IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA, Plaintiff, **v.** **AMAZON.COM, INC.**, Defendant.	**CASE NO: 2021 CA 001775 B** **Judge Hiram Puig-Lugo** **Next Event: Feb. 11, 2022, 10am** **Event: Initial Conference**

PLAINTIFF DISTRICT OF COLUMBIA'S OPPOSITION TO DEFENDANT AMAZON.COM, INC.'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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INTRODUCTION

Consumers in the District of Columbia and nationwide rely on online marketplaces to purchase a variety of goods, particularly over the last two years while we have grappled with a worldwide pandemic. But the country's dominant online marketplace—Defendant Amazon.com, Inc. ("Amazon")—has made online shopping more expensive for consumers through its anticompetitive agreements that prevent sellers from offering lower prices on and to competing online marketplaces. These agreements curtail competition, resulting in higher prices, lower innovation, and fewer choices for consumers.

In its Motion to Dismiss the District's Amended Complaint ("Complaint"), Amazon improperly ignores, recasts, and mischaracterizes the District's well-pled factual allegations that Amazon has executed pricing agreements with competitors that lead to higher prices for consumers and illegally entrench and maintain its monopoly. Amazon asks this Court to adopt its alternate allegations instead, namely that its written, executed contracts are not agreements under antitrust law, that the District's well-supported market definition is facially flawed, and that Amazon's price restraints actually lead to *lower* prices. Amazon's arguments are no more than competing allegations that are improper at this stage of the case and should be rejected on that ground alone.

But Amazon is also wrong on the law. Amazon's agreements are garden-variety anticompetitive agreements and lead to higher prices and reduced competition in both the online marketplace market and discrete retail product markets. Thus, it is unsurprising that courts have repeatedly rejected claims such as those made by Amazon that such conduct is *per se* legal.

The Court should deny Amazon's Motion to Dismiss ("MTD") and permit the District to develop the factual record necessary for evaluation of its claims and Amazon's defenses.

SUMMARY OF ALLEGATIONS

Amazon is the dominant online retail marketplace in the United States, controlling 50-70% of all online retail sales. Compl. ¶¶ 1, 3. Amazon competes with other online marketplaces, including both multi-seller online marketplaces (like eBay and Walmart.com) and single-seller online marketplaces (such as an individual seller's own website) for consumer traffic and sales. *Id.* ¶ 1.[1] Amazon hosts millions of third-party sellers ("TPS") on its marketplace, while its multi-seller online marketplace competitors host only a small fraction of that number. *Id.* ¶ 53. American consumers overwhelmingly turn to Amazon's online marketplace as the first place to buy anything online, with 74% of Americans going directly to Amazon when they are ready to buy a specific product. *Id.* ¶ 19.

Amazon also competes against many of its TPSs as a retailer of discrete products. *Id.* ¶ 65. In a recent survey, 53% of TPSs reported that Amazon sells its own products as a retailer in direct competition with the products sold by that TPS. *Id.* ¶ 2. Thus, not only is Amazon the gatekeeper to its dominant online marketplace, it is also a significant and direct horizontal competitor to TPSs for many individual products. *Id.*

TPSs execute a Business Solutions Agreement ("BSA") with Amazon to sell to consumers through Amazon's marketplace. *Id.* ¶ 5. Until at least 2019, the BSA included a most favored nation clause ("MFN")[2] called the Price Parity Provision ("PPP"), which prohibited the TPS from

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[1] A multi-seller marketplace sells access and services to multiple sellers while a single-seller marketplace like TPS websites self-supplies this access and services to facilitate sales to online consumers. *Id.* ¶ 34.

[2] An MFN is a contractual provision that requires one party to give the other better or no worse terms than it makes available to any competitor. *United States v. Apple, Inc.*, 791 F.3d 290, 304 (2d Cir. 2015).

offering its products through other online marketplaces, including the TPS's own website, at a lower price or on better terms than the TPS offers their products through Amazon's marketplace. Compl. ¶ 20. In 2019, amid scrutiny from government regulators, Amazon replaced the PPP with a new contractual provision in which TPSs agree to adhere to all Amazon policies, including its Fair Pricing Policy ("FPP"). *Id.* ¶¶ 21, 23. The FPP, similar to the PPP, prevents a TPS from offering products for a lower price through a competing online marketplace. *Id.* Amazon regularly threatens to (and does) sanction TPSs who violate the FPP, which can result in devastating economic consequences for the TPS. *Id.* ¶ 9. To avoid sanctions, TPSs keep their prices artificially high on other online marketplaces. *Id.* ¶ 70.[3]

Additionally, because of its dominance as an online marketplace, Amazon is able to extract higher fees and commissions from TPSs than competing marketplaces. *Id.* ¶ 33. The PPP and FPP result in Amazon's high fees being incorporated not only into the price charged for these goods on Amazon's marketplace, but also across competing marketplaces. *Id.* ¶ 36. Absent these agreements, TPSs would offer their goods for lower prices on competing marketplaces, including their own websites, because they could profitably do so. *Id.* Absent these agreements, other marketplaces could better compete with Amazon's marketplace on price and draw consumer traffic and sales away from the dominant market participant. *Id.* The artificially high price floor created by these agreements also insulates Amazon's retail business from competition from its TPSs, who would be able to offer products that compete directly with Amazon's retail products for lower prices on competing marketplaces. *Id.* ¶ 50.

Amazon also executes anticompetitive agreements with its wholesalers, or First Party Sellers ("FPS") that similarly incentivize FPSs to keep the prices of their products artificially high

[3] The PPP and FPP are hereinafter referred to collectively as the "MFNs."

on other online marketplaces. *Id.* ¶ 11. Under these Minimum Margin Agreements ("MMAs"), the FPS guarantees Amazon a certain minimum profit on the retail sale of products that Amazon purchases from the FPS. *Id.* If Amazon does not achieve that profit, because it has lowered its retail price, even to predatory levels, to match a price on another online marketplace, Amazon can force the FPS to compensate it for the difference. *Id.* To avoid this result, FPSs have raised their prices to and on other online marketplaces or refused to sell to those marketplaces at all. *Id.* In this way, Amazon further reduces the ability of other online marketplaces to compete on price and gain share from Amazon, entrenching its already dominant position. The MMA also disincentives Amazon from negotiating lower prices with its FPSs because its profit is guaranteed regardless of the wholesale price that it pays. *See* Compl. ¶ 11.

