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: February 11, 2022 EVENT: Initial Scheduling Conference

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

Table of Contents

Table of Authorities

Cases

Statutes

INTRODUCTION

The plain language of the policies that the District challenges—policies that ensure consumers are offered lower prices—dooms the District's case. Where, as here, the District's allegations contradict the policies' plain language, the Court "is not required to accept such allegations as true." *Rodriguez* v. *Lab. Corp. of Am. Holdings*, 13 F. Supp. 3d 121, 133 (D.D.C. 2014). The policies make clear that Amazon does not set—by agreement or otherwise—the prices at which third-party sellers sell their products in Amazon's store or anywhere else. The District's claims challenge policies that, *on their face*, discourage third-party sellers from charging shoppers in Amazon's store higher (or, in the case of the Fair Pricing Policy, "significantly higher") prices than those sellers charge for the same products in other stores. No court in any U.S. jurisdiction has held that policies such as these violate the antitrust laws. Courts have upheld such policies as a matter of law because they benefit both competition and consumers.

The District urges the Court to ignore the language of Amazon's policies and depart from established antitrust precedent. The District's claims are facially unsustainable, and the Amended Complaint ("AC") should be dismissed.

ARGUMENT

I. Amazon's Policies Are Categorically Lawful (All Claims).

A. Amazon's Former Price Parity Provision and Fair Pricing Policy Are *Per Se* Lawful Because They Promote Competitive Prices For Consumers (Count 1).

Amazon's policies are clearly directed at providing competitive prices for *consumers*. The former price parity provision required third-party sellers to provide customers in Amazon's store with prices at least as competitive as the prices those sellers charged elsewhere. The Fair Pricing Policy prohibits third-party sellers from setting prices in Amazon's store that are "significantly higher" than recent prices on or off Amazon. Amazon's Motion to Dismiss ("Mot."), Ex. B.

Policies directed at protecting consumers from higher prices are lawful and do "not constitute an unreasonable restraint of trade." *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 931 (1st Cir. 1984). The reason is straightforward: "As a matter of logic" it is not "unlawful for [an alleged monopolist] to insist that no additional charge be made to [ ] other[s]." *Id.* at 928. The District cites no case that suggests a policy directed at providing competitive prices for consumers could be condemned under the antitrust laws.

Instead, the District argues—based on conclusory allegations—that absent Amazon's policies, consumers would pay lower prices inside and outside Amazon's store. Pl.'s Opp'n Mot. Dismiss ("Opp.") at 18. The antitrust laws do not permit the District to challenge established procompetitive actions aimed at lower consumer prices with naked allegations of price increases. Because the policies, on their face, are directed at ensuring that consumers (rather than Amazon) are charged lower prices, the policies are *per se* lawful; no further inquiry into their effects is warranted. Condemning such low-price policies "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Grp.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993); *see also Kartell*, 749 F.2d at 929 (upholding competitive price provision despite allegation that it "discourage[d] doctors from charging others low prices"); *Atl. Richfield Co.* v. *USA Petrol. Co.*, 495 U.S. 328, 340 (1990) (low nonpredatory prices do not threaten competition).[1] The District cannot avoid these cases with its allegations: "[a]llegations that conduct 'has the effect of reducing consumers' choices or increasing prices to consumers do[ ] not sufficiently allege an injury to competition . . . [because]

[1] Then-Judge Breyer explained these principles in *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983): "For unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve."

[b]oth effects are fully consistent with a free, competitive market.'" *FTC* v. *Qualcomm, Inc.*, 969 F.3d 974, 990 (9th Cir. 2020) (citation omitted).

