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

DEFENDANT AMAZON.COM, INC.'S OPPOSITION TO PLAINTIFF DISTRICT OF COLUMBIA'S MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, FOR LEAVE TO AMEND THE COMPLAINT OR FOR A WRITTEN ORDER OF DECISION

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INTRODUCTION

Amazon's pro-consumer policies at issue in the District of Columbia's Amended Complaint are intended to ensure that customers receive competitive prices when shopping in Amazon's store and to prevent egregious practices such as price gouging. The antitrust laws are designed to promote and protect such policies, which are common throughout retail and pro-competitive because they allow retailers to offer customers a trusted place to shop. The Court was correct when it dismissed the Amended Complaint for failure to allege facts showing that Amazon's policies have anticompetitive effects. The District's motion for reconsideration should be denied because the District fails to show the "manifest error" required to justify the extraordinary relief that it seeks. Nor does the District present any new facts or evidence that it could not have previously presented. Instead, the District repeats the same arguments it made in opposing Amazon's motion to dismiss, citing the same factually unsupported and implausible conclusions and assertions that the Court has rejected as insufficient to state a claim.

The District's alternative request to amend its complaint for a second time should also be denied because it is procedurally improper and lacks merit. Leave to amend can only be granted if the Court first grants the District's reconsideration motion. Because the District cannot show a basis to grant the motion, there is no operative complaint left to amend, and the District's request to do so must be denied. Regardless, granting the District leave to amend would be futile; the proposed amendments still fail to allege facts linking Amazon's policies to any anticompetitive effects, and the claims fail to state antitrust claims for other, independent reasons as well.

For these reasons, and those discussed below, the District's motion for reconsideration or, alternatively, to amend its complaint for a second time should be denied.[1]

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[1] Amazon takes no position on the District's request that the Court enter a written order memorializing its ruling dismissing the District's Amended Complaint.

BACKGROUND

A. The District's Complaints

After skipping an appropriate pre-filing investigation, the District filed its initial Complaint nearly a year ago, challenging two Amazon policies aimed at ensuring that customers receive competitive prices when shopping in Amazon's store. The first, a parity provision that Amazon discontinued in March 2019, required third-party sellers to offer products for sale through Amazon's store at an all-in price and on terms "at least as favorable" as the seller's offers through other sales channels. The second, Amazon's current Fair Pricing Policy, provides that Amazon may choose not to promote products that a third-party seller offers at a price "significantly higher than recent prices offered on or off Amazon."

Amazon moved to dismiss the District's Complaint, arguing that the District's antitrust claims based on Amazon's former parity provision and its Fair Pricing Policy failed as a matter of law on several grounds, including that the Complaint did not plausibly allege that Amazon's policies had an anticompetitive effect that harmed consumers.

In response to Amazon's motion, the District filed an Amended Complaint, in which it again asserted that the former parity provision and Fair Pricing Policy violated the antitrust laws. The District also added a new allegation, challenging as anticompetitive Amazon's margin agreements with its wholesale suppliers which govern the wholesale price that Amazon pays for goods that Amazon offers for retail sale. As in its original Complaint, the District conceded that the terms of the Fair Pricing Policy prohibit sellers only from offering prices on Amazon that are "significantly higher" than recent prices on or off Amazon, and that the former parity provision required terms "at least as favorable to Amazon Site users as the most favorable terms" upon which a product is offered or sold by the third-party seller elsewhere online. Am. Compl. ("AC") ¶¶ 20–21. Likewise, the District acknowledged that the margin agreements are triggered

only when Amazon *lowers* its prices to consumers: the agreements then allow Amazon to recoup some of the profit margin it loses when offering lower prices to consumers. AC ¶ 81.

