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 REPLY IN SUPPORT OF ITS OPPOSED MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, FOR LEAVE TO AMEND THE COMPLAINT OR FOR A WRITTEN ORDER OF DECISION

I. INTRODUCTION

The Court should reconsider its oral Order dismissing the District's antitrust claims against Defendant Amazon.com, Inc. ("Amazon"), because that Order misapplies the law, ignores important factual allegations in the Amended Complaint ("Complaint"), and engages in fact-finding contrary to those allegations. The United States Department of Justice ("DOJ"), the primary enforcer of federal antitrust law on which the District's Antitrust Act is based, filed a statement of interest supporting the District's Motion to Reconsider—a rarity at the trial level—highlighting the importance of the Court correcting its errors here. The DOJ warns that "[i]f 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." DOJ Br. at 4.

Unable to squarely support the Court's ruling, Amazon's opposition to the District's Motion resorts to unsupported claims that the Court considered factual allegations and law that it clearly did not, and it doubles down on factual disputes with the District's well-pled allegations. Amazon invites the Court to endorse its prior fact-finding that, under black letter law, is patently inappropriate at the pleading stage. Specifically, and contrary to Amazon's arguments, the language used in the Price Parity Provision ("PPP"), Fair Pricing Policy ("FPP"), and Minimum Margin Agreement ("MMA") is perfectly consistent with the anticompetitive implementation of those agreements detailed in the Complaint. Even if it were not, any inconsistency would not be dispositive under the antitrust laws, the violation of which hinges on the likely incentives and effects, not the language, of the agreement. Amazon's claim that sellers could theoretically adhere to the agreements by lowering prices on Amazon rather than raising prices elsewhere ignores economic realities and is beside the point. Sellers will not lower prices on Amazon, because

Amazon charges too much in fees and commissions for them to do so, and Amazon's market power compels sellers to continue selling on Amazon's marketplace. Compl. ¶ 54. Moreover, the District has alleged that sellers *actually do* raise prices on competing online marketplaces to comply with these agreements. *Id.* ¶ 62. These allegations must be accepted as true at this stage, and they exceed the plausibility standard as to anticompetitive effects. Finally, Amazon's argument itself evinces the anticompetitive nature of these agreements by conceding that they tie the prices on other online marketplaces to the Amazon price in a way that prevents a free and competitive online market for consumers. Courts routinely deny motions to dismiss on facts similar to those alleged here, including the federal court's denial of a nearly identical motion based on the same conduct just a week before the Court issued its Order here. The Court should grant the District's Motion.

II. ARGUMENT

A. The District Plausibly Pled Anticompetitive Effects.

This is a case about written agreements between Amazon and its sellers that, as implemented and enforced, result in higher prices, decreased output, and harm to competition. The Complaint details exactly how these agreements result in higher prices. Compl. ¶¶ 24-25, 62-63. Specifically, Amazon charges higher commissions and fees to sellers, and then requires the price on Amazon's marketplace be the lowest. *Id.* ¶¶ 50, 62. Economics and common sense tell us that this results in the Amazon price being the price floor across online marketplaces. *Id.* Finally, the Complaint explains how Amazon's agreements impede other online marketplaces from competing against Amazon on price, thereby cementing Amazon's monopoly position. *Id.* ¶ 64. The Court failed to mention, let alone account for, any of these allegations in its ruling.

Amazon knows that the Court failed in this respect. Thus, its opposition wholly reimagines the Court's Order, contending that "the Court considered and rejected" Plaintiffs' allegations of

anticompetitive effects. Opp. at 7. This is demonstrably untrue. The Court addressed only three of the District's allegations—concerning European antitrust investigations, a letter from U.S. Senator Richard Blumenthal, and a ProPublica article addressing how the Buy Box works. Hearing Tr. 40:11-25. None of these allegations are germane to the anticompetitive effects described above. The Court never engaged with the District's well-pled allegations of anticompetitive effects, which it was obligated to take as true at this stage of the litigation.

Amazon's next argument, that the Court correctly concluded that the District failed to allege anticompetitive effects because the FPP does not include the words "lower" or "price floor", is no more persuasive. Opp. at 8. First, even if the antitrust laws required explicit language (which they do not), the PPP—the predecessor to the FPP and a subject of this lawsuit—explicitly required TPSs to price products on Amazon on terms "at least as favorable" as other sites. Compl. ¶ 21. The Court never addressed this language, which clearly and unequivocally required TPSs to set prices on competing online marketplaces at the same or higher than on Amazon, eliminating price competition. Nothing in the Court's Order supports dismissal of the District's claims based on the PPP, and Amazon does not even try to defend it. Further, the Complaint details how all three agreements were and are implemented and enforced to incentivize sellers to raise prices on other online marketplaces. *Id.* ¶¶ 21, 24-25. That is all that is required at this stage. The Complaint alleges, and discovery will show, that *in fact* Amazon uses the agreements to punish sellers for charging prices that are lower (by *any* amount) on other online marketplaces. *Id.* ¶¶ 24-25.