Instead of relying on cases that address policies that directly benefit consumers, the District focuses on cases involving policies where alleged monopolists negotiate favorable prices to benefit themselves over their competitors. In *United States* v. *Delta Dental of Rhode Island*, 943 F. Supp. 172 (D.R.I. 1996), for example, the policy was directed at ensuring that the defendant insurer would not reimburse dentists more than its competitor insurers. *Id.* at 183. The defendant *claimed* its policy benefited consumers, but unlike here, the policy's plain language was not directed at ensuring consumers received competitive prices—any benefit was indirect and theoretical because it depended on the defendant passing on its savings to its customers in the form of lower premiums. *Id.* at 179. Here the benefit is direct and concrete: Amazon's policies directly seek lower consumer prices. And unlike the *Delta Dental* policy that economically advantaged the defendant, Amazon's policies result in *lower* commissions to Amazon on each third-party sale. Such policies, which on their face require competitive consumer prices, are valid as a matter of law. *Kartell*, 749 F.2d at 927–28; *see also Tennessean Truckstop, Inc.* v. *NTS, Inc.*, 875 F.2d 86, 90 (6th Cir. 1989) (granting motion to dismiss where credit card company's policy that "merely sought to limit the differential between the prices quoted to its customers and the prices quoted to [other] customers" was "obviously a proconsumer device, and . . . not 'of the type the antitrust laws were intended to prevent'" (citation omitted)); *Ocean State Physicians Health Plan, Inc.* v. *Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989) (upholding "as a matter of law" insurer's policy requiring doctors to charge insurer no more than doctors charged other insurers).[2]

[2] Other cases cited by the District are even more distinguishable because they involved what are known as "MFN plus" provisions—policies by which dominant firms imposed higher prices on competitors in order to exclude rivals, *e.g.*, *Health All. Plan of Mich.* v. *Blue Cross Blue Shield of Mich. Mut. Ins. Co.*, 2017 WL 1209099, at *5 (E.D. Mich. Mar. 31, 2017); *U.S.* v. *Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 669, 674–75 (E.D. Mich. 2011).

The remaining cases cited by the District are off point because they involve firms using MFNs to collude with *competitors* to raise and fix prices. *E.g.*, *United States* v. *Apple*, 791 F.3d 290, 316 (2d Cir. 2015) (MFN was among tools Apple used to move publishers to an agency pricing model and to raise and fix prices); *In re: Am. Express Anti-Steering Rules Antitrust Litig.*, 2016 WL 748089, at *10 (E.D.N.Y. Jan. 7, 2016) (alleged agreements "eliminated horizontal competition across the entire product market"); *Nat'l Recycling Inc.* v. *Waste Mgmt. of Mass., Inc.*, 2007 WL 9797531 at *6 (D. Mass. July 2, 2007) (firms adopting MFNs "acted in a concerted manner to increase prices"); *Sitts* v. *Dairy Farmers of Am., Inc.*, 417 F. Supp. 3d 433, 472 (D. Vt. 2019) (MFNs used "to attract non-cooperative" third parties into conspiracy). The District does not allege that Amazon has colluded with other online marketplaces (*e.g.*, eBay or Walmart) to set a price across all online marketplaces. Nor does the District allege that Amazon and the millions of third-party sellers that offer products in Amazon's store have colluded with one another (and with Amazon) to set prices. It would be implausible to suggest, for example, that Amazon has convinced all sellers of AA batteries in Amazon's store to collude with one another to set a uniform price. Amazon's policies permit each of those sellers to determine its own price, and insist only that consumers shopping in Amazon's store do not pay more (or significantly more) than consumers shopping for the same product elsewhere. The District's reliance on these inapposite cases demonstrates the unprecedented stretch the District asks of this Court to extend the antitrust laws to policies that are explicitly directed at providing consumers competitive prices.

Amazon's policies are silent as to prices paid or costs incurred by competitors, and the AC does not allege that the policies at issue excluded rivals, which remain free to charge lower commissions to attract third-party sellers.

B. The Fair Pricing Policy Lawfully Prohibits Price-Gouging and Is Not an MFN (Count 1).

The District's claims based on Amazon's Fair Pricing Policy should be dismissed for the additional laudatory reason that the policy prohibits price gouging from third-party sellers setting prices in Amazon's store that are "significantly higher" than recent prices on or off Amazon. Mot. 10 & n.5. The District's only response is that Amazon is not really concerned with price gouging, because price gouging laws are more narrowly tailored than the Fair Pricing Policy and because Amazon looks to prices outside of its store. Opp. 18 n.21. But, of course, Amazon must reference other retailers' prices to know whether its customers are paying "significantly higher" prices than elsewhere.[3] The fact that Amazon's policy may be more expansive to prevent unfairly gouging customers than state price gouging laws only underscores that Amazon's policy is procompetitive.