LEGAL STANDARD

To survive a motion to dismiss, a complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* D.C. Super. Ct. R. 12(b)(6); D.C. Super. Ct. R. 8(a)(2); *Potomac Dev. Corp. v. D.C.*, 28 A.3d 531, 544 (D.C. 2011). The court must "construe the complaint in the light most favorable to the plaintiff by taking the facts alleged in the complaint as true." *Francis v. Rehman*, 110 A.3d 615, 620 (D.C. 2015). Moreover, a plaintiff is not required to present its entire case in its complaint. *In re Est. of Curseen*, 890 A.2d 191, 193 (D.C. 2006). Rather, the complaint must "contain factual allegations that plausibly give rise to an entitlement to relief." *Kamit Inst. for Magnificent Achievers v. D.C. Pub. Charter Sch. Bd.*, 55 A.3d 894, 903 (D.C. 2012) (citation omitted). A complaint is "plausible on its face" if it "allows[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Potomac Dev. Corp.*, 28 A.3d at 544; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556 (2007) (a complaint must merely raise a reasonable expectation that discovery will reveal evidence of the violation).

ARGUMENT

I. The Complaint Plausibly Alleges That Amazon Agreed to Restrain Trade In Violation of the D.C. Antitrust Act.

A plaintiff adequately pleads a violation of the D.C. Antitrust Act by alleging "(1) the existence of an agreement, and (2) that the agreement was an unreasonable restraint of trade." D.C. Code § 28-4502, *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 989 (9th Cir. 2020). [4] The existence of an agreement may be established by either direct or circumstantial evidence. *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99–100 (3d Cir. 2010). Written agreements that expressly memorialize the conduct alleged to be unlawful are direct evidence and require nothing additional to demonstrate concerted action under the Act. *In re Androgel Antitrust Litig. (No. II)*, No. 1:09-CV-955-TWT, 2018 WL 2984873, at *7-8 (N.D. Ga. June 14, 2018).

Some agreements so obviously threaten to reduce output and raise prices that they are properly condemned as unlawful *per se*. *Nat'l Collegiate Athletic Ass'n v. Alston,* 141 S. Ct. 2141, 2156 (2021). The "classic examples" of *per se* violations are "naked, horizontal restraints pertaining to prices or territories." *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 907 (6th Cir. 2003). While a plaintiff need not plead, and a court need not decide, which standard of review will apply at the motion to dismiss stage, *see PBTM LLC v. Football Nw., LLC*, 511 F. Supp. 3d 1158, 1178 (W.D. Wash. 2021), a *per se* violation does not require allegations (or any ultimate demonstration) regarding anticompetitive effects or a relevant market. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995); *Am. Copper & Brass, Inc. v. Donald Boliden*

[4] In interpreting the D.C. Antitrust Act, courts should look to federal jurisprudence interpreting the Sherman Act. D.C. Code § 28-4515 ("It is the intent of the Council of the District of Columbia that in construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes."). D.C. Code § 28-4502 and D.C. Code § 28-4503 are analogous to Section 1 and Section 2 of the Sherman Antitrust Action, respectively.

AB, No. 04-2771-DV, 2005 WL 1631034, at *5 (W.D. Tenn. July 6, 2005).

To the extent that conduct is not *per se* illegal, courts review alleged antitrust violations under the rule of reason test, which requires allegations that the agreement has or is likely to produce anticompetitive effects in a relevant market. *Fed. Trade Comm'n. v. Actavis, Inc.*, 570 U.S. 136, 157 (2013) (explaining that a practice's likely risk to competition constitutes the relevant anticompetitive harm); *Warrior Sports, Inc. v. Nat'l Collegiate Athletic Ass'n*, 623 F.3d 281, 286 (6th Cir. 2010); *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 674 (E.D. Mich. 2011). The rule of reason analysis is fact-intensive and is therefore not typically amenable to a motion to dismiss. *Robertson v. Sea Pines Real Est. Companies, Inc.*, 679 F.3d 278, 292 (4th Cir. 2012) (affirming denial of motion to dismiss and noting "rule of reason inquiry is best conducted with the benefit of discovery"); *United States v. Charlotte-Mecklenburg Hosp. Auth.*, 248 F. Supp. 3d 720, 729-30 (determination of "whether a restraint on trade is a fact-intensive inquiry," the resolution of which "requires discovery, and perhaps ultimate decision by the fact-finder").

A. The MFNs and MMA Are Express, Written Agreements.

The District has alleged that Amazon and its TPSs and FPSs have entered into express contractual agreements that restrict TPSs and FPSs from offering their goods to and on competing marketplaces for lower prices. It is well-established that if a complaint includes non-conclusory allegations of an express agreement, like the written, executed contracts at issue here, the agreement element is adequately pled. *W. Penn*, 627 F.3d at 99-100.

