No. 22-CV-657

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT,

V.

AMAZON.COM, INC.,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

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ARGUMENT

As Amazon all but concedes, its contracts with sellers and suppliers are concerted action under Section 28-4502. The only contested question on appeal is whether those agreements illegally restrain trade. On that score, the District has plausibly alleged that the agreements create a litany of anticompetitive harms—reduced competition, higher prices, and less consumer choice. These same agreements have been found to plausibly violate antitrust law by not one but *three* other courts. *See People v. Amazon.com, Inc.*, No. CGC-22-601826 (Cal. Super. Ct. Mar. 30, 2023) (Add. 1a-17a); *De Coster v. Amazon.com, Inc.*, No. C21-693RSM, 2023 WL 372377 (W.D. Wash. Jan. 24, 2023); *Frame-Wilson v. Amazon.com*, Inc., 591 F. Supp. 3d 975 (W.D. Wash. 2022). In response, Amazon contends that its agreements, which have led to higher prices across the internet, are somehow engineered to prevent "discrimination" or "price gouging." But common sense and the complaint's detailed allegations counsel otherwise. If Amazon wants to attack the District's evidence of anticompetitive harms—or offer its own evidence of procompetitive benefits—it will have plenty of opportunity to do so. Yet that evidentiary skirmish is a matter for trial, not the pleadings. The Superior Court erred in concluding otherwise and dismissing the District's complaint.

I. The District Adequately Pleaded That Amazon's Contracts Are Unreasonable Restraints Of Trade.

A. The District alleged that Amazon's agreements are anticompetitive.

1. The challenged contracts are "agreements."

To plead a violation of Section 28-4502, the District was required to allege only two elements: "(1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016); *see* District Br. 21-23. The first element of the claim merely serves to distinguish concerted action from "independent action," which Section 28-4502 does not proscribe. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). The question of whether an agreement exists "is different from and antecedent to the question whether [that agreement] unreasonably restrains trade." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 186 (2010).

Here, it is undisputed that Amazon entered into the challenged contracts—the most-favored nation agreements ("MFNs") and the minimum margin agreements—so the first element is satisfied. The first amended complaint quoted from the agreements directly and also illustrated how they work in practice. *See* JA 12-14, 17-36. Under the MFNs (the Price Parity Provision and Fair Pricing Policy), third-party sellers agree that the price of any good they offer on Amazon's marketplace (inclusive of Amazon's high fees and commissions) will be the lowest price available for that product on any online platform, even if other platforms charge

lower fees. *See* District Br. 7-10. The minimum margin agreements require suppliers to reimburse Amazon if Amazon realizes a lower-than-anticipated profit margin on sales of the supplier's products. *See* District Br. 10-11. Because the District alleged the existence of agreements that are "both plainly documented and readily available," it adequately alleged the first element of its Section 28-4502 claim. *Robertson v. Sea Pines Real Est. Cos.*, 679 F.3d 278, 289-90 (4th Cir. 2012).

Amazon may dispute the *effects* these agreements have on consumers and the market—which goes to the second element of a Section 28-4502 claim—but it does not deny that the agreements *exist*, or even really that they operate in the way the District contends. Amazon Br. 28 (acknowledging that Amazon entered into "millions of past and current agreements"). Instead, Amazon argues (at 27) that an agreement must involve "a 'conscious commitment' to a scheme that would violate the antitrust laws," implying that the parties to the agreement must know or intend that the consequences of their agreement will be illegal. That is wrong. It is well established that a civil violation of Section 28-4502 does not require proof of "an unlawful purpose" or any scienter at all. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978). All that is needed to allege concerted action is "enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Where, as here, the complaint "includes non-conclusory allegations of direct evidence of an agreement, a court need go no further

on the question whether an agreement has been adequately pled." *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010).

The cases that Amazon cites do not remotely support importing a scienter requirement into a Section 28-4502 claim. *Monsanto*, the source of the "conscious commitment" language, was decided after a jury trial (not a motion to dismiss), and it was merely making clear that the first element of the claim is about distinguishing concerted from independent action. 465 U.S. at 761, 764. To ultimately succeed at trial, an antitrust plaintiff must merely produce evidence "that tends to exclude the possibility of independent action" by the relevant parties; it does not need to prove knowledge or intent. *Id.* at 768. Indeed, the Court in *Monsanto* affirmed the jury's finding of a price-fixing scheme based on far more ambiguous evidence of an agreement than the written contracts here. *See id.* at 765-66 (relying on testimony that Monsanto had pressured two distributors to maintain a suggested retail price and a newsletter stating that Monsanto was making efforts to "get the market place in order"); *see also SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 430-31 (4th Cir. 2015) (cited at Amazon Br. 6) (finding allegations about a particular meeting between defendants plausibly alleged an agreement to engage in a group boycott).[1]

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[1] In passing, Amazon cites two cases about unilateral conduct, *Toscano v. Professional Golfers Association*, 258 F.3d 978, 984 (9th Cir. 2001), and *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072 (11th Cir. 2016). Amazon Br. 25 n.7, 27. To

2. The District plausibly alleged that Amazon's agreements are anticompetitive.

a. The District plausibly alleged that Amazon's MFNs fail the rule of reason.

The District plausibly alleged that Amazon's MFNs fail the rule of reason because it alleged both direct anticompetitive effects (*e.g.*, higher prices) as well as indirect evidence of Amazon's market power and harm to competition. *See* District Br. 26-32. By insisting that the price of any product offered on Amazon (including the fees that Amazon charges to its third-party sellers) be the lowest available, the MFNs inflate the cost of goods across online marketplaces to match the price on Amazon, the dominant platform. Three trial courts have already held that it is plausible that Amazon's MFNs fail the rule of reason. *See* Add. 11a-15a; *De Coster*, 2023 WL 372377, at *3-6; *Frame-Wilson*, 591 F. Supp. 3d at 988-92.

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the extent this is an attempt to preserve an argument that the MFNs and minimum margin agreements are unilateral conduct by Amazon, it fails. "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *McFarland v. George Wash. Univ.*, 935 A.2d 337, 351 (D.C. 2007). In any event, the agreements here are not unilateral conduct. *See* District Br. 25 (distinguishing *Toscano*). The agreements are promises by Amazon's sellers and suppliers about how *they* price *their* products on other, competing marketplaces, which is very different from one party agreeing to standard terms and conditions (as in *Toscano*) or when one party acts outside the contract entirely (as in *Procaps*).

In arguing to the contrary, Amazon ignores or dismisses the District's well-pleaded allegations about how the MFNs operate.[2] Amazon argues that the Fair Pricing Policy is not an MFN and does not set a price floor because it does not explicitly require third-party sellers to ensure that the price on Amazon is their lowest price, only that it not be "significantly higher" than elsewhere. Amazon Br. 29-30.[3] But this argument runs headlong into the District's detailed factual allegations. As the District explained, Amazon and its third-party sellers treat the ambiguous word "significantly" to mean that if the product is offered for *any* amount less on a competing platform, the seller is in violation of the policy. *See* JA 17-19, 289-90. For instance, the District alleged that:

- Amazon aggressively enforces its MFNs by barring sellers from access to the Buy Box if the seller offers "the same or similar product through another online marketplace at a lower price." JA 18.
- A consultant for third-party sellers regularly receives complaints from his clients that Amazon has suspended product listings for pricing products lower on competing platforms. JA 289.

