SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

No. 2021 CA 001775 B

Judge Hiram Puig-Lugo

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

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INTEREST OF THE UNITED STATES

The United States respectfully submits this statement under 28 U.S.C. § 517, which permits the Department of Justice "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." As the principal enforcer of federal antitrust law, the United States has a strong interest in the sound analysis of anticompetitive restraints and in promoting competition. Although the District brought suit under D.C. antitrust law, the D.C. statutes at issue mirror federal antitrust statutes, and D.C. law instructs courts to look to federal law for guidance; principles of federal antitrust law therefore bear on this Court's analysis. Based on the errors identified below, the United States files this Statement and urges the Court to reconsider its decision dismissing the District of Columbia's complaint against Amazon.com, Inc.

BACKGROUND

In May 2021, the District of Columbia sued Amazon.com, Inc. (Amazon), challenging as violations of D.C. antitrust law certain contractual provisions between Amazon and its merchants.[1] The District alleges that, due to Amazon's significant market power (Am. Compl. ¶¶ 3, 17, 39, 52-61), agreements between Amazon and its merchant partners affect not only how sellers set prices on items sold on Amazon's platform, but also elsewhere—leading to an outsized effect on the entire online marketplace. Am. Compl. ¶¶ 5-11, 20-26 (describing a "price-parity provision" contained in contracts between Amazon and third-party merchants, a "fair-pricing policy" agreed to by Amazon and third-party merchants, and a "minimum margin agreement" between Amazon and first-party sellers); *id.* ¶¶ 1-12, 25-35, 50. According to the complaint, Amazon's practices unlawfully harm competition and the competitive process by, among other means, inflating prices

[1] The District amended its complaint on September 10, 2021.

across all online marketplaces, reducing incentives to compete, and insulating Amazon from competition. *Id.* ¶¶ 12, 69-74.

On March 18, 2022, this Court dismissed the District's suit in a hearing, holding the complaint offered only conclusory allegations of anticompetitive effects. In reaching its holding, the Court appeared to require the District to exclude the possibility of lawful market behavior or "parallel conduct." Hearing Tr. 29, 36-37. The District timely moved for reconsideration.

ARGUMENT

The District brings this suit under sections of the D.C. Code that mirror the federal Sherman Antitrust Act.[2] Of relevance to this Statement of Interest, Section 1 of the Sherman Act outlaws any "concerted action" that unreasonably restrains trade. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010). To establish a claim under Section 1, then, the District must show merely (1) there is concerted action (*i.e.*, a "contract, combination . . . or conspiracy," 15 U.S.C. § 1); and (2) that action unreasonably restrains trade. *Ibid.*

These are distinct elements that require independent analyses, *see id.* at 186 ("whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade")—but this Court incorrectly blended the two inquiries. Specifically, in deciding whether the District plausibly pleaded that Amazon's restraints were "unreasonable" (the second element), this Court seems to have looked to inapplicable case law on the existence of concerted action (the first element) and required the District to exclude lawful explanations for alleged restraints that the Court recognized had been imposed by way of

[2] D.C. Code §§ 28-4502 and 28-4503 correspond to Sections 1 and 2 of the Sherman Act, respectively. Because the Court's reasoning appeared to focus exclusively on the District's equivalent of a Section 1 claim, this Statement is limited to discussion of Section 1. *See* D.C. Code § 28-4515 ("[A] court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes.").

contract (a form of concerted action). As described below, however, the District has no such burden. If left uncorrected, the Court's ruling could jeopardize the enforcement of antitrust law by improperly raising the bar on plaintiffs challenging anticompetitive contractual restraints in the District of Columbia.

I. The Alleged Restraints Constitute Concerted Action Because the Agreements are Contractual.

Concerted action can take many forms—whether via express agreement or implied. Section 1 of the Sherman Act specifically reaches "contract[s]," 15 U.S.C. § 1, which means that, where a contract or contractual provision is challenged (as in this case) as unreasonable, the restraint meets the "concerted action" requirement of Section 1 without further analysis. *See, e.g.*, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948) (concerted-action requirement is "plainly established" by "express agreements"); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010) (a written agreement is "independently adequate" to establish concerted action); *In re Se. Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008) ("[R]ather than simply alleging facts from which an inference of an agreement can be drawn, [plaintiffs] allege, and defendants concede, that actual agreements exist.").

Meeting the concerted-action requirement, however, sometimes can involve more. Where there is no direct evidence of concerted action (such as an express agreement), plaintiffs may establish concerted action through indirect, or circumstantial, evidence. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), for example, the primary issue confronted by the Supreme Court was whether an agreement among competitors could be inferred solely from allegations of a "parallel course of conduct," such as competitors choosing to stay out of each other's territories or increasing prices around the same time. *Id.* at 551, 567; *see also id.* at 553 ("Because § 1 of the Sherman Act does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected

by a contract, combination, or conspiracy, [t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express.") (internal quotations omitted). The Supreme Court held the plaintiffs in *Twombly* did not meet their burden to plead sufficient factual detail suggesting "an agreement was made." *Id.* at 556. *See also In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999) ("Parallel pricing is a relevant factor to be considered along with the evidence as a whole; if there are sufficient other 'plus' factors, an inference of conspiracy can be reasonable.").