Amazon does not dispute the existence of these agreements, but simply insists that more is needed to plead an agreement under the Act. MTD at 19. Amazon is wrong. Where, as here, a challenged restraint is memorialized in a written agreement, "[t]here is no need to show a common purpose in order to prove the absence of independent action because the ... contract amply

demonstrates that there was no independence of action." *Eskofot A/S v. E.I. Du Pont de Nemours & Co.*, 872 F. Supp. 81, 92 (S.D.N.Y. 1995); *see also In re Androgel Antitrust Litig. (No. II)*, No. 1:09-CV-955-TWT, 2018 WL 2984873, at *8 (N.D. Ga. June 14, 2018) ("[A]greements [that] specifically address the conduct the Plaintiffs argue is unlawful" establish concerted action.).[5]

United States v. Delta Dental of R.I., 943 F. Supp. 172 (D.R.I. 1996), is particularly instructive. That court rejected an argument nearly identical to the one Amazon makes here—that an MFN policy incorporated into a contract constitutes unilateral, rather than concerted action. In rejecting this argument, the court found that "the requisite concerted action has been alleged" because "each participating dentist agrees explicitly to comply with Delta's Participating Dentist's Agreement, which incorporates by reference Delta's Rules and Regulations, including the MFN clause at issue." *Id.* at 175. The concerted nature of an express agreement does not require that the anticompetitive provision agreed to benefits both parties[6] or that the parties to the agreement have similar motives for engaging in the collusive conduct. *Apple*, 791 F.3d at 317 ("Antitrust law has never required identical motives among conspirators when their independent reasons for joining together lead to collusive action.") (internal quotation omitted). Indeed, an agreement can be anticompetitive and violate the antitrust laws even if neither party intends to restrain

[5] *See also Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.,* 709 F.3d 129, 136 (2d Cir. 2013) ("Allegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate.") (internal quotation omitted); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1192 (N.D. Cal. 2009) ("One way of proving concerted action is by express agreement.").

[6] *Spectators' Commc'n Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 222 (5th Cir. 2001) (finding concerted activity when one party to the agreement "is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive."); *Isaksen v. Vt. Castings Inc.*, 825 F.2d 1158, 1162-63 (7th Cir. 1987) ("The fact that Isaksen may have been coerced into agreeing is of no moment; an agreement procured by threats is still an agreement for purposes of section 1."); *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317, 1322 (9th Cir. 1975) ("The collaboration of the person necessary to establish a combination need not even be willing.").

competition. *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1154 (9th Cir. 2003) ("Our antitrust law is clear that [plaintiff] need not prove intent to control prices or destroy competition to demonstrate the element of 'an agreement . . . among two or more entities.'").

The cases Amazon relies on are inapposite because they evaluate whether circumstantial evidence of an agreement, in the absence of an express written agreement like those identified here, is adequate. *See, e.g., Toscano v. Pro. Golfers Ass'n,* 258 F.3d 978, 985-86 (9th Cir. 2001) (in the absence of "direct evidence" of "an agreement for concerted action in restraint of trade" plaintiff's "circumstantial evidence" failed, particularly where defendants played no role in the enforcement of the restraint and there was evidence at summary judgment that they acted independently, rather than through concerted action).[7] Thus, the District has more than adequately pled agreements in this case.

B. The Facts Alleged Plausibly Demonstrate that the FPP and PPP Are *Per Se* Illegal.[8]

Absent the PPP and FPP, TPSs would offer lower prices on competing marketplaces, including their own websites, because the lower fees and commissions charged by those marketplaces would allow TPSs to realize the same profit, while attracting more consumer traffic and sales. Compl. ¶ 36. This explicit and obvious interference with pricing is *per se* illegal under our antitrust laws. "Price is the central nervous system of the economy, and an agreement that interferes with the setting of price by free market forces is illegal on its face." *Nat'l Soc. of Pro.*

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[7] *See also Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1077 (S.D. Cal. 2012) (in group boycott case, dismissal was appropriate where no relevant express or implicit agreement was alleged among boycotters); *Baar v. Jaguar Land Rover N. Am., LLC*, 295 F. Supp. 3d 460, 465 (D.N.J. 2018) (plaintiff alleged unilateral, not concerted action, where car dealers acted in accordance with, rather than agreed to, a policy set by a car manufacturer); *Chase v. Nw. Airlines Corp.*, 49 F. Supp. 2d 553, 560 (E.D. Mich. 1999) (no concerted action where the actor imposing the restraint does not need acquiescence of the other party).

[8] Contrary to Amazon's assertions, the District did not abandon its *per se* claim. MTD at 14.

Eng'rs v. United States, 435 U.S. 679, 692 (1978) (internal citations and quotations omitted). This is the case even where the agreement, like the ones here, interferes with competitive pricing rather than sets a specific price. *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 48 (1990).

While MFNs are often analyzed under the rule of reason because they appear in agreements between companies in vertical relationships that do not compete with one another, MFNs between horizontal competitors, like those alleged here, should be subjected to *per se* treatment. *See, e.g., Starr v. Sony BMG Music Ent*, 592 F.3d 314, 323, 326 (2d Cir. 2010) (consumers pled a plausible *per se* price fixing claim against music producers, who used virtually identical MFNs to enforce an industry-wide minimum wholesale price for songs and artificially inflate prices); *Apple*, 791 F.3d at 321-29 (affirming trial court judgment that Apple engaged in a *per se* violation by means of MFN that barred five major publishers from selling their electronic books at lower prices through other online retailers).[9]

Here, the District sufficiently alleges a *per se* violation based on Amazon's pricing agreements with horizontal competitors. Amazon directly competes with its TPSs' websites to attract consumer traffic and sales in the online marketplace market and with its TPSs in distinct retail product markets to sell those products to consumers. Compl. ¶¶ 1, 66-67.[10] These agreements interfere with the TPSs' ability to offer lower prices on competing marketplaces, including their own websites, even though they could profitably do so because competing marketplaces charge

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[9] *See also* European Commission, *Germany and United Kingdom: Antitrust Cases against Amazon formally closed* (noting that the German Cartel Office "considered the price parity clauses were a horizontal, price-related agreement between competitors"), *available at* https://ec.europa.eu/competition/ecn/brief/05_2013/amaz_deuk.pdf.

[10] The District has alleged several individual product markets (i.e. batteries) in which Amazon competes with TPSs. Only discovery will reveal the full spectrum of these individual product markets. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556 (2007) (complaint must merely raise a reasonable expectation that discovery will reveal evidence supporting those allegations).

lower fees and commissions than Amazon. This interference results in artificially high prices for TPS products that insulate Amazon's marketplace and retail business from price competition. The District has sufficiently pled a horizontal price restraint that constitutes a *per se* violation of the Act. Thus, the Court need go no further to deny Amazon's motion to dismiss. *Rebel Oil*, 51 F.3d at 1443; *Am. Copper & Brass*, 2005 WL 1631034, at *5; *Brennan*, 369 F. Supp. 2d at 1131.