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[2] Amazon attempts to preserve in a footnote an argument that the District's market definition is facially implausible. Amazon Br. 26 n.8. But Amazon has failed to develop this argument sufficiently to preserve it for this Court's review, and it does not advocate for affirmance on an alternative ground. *McFarland*, 935 A.2d at 351. Regardless, the District's market definition is viable, District Br. 27-29, and Amazon's argument has been rejected by every court to have considered it, *De Coster*, 2023 WL 372377, at *5; *Frame-Wilson*, 591 F. Supp. 3d at 988-90.

[3] Amazon admits (at 31) that the Price Parity Provision *did* explicitly require third-party sellers to ensure that their price on Amazon was the best available.

- Sellers and Amazon both invest in sophisticated "scraping" software to ensure that other platforms do not lower prices below the price listed on Amazon by any amount. JA 18, 289.
- One seller reported that Amazon sanctioned him within minutes when a competing platform lowered the price of his product by $4.01. Rather than contest the sanction, the seller increased the price on the competing marketplace. JA 290.

These are all allegations of fact, and they show that Amazon and its sellers mutually understand that the MFNs create a price floor tied to the Amazon price. Amazon cannot escape these allegations by re-labeling its MFNs as efforts to combat price gouging, or by characterizing its enforcement efforts as unilateral conduct. Unlike the price-gouging protections that Amazon cites (at 30), Amazon's MFNs do not prohibit sellers from listing prices on Amazon that are *objectively* "excessive" or "unreasonable"; the MFNs prohibit sellers from setting prices that are higher *compared to* other platforms. The only beneficiary of that kind of protection is Amazon, which can rest assured that none of its competitors will be able to undercut it on price. And the allegations that sellers monitor prices of their own products on other platforms (and acquiesce when threatened with sanctions) undermines Amazon's contention (at 31) that the parties disagree about the MFNs' meaning.

Amazon cites no authority for its assertion (at 32 n.10) that MFNs "are rarely condemned" under the antitrust laws, and that proposition is simply untrue. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* §§ 768a6, 1807b (2022 Supp.) (acknowledging

that MFNs can be unlawful *per se* or under the rule of reason, particularly when used by monopolists). Two federal courts and one state court have already held that the exact MFNs challenged here are plausibly anticompetitive. Many other courts have recognized that MFNs can create anticompetitive effects, depending on the circumstances. *See, e.g.*, *United States v. Apple, Inc.*, 791 F.3d 290, 320 (2d Cir. 2015); *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 323-25 (2d Cir. 2010); *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 674 (E.D. Mich. 2011). Academic scholarship strongly supports the view that MFNs can harm competition when employed by dominant firms like Amazon. *See* District Br. 42; Antitrust Scholars' Br. 15-21; OMI Br. 8-14. The Court should reject Amazon's request for a legal presumption insulating MFNs that is unsupported by the law and ignores the District's allegations of "actual market realities." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992).

Amazon's only response to all of this authority is *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1st Cir. 1984), which does not support its argument. Decided after a 37-day bench trial, *Kartell* did not involve an MFN clause, but a ban on balance billing. *See id.* at 925-26. Blue Shield, as a buyer of medical services for its insureds, required physicians not to charge patients extra amounts on top of the contracted rates, and physicians argued this unduly lowered prices. Amazon is not acting as a buyer under the MFNs, and the allegations here

are that the MFNs *raise* prices, not lower them, so *Kartell* is inapposite. *See De Coster*, 2023 WL 372377, at *3 (distinguishing *Kartell*).

b. The District plausibly alleged that Amazon's MFNs are *per se* illegal.

The Court need not address the District's *per se* theory at this stage of the litigation because the claim is plausible under the rule of reason. District Br. 25-26. But if it does, it should find the District plausibly alleged that the MFNs act as horizontal agreements whenever Amazon (1) competes with its third-party sellers' own websites for sales and (2) sells its own products as a retailer in direct competition with the third-party sellers. District Br. 32-33. Any agreement among horizontal competitors to restrict pricing is *per se* illegal. District Br. 32.

Amazon's contention that the District "abandoned" its *per se* theory is wrong. Amazon Br. 37. The District's minor amendments in its first amended complaint simply reaffirmed that it intended to prove that the MFNs violate D.C. Code § 28-4502 under both rule-of-reason and *per se* theories; the complaint continued to highlight that the MFNs operate as horizontal agreements. *See, e.g.*, JA 17, 33, 35.

Amazon is also wrong in arguing (at 39-40) that some horizontal price restraints are evaluated under the rule of reason rather than *per se*. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), did not involve agreements among competitors to restrict the price of goods that they each sold. Rather, it acknowledged that where collaboration creates a unique product that

would otherwise not exist—such as the non-exclusive blanket licensing agreements at issue in that case—courts should not automatically declare the restraint unlawful *per se*. *Id.* at 20-24. Amazon's MFNs do not create unique products, so *Broadcast Music* is inapplicable.

c. The District plausibly alleged that the minimum margin agreements fail the rule of reason.

The District also plausibly alleged that Amazon's minimum margin agreements are anticompetitive. *See* District Br. 33-34; Add. 4a-6a, 11a-15a. Contrary to Amazon's arguments (at 33), these agreements are not merely lawful negotiations by Amazon, as a buyer, to get low prices from wholesalers. Rather, by guaranteeing Amazon a minimum margin, these agreements strongly incentivize suppliers to ensure that retail prices on other platforms remain high, because any drop in the market price will hurt the supplier, not Amazon. *See* JA 14, 22-28. The District directly alleges that suppliers have artificially raised prices on competing platforms for precisely this reason. *See* JA 14, 22-23, 295.

Amazon's reliance (at 34-36) on *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir. 1983), and *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203 (10th Cir. 1982), is misplaced. Keeping with Amazon's theme of relying on cases decided after full discovery, *Lewis* was decided after a jury trial. 714 F.2d at 844. Examining the "entire record," the court concluded that the price-support system at issue was overall procompetitive because the evidence

showed that it reduced prices for customers. *Id.* at 848. *AAA Liquors* similarly found after a bench trial that certain liquor discounts were procompetitive. 705 F.2d at 1208. At trial, Amazon will be free to marshal whatever evidence it can to show that its minimum margin agreements have similar procompetitive effects. *See* District Br. 26 n.4. But for now, the District has plausibly alleged that the agreements caused suppliers to raise, not lower, prices, JA 14, 23, 27-28, and has highlighted at least one example where Amazon directed a supplier to ask competing platforms "to increase the prices they are charging," and the supplier did so. JA 295. That is more than enough to get to discovery.[4]

B. The Superior Court erred in dismissing the first amended complaint.

1. The Superior Court conflated the two elements of a restraint-of-trade claim.

The Superior Court's first error was to misread *Twombly* and conflate the two elements of a restraint-of-trade claim. In its oral ruling, the Superior Court stated,

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[4] Amazon's quotation (at 34) from *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990), is misleading. *Atlantic* did not hold that an agreement is legal so long as prices are above predatory levels. Indeed, there was no dispute that the price-fixing scheme at issue in that case *violated* the Sherman Act. *See id.* at 335, 339. The only question was whether that Sherman Act violation inflicted an "antitrust injury" on a competitor sufficient to create standing to seek damages under the Clayton Act. *Id.* at 334. For a competitor to obtain damages for lost sales under *that* statute, the Court explained, it had to show predatory pricing. *See id.* at 337-46. Here, because the case is brought by the District, "proof of the violation of law" is enough to create standing. *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990).

"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." JA 247. Because the Superior Court viewed the agreements as consistent with unchoreographed free market behavior, it concluded that they were not plausibly anticompetitive. *See* JA 247-48; JA 369-70.

