

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

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

APPEARANCES:

On Behalf of the District:

PAUL T. GALLAGHER, ESQUIRE

SWATHI BOJEDLA, ESQUIRE

HILARY K. SCHERRER, ESQUIRE

HALLI SPRAGGINS, ESQUIRE

Assistant United States Attorneys

22-00806

Diversified Reporting Services, Inc.
1426 Duke Street
Alexandria, Virginia 22314
(202) 467-9200

APPEARANCES (CONTINUED):

On Behalf of the District (Continued):

DAVID BRUNFELD, ESQUIRE, DCOAG

ARTHUR DURST, ESQUIRE, DCOAG

ADAM GITLIN, ESQUIRE, DCOAG

JENNIFER JONES, ESQUIRE, DCOAG

KATHLEEN M. KONOPKA, ESQUIRE, DCOAG

Assistant United States Attorneys

On behalf of the Defendant:

WILLIAM A. ISAACSON, ESQUIRE

KYLE SMITH, ESQUIRE

ANDREW J. TOPAL, ESQUIRE

Washington, D.C.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

C O N T E N T S

SCHEDULING CONFERENCE -- MOTION TO DISMISS

WRITTEN REQUEST ADDITIONS -- DEFENDANT	5
WRITTEN REQUEST ADDITIONS -- PLAINTIFF	6
COURT'S RULING	21

P R O C E E D I N G S

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

(Pause.)

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

(Pause.)

THE COURT: We still can't hear you.

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

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

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

THE COURT: Morning.

MR. GALLAGHER: Good morning.

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

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

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

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

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

4 THE COURT: Thank you, Mr. Gallagher.

5 Is there a counsel present for Amazon?

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

10 THE COURT: Thank you, Mr. Isaacson.

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

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

15 **WRITTEN REQUEST ADDITIONS - DEFENDANT**

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

22 THE COURT: All right. Thank you.

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

25 //

1 WRITTEN REQUEST ADDITIONS - PLAINTIFF

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

5 THE COURT: Let me double check.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 THE COURT: All right. Thank you.

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

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

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

1 a marketplace.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 And what that enables Amazon to do is --

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

23 MR. GALLAGHER: Correct, Your Honor.

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

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

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

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

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

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

16 THE COURT: So mid-last year would have been mid-
17 2021?

18 MR. GALLAGHER: Right.

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

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

23 THE COURT: How much slightly?

24 MR. GALLAGHER: Slightly by a few percentage
25 points.

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

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

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

10 THE COURT: Now Mr. Gallagher, as I understand it,
11 the District is making four claims in its complaint. Claims
12 1 and 2 relate to D.C. Code Section 28-40 -- 4502. And
13 Claims 3 and 4 relate to D.C. Code Section 28-4503; is that
14 correct?

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

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

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

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

1 MR. GALLAGHER: That's correct.

2 THE COURT: All right.

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

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

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

8 THE COURT: Okay. Bear with me. Now gentlemen,
9 let's take a look at the Amazon Fair Market -- Amazon
10 Marketplace Fair Pricing Policy. And it is Exhibit D, page
11 65 of the motion to dismiss. And I'll read in its entirety
12 beginning with the title.

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

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

1 cases, the spending or terminating selling privileges.

2 "Pricing practices that harm customer trust
3 include, but are not limited to: setting a reference price
4 on a product or service that misleads customers; setting a
5 price on a product or service that are significantly higher
6 than recent prices offered on or off Amazon, or selling
7 multiple units of a product perform more per unit than that
8 of a single unit of the same product; setting a shipping fee
9 on a product that is excessive.

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. GALLAGHER: That's correct.

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

8 MR. GALLAGHER: That's correct.

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

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

15 **COURT'S RULING**

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

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

1 (Pause.)

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

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

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

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

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

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

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

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

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

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

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

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

25 "The complaint also alleged the defendant's

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

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

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

25 So with that framework, let's revisit what the

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

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

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

17 "Pricing practices that harm customer trust
18 include, but are not limited to: setting a reference price
19 on a product that misleads customers; setting a price on a
20 product or service that is significantly higher than recent
21 prices offered on or off Amazon, or selling multiple units
22 of a product for more per unit than that of a single unit of
23 the same product; setting a shipping fee on a product that
24 is excessive.

25 "Amazon considers current public carrier rates,

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

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

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

13 MR. GALLAGHER: May I respond, Your Honor?

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

17 MR. GALLAGHER: Okay.

18 THE COURT: You may proceed, sir.

19 MR. GALLAGHER: Thank you, Judge.

20 THE COURT: You may proceed, sir.

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

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

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

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

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

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

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

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

15 MR. GALLAGHER: Understood, Your Honor.

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

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

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

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

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

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

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

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

22 MR. GALLAGHER: But --

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

1 the Court sets out, which I must use here.

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

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

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

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

22 Is there somebody else trying to pipe in here?

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

1 General's Office.

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

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

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

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

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

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

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

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

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

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

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

12 THE COURT: Please proceed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 lawful, unchoreographed free market behavior."

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

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

8 THE COURT: Well --

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

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

16 MR. ISAACSON: I --

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

20 MR. ISAACSON: Gotcha.

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

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

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

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

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

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

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

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

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

19 MR. ISAACSON: No, Your Honor.

20 THE COURT: Okay. Just a second, please.

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

23 THE COURT: Yes, sir.

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

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

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

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

10 (Pause.)

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

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

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

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

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

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

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

25 I will not rule on the other basis for the motion

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

4 Have a good day. Parties are excused.

5 MR. GALLAGHER: Thank you, Your Honor.

6 MR. ISAACSON: Thank you, Your Honor.

7 THE COURT: Thank you.

8 Call the next matter on the calendar, please.

9 (Thereupon, this concludes these proceedings.)

10 * * * * *

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF TRANSCRIBER

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

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

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


LEE ANN TARDIEU