C. The District Also Has Sufficiently Alleged Illegal Agreements under the Rule of Reason.

In addition to sufficiently alleging that the PPP and FPP constitute per se violations of the Act, the District has amply alleged anticompetitive effects in relevant markets flowing from the PPP, FPP, and the MMA to defeat a motion to dismiss under rule of reason review.[11] All three agreements prevent TPSs or FPSs from offering lower prices to and on competing marketplaces, which results in artificially inflated prices to online consumers and insulates Amazon from competition in both its marketplace and retail businesses and further entrenches its monopoly in the former. Compl. ¶¶ 69-74.

1. The Online Marketplace Market and Distinct Consumer Product Markets are Plausible Antitrust Markets.

An antitrust market is plausible if it is rationally related to the "commercial realities" of how sellers and consumers engage and use products. *Packaging Sys., Inc. v. PRC-Desoto Int'l,*

[11] Amazon's agreements may also be subject to "quick look" scrutiny—an abbreviated rule of reason standard, applied "where 'no elaborate industry analysis is required to demonstrate the anticompetitive character' of an inherently suspect restraint." *United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 669 (3d Cir. 1993) (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 110 (1984)). Under quick look, the court need not conduct a detailed market analysis where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. Fed. Trade Comm'n,* 526 U.S. 756, 770 (1999). However, as previously provided, the Court need not determine at this stage which level of scrutiny will ultimately be applied to Amazon's price agreements.

Inc., No. 2:16-cv-09127-ODW(JPRx), 2018 WL 735978, at *5 (C.D. Cal. Feb. 6, 2018); *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (market definition analyzes the interchangeability of products). "Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Id.*; *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 467 (1992) ("the proper market definition . . . can be determined only after a factual inquiry into the 'commercial realities' faced by consumers"). Only "facially unsustainable" allegations of the relevant market warrant dismissal. *Newcal Indus. v. Ikon Off. Sol.*, 513 F.3d 1038, 1045 (9th. Cir. 2008).

The online marketplace market and the individual consumer product markets in which Amazon competes with the TPSs are plausible product markets. Compl. ¶¶ 39-40, 65-68. The Complaint specifically details why physical retail stores are not interchangeable with online marketplaces. Amazon does not even argue that the individual product markets (i.e. batteries) in which Amazon goes head-to-head with its TPSs are not appropriately drawn antitrust markets, preferring to conflate the District's distinctly pled markets and baldly assert that the online marketplace market is simultaneously under- and over-inclusive. In doing so, Amazon fails to demonstrate that the alleged product markets are "facially unsustainable" or warrant dismissal.[12]

a. The Marketplace Market Is Properly Limited to Online Marketplaces.

Courts look to "practical indicia" and economic realities to determine the appropriate contours of a product market. *Fed. Trade Comm'n v. Sysco Corp.*, 113 F. Supp. 3d 1, 27 (D.D.C. 2015). "[P]ractical indicia" includes "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities,

[12] Amazon does not dispute that the District has sufficiently pled a geographic market or that Amazon has market power in the markets as pled by the District.

distinct customers, distinct prices, [and] sensitivity to price changes." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Consistent with these holdings, the District has properly limited the relevant product market to online marketplaces. Compl. ¶¶ 41-49.

Specifically, the District alleges that consumers do not consider physical stores to be a reasonable substitute for online marketplaces because online marketplaces offer a nearly endless variety of goods conveniently available at any time, day or night. *Id.* ¶ 43. Consumers can also compare prices of products sold on online marketplaces much easier than in physical retail stores. *Id.* The District also alleges that sellers do not consider physical stores to be a reasonable substitute for online marketplaces, recognizing the costs and benefits of selling their products online. *Id.* ¶ 45. In addition, economists and academics have published studies recognizing that consumer expectations of online marketplaces are different than physical marketplaces, especially in terms of price sensitivity. *Id.* ¶ 44. Indeed, the District alleges that Amazon's own business information and conduct distinguish between online retail and physical retail. *Id.* ¶ 44. Amazon's factual dispute with these allegations cannot form the basis for dismissal. *Olean Wholesale Grocery Coop., Inc. v. Agri Stats, Inc.*, No. 19 C 8318, 2020 WL 6134982, at *7 (N.D. Ill. Oct. 19, 2020) (defendant's argument that proposed market was underinclusive "is an attempt to have the Court resolve a factual dispute, which would be improper at this juncture"); *Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc.*, 795 F. Supp. 639, 647 (S.D.N.Y. 1992) (arguments concerning substitutability are inappropriate in the context of a motion to dismiss).

While Amazon claims that the relevant product market must include brick-and-mortar stores because consumers may be able to buy the same products in each, theoretical product availability does not without more determine the relevant product market. *Fed. Trade Comm'n v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1040 (D.C. Cir. 2008) ("Of course customers cross-shop,"

but the "fact that a customer might buy a stick of gum at a supermarket or at a convenience store does not mean there is no definable groceries market.").[13] Indeed, Courts have sustained allegations of distinct online markets that exclude brick-and-mortar stores. *See, e.g.*, *Distance Learning Co. v. Maynard*, No. 19-cv-03801, 2020 WL 2995529, at *7 (N.D. Cal. June 4, 2020) (finding a distinct market for online driving schools); *Origami Owl LLC v. Mayo*, No. CV-15-00110-PHX-DGC, 2015 WL 4747101, at *3 (D. Ariz. Aug. 7, 2015) (finding online market for specialized jewelry in the United States was plausibly alleged); *In re Ebay Seller Antitrust Litig.*, No. C 07-01882 JF (RS), 2010 WL 760433, at *9 (N.D. Cal. Mar. 4, 2010) (finding triable issue of fact as to whether "online auction markets" represent a distinct relevant product market).[14] Amazon's treatments of the online and physical retail markets as distinct in its own business planning, Compl. ¶ 49, also is strong evidence of a distinct online marketplace market. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 52 (D.D.C. 2011) ("When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents."); *Meijer, Inc. v. Barr Pharms., Inc.*, 572 F. Supp. 2d 38, 60 (D.D.C. 2008) (defendant's internal documents are probative in "determining the outer boundaries of the relevant product market").