The Superior Court's description of the law was wrong. The phrase "unchoreographed free market behavior" comes from *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), not *Twombly*, and the Superior Court did not quote it accurately. *See* Antitrust Scholars' Br. 8-9. *Iqbal* did not say that an "agreement" consistent with unchoreographed behavior is not anticompetitive; it said that "parallel conduct" consistent with unchoreographed behavior does not plausibly allege an agreement. 556 U.S. at 680. That distinction is critical. The District is not attempting to use parallel conduct to create an inference that Amazon made agreements with its suppliers and third-party sellers. It has "identif[ied] a written agreement," which *Twombly* itself explained is "a more specific allegation" that is sufficient to allege concerted action. 550 U.S. at 557. And the Superior Court's contention that agreements are not anticompetitive so long as the same conduct theoretically could have occurred absent an agreement is simply incorrect. *See* District Br. 36-37; Antitrust Scholars' Br. 9-10; JA 321-24 (statement of the United States).

Amazon's primary defense of the decision below attacks a straw man. Amazon and its amici variously argue that the District is advocating that *Twombly* and *Iqbal* categorically do not apply in the Superior Court, that they do not apply to certain types of claims, or that they do not apply to certain elements of a claim. *See* Amazon Br. 22-24, Chamber Br. 4-13; Federal City Council Br. 3-11. None of those contentions is correct. The District has never asked this Court to alter well-established pleading standards in any way, nor is it asking for an approach that would put the District out of step with federal courts.

All the District asks is that the Court apply the pleading standards *correctly*, which is what the Superior Court failed to do here. Under a proper reading of *Twombly*, there was no need for the Superior Court to inquire whether the conduct of Amazon and its sellers "could be explained by lawful, . . . unchoreographed free market behavior," JA 247, because Amazon *wrote its agreements down*. Where an agreement is alleged directly, the only inquiry is whether the agreement unreasonably restrains trade. *See* District Br. 24, 35-37, 42.[5]

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[5] Amazon's effort (at 25 n.7) to distinguish *Robertson*, 679 F.3d 278, fails. Just as in *Robertson*, Amazon and its sellers and suppliers have entered into agreements, which establishes that their conduct is concerted. *Id.* at 289-90. The only "remaining question, therefore, is whether [the District] adequately pled the second element of a [Section 28-4502] violation—that the [agreements] imposed an unreasonable restraint of trade," either *per se* or under the rule of reason. *Id.* at 290.

Indeed, it is Amazon's position that would create disuniformity in the law. *De Coster* and *Frame-Wilson* have already held that virtually identical allegations pass muster under *Iqbal* and *Twombly*, and *People* concluded the same under California's similar pleading standards. Amazon attempts (at 40) to distinguish the allegations in *Frame-Wilson* as more detailed, but its argument lacks merit (and ignores *De Coster* and *People* altogether). *Frame-Wilson*'s additional allegations were not necessary to get past the pleadings, *see infra* pp. 14-16, but regardless, they addressed the agreements' anticompetitive *effects*, not the existence of the agreements themselves.

2. The Superior Court ignored factual allegations of anticompetitive effects.

The Superior Court's second principal error was to ignore or discount the District's factual allegations regarding the anticompetitive effects of Amazon's agreements. Critically, it "rejected" the District's allegation that Amazon's MFNs cause sellers to raise their prices, JA 368, even though both the first and second amended complaints alleged that this occurs, replete with specific examples, *see* JA 18, 31-32, 289-90, 292-95. The House of Representatives' investigation of Amazon came to the same conclusion, District Br. 40, and three other courts have held that this is a plausible consequence of Amazon's MFNs. The Superior Court also erred in assuming that sellers can easily migrate to other platforms, which contradicts the District's allegations about Amazon's market dominance. *See* District Br. 43-44.

Amazon doubles down on the Superior Court's flawed reasoning, dismissing every allegation that explains how its agreements raise prices or hurt competition as "conclusory." For instance, it contends (at 31) that the District's allegations that Amazon has punished sellers for lowering prices on competing platforms "should be disregarded," and argues the same (at 35-36) as to the District's allegations that suppliers raised prices on competing platforms to comply with the minimum margin agreements. Amazon misunderstands the meaning of the word "conclusory." A conclusory allegation is one that merely parrots legal standards, such as when a plaintiff offers "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Iqbal*, 556 U.S. at 681 (quoting *Twombly*, 550 U.S. at 555). A proper factual allegation is provable using evidence, even if it does not forecast the specific nature of that evidence. For instance, the allegation in *Iqbal* that the defendants "arrested and detained thousands of Arab Muslim men" and held them in "highly restrictive conditions of confinement" was "[t]aken as true," even though the complaint did not specify how the plaintiffs intended to prove that allegation. *Id.*

The District was likewise not obligated to identify by name particular sellers or products affected by Amazon's anticompetitive policies, contrary to Amazon's arguments (at 43-44). Instead, all of the following facts must be presumed true: Amazon has market power because it controls a majority of online retail sales, JA

10-11, 16, 23, 28-29, 38; sellers have no choice but to use Amazon because of its dominant market position, JA 28, 293-94; Amazon charges higher fees than its competitors despite seeing little seller attrition, JA 12, 20-21, 34-36; Amazon enforces its MFNs against even modest price cuts on competing platforms, JA 12, 18, 289-90, 292-95; Amazon and sellers use sophisticated scraping software to comply with the MFNs and minimum margin agreements, JA 17-18, 289; sellers and consultants have reported on Amazon's enforcement mechanisms, JA 18-19, 289; sellers have increased their prices on competing platforms to comply with the MFNs, JA 18, 289-90; suppliers have increased their prices on competing platforms to comply with the minimum margin agreements, JA 14, 34-35, 295; Amazon competes against other websites (including those of its sellers) as an avenue for sales as well as a retailer in many product markets, JA 10-11, 23-24, 33, 36; and Amazon removed the Price Parity Provision from its contracts in 2019 to avoid antitrust scrutiny, JA 13. No further details were required to plausibly allege that the MFNs and minimum margin agreements violate Section 28-4502.[6]

For the first time on appeal (and without citing any supporting authority), Amazon argues (at 42, 45) that the District was required to allege that sellers possess

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[6] The District's ability to conduct pre-suit investigations, *see* Amazon Br. 22 n.4, does not subject it to a more demanding pleading standard. As Amazon itself stresses, the standards of *Iqbal* and *Twombly* apply to all civil actions equally.

market power in particular product markets for Amazon's agreements to have anticompetitive effects on other platforms. Not so. The anticompetitive nature of an agreement can be proved in multiple ways, including through direct evidence of higher prices or indirect evidence of market power plus harm to competition. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). The District alleged both, and its direct allegations that individual sellers raised their prices to comply with the agreements are sufficient, standing alone, to state a claim. District Br. 27-34; *see Blue Cross*, 809 F. Supp. 2d at 674 (finding that direct allegations that insurer's MFNs with hospitals raised prices to its competitors were sufficient to state a Section 1 claim). Amazon simply ignores these direct allegations.

But the District also alleged indirect evidence, contending that Amazon has monopoly power over all online sales such that most sellers and suppliers must use its platform to remain profitable, even if doing so means forgoing sales on other platforms. JA 28, 31-32, 293-94. And sellers know that all their competitors who use Amazon's platform will also have to build Amazon's fees into their prices, even on other platforms. For this reason, competing platforms cannot cut their prices to increase market share, as Amazon suggests (at 43). Other platforms *already* charge lower fees than Amazon, yet the MFNs and Amazon's market dominance prevent this from translating to lower retail prices. District Br. 30-31. For this reason, every court examining Amazon's MFNs has rightly focused on *Amazon's* market power.