Amazon again moved to dismiss on multiple grounds, including that the Amended Complaint still failed to allege facts plausibly showing anticompetitive effects. As Amazon explained, the District's allegations that Amazon's policies create a "price floor" were unsupported and conclusory. Those allegations also conflicted with the terms of the challenged policies. The parity provision did not prohibit sellers from lowering their prices off Amazon; it required that they did not discriminate against Amazon customers, including on the basis of price. The Fair Pricing Policy allows sellers to offer lower prices off Amazon. And the margin agreements are triggered when Amazon lowers—not raises—its retail prices. Amazon's Mot. to Dismiss AC at 17–18. Despite the District's sweeping assertions, the Amended Complaint, like the original Complaint, contained no allegation that any specific product was available at a supra-competitive price in Amazon's store, or in any competing retailer's store, as a result of the parity provision, Fair Pricing Policy, or margin agreements. *Id.* at 6–7. And the District's allegations regarding the effect of the margin agreements were implausible for the additional reason that the District failed to plead that any individual wholesale supplier had the market power to require major retail competitors—*e.g.*, Walmart, Costco, and Target—to raise their retail prices or refrain from matching Amazon's prices. *Id.* at 6–7, 18.

Rather than seek leave to amend for a second time, the District opted to oppose Amazon's motion to dismiss. But, for all the District's extensive citations to the Amended Complaint (here as well as in its opposition to the motion to dismiss), none of those paragraphs plausibly alleged that Amazon's policies prohibit sellers from lowering their prices off of Amazon or require sellers to raise their prices on Amazon, or shows that Amazon's policies

exclude rivals or have caused increased consumer prices. And the Amended Complaint, like the District's initial Complaint, identified no product with a supra-competitive price and no competitor that was excluded as a result of the challenged policies.

B. The Hearing and the Court's Ruling

At the hearing on Amazon's motion, the Court carefully and correctly explained the applicable pleading standard and received extensive argument (from multiple lawyers for the District), explaining how, in the District's view, the Amended Complaint plausibly alleged anticompetitive effects.

After considering and addressing the District's arguments, the Court rejected them—concluding that the Amended Complaint should be dismissed because it "fails to allege anti-competitive effects from these policies," alleging only "the conclusion that that's happening." Mar. 18, 2022 Hearing Tr. ("Tr.") 41:18-24. The Court observed that the fact (admitted by the District itself) that third-party sellers are free to sell through competing online outlets that "charge lower fees and commissions" shows the presence of "marketplace behavior"—*i.e.*, competition—not its absence. *Id.* at 41:3-17. As a result, the Court concluded that Amazon's "motion to dismiss should be granted," and dismissed the Amended Complaint. *Id* at 41:23-24.

At no time, either in its briefing in opposition to Amazon's motion, or during the hearing, did the District take the position that any pleading defects could be cured and ask for an opportunity to amend its complaint again; it waited to request leave to amend until after its case was dismissed.

ARGUMENT

I. The District's Motion for Reconsideration Should Be Denied Because the Court's Ruling Was Not Manifest Error and Because the District Raises No New and Previously Unavailable Arguments.

A "trial court may grant a Rule 59(e) motion only to correct manifest errors of law or fact." *Hackman* v. *Goya Foods, Inc.*, 2018 WL 6448569, at *1 (D.C. Super. Dec. 3, 2018) (quotation marks omitted). Rule 59(e) of the Superior Court Rules is not "designed to enable a party to complete presenting [its] case after the court has ruled against [it]," nor can a motion for reconsideration be "used to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Dist. No. 1--Pac. Coast Dist.* v. *Travelers Cas. & Sur. Co.*, 782 A.2d 269, 278 (D.C. 2001) (brackets in original; quotation marks and internal citations omitted).[2] A party may not "reargue facts and theories upon which a court has already ruled." *New York* v. *United States*, 880 F. Supp. 37, 38 (D.D.C. 1995). The District's motion fails to meet these standards.

A. The District Failed to Allege Anticompetitive Effects.

Anticompetitive effects are an essential element of each of the District's claims. *In re McCormick & Co., Pepper Prods. Mktg. and Sales Practices Litig.*, 275 F. Supp. 3d 218, 225 (D.D.C. 2017).[3] Accordingly, failure to allege anticompetitive effects requires the claims'

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[2] Rule 59(e) of the Superior Court Rules mirrors the language of Federal Rule of Civil Procedure 59(e).