[13] Courts regularly sustain markets despite the availability of products from other sources outside that market. *Whole Foods Mkt., Inc.*, 548 F.3d at 1045 (sustaining "premium, natural, and organic supermarkets" product market, despite the availability of many of the same products at "traditional grocery stores,"); *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860, 865, 875 (W.D.N.Y. 1994) (sustaining a "department stores market," which excluded "general merchandise, apparel and furniture" stores); *Fed. Trade Comm'n v. Staples, Inc.*, 970 F. Supp. 1066, 1080 (D.D.C. 1997) (sustaining market for "the sale of consumable office supplies through office supply superstores," which excluded sales of such goods through other outlets).

[14] The Federal Trade Commission has also noted this distinction. Complaint, *In the Matter of Edgewell Pers. Care Co. and Harry's Inc.*, No. 1910147 (F.T.C. Feb. 3, 2020), Dkt. No. 9390 ("Finally, the relevant market may be divided by channel of sale, resulting in separate markets for brick-and-mortar sales and online sales.").

The cases cited by Amazon are inapposite because the plaintiffs in those cases, unlike the District here, failed to explain their rationale for certain exclusions in drawing their product markets.[15] Here, the District included exhaustive allegations detailing why consumers, sellers, economists, and other market participants do not view online and physical stores to be substitutes. Compl. ¶¶ 41-49. Any disputes of those allegations are not ripe on a motion to dismiss.

b. The Online Marketplace Market Is Not Overly Broad.

Amazon mischaracterizes the District's online marketplace market as containing a "virtually-unlimited" range of products that are not reasonably interchangeable with each other. MTD at 16. Amazon conflates the two types of markets alleged in the Complaint: the online marketplace market, where Amazon competes with other online marketplaces (including TPS websites) to provide access and services to online sellers and to attract consumer traffic and sales, and the individual retail product markets for the goods sold (*i.e.* Amazon selling its own brand of batteries in competition with batteries sold by TPSs). Thus, the online marketplace market does not contain a range of non-substitutable products, "virtually-unlimited" or otherwise, but is defined as the provision to TPSs of access and services to facilitate online sales to consumers. Compl. ¶ 39.

Separately, the District has alleged individual retail product markets for each of the product categories in which Amazon competes with TPSs, *e.g.,* a separate market for batteries, a separate market for mattresses, a separate market for motor oil. *Id.* ¶¶ 66-67. Each of these individual

[15] *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010) (plaintiff failed to sufficiently allege why one brand's product were not interchangeable with other brands); *In re German Auto. Mfrs. Litig.*, 497 F. Supp.3d 745, 758 (N.D. Cal. 2020) (plaintiffs offered no plausible allegations regarding how diesel passenger vehicles were insulated from competition with other vehicles); *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120-23 (9th Cir. 2018) (plaintiffs' market definition of "in-play" golf advertisements omitted many substitutes without explanation).

markets includes only those products that are reasonably substitutable for one another. Thus, properly construed, the District's markets are reasonable, and Amazon's cases are inapposite. *E.g.*, *Golden Gate Pharmacy Svcs., Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2010 WL 1541257, at *3 (N.D. Cal. Apr. 16, 2010) (alleging a market of "all pharmaceutical products," without regard to whether consumers viewed those products as substitutes).[16]

c. The MMA Does Not Require Allegations of a Different Market.

The MMA causes anticompetitive effects in the same online marketplace market alleged for the MFNs. The MMA incentivizes FPSs to raise prices to and on competing online marketplaces or to refuse to sell to Amazon's competitors at all. Compl. ¶ 11. These agreements raise Amazon's rivals' costs, hamper other online marketplace's ability to compete with Amazon on price, and result in higher prices for online consumers. *Id.* ¶ 74.

Amazon's argument that it lacks market power as a buyer is irrelevant and beside the point. The District has amply alleged Amazon's market power in the online marketplace market in which the MMA has constrained competition and raised prices. Amazon's cases are inapposite and merely stand for the unremarkable proposition that a plaintiff must allege power in the market that it alleges is constrained.[17] The District has not alleged anticompetitive effects in the wholesale market for goods that Amazon purchases. Rather, the District has alleged an anticompetitive

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[16] Amazon's additional cases are even more off base. *See Gross v. Wright,* 185 F. Supp. 3d 39, 51 (D.D.C. 2016) (*denying* a motion to dismiss because the complaint established a "renovation property market"); *Universal Grading Serv. v. eBay, Inc.*, 2012 WL 70644, at *7 (N.D. Cal. Jan. 9, 2012) (plaintiff alleged competitive harm in markets in which the defendant did not even compete).

[17] *See, e.g., Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008) (dismissing complaint where the plaintiff in a monopsony case failed to allege market power in the buyer market); *Cable Line, Inc. v. Comcast Cable Commc'ns of Pa., Inc.*, No. 3:16-CV-1000, 2017 WL 4685359, at *8 (M.D. Pa. Oct. 18, 2017) (dismissing complaint that failed to allege market power in the buyer market that plaintiffs alleged defendants conspired to consolidate).

agreement between Amazon and its FPSs that constrains price competition in the online marketplace market, in which Amazon is dominant. *Cf. Warrior Sports*, 623 F.3d at 286 (plaintiff must allege "that the purportedly unlawful contract, combination or conspiracy produced adverse anticompetitive effects within relevant product and geographic markets"). Thus, the District has adequately alleged relevant antitrust markets.