Amazon next argues that, because the express language of the FPP theoretically allows sellers to lower their prices on Amazon rather than raise them on other online marketplaces, the FPP cannot possibly have anticompetitive effects. Opp. at 8. This is contrary to both the facts alleged in the Complaint and the law. The Complaint alleges that Amazon's market power means

that TPSs must sell on Amazon to reach a sufficient audience of buyers (Compl. ¶¶ 54-57),[1] that Amazon is able to and does charge inflated selling fees to its TPSs (*id.* ¶¶ 27-36), and that the PPP and FPP force TPSs functionally to incorporate those fees into their prices across the internet (*id.* ¶ 36). In other words, as implemented, the likely and actual effect of the agreements is that sellers charge higher prices on other online marketplaces than they would absent the agreements. Indeed, as one competing online marketplace explained to Congress, "as Amazon raises the costs to sellers, and requires that Amazon have the lower 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." *Id.* ¶ 63. Explaining the incentives created by of these provisions, as the District has done, is all that antitrust law requires at the pleadings.

Amazon claims that the District's theory of harm defies the "basic laws of economics" and the "obvious realities of competition," but it is Amazon's argument that flies in the face of economic realities. Opp. at 6 (internal quotations omitted). If, for example, 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. In a free market, that TPS would sell its product on the competing marketplace at $11.01 to better compete with similar products and increase sales. But the PPP and FPP dictate that if the TPS sells its product on another online marketplace at $11.01, it would also have to sell that product on Amazon for $11.01, or face sanctions. To comply with the agreements, then, the TPS has two choices: (1) lower its prices on Amazon and *lose* $.50 on every sale on Amazon; or (2) raise its prices across the internet, charging $11.51 everywhere so as not to lose money on every

[1] The Court cannot disregard (and Amazon has not even disputed) the District's allegations of Amazon's market power in the online marketplace market that prevent sellers from simply refusing to sell on Amazon. Compl. ¶¶ 39, 52-55.

Amazon sale. Amazon's argument that economic reality would result in the former option is plainly absurd; no rational economic actor would choose to lose money on the majority of its sales. Thus, the likely and actual effect of the agreements is higher prices on other online marketplaces, not lower prices on Amazon.[2] To the extent Amazon urges the Court to conclude otherwise, it continues to demand improper fact-finding. *Houck v. Substitute Tr. Servs., Inc.,* 791 F.3d 473, 484 (4th Cir. 2015) (reversing where district court determined at the pleading stage "whether a lawful alternative explanation appear[s] more likely" from the facts of the complaint).

Indeed, Amazon continues to try to mislead the Court into thinking that antitrust cases are analyzed like contract cases, where clever lawyers can draft around an antitrust violation by not spelling out an agreement's intended anticompetitive effects. But antitrust violators rarely are so explicit. Thus, 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"). The incentives and punishments described in the Complaint, taken as true, are more than enough at this stage in the proceedings 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).

B. The Court and Amazon Confuse Application of *Twombly* and *Iqbal*.

As detailed in the District's Motion, a central error in the Court's analysis was its

---

[2] The Complaint alleges that the MMA operates in much the same way. Under the MMA, the FPS guarantees a certain minimum profit to Amazon. Compl. ¶ 11. If Amazon does not achieve that profit because it has lowered its retail price, Amazon can force the FPS to compensate it for the difference. *Id.* To avoid this result, FPSs keep their prices higher on competing online marketplaces or refuse to sell to those marketplaces altogether because the MMA incentivizes them to do so. *Id.* As with the PPP and FPP, these MMA allegations must be taken as true at the pleading stage.

misreading of *Twombly*, which led the Court to mistakenly apply that case's warning concerning parallel conduct to allegations of anticompetitive effects. This Court found an agreement, but ultimately decided that the alleged anticompetitive effects of the agreement could be explained by "lawful, unchoreographed free market behavior." Hearing Tr. 36:20-37:1. *See also id.* 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."). But the possibility of "unchoreographed free market behavior" described in *Twombly* speaks only to whether the plaintiff has sufficiently alleged an agreement, not whether the complaint has pled anticompetitive effects. Mot. at 18-20 (citing cases). Because the Court has found the existence of concerted action in the form of an agreement, it is immaterial whether the Court believes that those effects could have been the product of unconcerted "unchoreographed free market behavior."