[3] While the District contends that its Amended Complaint pleads a *per se* restraint of trade claim obviating the need to establish anticompetitive effects, the District withdrew a *per se* claim in its Amended Complaint. Amazon's Reply to the District's Opp'n to Def.'s Mot. to Dismiss AC at 7–8. But, even were the Court to find that a *per se* claim was still alleged in the Amended Complaint, the presumptive rule is that restraint of trade claims are reviewed under the rule of reason, with the *per se* framework applied only to "certain types of recurring agreements which proved to be so consistently unreasonable that they could be branded illegal *per se*," *Kruezer* v. *Am. Acad. of Periodontology*, 735 F.2d 1479, 1490 (D.C. Cir. 1984), such as horizontal agreements "to fix prices or allocate markets." *In re: McCormick & Co.,* 217 F. Supp. 3d 124, 135 (D.D.C. 2016). The Court's decision explains that Amazon's policies do not establish a price floor agreement among horizontal competitors to justify *per se* treatment. The District has failed to identify any precedent supporting application of a *per se* framework here. *See* Amazon's Reply to the District's Opp'n to Def.'s Mot. to Dismiss AC at 7–9.

dismissal. Pleading anticompetitive effects requires more than "labels and conclusions." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007)). Bare assertions "devoid of 'further factual enhancement'" are not enough. *Id.* (quoting *Twombly*, 550 U.S. at 557). "Likewise, alleged explanations of anticompetitive effect fail if they 'def[y] the basic laws of economics' or ignore obvious realities about competition." *In re McCormick*, 275 F. Supp. 3d at 225 (quoting *PSKS, Inc.* v. *Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 419–20 (5th Cir. 2010)). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Based on these standards, courts have dismissed antitrust claims, like those of the District, that are based on "a conclusory allegation that prices have increased." *Spinelli* v. *NFL*, 903 F.3d 185, 212 (2d Cir. 2018); *see also McCormick*, 275 F. Supp. 3d at 225 ("Conclusory allegations of supracompetitive prices are not sufficient."). The District's claims here are premised on a conclusory assertion that Amazon's policies create a "price floor," which supposedly leads to higher prices across every single product sold online to consumers. *E.g.*, AC ¶ 6 ("These price restrictions resulted in less competition and innovation among online marketplaces, and higher prices and less choice for consumers."); *see also* AC ¶¶ 4, 12, 24, 34, 40, 50, 71, 73, 77, 88. But the Amended Complaint contains no facts that plausibly support that assertion. And the facts that are alleged render the District's assertion implausible—including the plain language of the policies, as well as the fact that sellers can and do offer their products through numerous other marketplaces alleged to have lower commissions that compete against Amazon, such as Walmart and eBay.

The District argues that the Court overlooked allegations of anticompetitive effects. But, in doing so, the District cites the very same allegations the Court already considered and found lacking. *Compare* District's Opp. to Mot. to Dismiss at 16 (citing AC ¶¶ 10, 11, 34, 62, 64, 71, 73–74, 77), *with* District's Mot. for Recons. at 7 (citing the exact same paragraphs). Those allegations have not become any more plausible or less conclusory than they were last month when the Court considered and rejected them. Among the hundreds of millions of products sold to online consumers, the District does not allege which products are priced above competitive levels or by which sellers. Nor does it allege how those prices were the result of Amazon's policies as opposed to other market forces. This is exactly the type of Complaint that *Twombly* and *Iqbal* requires be dismissed. *Spinelli*, 903 F.3d at 212 (citing *Twombly* and affirming dismissal of antitrust claim because Plaintiffs "cite no examples, data, or other facts to support their assertion, and a conclusory allegation that prices have increased will not suffice"); *Nat'l ATM Council, Inc.* v. *Visa Inc.*, 922 F. Supp. 2d 73, 75, 85–87 (D.D.C. 2013) (dismissing case because "when one strips away the conclusory assertions and the inferences [of higher costs] proffered without factual support, there is very little left to consider").