2. The District Plausibly Alleges Anticompetitive Effects in the Relevant Markets.

Plaintiffs can ultimately prove anticompetitive effects through direct evidence, such as reduced output, increased prices, or decreased quality, or indirectly through proof of market power plus some evidence that the challenged restraint is likely to harm competition. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).[18] Like market definition, the analysis of anticompetitive effects is fact-specific, requiring an examination and balancing of the anticompetitive effects of the alleged conduct against any procompetitive benefits. *E.I. DuPont de Nemours & Co. v. Fed. Trade Comm'n*, 729 F.2d 128, 139-40 (2d Cir. 1984); *Delta Dental*, 943 F. Supp. at 178.

The District's Complaint is replete with allegations of how the PPP, FPP, and MMA increase prices on competitors' online marketplaces, stifle innovation and growth in the online marketplace market, and reduce choice for online consumers. Compl. ¶¶ 10, 11, 34, 62, 64, 71, 73-74, 77.[19] Absent these agreements, TPSs and FPSs would provide their products to and on

[18] *See also Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (describing direct effects); *Spanish Broad. Sys. of Fla. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1073 (11th Cir. 2004) (describing indirect evidence).

[19] The District's allegations of anticompetitive effects are corroborated by governmental findings. Specifically, the House Antitrust Subcommittee found that Amazon's MFNs ensure that its TPSs cannot "collaborate with an existing or potential competitor to make lower-priced or innovative product offerings available to consumers." Compl. ¶ 64. European authorities similarly found that when TPSs cannot offer lower prices to competing online marketplaces, "it can be difficult for other internet marketplaces that compete with Amazon, especially new platforms entering the market, to reach a large number of customers." *Id.*

competing online marketplaces for lower prices. *Id.* ¶ 62. ("Walmart routinely fields requests from TPSs to raise prices on Walmart's online marketplace because TPSs worry that a lower price on Walmart's online marketplace will jeopardize their status on Amazon's marketplace."); ¶ 74 (FPSs have raised prices to avoid triggering payments under the MMA).

In addition to the detailed allegations of direct evidence, the Complaint alleges indirect evidence of anticompetitive effects. Specifically, the District alleges that Amazon has market power, accounting for up to 70% of *all* online marketplace sales, and that Amazon's market power allows it to control prices on other online marketplaces, preventing those prices from being lower than on Amazon's marketplace. *Id.* ¶ 50.

These are precisely the types of allegations of anticompetitive effects that courts have found sufficient to preclude a motion to dismiss. *See, e.g.*, *Delta Dental*, 943 F. Supp. at 177 (finding anticompetitive effects satisfied where the government alleged that MFN clauses raised competitors' costs and increased prices for consumers).[20] Thus, the District has adequately alleged that Amazon's agreements with TPSs and FPSs result in anticompetitive effects in relevant antitrust markets.

D. Amazon's Agreements Are Not *Per Se* Legal.

Amazon devotes a substantial portion of its brief to arguing that the PPP, FPP, and MMA are *per se* legal. MTD at 8-14. Amazon's argument begins with a bald assertion that these agreements lower rather than raise prices and then proceeds from a faulty legal premise that MFN

[20] *See also In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 940 F. Supp. 2d 367, 375 (E.D. La. 2013) (declining to dismiss Section 1 claim where the distributor allegedly used MFNs in contracts with manufacturers to suppress its competitors' ability to compete on price); *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 674 (E.D. Mich. 2011) (denying motion to dismiss Section 1 claim alleging healthcare insurer used MFNs to artificially inflate prices); *Lucasys, Inc. v. PowerPlan, Inc.*, No. 1:20-cv-2987-AT, 2021 WL 5279391, at *13 (N.D. Ga. Sept. 30, 2021) (harm to competition may include "depriving customers of choice").

agreements are legal as a matter of law unless they require predatory pricing. Amazon's assertions are wrong on the facts and the law. *In re Loc. TV Advert. Antitrust Litig.*, No. 18 C 6785, 2020 WL 6557665, at *13 (N.D. Ill. Nov. 6, 2020) ("The alleged facts indicate a plausible anticompetitive effect, and while there are certainly factual questions here, these are not to be resolved at the motion to dismiss stage. It is sufficient that Plaintiffs allege a plausible anticompetitive effect.").

Amazon's bald assertion of lower prices is contrary to the District's well-pled allegations and defies logic. If Amazon charges higher fees and commissions than other competing marketplaces, TPSs could sell their products for lower prices on competing marketplaces while earning the same profit absent the MFN restrictions. TPSs would be incentivized to offer these lower prices to sell more product and the competing marketplaces would be incentivized to encourage these lower prices in order to draw consumer traffic away from Amazon. Thus, absent the agreements, TPSs' products would be available to consumers at lower (not higher) prices on competing marketplaces.[21]

Amazon relies on *Kartell v. Blue Shield of Mass.*, 749 F.2d 922, 924 (1st Cir. 1984) and *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989) to support its argument that the MFNs are *per se* legal. But subsequent cases have

[21] Amazon makes a half-hearted effort to liken its MFNs to the District's price-gouging laws. *See* MTD at 10 n.5. But price-gouging laws are narrowly tailored government protections geared to specific public health or natural disaster emergencies and are meant to address temporary, rapid increases in prices exploiting those emergency situations. *E.g.* D.C. Code § 28-4102. These laws are tied to the "average retail price" of certain commodity products and strictly proscribed percentage increases. *Id.* Additionally, Amazon's MFNs tellingly look to prices both on *and off* its own marketplace; if Amazon was truly motivated by a goal to police potential price gouging on its marketplace, the relevant reference point would need extend no further. At any rate, Amazon at most raises a theoretical procompetitive justification that will need to be evaluated on a full factual record. *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1133 (N.D. Cal. 2005) (merits of pro-competitive justifications "are intrinsically factual" and "inappropriate for resolution at the motion to dismiss stage").

unambiguously rejected the simplistic reading that Amazon advances here, and even *Kartell* and *Ocean State*, properly read, recognize the need for a court to analyze the effects of an alleged restraint before ruling on its legality.