The Fair Pricing Policy is also not an MFN. The District does not dispute that the policy's plain language, by prohibiting only "significantly higher" prices, permits third-party sellers to set lower prices outside Amazon's store. The policy therefore fails to meet even the District's definition of an MFN—a provision that prohibits third-party sellers from selling products on other marketplaces for "lower prices, or on better terms, than offered through Amazon's online marketplace." AC ¶ 10; *see also* Opp. 2 n.2. The policy is also not an MFN because it references market prices generally—not just the specific prices charged by the third-party seller in other stores. Mot., Ex. B. The District cites no case holding that a policy protecting consumers from "significantly higher" prices violates the antitrust laws. Instead, the District argues that the Fair Pricing Policy, like the former price parity provision, prevents third-party sellers from offering lower prices through other outlets, resulting in an allegedly inflated price floor across the board.

[3] For example, the District's claim that Amazon should limit its price references to prior pricing in its own store would leave Amazon with no mechanism to protect customers against price gouging on new products in its store.

Opp. 18. But that assertion contradicts the policy's plain language, which expressly permits sellers to charge higher prices in Amazon's store so long as they are not "significantly higher." *See United States ex rel. Scott* v. *Pac. Architects & Eng'rs, Inc.*, 2020 WL 224504 at *1, *9 (D.D.C. Jan. 15, 2020) (allegations taken as true on motion to dismiss "only insofar as they do not contradict the documents upon which they necessarily rely"). The District cannot allege that the policy is an MFN by labeling it one when it is not. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007))). The AC alleges third-party sellers have every incentive to sell at lower prices (including less than significantly higher prices) outside of Amazon's store. AC ¶¶ 33–34.[4]

C. Amazon's Margin Agreements Are Lawful (Count 2).

The District challenges Amazon's Margin Agreements with suppliers—agreements that have no relationship to the former price parity provision or the Fair Pricing Policy. Those claims fail because the AC alleges only that Amazon negotiates "the prices, terms, and conditions" on which it deals with suppliers ("first-party sellers" in the AC)—conduct that is lawful under the antitrust laws. *Pac. Bell Tel. Co.* v. *linkLine Comm'cns, Inc.*, 555 U.S. 438, 448 (2009); AC ¶¶ 11, 37–38. The District concedes that "buyers may freely bargain aggressively when negotiating the prices they pay for goods or services." Opp. 21. That is what Amazon does through the Margin Agreements. The AC alleges the Margin Agreements allow Amazon to recoup some of its wholesale costs (the price it pays suppliers for goods) when it lowers consumer prices for such goods. AC ¶ 38. Whether Amazon negotiates for lower costs up front or negotiates rebates on the backend when consumer prices decline has no relevance to an antitrust claim.

[4] A ruling that the Fair Pricing Policy is lawful and procompetitive will affect the scope of discovery regarding third-party seller pricing, even should other claims survive dismissal.

The District argues that "because these payments to Amazon are triggered when Amazon lowers its retail price to meet a competing marketplace's offer, [first-party sellers] have raised their prices to these competing marketplaces to avoid payments to Amazon." Opp. 21. This defies both common and economic sense because it requires the assumption that in response to a competitor's price cutting, other competitors could or would raise prices. The District has offered nothing but speculation that Margin Agreements lead to higher wholesale prices to other retailers. Nor has the District alleged that Amazon's suppliers have the market power necessary to cause other retailers such as Walmart or Target to raise their retail prices in response. Mot. 13.

D. The Monopoly Maintenance and Attempted Monopolization Claims Fail Because the Restraint of Trade Claims Fail (Counts 3–4).

The District concedes that its monopoly maintenance and attempted monopolization claims depend on the same alleged conduct as its restraint of trade claims, Opp. 24; these claims therefore also fail because the District has failed to allege any anticompetitive conduct.[5]

II. The Restraint of Trade Claim Is Subject to the Rule Of Reason—Not a *Per Se* Framework (Count 1).

The District's initial complaint alleged that the price parity provision and Fair Pricing Policy constitute "a *per se* violation of D.C. Code § 28-4502." Compl. ¶ 67. Amazon moved to dismiss the *per se* claim. Amazon's 7/20/21 Mot. 9–11. Instead of responding, the District filed the AC, eliminating its previous *per se* violation allegation. Amazon, in preparing its motion to dismiss the AC, relied on the District's withdrawal of its *per se* allegation and did not argue against such a claim. The District now declares in a footnote that it is still asserting the *per se* claim, Opp.