The District's allegations are not only conclusory and implausible, they are contradicted by the plain language of the Fair Pricing Policy, which expressly grants sellers the authority for "setting their own prices on Amazon" and prohibits only "setting a price on a product or service that is significantly higher than recent prices offered on or off of Amazon." Amazon's Mot. to Dismiss AC, Ex. B (Fair Pricing Policy). This express language permits sellers to charge lower prices off Amazon, including on sites with lower commissions. As the Court correctly held, based on the allegations of the Amended Complaint, "sellers are free to set prices within the marketplace provided that those prices" are not "significantly higher than recent prices offered

on or off Amazon." Tr. 27:4-8. "[N]othing in [the Fair Pricing Policy] refers to a floor." Tr. 27:9-12.

Moreover, the District does not plausibly allege that either the Fair Pricing Policy or the former parity provision compel third-party sellers to raise prices or confer on those sellers the market power to do so. The District's proposed Second Amended Complaint shows that third-party sellers could comply with the Fair Pricing Policy and the former parity provision by dropping prices on Amazon to match the prices offered through their own websites or other channels. Proposed Second Am. Compl. ("Proposed SAC") ¶ 37. Again, nothing in the Amazon policies as alleged refers to a price floor. To the extent any third-party sellers *do* raise their prices on sales channels other than Amazon, that result is not required by Amazon's policies and can be explained by each individual seller acting independently to maximize its profits both on and off Amazon.

The District also fails to allege any facts that show Amazon's policies have the anticompetitive effect of excluding competition, citing only a law review article that discusses so-called "platform MFNs" generally and without analyzing the impact of Amazon's policies on third-party sellers in the United States. AC ¶ 72. Consistent with its other conclusory allegations of anticompetitive effects, the District fails to identify any actual or potential competitors that have been excluded by the policies at issue here. To the contrary, as the Court noted in its oral ruling, the District concedes that Amazon's competitors are able to compete by offering third-party sellers more attractive terms and conditions, and third-party sellers are free to sell through those rivals' retail outlets. Tr. at 41:13-17. The speculative predictions or theoretical conclusions in a law review article are not a substitute for plausibly alleging *facts* that

show anticompetitive effects with regard to the products and sellers at issue. *Iqbal*, 556 U.S. at 678.

The District's claims about Amazon's margin agreements fare no better. The District asserts that wholesale suppliers ask major retailers, like Walmart, to increase their prices to avoid triggering the suppliers' obligations to Amazon under the margin agreements. But nowhere in the Amended Complaint does the District identify any such suppliers or explain how any individual supplier has sufficient market power to impose not just higher, but supra-competitive prices on any retailer, let alone Amazon's major retail rivals, such as Walmart, which had over twice as much revenue as Amazon earns from the sale of products last year.[4] Nor does the Amended Complaint address how Walmart and other retailers then have market power to impose the supposed supra-competitive prices on consumers. *Gross* v. *Wright*, 185 F. Supp. 3d 39, 53–54 (D.D.C. 2016) (with no allegation of market power, defendants' alleged "conduct could not possibly (let alone plausibly) cause" price increases).

B. The Court Correctly Applied *Twombly* and *Iqbal*.

The District did not allege sufficient "factual content to nudge [their claim] across the line from conceivable to plausible." *Potomac Dev. Corp.* v. *District of Columbia*, 28 A.3d 531, 550 (D.C. 2011) (quoting *Iqbal*, 556 U.S. at 683). Applying *Twombly*, the Court therefore concluded that the District had failed to meet this requirement. The Court went on to add that the Amended Complaint alleged only facts that could "be explained by, lawful, . . . unchoreographed free-market behavior." Tr. 36:14–19 (quoting *Iqbal*, 556 U.S. at 680). The District argues that the Court "appeared to engage in an analysis of whether the allegations were implausible because they could be explained by 'parallel conduct,'" based on its quotation of this

[4] *Compare* Walmart FY2022 Form 10-K at 53 (reporting $555 billion in net sales revenue in 2021), *with* Amazon FY2021 Form 10-K at 37 (reporting $241 billion in net product sales in 2021).