In *Delta Dental*, the court analyzed and rejected the argument that Amazon makes here—that its restraints must be found *per se* lawful under *Kartell* and *Ocean State*—on a motion to dismiss:

> Despite *Kartell* and *Ocean State's* broad language, these decisions, properly construed, **failed to establish a per se validation of the MFN clauses in all cases where pricing is not predatory or below incremental costs**. Such a blanket condonation of MFN clauses would ignore the context *Kartell* and *Ocean State* were decided in, run counter to the **Sherman Act's preference for fact-specific inquiries**, implausibly reject the premise that MFN clauses produce substantial anticompetitive effects in particular circumstances and contradict the Sherman Act's animating concern for low consumer prices.

Delta Dental, 943 F. Supp. at 176-77 (internal quotations omitted) (emphasis added). *See also Nat'l Recycling Inc. v. Waste Mgmt. of Mass., Inc.*, No. 03-12174-NMG, 2007 WL 9797531 at *4 (D. Mass. July 2, 2007) ("Neither *Ocean State* nor *Kartell* stand for the proposition that the effect of a MFN clause on a market is always *de minimus* in the absence of predatory or below costs pricing . . . .").

Specifically, these cases make clear that a court must look to the *effects* of the MFNs, and not simply the language as written, to determine whether the agreement is anticompetitive. *See Delta Dental*, 943 F. Supp. at 177 (denying motion to dismiss and distinguishing *Kartell* where the plaintiff alleged that a challenged restraint, phrased identically to the one found legal in *Kartell*, had the effect of excluding potential rivals, slowing expansion by existing competitors, and substantially increasing prices); *In re: Am. Express Anti-Steering Rules Antitrust Litig.*, No. 08-CV-2315(NGG)(RER), 2016 WL 748089, at *9-10 (E.D.N.Y. Jan. 7, 2016) (contrasting *Kartell* court's findings of lower prices with allegations that, as a result of the alleged agreements,

purchasers were paying higher prices). In both *Kartell* and *Ocean State*, the courts found on full evidentiary records (not, as Amazon suggests is appropriate here, at the pleading stage) that the challenged restraints *lowered* prices to consumers. *Kartell*, 749 F.2d at 930-31 ("[T]he prices at issue here are low prices, not high prices."); *Ocean State*, 883 F.2d at 1111. The District alleges just the opposite here, that the agreements raise prices for consumers. Based on similar allegations, courts have repeatedly found MFNs anticompetitive under both Section 1 and Section 2.[22]

Moreover, *Kartell* and *Ocean State* are factually distinguishable from the case at bar. Both cases hinge on the fact that the defendant was simply a buyer negotiating a price. *Kartell*, 749 F.2d at 928 ("the conduct at issue was simply an agreement between a buyer (the insurer) and a seller (the doctors) regarding price—'[w]hether or not that price bargain is, in fact, reasonable is, legally speaking, beside the point.'"); *Ocean State*, 833 F.2d at 1111 (agreement set a price term between a buyer insurer and seller provider).

In contrast, Amazon is not a buyer negotiating its price with TPSs. Rather, Amazon is the dominant provider of access to consumers, and, through the MFNs, is restricting the price that TPSs can charge for their products, not to Amazon or consumers using Amazon, but to consumers shopping on competing online marketplaces. It is Amazon's price restraints on these *other* marketplaces that make Amazon's MFNs anticompetitive and materially different from those

[22] *See, e.g.*, *Apple,* 791 F.3d at 320 ("[W]e are breaking no new ground in concluding that MFNs, though surely proper in many contexts, can be misused to anticompetitive ends in some cases.") (internal quotations omitted); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 619 (1975) (MFN in bargaining agreement could violate Sections 1 and 2 by sheltering union subcontractors); *Staley v. Gilead Scis., Inc.*, 446 F. Supp. 3d 578, 610-12, (N.D. Cal. 2020) (MFN supported Sections 1 and 2 claims); *Sitts v. Dairy Farmers of Am., Inc.*, 417 F. Supp. 3d 433, 472-76 (D. Vt. 2019) (denying defendants' motions for summary judgment on Sections 1 and 2 claims, where MFNs in agreements used to depress prices paid to dairy farmers); *Nat'l Recycling*, 2007 WL 9797531 at *7 (denying defendants' summary judgment motion on Section 1 claim where they allegedly used MFNs to set a price floor for their competitors).

analyzed in *Kartell* and *Ocean State. Health All. Plan of Mich. v. Blue Cross Blue Shield of Mich. Mut. Ins. Co.*, No. 14-13788, 2017 WL 1209099, at *5 (E.D. Mich. Mar. 31, 2017) (agreement that required higher prices to be charged to defendant's competitors unlawful and distinguishable from simple sales agreements on the price to be charged to defendant).

Amazon's protestations of *per se* legality of the MMA are no more convincing. It first cites a number of cases that stand for the unremarkable proposition that buyers may freely bargain aggressively when negotiating the prices they pay for goods or services. MTD at 11-12. But that is not the alleged conduct here. Rather, Amazon agrees with its FPSs that FPSs will guarantee Amazon a minimum profit regardless of Amazon's purchase price from the FPSs and resale price to the consumer. Compl. ¶ 11. These agreements actually disincentivize Amazon from negotiating for lower wholesale prices because its profit is guaranteed regardless of the purchase price. Moreover, because these payments to Amazon are triggered when Amazon lowers its retail price to meet a price on a competing online marketplace, FPSs have raised their prices to these competing marketplaces to avoid payments to Amazon. In other words, Amazon uses agreements with its suppliers to *control pricing on other online marketplaces* and raise its rivals' costs, which is anticompetitive. *Blue Cross Blue Shield of Mich.*, 809 F. Supp. at 674 (agreement that was alleged to raise competitors' costs found to be plausibly anticompetitive); *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, No. CV 00-1693-PA, 2003 WL 23715981, at *8 (D. Or. Jan. 21, 2003) (finding that purposeful inflation of a competitor's costs can be anti-competitive and noting that it was "unable to say, as a matter of law, that [defendant's] conduct did not violate the Sherman Act").