[5] The District argues that "Amazon does not dispute that the District plausibly alleged Amazon has monopoly power in the markets alleged by the District," Opp. 23, but it is not possible to address market power until there is a properly defined antitrust market—a "threshold step in any antitrust case[.]" *Qualcomm Inc.*, 969 F.3d at 992 (citing *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018)).

8 n.8, with no explanation as to why it removed references to a *per se* violation in its AC. The District should not be permitted to resurrect its *per se* claim; it should be treated as withdrawn.[6]

If the Court were to consider the claim, the District still fails to demonstrate why the Court should deviate from the presumptive rule that restraint of trade claims are reviewed under the rule of reason, with only "certain types of recurring agreements which proved to be so consistently unreasonable that they could be branded illegal *per se*," *Kruezer* v. *Am. Acad. of Periodontology*, 735 F.2d 1479, 1490 (D.C. Cir. 1984), such as horizontal agreements "to fix prices or allocate markets." *In re: McCormick & Co., Inc.*, 217 F. Supp. 3d 124, 135 (D.D.C. 2016).

The District concedes that MFN provisions "are often analyzed under the rule of reason," Opp. 9, citing cases concerning MFN provisions in favor of dominant purchasers (not consumers), *all* of which were decided under a rule of reason standard. That should be dispositive.

The District tries to overcome the absence of any cases supporting application of a *per se* rule by citing cases involving naked horizontal agreements among competitors to allocate geographic markets, *Palmer* v. *BRG of Ga., Inc.*, 498 U.S. 46 (1990), or to collude on price. *Apple*, 791 F.3d at 318, 322 (finding Apple played "key role" in orchestrating "express collusion" among major ebook publishers "to set ebook prices").[7] The *per se* rule was applied in those cases not solely because the agreements were horizontal, but because of the type of restraints involved. Apart from price fixing and market allocation, there are agreements between or among horizontal competitors that "do not fall within the narrow category of activity that is *per se* unlawful[.]" *Texaco* v. *Dagher*, 547 U.S. 1, 8 (2006). The cases the District cites are a far cry from a store's

[6] *Zanders* v. *Baker*, 207 A.3d 1129, 1136 (D.C. 2019) ("amended complaint renders any previous complaints a legal nullity" unless expressly incorporated by reference).

[7] *Starr* v. *Sony BMG Music Entertainment*, 592 F.3d 314, 319 n.2 (2d Cir. 2010), did not address the applicable framework; the allegation that defendants agreed to a price floor was conclusory and was "not accepted as true."

low-price provision designed to protect its customers from high prices.

The District's attempt to recast the challenged policies as a horizontal agreement among competitors to fix prices does not bring them within the scope of any *per se* rule. There is no allegation that Amazon and third-party sellers compete against one another in the alleged "Online Marketplace Market"—which the District describes as "the provision to TPSs of access and services to facilitate online sales to customers." Opp. 14; AC ¶ 39. They are therefore not horizontal competitors in that market. Even if they are alleged to be horizontal competitors in some contexts, that does not alter the vertical nature of the policies that apply to third-party sellers as a condition of selling in Amazon's store. *Integrated Sys. & Power, Inc.* v. *Honeywell Int'l, Inc.*, 713 F. Supp. 2d 286, 291 (S.D.N.Y. 2010) (rejecting *per se* rule; although conduct complained of "includes both horizontal and vertical components," the specific conduct complained of was Honeywell's termination of ISPI as a distributor, which is "unquestionably a restriction or restraint between actors at different levels of the supply chain, i.e., a vertical restraint"). Courts apply the rule of reason where, as here, a plaintiff alleges "both a vertical and horizontal relationship." *Beyer Farms, Inc.* v. *Elmhurst Dairy, Inc.*, 35 F. App'x 29, 29 (2d Cir. 2002).[8]

III. The Restraint of Trade Claims Fail to Allege Concerted Action (Counts 1 and 2).

No matter the framework that applies to the District's restraint of trade claims, those claims also fail because the District has failed to allege concerted action, an essential element of those claims. The law is clear that complying with a unilateral policy, even if contained in an enforceable contract, does not constitute concerted action, i.e., "a 'conscious commitment to a common scheme