language from *Twombly*. District's Mot. for Recons. at 18. The United States has now also filed a statement arguing that the question of "parallel conduct" bears only on whether a plaintiff has pleaded the existence of an agreement. Statement of Interest of the United States in Support of Pl.'s Mot. for Recons. at 5–7. Those arguments are both wrong and beside the point. The United States urges reconsideration but not a different result. Specifically, the United States does not argue that the District pleaded facts plausibly showing an anticompetitive effect, and this Court—having carefully reviewed the allegations of the Amended Complaint—correctly held it did not. That on its own was a proper basis for dismissal. At the hearing, the District tried to limit the Supreme Court decisions in *Twombly* and *Iqbal*, asserting that the issue in *Twombly* was whether there was an agreement, and that is not an issue here. Tr. 30:17-19; 33:13-35:8. The Court correctly rejected such arguments, explaining that the fact that there may be an agreement "is not dispositive." Tr. 36:15. Again the United States does not take issue with that holding, nor could it. *Twombly* requires "that a plaintiff must allege facts that plausibly suggest the existence of all the elements of his claim." *Ogden* v. *Little Caesar Enters. Inc.*, 393 F. Supp. 3d 622, 639 (E.D. Mich. 2019) (citing *Twombly*, 550 U.S. at 547); *see also Iqbal*, 556 U.S. at 684 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions[.]'").[5] Thus, even where there is no dispute as to the existence of an agreement, a plaintiff must still allege facts from which the Court plausibly could infer that any such agreement caused any anticompetitive effects. *See Ogden*, 393 F. Supp. at 640 (dismissing antitrust claim for failure to plead anticompetitive effects and pointing to same language from

[5] D.C. courts routinely apply the *Twombly* pleading standard. *See, e.g.*, *Bereston* v. *UHS of Del., Inc.*, 180 A.3d 95, 99–100 (D.C. 2018) (affirming dismissal of wrongful termination and retaliatory harassment claims for failure to satisfy *Twombly* pleading standard); *Potomac Dev. Corp.*, 28 A.3d at 543–45 (affirming dismissal of § 1983 claim for failure to satisfy *Twombly* pleading standard); *Sundberg* v. *TTR Realty, LLC*, 109 A.3d 1123, 1128–29 (D.C. 2015) (affirming dismissal of Consumer Protection Act claim for failure to satisfy *Twombly* pleading standard).

Twombly regarding "lawful, unchoreographed free-market behavior"). The Court correctly concluded that the District failed to plausibly allege that required element of its claim, and therefore failed to plead an antitrust violation.

Other courts have likewise rejected the incorrect reading of *Twombly* that the District propounds, confirming that this Court's decision is not an outlier. Instead, the Court's dismissal of the Amended Complaint reflects what is required under *Iqbal* and *Twombly*: "Conclusory 'allegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers do[ ] not sufficiently allege an injury to competition. Both effects are fully consistent with a free, competitive market." *Prime Healthcare Servs., Inc.* v. *Serv. Emps. Intern. Union*, 642 Fed. App'x 665, 666–67 (9th Cir. 2016) (quoting *Brantley* v. *NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012)) (affirming dismissal of antitrust claim because it does "does not sufficiently plead facts showing that the Defendants harmed competition"); *see also Brantley*, 675 F.3d at 1202 (affirming dismissal where "allegations do not, without more, allege an injury to competition 'that is plausible on its face'" (quoting *Twombly*, 550 U.S. at 570)); *Spinelli*, 903 F.3d at 212 (citing *Twombly* and dismissing antitrust claim where "allegations of anticompetitive effect here are insufficient"); *Jacobs* v. *Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1339–40 (11th Cir. 2010) (same); *McCormick*, 275 F. Supp. 3d at 225 (applying *Twombly* and holding allegations of anticompetitive effects were implausible); *Castro* v. *Sanofi Pasteur Inc.*, 2012 WL 12516573, at *7–8 (D.N.J. Dec. 20, 2012) (granting motion to dismiss for failure to allege anticompetitive effects where "specific facts" were not alleged to draw a "plausible inference" that manufacturers exited market due to the alleged unlawful agreement, and there were "a number of reasons why certain vaccine manufacturers may be unable to compete").

C. The Cases Cited by the District Support Dismissal.

The District cites cases in which courts have upheld allegations of anticompetitive effects, applying the pleading standards in *Iqbal* and *Twombly*. District's Mot. for Recons. at 11–13. But the differences between the factual allegations in those cases and this case only further confirm that the Court was correct to dismiss the District's antitrust claims.