DOJ's statement of interest crystalizes this point. DOJ Br. at 6 ("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."); *id.* ("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."). *Robertson v. Sea Pines Real Estate Companies, Inc.*, cited by the DOJ, is particularly illuminating, making clear that *Twombly* is distinguishable from express agreement cases like this one because *Twombly* required contextual evidence to substantiate a speculative claim about the existence and substance of a conspiracy. 679 F.3d 278, 289 (4th Cir. 2012) ("Circumstantial evidence sufficient to 'suggest[] a preceding agreement,'" was "superfluous in light of the direct evidence … of the agreement itself." (quoting *Twombly*, 550 U.S. at 557)).

Amazon's attempts to distinguish cases cited in the District's Motion are unavailing. It distinguishes *United States v. Charlotte-Mecklenburg Hospital Authority,* 248 F. Supp. 3d 720 (W.D.N.C. 2017) by pointing out the unremarkable point that the relevant geographic and product markets are narrower in that case. But Amazon has not disputed the relevant geographic market here, and the Court has taken no issue with the product markets alleged. Amazon next tries to distinguish *Thompson v. 1-800 Contacts, Inc.*, No. 2:16-CV-1183-TC, 2018 WL 2271024, at *4 (D. Utah May 17, 2018), by claiming a "developed body of case law" unique to that case. But, like *Thompson*, there is a developed body of case law that applies to Amazon's conduct—many courts have addressed MFNs comparable to those in this case and found them to be unlawful. *E.g.* District's Opp. to Mot. to Dismiss at n.22. Amazon then points out that the plaintiff in *Emulex Corp. v. Broadcom Corp.*, No. 09-cv-01310-JVS (RNBx), 2010 WL 11595718 (C.D. Cal. June 7, 2010), alleged delayed entry into the market as the relevant anticompetitive harm. The District also has alleged that Amazon's agreements prevent competitors from gaining market share and deter new entry. Compl. ¶¶ 63-64. Moreover, deterred entry is only one of a common set of anticompetitive effects that will sustain an antitrust violation. Another is higher prices, which have been amply plead in this case. *Id.* ¶¶ 6, 11, 34, 50-51, 69, 74. Finally, Amazon has found no case (because none exists) to save the Court's analysis tethering unchoreographed free market behavior to a finding of failure to plead plausible anticompetitive effects.

Lacking a jurisprudential bulwark, the crux of Amazon's answer to the District's Motion and DOJ's Statement of Interest is to misrepresent a litany of cases in a base attempt to provide cover for the Court's misapplication of *Twombly* and *Iqbal*. First, and perhaps most audaciously, Amazon cites to *Ogden v. Little Caesar Enterprises Inc.*, 393 F. Supp. 3d 622, 640 (E.D. Mich.), suggesting that that court there—like the Court here—relied on *Twombly's* "lawful,

unchoreographed free-market behavior" language as grounds for dismissing an antitrust claim for failure to plead anticompetitive effects. The *Ogden* court did no such thing. Instead, the *Ogden* court faulted the plaintiff for "not offer[ing] any facts to show that the agreement precipitated any specific wage or opportunity loss to him." *Id.* at 638. There was *no* discussion in that case about how the plaintiff's alleged anticompetitive effects could be explained by "lawful unchoreographed free-market behavior" under *Twombly*.

Amazon's other cases are also easily distinguished. In most of these cases, the plaintiff simply stated that prices would increase without explaining the mechanism for that increase, in contrast to the detailed allegations here. For example, in *Prime Healthcare Services, Inc. v. Service Employees International Union*, the court dismissed where the plaintiff did not tie the anticompetitive harm claimed to the challenged conspiracy. 642 F. App'x 665, 667 (9th Cir. 2016). Here, the District has explained exactly how and why the agreements reduce competition, causing prices to increase. Similarly, the plaintiff in *In re McCormick & Co., Inc., Pepper Products Marketing & Sales Practices Litigation* failed to explain why prices would be lower absent the agreement. 275 F. Supp. 3d 218, 225 (D.D.C. 2017). Here, the District's allegations explain as a purely mathematical proposition why Amazon's PPP, FPP, and MMA cause TPSs and FPSs to charge more than they otherwise would absent the agreements.

In *Spinelli v. National Football League*, the court dismissed on two bases, neither of which applies here. 903 F.3d 185, 212 (2d Cir. 2018). First, the court found that plaintiff alleged reduction of output in a market different from the relevant market. *Id.* Here, the District has alleged a reduction in output in the online marketplace market—the relevant market. Second, the *Spinelli* court concluded that the plaintiffs alleged no "facts to support their assertion" that the aggregate cost to consumers increased as a result of the challenged restraints. *Id.* The entirety of the plaintiffs'

allegations there relating to higher costs consisted of one sentence: "Because of the Defendants' influence on and control over this market, the aggregate cost to consumers has increased." Second Am. Compl. ¶ 239, *Spinelli v. Nat'l Football League*, No. 13-cv-07398 (RWS), 2015 WL 5697801 (S.D.N.Y. Aug. 17, 2015). Again, this is in stark contrast to the extensive allegations in the District's Complaint.