Amazon's cases are also inapposite because they address unilateral conduct, whereas the

District has alleged concerted conduct.[23] Concerted action is subject to a higher level of scrutiny than unilateral conduct. *W. Penn*, 627 F.3d at 103. "This is so because unlike independent action, 'concerted activity inherently is fraught with anticompetitive risk' insofar as it 'deprives the marketplace of independent centers of decision making that competition assumes and demands.'" *Id.* (quoting *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010) (internal quotations omitted)).

Finally, Amazon incongruously relies on cases that were dismissed because a private plaintiff could not allege antitrust injury.[24] These cases have no bearing on the Court's analysis here because the District does not have to allege or prove antitrust standing and injury. *Cal. v. Am. Stores Co.*, 495 U.S. 271, 295-96 (1990) (noting that government need only prove "violation of the law" while private plaintiffs must also have standing, proved through "threatened harm or damages"). As the FTC noted in language adopted by the First Circuit: "This distinction is rooted in public policy. The interest of private plaintiffs is to remediate an injury they have suffered or may suffer. The interest of the government is to 'prevent and restrain' violations of the antitrust laws along with the attendant social costs such violations can cause." *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 60 (1st Cir. 2016) (internal quotations omitted).

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[23] *See, e.g., N.M. Oncology v. Presbyterian Healthcare Servs.*, 418 F. Supp. 3d 826, 847 (D.N.M. 2019); *Anesthesia Assocs. of Ann Arbor, PLLC* v. *Blue Cross Blue Shield of Mich.*, 2021 WL 4169711, at *11 (E.D. Mich. Sept. 14, 2021); *Kartell*, 749 F.2d at 929. Additionally, *N.M. Oncology* and *Kartell*, were both decided at summary judgment or later, evidencing the need for discovery before resolving whether in fact Amazon's conduct had anticompetitive effects. 418 F. Supp. 3d at 867; *Kartell v. Blue Shield of Mass., Inc.*, 582 F. Supp. 734, 736 (D. Mass. 1984) (decided after 37-day bench trial).

[24] *See, e.g., Austin v. Blue Cross & Blue Shield of Ala.*, 903 F.2d 1385, 1393 (11th Cir. 1990) (affirming dismissal because appellants "lack antitrust standing to sue under § 4 of the Clayton Act"); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) (threat of loss of profits "does not constitute a threat of antitrust injury" under § 7 of the Clayton Act); *Anesthesia Assocs. of Ann Arbor, PLLC,* 2021 WL 4169711, at *5 ("T]he Court need only focus on the pleading-stage threshold question of antitrust standing.").

Thus, Amazon has not demonstrated that either the MFNs or the MMAs are *per se* legal.

II. The District Has Plausibly Alleged Monopolization Claims Under the D.C. Antitrust Act.

The Complaint alleges that Amazon uses its illegal agreements to maintain its monopoly in the online marketplace market. Compl. ¶¶ 84-96. A claim for illegal monopoly maintenance under the Act requires proof of: (1) possession of monopoly power in the relevant market; and (2) the willful maintenance of that power. *City of Moundridge, KS v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 41 (D.D.C. 2007) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)).[25] Amazon does not dispute that the District plausibly alleged Amazon has monopoly power in the market alleged by the District—the online marketplace market. Compl. ¶¶ 52 (alleging up to 70% market share), 50-51 (alleging how Amazon controls prices within the market), 56-61 (describing barriers to entry); *Royal Mile Co., Inc. v. UPMC*, No. 10-1609, 2013 WL 5436925, at *31 (W.D. Pa. Sept. 27, 2013) (allegations of 60% market share, supracompetitive pricing, and barriers to entry support inference of monopoly power).

Amazon's arguments for dismissal of the District's monopoly claims hinge on its arguments that the online marketplace market is implausible and its agreements with TPSs and FPSs are not anticompetitive and thus cannot constitute actions illegally maintaining its monopoly. As fully demonstrated above, the District has amply alleged that Amazon's agreements cause anticompetitive effects in plausible antitrust markets. Thus, Amazon's arguments for dismissal of

[25] A claim for attempted monopolization alternatively requires evidence that Amazon has sufficient market power to create a dangerous probability of achieving monopoly power within the relevant market. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Amazon does not (and cannot) negate as a matter of law its monopoly power in the online marketplace market.

the Section 2 claims are as meritless as their arguments as to Section 1.[26]

Amazon's cited cases fail to convince as they simply stand for the proposition that an agreement found not to be anticompetitive in the Section 1 context cannot be used as anticompetitive conduct supporting a Section 2 claim. Moreover, two of the three cases cited by Amazon were decided only after development of a full discovery record. *Dickson* v. *Microsoft Corp.*, 309 F.3d 193, 211 (4th Cir. 2002); *Williams* v. *I.B. Fischer Nev.*, 999 F.2d 445, 447 (9th Cir. 1993) (summary judgment); *Sicor Ltd.* v. *Cetus Corp.*, 51 F.3d 848, 856 (9th Cir. 1995) (same). The District has adequately pled that Amazon has monopoly power in the online marketplace market and that it has illegally further entrenched and maintained that monopoly through the PPP, FPP, and MMA, which raise Amazon's rivals' costs, reduce competition, and raise consumer prices.

CONCLUSION

For the foregoing reasons, Amazon's Motion to Dismiss should be denied.

[26] It is appropriate for the same conduct—here, the anticompetitive agreements—to support both Section 1 and Section 2 claims simultaneously. *See In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1144 (9th Cir. 2019) (sustaining claims under Section 1 and 2 of the Sherman Act); *W. Concrete Structures Co., Inc. v. Mitsui & Co. (U.S.A.), Inc.*, 760 F.2d 1013, 1020 (9th Cir. 1985) (finding Section 1 and 2 claims based on same conspiracy were plausibly alleged at the motion to dismiss stage).

December 15, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 2021, a true and correct copy of the foregoing Opposition to Defendant Amazon.com, Inc.'s Motion to Dismiss Amended Complaint was served on counsel for Amazon by the court's electronic filing service.

Dated: December 15, 2021

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