In *United States* v. *Charlotte-Mecklenburg Hospital Authority*, the court held that conclusory allegations that conduct would "lessen competition," and "likely reduce the prices paid," were, by themselves, "threadbare recitals and conclusory statements barred by *Twombly* and *Iqbal*." 248 F. Supp. 3d 720, 729 (W.D.N.C. 2017). Those "threadbare recitals and conclusory statements" are all the District offers here. The allegations that the *Charlotte-Mecklenburg* court *did* credit, on the other hand, pleaded facts sufficient to identify the competitive impact of the defendants' practices on a specific set of customers for the purchase of a specific product in a narrow geographic area. *Id.* Here, the District alleges no similar facts, but rather asserts, without specific examples or other factual content, that Amazon's policies impact the prices of a virtually unlimited range of products sold online by millions of sellers across the entire country.

The District also cites *Thompson* v. *1-800 Contacts, Inc.*, 2018 WL 2271024 (D. Utah May 17, 2018), a case concerning restrictions on competitive advertising in online searches. As the court there explained, established case law, including Supreme Court decisions, supported that such advertising restrictions plausibly result in higher search costs and higher prices for consumers. *Id.* at *4. There is no similar body of case law, much less controlling Supreme Court decisions, to suggest that the policies at issue here are anticompetitive. Further, unlike the plaintiffs in *Thompson*, the District does not plausibly explain how or why the Fair Pricing Policy or the former parity provision prohibits sellers from reducing prices on or off Amazon.

The District cites *Emulex Corp.* v. *Broadcom Corp.*, 2010 WL 11595718 (C.D. Cal. June 7, 2010), for the proposition that plaintiffs with "far less fulsome" allegations of anticompetitive effects have survived motions to dismiss. District's Mot. for Recons. at 12–13. The primary issue in *Emulex* was whether statements by Broadcom concerning its potential new competitor Emulex were sufficiently disparaging to overcome a legal presumption that the statements had only a *de minimis* effect on competition. *Emulex*, 2010 WL 11595718, at *2–3. Applying a multi-factor test for evaluating statements by a competitor, the court concluded that plaintiff's factual allegations about some of the statements overcame the presumption. *Id* at *8. Broadcom argued that Emulex's antitrust claim also failed because Emulex alleged only injury to itself, as opposed to competition. *Id.* But, because Emulex alleged facts showing that its own entry as a market participant was delayed as a result of Broadcom's disparagement, the Court concluded that Emulex had sufficiently alleged competitive injury in a relatively narrow market in which Emulex actually competed. *Id.* In this case, as this Court pointed out, the District concedes that Amazon faces competition from several sources, including large competing marketplaces such as Walmart and eBay and has not alleged any competitor was denied entry.

Finally, the decision in *Frame-Wilson* does not counsel in favor of reconsideration. The court in *Frame-Wilson* did not examine the language of the Fair Pricing Policy or the former parity provision in detail, and instead credited the plaintiffs' allegation that both policies "*require[]* sellers to add Amazon's fees to the cost of their products when they sell them on all external platforms."[6] *Frame-Wilson* v. *Amazon.com, Inc.*, 2022 WL 741878, at *11 (W.D. Wash. Mar. 11, 2022) (emphasis added). The District does not argue for reconsideration on the ground that Amazon's policies require sellers to add Amazon fees to sales off Amazon, and

[6] The plaintiffs in *Frame-Wilson* have not asserted a claim based on the margin agreements.

rightly so: the plain language of the Fair Pricing Policy and former parity provision make clear that neither contains such a requirement. Amazon's Mot. to Dismiss AC, Ex. A at 14 (Parity Provision); Ex. B (Fair Pricing Policy).