C. The Court Should Grant the District Leave to Amend.

At the hearing, the Court seemed to find it dispositive that the District did not include allegations identifying individual sellers' circumstances. Hearing Tr. 37:11-24. While no such allegations are required[3], the District seeks leave to amend to add specific facts from individual interviewees describing how the challenged agreements were implemented in their experience, along with examples of sellers raising prices as a direct result of the challenged agreements. The Court seemed to suggest that such specific pleading would satisfy it. Tr. 37:11-19.

Amazon wrongly argues that this Court cannot grant leave to amend without granting the District's Motion for Reconsideration, and that the "stringent standard for reconsideration" warrants denial of the District's Motion (and with it, the District's ability to amend the complaint). In each case Amazon cites, amendment could not cure the deficiencies the court noted. Recent D.C. Circuit law interpreting the analogous federal rules 59(e) and 15(a) explains how to deal with a situation where, as here, additional facts *would* remedy the court's concern.[4] When a plaintiff

---

[3] *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"); *In re Polyurethane Foam Antitrust Litig.*, 799 F. Supp. 2d 777, 791-92 (N.D. Ohio 2011); *Erickson v. Pardus et al.*, 551 U.S. 89, 93 (2007) (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).

[4] Where the local rule and the federal rule contain parallel language, D.C. courts look to federal court decisions interpreting the analogous federal rule as persuasive authority in interpreting the

files a Rule 59(e) motion to alter or amend a judgment combined with a Rule 15(a) motion requesting leave to amend a complaint (as the District has done here), it is an abuse of discretion to deny the motion unless "allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Brink v. Continental Ins. Co*, 787 F.3d 1120, 1128–29 (D.C. Cir. 2015) (cleaned up). *Brink*'s permissive standard applies to complaints that have been dismissed. *Jones v. Perkins*, No. 19-CV-03168 (APM), 2021 WL 5774085, at *1 (D.D.C. Sept. 15, 2021). Because the District seeks to add the allegations the Court specifically called for at the hearing, *Brink* applies, and this Court should allow leave to amend.

Amazon also argues that these new allegations are insufficient. The *Frame-Wilson* court disagreed, sustaining nearly identical allegations as adequately pleading anticompetitive effects. *Frame-Wilson v. Amazon.com, Inc.*, No. 2:20-CV-00424-RAJ, 2022 WL 741878, at *12 (W.D. Wash. Mar. 11, 2022) ("While Amazon asserts that Plaintiffs 'allege only some anecdotal matching of Amazon's prices in cherry-picked instances,' the Court finds that facts alleged that would constitute an offense, regardless of how numerous, are sufficient to survive a motion to dismiss."). Given that the District has included the very allegations the Court felt were necessary to demonstrate anticompetitive effects, at a minimum the Court should grant the District's request for leave to amend.

III. CONCLUSION

For the foregoing reasons, the District's Motion for Reconsideration should be granted.

---

local rule. *So v. 514 10th St. Assocs., L.P.*, 834 A.2d 910, 914 (D.C. 2003). Here, the relevant portions of both D.C. and Federal Rules 15(a) and 59(e) are identical.

Dated: May 5, 2022

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

KATHLEEN KONOPKA
Deputy Attorney General
Public Advocacy Division

/s/ Kathleen Konopka

Kathleen Konopka [D.C. Bar 495257]
kathleen.konopka@dc.gov
Adam Gitlin
adam.gitlin@dc.gov
Jennifer C. Jones
jen.jones@dc.gov
David Brunfeld
david.brunfeld@dc.gov
Arthur Durst
arthur.durst@dc.gov
Public Advocacy Division
Office of the Attorney General for the District of Columbia
400 6th Street, N.W., 10th Floor
Washington, D.C. 20001
Tel: (202) 442-9853

/s/ Swathi Bojedla

Hilary K. Scherrer [D.C. Bar 481465]
hscherrer@hausfeld.com
Swathi Bojedla [D.C. Bar 1016411]
sbojedla@hausfeld.com
Theodore F. DiSalvo [D.C. Bar 1655516]
tdisalvo@hausfeld.com
Halli Spraggins [D.C. Bar 1671093]
hspraggins@hausfeld.com
HAUSFELD LLP
888 16th Street, NW, Suite 300
Washington, D.C. 20006
Tel: (202) 540-7200

Attorneys for Plaintiff District of Columbia

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May 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
Theodore F. DiSalvo [D.C. Bar 1655516]

Attorney for Plaintiff