None has demanded allegations that individual sellers possess market power over particular products. *See also Blue Cross*, 809 F. Supp. 2d at 673-74 (finding it sufficient that insurer had market power in insurance markets even if hospitals subject to the MFNs did not).

II. The District Adequately Pleaded That Amazon Has Established Or Attempted To Establish A Monopoly.

Amazon barely addresses the District's monopolization claims and offers no convincing rebuttal to the District's extensive allegations showing that Amazon has established, or is dangerously close to establishing, a monopoly over online sales. District Br. 44-47. Amazon merely contends (at 44-45) that the District's allegation that Amazon controls 50-70% of the market "must be disregarded" because that figure "conveniently" aligns with what other courts have held constitutes monopoly power. But market share is a provable fact, and this allegation aligns with estimates alleged in other complaints challenging Amazon's agreements. *E.g.*, *Frame-Wilson*, 591 F. Supp. 3d at 990 (alleging Amazon "controls 70% of all online marketplace sales"). That the District's estimate of Amazon's market share "plausibly suggest[s] an entitlement to relief" only reaffirms that the District's complaint is viable; it is not a valid reason to ignore the allegation. *Iqbal*, 556 U.S. at 681.

III. The Superior Court Abused Its Discretion In Denying Leave To Amend.

Amazon also makes little effort to defend the Superior Court's decision denying the District leave to amend. The parties agree that the District had to satisfy

Rule 59(e), *see* JA 258 (invoking this rule), but the Superior Court conducted no analysis whatsoever to determine whether the District met that standard. *See* JA 376-77. Failing to consider the relevant factors is, by definition, an abuse of discretion. *E.g.*, *Ford v. ChartOne, Inc.*, 908 A.2d 72, 84 (D.C. 2006).

Applying Rule 59(e), the Superior Court committed a "clear error" by dismissing the District's first amended complaint with prejudice. *In re Est. of Derricotte*, 885 A.2d 320, 325 (D.C. 2005). Dismissal was wrong as a matter of law, *see supra* Parts I-II, but dismissal with prejudice was even more clearly erroneous because the Superior Court's purported basis for dismissal could easily be cured by alleging more detailed facts. *See Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 569 n.3 (D.C. 2011). Once the District proffered a second amended complaint alleging those additional details, the Superior Court further abused its discretion in refusing to even consider whether amendment would be futile. *See* District Br. 49-50 (collecting cases).

The District's proposed amendments were not futile. The District proposed adding exactly the kinds of allegations that the Superior Court faulted it for not including earlier: examples of specific sellers and suppliers who raised their prices on competing platforms to comply with Amazon's MFNs and minimum margin agreements. *See* JA 289-90, 292-95. Amazon attacks one of the District's examples (from the toy manufacturer Viahart) where a seller raised prices to comply with the

MFN by asserting that the seller should have instead slashed its profits by 73% across the board. Amazon Br. 48. But it is irrelevant whether manufacturers could, in some cases, absorb Amazon's fees and commissions rather than pass those costs on to consumers through higher prices. The point is that they usually don't. *See, e.g.*, JA 289 (alleging sellers "regularly" increase their prices to comply with the MFNs), 289-90 (describing example of seller raising its price on another platform to comply with the MFN), 294 (describing example of seller raising its price on its own website to comply with the MFN), 295 (describing example of supplier asking Walmart and Target to raise prices to avoid true-up payments). That makes sense because Amazon makes up the vast majority of third-party sellers' business—Viahart, for instance, notes that Amazon comprises 98% of its sales. *See* JA 293.

The decision by sellers to raise prices in response to the MFNs is also not "unilateral conduct." Amazon Br. 49. If Amazon is aggressively enforcing its MFNs when sellers lower their prices on other websites, JA 12, 18, 289-90, 292-95, and sellers are raising their prices on other websites (or not selling there at all) to avoid sanctions under the MFNs, JA 18-19, 289-90, then the parties on either side of the agreement are not acting independently. They are working together to enforce their agreement.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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May 2023

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
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     (1) the acronym "SS#" where the individual's social-security number would have been included;
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2. Any information revealing the identity of an individual receiving mental-health services.

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4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the

purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

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/s/ Jeremy R. Girton
Signature

22-CV-657
Case Number

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I certify that on May 22, 2023, this reply brief was served through this Court's electronic filing system to:

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ADDENDUM

People v. Amazon.com, Inc.,
No. CGC-22-601826 (Cal. Super. Ct. Mar. 30, 2023)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. AMAZON.COM, INC., Defendant.	Case No. CGC-22-601826 ORDER ON AMAZON'S DEMURRER TO THE COMPLAINT

On March 15, 2023, Defendant Amazon.com, Inc.'s demurrer to the Complaint came on for hearing before the Court. Having considered the papers and pleadings on file in the action, and the argument of counsel presented at the hearing, the Court hereby overrules the demurrer.

SUMMARY OF KEY FACTUAL ALLEGATIONS

Defendant Amazon.com, Inc. (Amazon) operates the largest online retail store in the United States, accounting for nearly 50% of all sales in the online retail store market and 60% of sales among its

key competitors, such as Walmart, Target, and Costco. (Compl. ¶¶ 22, 103-104.)[1] On its online platform, Amazon resells products purchased wholesale from suppliers to consumers, and third-party sellers sell products directly to consumers. (*Id.* ¶ 22.) The former category, "first-party sales," follow a traditional retail model: Amazon purchases products from wholesale suppliers or vendors at a wholesale price, and resells them to consumers through its online store at a retail price. (*Id.* ¶ 23.) Amazon earns profits on these sales by generally selling products for higher retail prices than it paid for them wholesale, and by charging its wholesale suppliers various fees and funding, including marketing development and advertising funding, damage allowance fees, and shipping/freight fees. (*Id.*) In contrast, "third-party sales" through Amazon's Marketplace involve sales by third-party sellers, including "brands" that sell their own branded products and resellers. (*Id.* ¶ 24.) Third-party sellers pay Amazon "referral" fees (a percentage or minimum dollar amount per unit sold), shipping and fulfillment fees, storage fees, sponsored products and other advertising fees, and other miscellaneous fees. (*Id.*) Amazon requires third-party sellers to sign a Business Solutions Agreement (BSA), through which they agree to certain "Program Policies" and other selling terms. (*Id.* ¶ 113.)

The Complaint focuses on certain agreements between Amazon and its third-party sellers and wholesale suppliers (together, "merchants") that the People allege have "prevented effective competition across a wide swath of online marketplaces and stores," thereby insulating Amazon from price competition, entrenching its dominance, preventing effective competition, and harming consumers and the California economy. (*Id.* ¶¶ 1-2, 4-7, 9.) They follow into two main categories:

Retail Price Parity Agreements (Compl. ¶¶ 113-174)

Amazon requires the third-party sellers on its Marketplace to agree not to offer their products at a lower price elsewhere, such as on competing online marketplaces or their own direct-to-consumer (DTC) outlets. (*Id.* ¶ 4.) From 2012 to March 2019, this requirement was explicitly codified in the "Price Parity Provision" of Amazon's BSA with Marketplace sellers. (*Id.* ¶ 4.) The provision stated,

> You will maintain parity between the products you offer through Your Sales Channels and the products you list on any Amazon Site by ensuring that: (a) The Purchase Price and every other

[1] The People define the relevant Online Retail Stores Market as "the market for online retail sales of new products for custom delivery (e.g., delivery to the customer's home) in the United States." (Compl. ¶ 84.) Amazon does not raise any issues in its demurrer regarding market definition or market power.