The situation confronted in *Twombly* is distinct from this case, where the parties do not dispute—and this Court has already recognized—that there was agreement between Amazon and its merchants. Hearing Tr. 29, 36, 39. To meet the concerted-action element, it is dispositive that the District challenges express contractual provisions themselves as unreasonable restraints, *see* Am. Compl. ¶¶ 5-11; the discussion in *Twombly* on when courts may draw an inference of agreement is "superfluous." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 289 (4th Cir. 2012). The Court's references to this aspect of *Twombly* throughout the hearing thus misinterpret the law and should be corrected. *See, e.g.*, Hearing Tr. at 36 ("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 . . . the Court found that the agreement could be explained by lawful . . . unchoreographed free market behavior.").

II. This Court Improperly Raised the Burden for the District by Blending the Concerted-Action Requirement with the Requirement that the Challenged Restraints be Unreasonable.

With concerted action established, the only remaining question under Section 1 is whether the District has sufficiently alleged the challenged agreements are "unreasonable." This element can be met in one of two ways—through the per se rule or the rule of reason. *Ohio v. Am. Express*

Co., 138 S. Ct. 2274, 2283 (2018). Some restraints are unreasonable per se under Section 1 based on their inherently anticompetitive "nature and character," *Standard Oil Co. v. United States*, 221 U.S. 1, 64-65 (1911); restraints judged under the rule of reason are condemned as unreasonable after courts "conduct a fact-specific assessment. . . to assess the [restraint]'s actual effect on competition." *Am. Express*, 138 S. Ct. at 2283-84 (internal quotation marks omitted).

Notably, whether the District has plausibly asserted that a restraint of trade is unreasonable is analyzed separately from whether the District has plausibly alleged the restraint is a product of concerted action. As the Supreme Court put it, "[t]he question whether an arrangement is a contract, combination, or conspiracy is *different from and antecedent to* the question whether it unreasonably restrains trade." *Am. Needle, Inc.*, 560 U.S. at 186 (emphasis added).

To the extent this Court treated the question whether the restraints are explainable by lawful, unchoreographed behavior as relevant to deciding reasonableness, that too is wrong. *See* Hearing Tr. 29-30 (responding to counsel for the District, who said the "only question" for the Court is whether the restraints "should be considered . . . unreasonable," that the District's allegations are implausible because they are explained by lawful behavior, such as the "parties' rights to enter into contracts" and other "market factors"); *id.* at 36-37 ("My focus here is on the latter part of the analysis that the Supreme Court decides in *Iqbal*. Specifically, whether it could be 'explained by lawful, unchoreographed free market behavior.'"). As described above, *Twombly*'s inquiry into parallel conduct relates exclusively to the concerted-action element of a Section 1 claim; *Twombly* never reached the question whether any alleged agreement was unreasonable.[3]

[3] For reasons described in Part I of this Statement, it would be error even if this Court applied the analysis on "parallel conduct" from *Twombly* to determine whether the District has met the concerted-action element.

Dicta cited by this Court from *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) underscores this point. There, the Supreme Court cited *Twombly* to say that a lawful explanation for parallel conduct bears on the existence of an "accord" or "agreement"—and not whether that agreement was unreasonable. As explained in *Iqbal*, the Court in *Twombly* "concluded that [parallel conduct] did not plausibly suggest an illicit *accord* because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. Because the well-pleaded fact of parallel conduct . . . did not plausibly suggest an unlawful *agreement*, the Court held the plaintiffs' complaint must be dismissed." *Id.* at 680 (emphases added). As used in this passage of *Iqbal*, the term "lawful" refers to conduct that does not violate Section 1 because it does not meet the concerted-action element (the first element)—but this Court appears to have errantly applied this part of *Iqbal*'s reasoning to determine whether the conduct unreasonably restrains trade (the second element).

Because this Court has accepted that the District has challenged express agreements between Amazon and its merchants, whether these agreements resulted from "unchoreographed free-market behavior" is irrelevant. *See* Hearing Tr. at 25, 29, 36-37 (quoting *Iqbal*). The only question for the Court to resolve at the motion-to-dismiss stage is whether the District has sufficiently alleged the agreements are unreasonable, and the Court's analysis should properly focus on this inquiry.

CONCLUSION

For the reasons above, the government respectfully requests that the Court grant the District's motion for reconsideration.

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Respectfully submitted,

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