D. The Court Did Not Engage in Improper Fact Finding.

The District next argues the Court engaged in improper "fact finding," but that is also incorrect. The Court conducted a straightforward analysis under *Iqbal* and *Twombly* of the allegations of the Amended Complaint to determine whether there were plausible non-conclusory allegations of anticompetitive effect, and pointed out how the District's own allegations and admissions rendered its claims implausible. The District has acknowledged that there is no express language in the Fair Pricing Policy that refers to or establishes a "price floor," Tr. 27:9-10, arguing that a floor is "implied." Tr. 27:21-22. But, as the Court correctly concluded, the District's argument that a price floor may be implied is based on the asserted "conclusion that that's happening," with no supporting facts. Tr. 41:18-20. Because the "price floor" allegations are contrary to the plain terms of the Fair Pricing Policy and otherwise unsupported by factual content in the Complaint, the Court was not required to accept as true the District's conclusory assertion that the Fair Pricing Policy compels an outcome that its terms do not require. *E.g.*, *Rodriguez* v. *Lab. Corp. of Am. Holdings*, 13 F. Supp. 3d 121, 133 (D.D.C. 2014) (claim failed to "satisfy the plausibility standard of *Twombly* and *Iqbal*" where plaintiff relied on a document that "expressly contradicts the conclusions he draws from it" and was "without any other factual allegations to support his claim"); *United States ex rel. Scott* v. *Pac. Architects & Eng'rs, Inc.*, 2020 WL 224504 at *1, *9 (D.D.C. Jan. 15, 2020) (allegations taken as true on motion to dismiss "only insofar as they do not contradict the documents upon which they necessarily rely").

The Court properly concluded the "price floor" allegations were not only unsupported, Tr. 41:18-20, but were implausible in light of allegations about "other stores, website[s] and marketplaces that charge lower commission," creating other avenues for the sale of products to consumers. Tr. 41:9-17. This was not a finding of fact, it was a conclusion based on the allegations of the Amended Complaint itself regarding other stores, websites and marketplaces, including Walmart and eBay, available to sellers that are charging lower commissions than Amazon. *E.g.*, AC ¶¶ 3, 23, 33.

II. The District Is Not Entitled to Amend Its Complaint Again.

The District's request for leave to file a Second Amended Complaint is procedurally improper because "the Court may only consider plaintiffs' motion for leave to amend if it first grants plaintiffs' motion for reconsideration." *W. Wood Preservers Inst.* v. *McHugh*, 292 F.R.D. 145, 147 (D.D.C. 2013). Because the District has not satisfied the stringent standard for reconsideration, the Court "must also reject its entreaty to amend its Complaint." *People for the Ethical Treatment of Animals, Inc.* v. *U.S. Dep't of Agric.*, 60 F. Supp. 3d 14, 21 (D.D.C. 2014); *see also Dun* v. *Transamerica Premier Life Ins. Co.*, 2020 WL 4001472, at *6 (D.D.C. 2020) ("Because Plaintiffs do not prevail in their effort to vacate the judgment, their Motion to Amend is denied as moot.").[7]

Even if the District's request were procedurally proper, it would be futile to grant the District leave to amend because, even with its proposed amendments, the District's claims should not survive a motion to dismiss for failure to allege anticompetitive effects. *E.g.*, *Jung* v. *Ass'n of Am. Med. Colls.*, 226 F.R.D. 7, 9 (D.D.C. 2005) ("An amendment is futile if it would

[7] Amazon's motion to dismiss, which the Court granted, Tr. 41:23-24, expressly requested dismissal with prejudice. Amazon's Mot. to Dismiss AC at 19. Regardless, when a court does not state whether a dismissal under 12(b)(6) is with or without prejudice, it operates as a dismissal with prejudice. *Colvin* v. *Howard Univ.*, 257 A.3d 474, 485 (D.C. 2021).

not survive a motion to dismiss or for judgment on the pleadings."). For example, the proposed Second Amended Complaint focuses primarily on the allegation that an individual third-party seller, Molson Hart, claims he is "forced to charge higher prices" on the website for his company, Viahart. Proposed SAC ¶ 37. Supposedly, Hart must raise prices on Amazon in order to absorb Amazon's 15% commission and other fees charged for services such as search advertising, and in turn must raise prices on its own website in order to comply with the Fair Pricing Policy:

	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

Proposed SAC ¶ 37.