> term of offer or sale of Your Product (including associated shipping and handling charges, Shipment Information, any "low price" guarantee rebate or discount, any free or discounted products or other benefit available as a result of purchasing one or more other products, and terms of applicable cancellation, return and refund policies) is at least as favorable to Amazon Site users as the most favorable terms upon which a product is offered or sale via Your Sales Channels.

(*Id.* ¶ 114.) Third-party sellers "understood this policy as a prohibition on listing products off Amazon for a lower price than the price posted on Amazon." (*Id.*) And it was effective: "sellers refrained from selling their products for less off Amazon because they had agreed not to do so in their BSA with Amazon." (*Id.*)

In March 2019, after a German regulatory authority found that this provision "resulted in significant price increases in e-commerce," and a Senator called for an investigation of the practice, Amazon removed this provision from its BSA. (*Id.* ¶¶ 4, 125.)[2] However, Amazon "continued to interpret and apply other provisions of its BSA to mandate the same price agreement from third-party sellers," a practice the People refer to as "a de facto price parity agreement." (*Id.* ¶¶ 5, 125-130.) In particular, "Amazon continued to contractually require (and enforce) price parity through the Amazon Standards for Brands Policy, the Marketplace Fair Pricing Policy, and the Seller Code of Conduct." (*Id.* ¶ 125; see *id.* ¶¶ 116, 118, 121-123 [discussing and quoting policies and Code of Conduct].) Third-party sellers and their ecommerce consultants understand this to be Amazon's policy, even if it is cloaked in different language. (E.g., *id.* ¶¶ 115, 120, 122, 126, 133, 142-143, 147, 151, 159-160.)[3] And Amazon itself has confirmed, in internal and external documents and testimony, that despite the removal of the price parity clause, "our expectations and policies have not changed," and that it views lower off-Amazon pricing as a practice that harms customer trust and "price competitiveness." (*Id.* ¶¶ 115, 117, 119, 122,

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[2] Amazon seeks judicial notice that the 2019 change in its Price Parity Provision was "widely reported in such varied news sources as Axios, the Financial Times, and TechCrunch" (Opening Brief, 6 fn.3), and attaches articles from those publications. Amazon's request for judicial notice is denied. The Court may not take judicial notice of such evidentiary materials for the truth of matters stated in them. (E.g., *Voris v. Lampert* (2019) 7 Cal.5th 1141, 1147 fn. 5 [newspaper articles "are not proper authorities to establish the truth of the matters asserted therein"]; *Malek Media Group, LLC v. AXQG Corp.* (2020) 58 Cal.App.5th 817, 824-827 [declining to take judicial notice of press releases and other exhibits for the truth of their contents]; *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 194 [declining to take judicial notice of the truth of the contents of websites and blogs, including those of newspapers].)

[3] Amazon takes issue with the accuracy of these allegations, pointing out at length that the written policies and Code of Conduct do not explicitly mandate price parity. (Reply, 1-5.) However, "[t]he sole issue raised by a general demurrer is whether the facts pleaded state a valid cause of action, not whether they are true. No matter how unlikely or improbable, plaintiff's allegations must be accepted as true for the purpose of ruling on the demurrer." (*Kerivan v. Title Ins. & Trust Co.* (1983) 147 Cal.App.3d 225, 229.)

146.) The People characterize the latter term as "'price parity' by another name." (*Id.* ¶ 115.)

Amazon regularly monitors prices offered by third-party sellers on their own websites or other online retail marketplaces, and sends sellers "price competitiveness" notifications alerting them that their offers are priced higher on Amazon than at other retailers. (*Id.* ¶¶ 132-133, 135-138.) Where third-party sellers fail to comply with this price parity requirement, Amazon imposes "escalating penalties" on them until they do comply. (*Id.* ¶ 5.) These sanctions have included disqualifying such sellers from winning the "Buy Box" (the box containing the "Add to Cart" button on the product detail page the shopper clicks to add the product to her cart),[4] demoting their offers to the bottom of Amazon's organic search results, and blocking them from creating new offers in their third-party seller accounts altogether. (*Id.* ¶¶ 5, 30, 88, 133, 142-143, 148-149, 157-158.) "As a result of Amazon's price parity enforcement, third-party sellers have learned to raise their prices on eBay and other marketplaces, and their own direct-to-consumer websites, to match or exceed their prices on Amazon—even though it costs them far more to sell on Amazon. They continue this practice to this day, to maintain compliance with their coerced price parity agreements." (*Id.* ¶ 140; see also *id.* ¶¶ 152-155.) The Complaint lists numerous specific examples of third-party sellers who, to comply with Amazon's enforcement of its price parity requirement, either raised their prices off Amazon or stopped offering their products to competing retailers. (*Id.* ¶¶ 157-164, 166-173.)

Wholesale Minimum Margin Agreements (Compl. ¶¶ 175-204)

Amazon also enters into agreements with its wholesale suppliers that, the People allege, enforce price parity at that level. (*Id.* ¶ 7.) First, with respect to a substantial volume in annual sales,[5] "Amazon enters into formalized minimum margin agreements with wholesale suppliers, under which they explicitly agree to make true-up payments to Amazon if Amazon's price-matching results in Amazon making less than the 'minimum margin' specified in the agreement." (*Id.* ¶ 175.) These "Guaranteed Minimum Margin agreements" "essentially allow Amazon to take control of pricing (and discounting) away from wholesale suppliers. If the product of a wholesale supplier is offered for a lower price off Amazon,

[4] The People allege that Amazon's primary marketplace competitors, eBay and Walmart.com, do not use external prices to disqualify third-party sellers' offers from the Buy Box equivalent on their marketplace sites. (Compl. ¶ 144.)

[5] The precise figure alleged, like other amounts referred in this section, is subject to a sealing order.

Amazon proactively lowers the on-Amazon price and then demands the seller make up the difference. This hurts sellers' profits, so the effect is not lower prices, but a disincentive to lower prices off Amazon." (*Id.* ¶ 176.)

Second, in addition to these formalized guaranteed minimum margin agreements, "Amazon imposes informal or de facto minimum margin agreements covering billions of dollars more in sales every year, under its 'Matching Compensation program,' or 'MCP.'" (*Id.* ¶ 178.) Pursuant to these agreements, Amazon and wholesale suppliers jointly set profitability targets, and the suppliers agree to make true-up payments after the fact if Amazon fails to meet the profitability target because of price-matching. (*Id.*) In 2020, suppliers made substantial payments to Amazon under these two programs. (*Id.* ¶ 179.) Although the agreements are nominally voluntary, suppliers who do not agree to pay MCP funding are subject to various disincentives. (*Id.* ¶¶ 180-182.)

"Amazon's explicit and informal/de facto minimum margin agreements result in suppliers raising wholesale prices to competing online retail stores, asking those retailers to raise retail prices to consumers, charging higher prices on their own websites and on other marketplaces than they otherwise would, or withholding selection from Amazon's competitors altogether, to avoid triggering true-up payments." (*Id.* ¶ 184; see *id.* ¶¶ 185-191, 199.) These agreements and their effects are confirmed by Amazon's internal documents. (*Id.* ¶¶ 192-194, 197-198, 200.) They reduce the ability of competing online stores to offer online prices to consumers, with the result that prices are higher across online stores. (*Id.* ¶ 202.)

