability that Amazon will be successful in achieving its goal of obtaining monopoly power among online marketplaces (if it has not already done so). In 2016, Amazon accounted for 38% of sales through online marketplaces. It now accounts for over 50%, and possibly as high as 70%, of all online sales. Its percentage of multi-seller online marketplaces is even higher.

~~99-100~~ As a direct and proximate cause of Amazon's anticompetitive conduct, District residents have been injured because they have been denied competitive online marketplaces and paid higher prices for products than they would have paid absent Amazon's anticompetitive acts. District consumers are deprived of choosing from a full, competitive range of online marketplaces that could have offered lower prices. TPSs and FPSs have been injured because they could have made and kept more profits and a greater ability to maintain and grow

their businesses (many of which compete directly with Amazon at retail in individual product markets) if they had the ability to adjust prices on other online marketplaces to implement their individual sales strategies.

~~100-101~~_____ Amazon's anticompetitive conduct constitutes an attempt to achieve a monopoly in violation of D.C. Code § 28-4503.

PRAYER FOR RELIEF

~~101-102~~_____ The District of Columbia respectfully requests that this Court, as authorized by statute and its own equitable powers, enter final judgment against Amazon and:

- a. Adjudge and decree that Amazon's actions constitute unreasonable and unlawful restraints of trade in violation of the District of Columbia Antitrust Act, D.C. Code § 28-4502;
- b. Adjudge and decree that Amazon acted unlawfully to maintain or attempt to achieve a monopoly among online marketplaces in the United States, in violation of the District of Columbia Antitrust Act, D.C. Code § 28-4503;
- c. Enjoin and restrain Amazon, its affiliates, assignees, subsidiaries, successors, and transferees, and its officers, directors, partners, agents and employees, and all other persons acting or claiming to act on Amazon's behalf or in concert with it, from continuing to engage in any anticompetitive conduct and from adopting in the future any agreement, practice, plan, program, or device having a similar purpose or effect to the anticompetitive actions set forth above;
- d. As needed, enter such relief to remove any ability of Amazon to harm competition by disadvantaging any current, potential, or nascent threat to its market power, including but not limited to structural relief as well as

effective, monitorable, and measurable conduct remedies that eliminate the ability of Amazon to continue to reap benefits from its pattern of competitive harm;

- e. Appoint a corporate monitor to ensure implementation of all structural or practice remedies ordered by the Court, as well as to ensure that Amazon does not engage in further anticompetitive conduct, at Amazon's expense;
- f. Award to the District any other equitable relief as the Court finds appropriate to redress Amazon's violations of the laws specified above and to restore competitive conditions in the markets affected by Amazon's unlawful conduct and deprive Amazon of any advantages from its unlawful acts;
- g. Award to the District the maximum civil penalties as provided by the D.C. Antitrust Act;
- h. Award to the District actual damages on behalf of District residents in the District's parens patriae capacity, and such other relief as provided by the D.C. Antitrust Act;
- i. Award pre-judgment and post-judgment interest on such monetary relief;
- j. Award to the District statutory or equitable disgorgement, or any other equitable relief for the benefit of the District consumers as appropriate under the D.C. Antitrust Act;
- k. Award to the District its costs, including reasonable attorneys' fees; and
- l. Order any additional relief that this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial on all issues so triable.

DATED: April 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of April 2022, a true and correct copy of the foregoing was served on counsel for Amazon by the court's electronic filing service.

/s/ Theodore F. DiSalvo
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Attorney for Plaintiff