[8] *See also 2238 Victory Corp.* v. *Fjallraven USA Retail, LLC*, 2021 WL 76334, at *5 (S.D.N.Y. Jan. 8, 2021) ("Because the Complaint describes a mixed vertical and horizontal relationship between [defendants], any agreement between them is scrutinized under the rule of reason and is not categorized as *per se* unlawful"); *Ogden* v. *Little Caesar Enters., Inc.*, 393 F. Supp. 3d 622, 636 (E.D. Mich. 2019) (agreements displaying "both vertical and horizontal components" merit "a more in-depth analysis to determine unreasonableness" than "quick-look" approach).

designed to achieve an unlawful objective.'" *Toscano* v. *Pro. Golfers Ass'n*, 258 F.3d 978, 984–85 (9th Cir. 2001) (quoting *Monsanto* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Under the District's misguided definition of concerted action—requiring only "non-conclusory allegations of an express agreement," Opp. 6—every set of terms and conditions agreed to with any firm would be concerted action under the antitrust laws among all those who agreed to such terms, subjecting all parties to such terms to joint and several liability under the antitrust laws.

To state a restraint of trade claim, a plaintiff must allege more than a "facially neutral contract"; it must allege facts "in addition to the contract" demonstrating the required "conscious commitment" to an unlawful scheme. *Gulf States Reorg. Grp., Inc.* v. *Nucor Corp.*, 822 F. Supp. 2d 1201, 1217–21 (N.D. Ala. 2011) (rejecting "astounding" argument that written agreement, standing alone, satisfied the concerted action requirement); *Procaps S.A.* v. *Patheon, Inc.*, 845 F.3d 1072, 1081 (11th Cir. 2016) (rejecting argument that "simple existence of the contract . . . standing alone" was enough "to satisfy the concerted action requirement"). The AC contains no allegations that third-party sellers consciously committed to an allegedly unlawful scheme. Instead, the AC alleges that third-party sellers, who number in the millions, must agree to the former parity provision and Fair Pricing Policy and that Amazon "aggressively enforces" these policies. AC ¶¶ 20–21, 24–25, 27. That is unilateral—not concerted—action. Mot. 19.

The District cites cases involving allegations of a conscious commitment to an unlawful scheme in addition to a contract. *E.g.*, *West Penn Allegheny Health Sys., Inc.* v. *UPMC*, 627 F.3d 85, 93–94, 100 (3d Cir. 2010) (numerous meetings and negotiations alleged between competitors plausibly suggesting an agreement to "protect one another from competition"); *Apple*, 791 F.3d at 316 (MFN was one tool, among many others, Apple used to "consciously orchestrate[] a conspiracy" to fix prices among publishers); *In re Androgel Antitrust Litig. (No. II)*, 2018 WL

2984873, at *8 (N.D. Ga. June 14, 2018) (negotiated litigation settlement agreements reflected "common objective" to delay entry of potential competitor).[9]

IV. All of the District's Claims Must Be Dismissed for Failure to Allege a Relevant Product Market in Accordance with the Applicable Legal Standard (Counts 1–4).

The AC fails to set forth allegations critical to a properly defined relevant market: the degree to which buyers of one product switch to another in response to price changes. *Gross* v. *Wright*, 185 F. Supp. 3d 39, 50 (D.D.C. 2016) (granting motion to dismiss). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962). "Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the relevant market must include all products reasonably interchangeable by consumers for the same purposes." *United States* v. *Microsoft*, 253 F.3d 34, 51–52 (D.C. Cir. 2001) (citation and quotation marks omitted). Reasonable interchangeability "depends most sensitively on the price of the products," not just how or where customers could turn to obtain a substitute. *FTC* v. *Whole Foods, Inc.*, 548 F.3d 1028, 1037 (D.C. Cir. 2008). The District asks this Court to find an unprecedented "market" that departs from these established principles.