Harm to Competition

Amazon's size and market power make it a critical outlet for third-party sellers and wholesale suppliers, including those merchants that offer their products through other, competing online retail stores and through their own online outlets. (*Id.* ¶¶ 38-39.) For many merchants, including wholesale suppliers and third-party sellers, Amazon represents a critical portion of their sales that they could not recover through other channels if they stopped selling on Amazon. (*Id.* ¶ 39.) For a substantial portion of merchants whose products are sold on Amazon, Amazon is their most important distribution channel, which gives it substantial power over merchants. (*Id.* ¶ 39.)

"Amazon has entered into and enforced its retail and wholesale price parity agreements with the intent and effect of expanding and entrenching its market power as an online retail store, impeding rivals, insulating the Amazon store from competition, enabling Amazon to extract anticompetitive rents through multiple channels, including supra-competitive seller fees, and pricing above competitive levels across California." (*Id.* ¶ 112.)

The challenged retail- and wholesale-level agreements "cause third-party sellers and wholesale suppliers to impose higher prices or enforce minimum advertising price policies on Amazon's rivals, to charge higher prices on their own websites and on competing marketplaces, and to withhold selection from these competing online stores and their own sites." (*Id.* ¶ 7; see also *id.* ¶ 115.) "Numerous sellers reported that in response to Amazon's price parity requirements, penalties for noncompliance, and related notifications, they raised or have been unable to lower their prices for the same products on their own websites and other marketplaces such as Walmart.com and eBay." (*Id.* ¶ 152.) As a result, "sellers maintain higher prices on their own websites, maintain higher prices on other marketplaces and, in the case of brands that manufacture their own products, charge higher wholesale prices to other retailers and set higher price floors for resale." (*Id.* ¶ 150.) "Walmart.com, eBay, Target.com, and Amazon's other competitors generally cannot draw customers away from Amazon with lower prices, because Amazon *compels* suppliers and sellers to cause the prices on those competing websites to be the same or higher than the prices for the same products on Amazon." (*Id.* ¶ 82 (emphasis in original).) As a result, "merchants on their own direct-to-consumer sites, and numerous online retailers, have dramatically cut back on discounting and other price competition, including in some cases abandoning or pivoting away from a discount model altogether. Absent these agreements, a greater selection and total output of lower-priced products would be available across online stores." (*Id.*)

DISCUSSION

I. LEGAL STANDARD

A demurrer lies where "the pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. § 430.10(e).) A demurrer admits "all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The complaint is given a reasonable interpretation, reading it as a whole and its parts in their context. (*Id.*) California courts require a "high degree of particularity in the pleading of Cartwright Act violations," such that "the lack of factual allegations of specific conduct directed toward furtherance of the conspiracy to eliminate or reduce competition renders the complaint legally insufficient." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 265-266; see also *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236.) "At the same time, as with any demurrer, the material allegations of an antitrust cause of action are deemed admitted and assumed to be true, while the general rule of pleading that a complaint must be given liberal construction in order to achieve substantial justice between the parties is applicable." (*Id.* at 266 (cleaned up).)

II. THE COMPLAINT STATES A CAUSE OF ACTION FOR VIOLATION OF THE CARTWRIGHT ACT.

A. Background Law – Cartwright Act

The Cartwright Act, Bus. & Prof. Code § 16720 *et seq.*, is California's principal antitrust law. (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.) The Act's principal goal is the preservation of consumer welfare. (*Id.*) Like antitrust law generally, the Cartwright Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." (*Id.* (cleaned up). "At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces." (*Id.*)

The Cartwright Act "generally outlaws any combinations or agreements which restrain trade or competition, or which fix or control prices, and declares that, with certain exceptions, every trust is unlawful, against public policy and void." (*Id.* (cleaned up); see Bus. & Prof. Code § 16726.) The "trust[s]" the act prohibits include any "combination . . . by two or more persons" to "create or carry out restrictions in trade or commerce," "to limit or reduce the production, or increase the price of merchandise or of any commodity," or "to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity." (Bus. & Prof. Code § 16720.)

"Though the Cartwright Act is written in absolute terms, in practice not every agreement within the

four corners of its prohibitions has been deemed illegal." (*In re Cipro Cases I & II*, 61 Cal.4th at 136.) Instead, drawing upon common law prohibitions against restraints of trade, "the broad prohibitions of the Cartwright Act are subject to an implied exception similar to one that validates reasonable restraints of trade under the federal Sherman Antitrust Act." (*Id.* at 136-37, 146.) Put differently, "the Cartwright Act and the Sherman Act carry forward the common law understanding that only unreasonable restraints of trade are prohibited." (*Id.* at 146 (cleaned up).)[6]

Under a traditional rule of reason analysis, the inquiry is limited to whether the challenged conduct promotes or suppresses competition. (*Id.* at 146.) This entails a determination of whether the challenged restraint hurts competition more than it helps. (*Id.*) To determine that issue, a court may consider the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. (*Id.*)

Rule of reason inquiry is not required in every case. "[The California Supreme Court] and the United States Supreme Court have partially simplified the analysis by identifying categories of agreements or practices that can be said to always lack redeeming value and thus qualify as per se illegal." (*Id.*) "The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct to a full-blown inquiry, a violation would be found under the traditional rule of reason." (*Id.* (cleaned up)].) Application of the per se rule establishes illegality "without any regard to their economic effects or possible justification." (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 931.)

"More recently, a third category, quick look rule of reason analysis, has emerged." (*In re Cipro Cases I & II*, 61 Cal.4th at 146.) "Under the quick look approach, applicable to cases where an observer with even a rudimentary understanding of economics could conclude that the arrangements would have an

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[6] The Cartwright Act is "broader in range and deeper in reach" than the Sherman Act. (61 Cal.4th at 160-161 (cleaned up).) "Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1195; accord, *Cellular Plus, Inc v. Superior Court* (1993) 14 Cal.App.4th 1224, 1240 ["the appropriate use of federal cases interpreting the Sherman Act is as an aid in interpreting our own Cartwright Act, not as controlling precedent"].) Thus, a claim dismissed under the Sherman Act can still survive under the Cartwright Act. (See *Samsung Electronics Co. v. Panasonic Corp.* (9th Cir. 2014) 747 F.3d 1199, 1205 fn. 4.)

anticompetitive effect on customers and markets, a defendant may be asked to come forward with procompetitive justifications without the plaintiff having to introduce elaborate market analysis first." (*Id.* at 146-147 (cleaned up).)

The three approaches do not form a "trichotomy." (*Id.* at 147.) Instead, the different approaches are "useful tools the courts have developed over time to carry out the broad purposes and give meaning to the general phrases of the antitrust statutes." (*Id.*) The appropriate analytic approach involves a "continuum," with the "circumstances, details, and logic of a particular restraint dictating how the courts that confront the restraint should analyze it. In lieu of an undifferentiated one-size-fits-all rule of reason, courts may devise rules ... for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones." (*Id.* (cleaned up).) Thus, a "more nuanced approach" is required under the Cartwright Act. (*Id.*)

A plaintiff alleging violation of the Cartwright Act's prohibition on restraints of trade must plead: (1) formation and operation of a conspiracy; (2) illegal acts pursuant to the conspiracy; (3) purpose to restrain trade; and (4) damages. (*G.H.I.I.*, 147 Cal.App.3d at 265.) "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a *horizontal* restraint, consisting of a collaboration among competitors; or a *vertical* restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*Id.* at 267 (emphasis in original).) A horizontal agreement is "an anticompetitive agreement among competitors who are at the same level of distribution" and is generally unlawful per se. (*Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 493.) Vertical agreements are "imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained." (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680, quoting *Muenster Butane, Inc. v. Stewart Co.* (5th Cir. 1981) 651 F.2d 292, 295.)