This example makes no economic sense and only confirms why the District's claim about the supposed effects of Amazon's policies is implausible. The District wants to allege that Hart has no choice but to raise prices on his own website to $150 to comply with Amazon's policies. But these figures that the District cites show that Hart could instead *lower* his price on Amazon to $113.20 and—because the product's cost is $58.88—still make a profit of over $14 per unit. Neither the former parity provision nor the Fair Pricing Policy would *require* Hart to raise prices on his own website, rather than lowering his prices on Amazon. To the extent Hart chooses to do so, that is his independent choice as a third-party seller—not the result of any agreement with Amazon. (And this example ignores value that Hart would receive in exchange for Amazon's fees, such as consumer trust earned by how Amazon operates its store and broader potential

exposure for his products, which could further increase his sales and profits on Amazon.) The figures that the District presents makes an "apples to oranges" comparison because they fail to take into account advertising costs that Hart must pay to promote products in his online store, or the benefits that Hart receives from Amazon's advertising and promotion of his products. Thus, these proposed allegations by the District only underscore that nothing in Amazon's policies forecloses sellers from price-cutting on Amazon or on competing, lower-cost sites. That price-cutting, like any other price-cutting, may reduce a seller's margins, but that is a byproduct of aggressive price competition which the antitrust laws encourage, not prohibit.[8]

The District also proposes to add allegations that some unidentified number of unidentified sellers have been punished for "pricing their products lower on competing platforms," Proposed SAC ¶ 25, and that third-party sellers have gone to "great lengths" to not "run afoul of the MFNs." *Id.* ¶ 26.[9] But these new allegations continue to suffer from "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." Tr. 37:21-24. The allegations also disregard the plain terms of Amazon's policies and how they operate, and fail plausibly to allege an anticompetitive effect from the policies.

For its claims relating to Amazon's margin agreements with its suppliers, the District has added the allegation that a single, unidentified Amazon supplier reached out to Walmart and Target to request that they "increase the prices they are charging" to avoid Amazon lowering its prices and the supplier having to make any true-up payments to Amazon. Proposed SAC ¶ 43.

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[8] The District has also not alleged any facts to suggest that this seller's overall margins would be lower if it cut prices, only its per unit margins; with increased volume, overall margins might well be higher from increased sales.

[9] The District asserts that it has not identified these sellers by name because the sellers fear retaliation. This assertion is not only baseless, but the District could have addressed any concerns by filing a version of the Complaint under seal disclosing the sellers' identities and making disclosure to Amazon's counsel subject to a protective order.

This new allegation does nothing to allege anticompetitive effects. The District has not alleged that Amazon's suppliers have the market power necessary to cause other retailers such as Walmart and Target to raise their retail prices by any amount, much less above competitive levels. Likewise, the District does not allege that Walmart or Target have the power to or did raise their prices above competitive levels in response to this alleged request from an unidentified supplier for any specific consumer product, much less the hundreds of millions of products available to consumers.

Amazon's motion to dismiss identified a number of additional reasons supporting dismissal on which the Court did not rule that would also make amendment futile. In brief, all of the claims fail because the District has failed to allege any anticompetitive conduct. Amazon's Mot. to Dismiss AC at 8–14. All of the District's claims likewise fail because the District has failed to allege a plausible antitrust market, an essential element of each of its claims. *Id.* at 14–17. Instead, the District has alleged markets comprised of products that are not reasonably interchangeable substitutes, alleging a market that is both too broad because it includes a "virtually unlimited" number of products sold online, Proposed SAC ¶ 48, and too narrow because it includes the identical products sold in physical stores but excludes all the physical stores where consumers buy these products from their market definition. To the extent the District is alleging in the alternative individual retail product markets, those markets are legally insufficient because they do not contain all reasonably interchangeable substitutes, and the District does not allege that Amazon has market power in any individual product market. Amazon's Mot. to Dismiss AC at 14–17. The restraint of trade claims (Counts 1 and 2) also fail because the District has failed to allege concerted action between Amazon and its third-party sellers or suppliers. *Id.* at 19. None of the District's proposed new allegations cure any of these

fundamental pleading defects.

Leave to amend should therefore be denied.

CONCLUSION

For the foregoing reasons, the District's motion should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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