A. The District's Exclusion of Physical Stores from Its Alleged "Online Marketplace" Market Defies Common Sense.

The District's alleged Online Marketplace Market violates established market definition principles because the District does not—and cannot—allege that consumers would not turn to

[9] The District's cases cited at Opp. 7 n.5 stand for the unremarkable proposition that, in a clandestine antitrust conspiracy, direct evidence of an express agreement can survive a motion to dismiss, but the District does not allege such a conspiracy here. Its other cases, Opp. 7, are also inapposite. *Eskofot A/S* v. *E.I. du Pont de Nemours & Co.*, 872 F. Supp. 81, 92 (S.D.N.Y. 1995) (bilateral merger agreement on its face created an anticompetitive effect); *Delta Dental.*, 943 F. Supp. at 175 (dentists conscious of need to maintain higher prices).

their neighborhood stores—for example, Walmart or Target—if those stores offered better prices.

The District argues it was not required to allege such facts because the Court can look to "practical indicia . . . to determine the appropriate contours of a product market," relying on *Brown Shoe*. Opp. 11–12. *Brown Shoe*'s "practical indicia" are not an alternative test for market definition; they are "evidentiary proxies for direct proof of substitutability." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 219 (D.C. Cir. 1986). The AC contains no allegations addressing any of the *Brown Shoe* practical indicia: it contains no allegations that online marketplaces are characterized by "unique production facilities," "distinct customers," "distinct prices" or a distinct "sensitivity to price changes." *Brown Shoe*, 370 U.S. at 325. Nor does the District allege facts showing that products bought from online marketplaces have "peculiar characteristics and uses" compared to products bought in physical stores. *Id.*

Consumers do not shop for "online marketplaces"; they shop for *goods*, and the AC lacks factual allegations demonstrating that online marketplaces have unique features that would justify excluding physical stores that offer consumers the same goods. The District also does not allege, and would have no basis to allege, that there is industry or public recognition that consumers demand a bundle of a "virtually-unlimited" number of products in making a purchase.[10] All that the District can point to are allegations of "industry or public recognition" of differences between shopping online and in physical stores. *Brown Shoe*, 370 U.S. at 325; AC ¶¶ 41–49. But that fails to speak to the substitutability of products available online versus in a physical store. It is common sense that whether an identical product—for example, a pair of Nike sneakers—is bought from an online marketplace, the Nike website, or a physical store, the sneakers are not only reasonably

[10] *See also E & G. Gabriel* v. *Gabriel Bros.*, 1994 WL 369147, at *3 (S.D.N.Y. Jul. 13, 1994) (finding product market "implausible" because it included products "as varied as household hardwares and children's sleepwear. Hammers are obviously not reasonable substitutes for children's pajamas").

interchangeable, they are the same. In considering the District's alleged market, the Court is not "require[d] to ignore its common sense." *McCagg* v. *Marquis Jet Partners, Inc.*, 2007 WL 2454192, at *6 (S.D.N.Y. July 27, 2007) (granting motion to dismiss).

The District tries to avoid the common-sense conclusion that goods available in physical stores must be part of any relevant product market by arguing that "Courts regularly sustain markets despite the availability of products from other sources outside that market." Opp. 13 n.13.[11] But that is true *only* when there is a "core group of particularly dedicated, 'distinct customers,' paying 'distinct prices'" for whom only "a particular package of goods or services . . . will do." *Whole Foods*, 548 F.3d at 1038–39 (quoting *Brown Shoe*, 370 U.S. at 325). *Whole Foods* involved a core group of customers who shopped for a package of premium, natural, and organic foods, and on that basis the court found that this particular package of products was not reasonably interchangeable with foods at conventional grocery stores. *Id.* at 1039.[12] The District pleads the *opposite* of a core group of customers purchasing a distinct package of products at distinct prices—"hundreds of millions" of consumers purchasing from Amazon and "millions" of third-party sellers a "virtually-unlimited" range of products. AC ¶¶ 3, 43, 57.

B. The District's Claimed Assertion of "Individual Retail Product Markets" Cannot Save Its Defective Market Definition Allegations.

Faced with fundamental flaws in its alleged Online Marketplace market, the District pivots to arguing that it has also "alleged individual retail product markets for each of the product

[11] The District relies on cases concerning sales of specific products or product categories, not cases with online retail marketplaces with hundreds of millions of transactions for unlimited consumer goods. *Distance Learning Co.* v. *Maynard*, 2020 WL 2995529 at * 7 (N.D. Cal 2020) (online driving schools); *Origami Owl LLC* v. *Mayo*, 2015 WL 4747101 at *3 (D. Ariz. 2015) (online market for specialized jewelry).