B. The *Per Se* Rule Does Not Apply.

As a threshold matter, the parties dispute the standard the Court should apply to determine whether the Complaint states a valid of cause of action. Amazon asserts that its agreements and policies are not *per se* illegal under California law. (Opening Brief, 8-12; Reply, 5-9.) It further contends that the

People's allegations of vertical restraints of trade are subject to rule of reason analysis. (Opening Brief, 13-17.) The People contend that the facts pleaded constitute a *per se* violation of the Cartwright Act, in that Amazon's challenged agreements with third-party sellers and wholesale suppliers constitute price-tampering agreements or horizontal restraints that are *per se* unlawful. (Opposition, 10-18.) In the alternative, the People contend that even if the *per se* rule does not apply, Amazon's challenged agreements violate the Cartwright Act under a rule of reason analysis. (Opposition, 18-22.)

The Court cannot conclude on the face of the Complaint that the challenged agreements are *per se* illegal under California law. As Amazon observes, and the People appear to concede, no reported California decision has addressed the lawfulness of a price parity clause or of a guaranteed minimum margin agreement. (Opening Brief, 14; Opposition, 17.) The dated cases that the People contends are "controlling" (Opposition, 1, 12) involved very different agreements, conduct, and industries, and are distinguishable on their facts. (See *Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co.* (1971) 4 Cal.3d 354, 362-366 [determining that certain rules of bid depository for construction project constituted a combination of subcontractors with the purpose and effect of restraining open price competition among subcontractors]; *Mailand v. Burckle* (1978) 20 Cal.3d 367, 377-379 [holding that provisions of franchise agreement that required plaintiff franchisees to purchase gasoline from third-party oil company and allowed defendants to set the price of gasoline sold by plaintiffs in exchange for a guaranteed profit to plaintiff on gasoline sales were invalid as constituting illegal price-fixing].) The challenged agreements do not fall neatly into categories of agreements that have been found to be *per se* violations of the antitrust laws in the past, such as agreements between business to "engage in a horizontal allocation of markets, with would-be competitors dividing up territories or customers." (See *In re Cipro Cases I & II*, 61 Cal.4th at 148; see also *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co.* (2020) 51 Cal.App.5th 867, 872 ["agreements to fix prices, divide markets, or tie the purchase of one product or service to another, as well as certain boycotts"].) Indeed, as Amazon points out, some federal courts have upheld agreements similar—but not identical—to those challenged here. (Opening Brief, 14-15 & fn. 7; see *Frame-Wilson v. Amazon.com, Inc.* (W.D. Wash. 2022) 591 F.Supp.3d 975, 991.)

Under the circumstances, the Court concludes that application of rule of reason analysis is appropriate. (See *In re Cipro Cases I & II*, 51 Cal.4th at 146 [*per se* approach is reserved for "categories of agreements or practices that can be said to always lack redeeming value and thus qualify as per se illegal]; see also *Ixchel Pharma, Inc. v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1150-1162.)[7]

C. Application Of Rule Of Reason Analysis Raises Factual Issues That Cannot Be Decided On Demurrer.

The rule of reason as traditionally framed requires a court to decide whether the challenged conduct promotes or suppresses competition. (*In re Cipro Cases I & II*, 61 Cal.4th at 146.) As noted above, to make that determination, "a court may consider the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." (*Id.* (cleaned up).) "In a typical case, this may entail expert testimony on such matters as the definition of the relevant market and the extent of a defendant's market power." (*Id.* (cleaned up).) Further, courts do not apply "an undifferentiated one-size-fits-all rule of reason," but may "devise rules . . . for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones." (*Id.* at 147 (cleaned up).) The Court concludes that this "nuanced" approach raises factual issues that are not susceptible to decision on demurrer. (See *Ben-E-Lect*, 59 Cal.App.4th at 873 ["Whether a restraint of trade is reasonable is a question of fact to be determined at trial"].)

Amazon's principal argument is that the People do not, and cannot, allege a market-wide anticompetitive effect caused by its use of retail price parity and guaranteed minimum margin agreements.

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[7] At the hearing, the People urged the Court to refrain from deciding whether *per se* or rule of reason analysis applies, arguing that such a determination would be "premature." In their opposition to the demurrer, however, the People explicitly asserted that Amazon's agreements with third-party sellers and wholesale suppliers are "*per se* unlawful price-tampering agreements" and "*per se* unlawful horizontal restraints." (Opposition, 11, 13; see also *id.* at 13 [arguing that "Amazon's argument fails under controlling California Supreme Court precedent holding price-fixing and price-tampering claims such as those alleged here are *per se* violations whether characterized as horizontal or vertical"].) Accordingly, the Court declines the People's request to avoid addressing the threshold issue of the applicable standard, which is squarely raised by the parties' briefing on the demurrer. Further, one court confronted with closely similar allegations concluded that even if it were to find that "the agreements between Amazon and third-party sellers contained a horizontal element, such a 'hybrid arrangement' would be analyzed under the rule of reason." (*Frame-Wilson*, 591 F.Supp.3d at 987, citing *Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1481.)

(Opening Brief, 5-6, 13-17.) Amazon contends that "the allegations in the Complaint demonstrate that such provisions affect only a *de minimis* share of retail commerce." (Opening Brief, 16.) And it goes further, contending that the provisions have an "obvious procompetitive nature" because they "permit Amazon to offer products that might otherwise be unprofitable, and to facilitate Amazon discounting to meet or beat the competition." (*Id.* at 16.) The Court is unpersuaded.

The People's detailed factual allegations adequately state a claim that Amazon's agreements and policies have had the anticompetitive effect of raising prices on competing retail marketplaces as well as on third-party seller's own websites. As the *Frame-Wilson* court observed in denying a motion to dismiss closely similar claims brought under Section 2 of the Sherman Act,

> Amazon's fair pricing provision does not simply require that sellers sell their products on Amazon.com for a price that is equal to or lower than the price they sell the same products on other platforms. Instead, Amazon's pricing policy requires sellers to add Amazon's feeds to the cost of their products when they sell them on all external platforms. The cost of the product is thus based on the price of the product itself—as set by the seller—*plus* the cost of Amazon-set fees, which are built into the product cost on the Amazon.com platform. Such a pricing provision could—and as Plaintiffs allege, does in fact—raise the cost of products on external platforms that charge lower fees than Amazon. Amazon thus suppresses competition from its sellers on external platforms, where they would otherwise competitively price their goods at a lower price. Consumers of such products are therefore subject to higher prices of products on external platforms as a result of Amazon's pricing policy.

(591 F.Supp.3d at 991-992 (cleaned up).) The court found that the allegations in that case were "sufficient to demonstrate that the conduct at issue has resulted in and continues to result in the suppression of competition and increase of prices on external platforms," and therefore sufficiently alleged the requisite anticompetitive conduct for Section 2 claims under the Sherman Act. (*Id.* at 992.) The same conclusion follows here.

Whether Amazon's alleged agreements and conduct have had a substantial anticompetitive effect raises factual questions that cannot be decided on demurrer. Amazon does not cite a single case in which a court determined on the pleadings that a given challenged practice, much less the practices involved here, was not anticompetitive. To the contrary, it admits that "no California court has addressed the competitive effects of an alleged price parity clause, and likewise no court has addressed the competitive effects of [Guaranteed Minimum Margin agreements or Matching Compensation Agreements]." (Opening Brief, 14.) As courts have emphasized in other contexts, whether a given practice is

anticompetitive (or, as Amazon contends, procompetitive) often does not lend itself to bright-line rules. (See, e.g., *Fisherman's Wharf Bay Cruise Ship Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 336-38 [in action challenging written exclusive dealing contracts, disagreeing that the competitive impact of foreclosing 20 percent of a market always has an insubstantial effect on competition under section 16720].) Rather, given the industry- and market-specific contexts in which such issues arise, such issues almost certainly will be the subject of competing expert testimony, and raise factual issues that cannot be decided on demurrer. (See, e.g., J. Baker & F. Morton, "Antitrust Enforcement Against Platform MFNs," 127 Yale L.J. 2176, 2185 (2018) ["when a [Most Favored Nation clause] may create both anticompetitive effects and efficiencies, it is an empirical question whether it would be justified as procompetitive in any particular industry." (footnote omitted)].[8]

The same conclusion follows as to Amazon's contention that the Complaint challeges only "unilateral conduct" that is not cognizable under the Cartwright Act. (Opening Brief, 8-12; Reply, 5-13.) At the hearing, Amazon focused that argument on the People's allegations regarding its conduct and policies after 2019, when it removed the formal Price Parity Provision from its BSA. Pointing out that the Cartwright Act applies only to "combinations," Amazon argues that it "does not regulate any policies that Amazon adopts unilaterally to govern the operation of its store." (Opening Brief, 11.) Again, however, Amazon's arguments raise factual issues that cannot be resolved on the face of the Complaint.

Amazon bases its argument on the *Colgate* doctrine,[9] which originates out of Sherman Act jurisprudence, but has been adopted by California courts for purposes of applying the Cartwright Act.

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[8] Significantly, some academic literature regarding price parity provisions (also referred to, in the online context, as "platform most favored nation" (MFN) clauses) appears to support the People's position. (See, e.g., "Antitrust Enforcement Against Platform MFNs," 127 Yale L.J. at 2181-2182, 2200-2201 [concluding that "MFNs employed by online platforms can harm competition by keeping prices high and discouraging the entry of new platform rivals, through both exclusionary and collusive mechanisms, notwithstanding the possibility that some MFNs may facilitate investment by limiting customer freeriding"]; B. Bloodstein, "Amazon and Platform Antitrust," 88 Fordham L.Rev. 187, 209 (2019) ["Evidence suggests that MFNs lead to higher prices for consumers by preventing rival discounting and/or discouraging entry. Further, a 2016 literature review detailed the potential of MFNs to soften competition between retailers on the margin charged to suppliers, restrict entry at the retailer level, and fully eliminate price competition at the retail level." (footnotes omitted)].)

[9] *United States v. Colgate & Co.* (1919) 250 U.S. 300, 307; see also *Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 761 ["Under *Colgate,* the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination."].)

(*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 370.) Under California law, "[i]f a seller does no more than announce a policy designed to restrain trade, and declines to sell to those who fail to adhere to the policy, no illegal combination is established." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal..App.3d 709, 721.) Thus, a manufacturer may announce a resale price policy and refuse to deal with dealers who do not comply. (*Chavez*, 93 Cal.App.4th at 370-372.) Further, the Cartwright Act also permits non-coercive monitoring of compliance with pricing policies. (*Id.* at 373 ["By monitoring the dealers' compliance without forcing compliance or seeking or receiving communication of their compliance, a manufacturer permissibly exercises its right to select with whom to do business and on what terms. In this manner, a manufacturer who announces a resale price policy and enforces the policy by monitoring the dealers' compliance and refusing to deal with dealers who do not comply does not violate the Cartwright Act."].)

At the same time, however, suppliers cannot force their purchasers to adhere involuntarily to terms by use of coercion or pressure. If they do, the resulting arrangement may be deemed a "combination" prohibited by the Cartwright Act. As *Kolling* explained, "an illegal combination may be found where a supplier secures compliance with announced policies in restraint of trade by means which go beyond mere announcement of policy and the refusal to deal." (137 Cal.App.3d at 721.) "If, for example, the supplier takes 'affirmative action' to bring about the involuntary acquiescence of its dealers, an unlawful combination exists." (*Id.*) Thus, in *Kolling*, the court held that defendant Dow Jones had illegally combined with its distributors to fix retail prices where it had "a definitive pricing policy"; it "dealt with 'dissident' distributors by strongly suggesting a price roll back," suggestions the court found in light of the company's "vastly superior bargaining strength . . . were in fact thinly disguised and threatened commands"; "some distributors unwillingly lowered their price schedules to adhere to the Dow Jones policy"; and at least one distributor was terminated because of his refusal to adhere to Dow Jones' pricing policy. (*Id.* at 722; see also, e.g., *R.E. Spriggs Co. v. Adolph Coors Co.* (1979) 94 Cal.App.3d 419, 425 ["Coors' ideas about proper prices at the wholesale and retail level may only have been couched in terms of suggestions, but having in mind Coors' relative economic clout, particularly its power to cancel

valuable distributor franchises almost at will, it seems clear that there is evidence that Coors engaged in price maintenance through suggestions which the distributors could not refuse."].)

Here, the People allege that even after Amazon removed its formal Price Parity Provision from its BSA, it continued to enter into "de facto" price parity agreements with third-party sellers. (See *supra* at pp. 3-4.) It is "well settled" that anticompetitive agreements need not always be express, but "may be inferred from the circumstances surrounding a course of dealing." (*Fisherman's Wharf Bay Cruise Corp.*, 114 Cal.App.4th at 338 (cleaned up) ["the trial court's ruling focused solely on the fixed percentage of the market locked up through *written* exclusive dealing agreements, and failed to acknowledge a substantial body of federal authority . . . indicating that the existence of an exclusive dealing arrangement may be express or implied"]; see also, e.g., *Chavez*, 93 Cal.App.4th at 370 ["[a] resale price maintenance agreement can be inferred from certain conduct"].) Moreover, as discussed above, the People make extensive allegations regarding Amazon's superior bargaining strength and alleged coercive conduct toward third-party sellers, including allegations that Amazon counsels third-party sellers and wholesale suppliers to engage in "channel management" or "channel optimization" with other retailers, which goes beyond unilateral conduct. (E.g., Compl. ¶¶ 7, 157-158, 195.) Those allegations are sufficient to state a claim under the Cartwright Act. Whether Amazon's alleged conduct is protected by the *Colgate* doctrine raises factual issues that are not susceptible to decision on demurrer.

III. THE COMPLAINT ALSO STATES A CAUSE OF ACTION FOR VIOLATION OF THE UNFAIR COMPETITION LAW.

Having concluded that the Complaint states a cause of action for violation of the Cartwright Act, the Court necessarily concludes that it also states a viable cause of action for violation of the Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.* (UCL) under the "unlawful" prong of the UCL. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 ["By proscribing 'any unlawful' business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable" (cleaned up)]; *Chavez*, 93 Cal.App.4th at 374 ["The broad scope of the statute encompasses both anticompetitive business practices and practices injurious to consumers."]) That conclusion renders it unnecessary for the Court to address the parties' disagreement regarding the competing tests for whether

an act or practice is "unfair" under the UCL.

CONCLUSION

For the foregoing reasons, Amazon.com's demurrer to the Complaint is overruled.

IT IS SO ORDERED.

Dated: March 30, 2023

Ethan P. Schulman
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, Felicia Green, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On March 30, 2023, I electronically served ORDER ON AMAZON'S DEMURRER TO THE COMPLAINT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: MAR 30 2023

Mark Culkins, Interim Chief Executive Officer

By: Felicia Green
Felicia Green, Deputy Clerk