[12] Other cases cited by the District also involved a core group of customers shopping for a distinct package of products. *Bon-Ton Stores, Inc.* v. *May Dep't Stores Co.*, 881 F. Supp. 860, 872–74 (W.D.N.Y. 1994) ("women's clothing and cosmetics at department stores"); *FTC* v. *Staples, Inc.*, 970 F. Supp. 1066, 1075, 1079 (D.D.C. 1997) (office supply superstores with "distinct formats, customers, and prices;" the "superstores' customer base overwhelmingly consists of small businesses with fewer than 20 employees and consumers with home offices").

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," and that it is not seeking to aggregate a "virtually-unlimited" "range of non-substitutable products." Opp. 14. But nowhere does the AC allege individual markets for *each* of the millions of distinct retail consumer product categories or justify limiting them to online markets. Nor does the AC allege that the market for each individual retail product "include[s] all products reasonably interchangeable by consumers for the same purposes," *Microsoft*, 253 F.3d at 52 (citation and quotation marks omitted), only listing eight examples, paired with a conclusory allegation that each product category constitutes its own relevant market. AC ¶¶ 66–67. Allegations of eight only illustrative product categories to support claims based on markets for millions of products cannot survive a motion to dismiss. Among other things, the District fails to provide notice of each of the product categories on which its claims depend and the products allegedly included within each category, and what potential substitutes exist for those products. This makes the District's market definition "too overbroad and amorphous" to survive a motion to dismiss. *Universal Grading Serv.* v. *eBay, Inc.*, 2012 WL 70644, at *7 (N.D. Cal. Jan. 9, 2012) (dismissing complaint where alleged relevant market "would theoretically encompass the market for every one of the millions of items sold through eBay"); Mot. 16.

The District's reliance on individual product markets fails for an additional independent reason: the District does not allege that Amazon has market power over each such product market. Nor would it be plausible to allege that Amazon has market power over every one of the hundreds of millions of products that it sells in its store. Without market power, the District cannot demonstrate competitive harm. *Dickson* v. *Microsoft Corp.*, 309 F.3d 193, 208–09 (4th Cir. 2002).

C. The District Cannot State a Claim Based on the Margin Agreements by Relying on Alleged Effects in the Online Marketplace Market (Counts 2–4).

Because the Margin Agreements address the prices that Amazon pays suppliers for the products it sells in its store, the relevant question is whether Amazon has market power in a market of competing buyers for all of the "virtually-unlimited" products it sells. Mot. 16–17. The District admits that it has not alleged a market of competing buyers, or that Amazon has market power in such a market, arguing that that is "irrelevant and beside the point" because the District has alleged "Amazon's market power in the online marketplace market in which the MMA has restrained competition and raised prices." Opp. 15. The District has not alleged—and cannot allege—how the price Amazon pays its suppliers—for example, Proctor & Gamble for diapers—causes other marketplaces like Walmart to increase their diaper prices to consumers. This highlights why the District cannot mix an alleged restraint in one market with effects in another; "courts must focus on anticompetitive effects 'in the market where competition is [allegedly] being restrained.'" *Qualcomm*, 969 F.3d at 992 (citation omitted).

V. The District Fails to Plausibly Allege Anticompetitive Effects (All Counts).

The District points to its bald claims of increased prices and reduced consumer choice to assert anticompetitive effects. "But [the District] cite[s] no examples, data, or other facts to support [its] assertion, and a conclusory allegation that prices have increased will not suffice to state anticompetitive effect." *Spinelli* v. *Nat'l Football League*, 903 F.3d 185, 212 (2d Cir. 2018).[13]

CONCLUSION

The Court should dismiss the District's Amended Complaint with prejudice.

[13] The District also alleges that Amazon's practices "stifle[d] innovation and growth," Opp. 16, with no allegation any competitor was excluded. The District's cited cases highlight its failure to sufficiently plead anticompetitive effects, with each case citing specific examples. *E.g., Delta Dental*, 943 F. Supp. at 179; *Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d at 674; *Lucasys Inc.* v. *PowerPlan, Inc.*, 2021 WL 5279391, at *12 (N.D. Ga. Sept. 30, 2021).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2022, a true and correct copy of the foregoing reply statement was served electronically via Case File Xpress to the following:

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