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: March 18, 2022 EVENT: Initial Scheduling Conference

DEFENDANT AMAZON.COM, INC.'S RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY OF PLAINTIFF DISTRICT OF COLUMBIA

Amazon.com, Inc. respectfully submits this response to the Notice of Supplemental Authority filed by the District of Columbia ("District") in connection with Amazon's Motion to Dismiss the District's Amended Complaint (the "District's Notice"). On March 11, 2022, Judge Jones of the United States District Court for the Western District of Washington issued an order granting-in-part and denying-in-part Amazon's motion to dismiss in a putative antitrust class action in *Frame-Wilson* v. *Amazon.com, Inc*, No. 2:20-cv-00424-RAJ, ECF No. 48 (W.D. Wash. Mar. 11, 2022) ("*Frame-Wilson* MTD Order"). The plaintiffs in *Frame-Wilson* are consumers who allege that Amazon's pricing policies—including the former Parity Provision and the Marketplace Fair Pricing Policy challenged in this case—increased the prices they paid for products they purchased *off-Amazon* in e-commerce. The Amended Complaint in *Frame-Wilson* and the motion to dismiss that Amazon filed in that case overlap in part with the District's Amended Complaint and Amazon's pending motion to dismiss but, as explained below, there are also important differences.

I. Plaintiffs' *Per Se* Claim in *Frame-Wilson* Was Dismissed.

The plaintiffs' *per se* claim in *Frame-Wilson* based on the former Parity Provision and the

Marketplace Fair Pricing Policy was dismissed. *Frame-Wilson* MTD Order at 11. Contrary to the District's argument that it is more appropriate to decide whether a case is subject to the *per se* or rule of reason framework on a motion for summary judgment, District's Notice at 2, courts routinely resolve which framework is appropriate on a motion to dismiss. *E.g.*, *Olean Wholesale Grocery Coop., Inc.* v. *Agri Stats, Inc.*, 2020 WL 6134982, *10 (N.D. Ill. Oct. 19, 2020) (deciding on motion to dismiss that rule of reason framework applies); *In re Xyre, (Sodium Cxybate) Antitrust Litig.*, 2021 WL 3612497, *31 (N.D. Cal. Aug. 13, 2021) (same); *In re: German Automotive Mfrs. Antitrust Litig.*, 497 F. Supp.3d 745, 755 (N.D. Cal. 2020) (same); *2238 Victory Corp.* v. *Fjallraven USA Retail, LLC*, 2021 WL 76334, *1 (S.D.N.Y. Jan. 8, 2021) (same).

The arguments the plaintiffs in *Frame-Wilson* made in support of their *per se* restraint of trade claim were nearly identical to the arguments the District makes in support of the *per* se claim in this case. *Compare* District's Opp'n MTD at 9 (referring to Amazon and third-party sellers, the District alleged that "MFNs between horizontal competitors, like those alleged here, should be subjected to *per se* treatment") *with Frame-Wilson* MTD Order at 11 ("Plaintiffs contend that the pricing provision at issue is a *per se* violation of Section 1 based on the horizontal agreement between Amazon and third-party sellers on the Amazon.com platform."). The District tries to distinguish its restraint of trade claim by arguing that, unlike the *Frame-Wilson* complaint, the District's complaint "contains extensive allegations supporting *per se* treatment of its concerted action claim based on Amazon's and its TPSs' horizontal competition and agreement to restrict prices in: (1) the online marketplace market in which Amazon's marketplace and third-party sellers[']s websites directly compete for consumer traffic and sales; and (2) specific product markets in which Amazon and its third-party sellers directly compete." District's Notice at 2. The Court in *Frame-Wilson* considered these same arguments and rejected them because these allegations do

not establish a horizontal agreement between Amazon and third-party sellers as competitors "with respect to the MFN." *Frame-Wilson* MTD Order 13. In addition, these allegations fail to allege a conspiracy or meeting of the minds between third-party sellers—as opposed to a series of alleged vertical agreements between each of those third-party sellers and Amazon. *Id.* at 11–13. As a result, that court stated the "Amazon is not competing with third-party sellers, but rather setting requirements as a condition for platform access." *Id.* at 12. Finally, the Court stated, even if there were a horizontal element of the relationship, "such a 'hybrid arrangement' would be analyzed under the rule of reason." *Id.* Just as dismissal of the *per se* claim was appropriate in *Frame-Wilson*, dismissal of the District's *per se* claim is appropriate here where the District relies on the same horizontal conspiracy arguments.

II. The Court in *Frame-Wilson* Applied a Standard for Pleading a Relevant Market Different from the Applicable Standard in the District.

The court in *Frame-Wilson* concluded that the "validity of the relevant market is a factual question reserved for a jury, and the Court makes no such determination." *Id.* at 18. In this case, however, Amazon's motion with respect to market definition relies on cases in the District of Columbia holding that, to reach the factfinder, "an alleged market 'must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes.'" *Gross* v. *Wright*, 185 F. Supp. 3d 39, 50 (D.D.C. 2016) (quoting *Todd* v. *Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001)). That market definition methodology as declared by the Supreme Court is that "commodities [that are] reasonably interchangeable by consumers for the same purposes" belong in the same market. *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). For the reasons Amazon stated in its motion to dismiss, the District's Amended Complaint does not follow that methodology. Amazon's MTD Brief at 14–16. Rather, to support a market definition of millions of exclusively online products, the District mistakenly relies on a market definition methodology

drawn from *FTC* v. *Whole Foods, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008). That case permits a market for a "core group of particularly dedicated, 'distinct customers,' paying 'distinct prices'" for whom only "a particular package of goods or services . . . will do," *id.* at 1039—the opposite of the type of market alleged in the District's Amended Complaint. Amazon's Reply at 13.

III. The Court in *Frame-Wilson* Relied on an Allegation Not Made in this Case.

The court in *Frame-Wilson* noted that "certain most-favored-nation and best-price provisions do not run afoul of the Sherman Act," *Frame-Wilson* MTD Order at 19, but distinguished Amazon's pricing policy because the *Frame-Wilson* plaintiffs alleged that the policy "*requires* sellers to add Amazon's fees to the cost of their products when they sell them on all external platforms." *Id.* at 20 (emphasis added). The District makes no such allegation here, and rightly so: The plain language of the former Parity Provision and the Fair Pricing Policy make clear that neither contains such a requirement. Amazon's MTD Brief at, Ex. A at 14 (Parity Provision); Ex. B (Fair Pricing Policy). Neither one requires any fees when a sale occurs off-Amazon. Nor do they provide for Amazon's involvement in how sellers price their products anywhere.

IV. Amazon's Motion Here Raises Issues Not Addressed in the *Frame-Wilson* Decision.

The Court in *Frame-Wilson* did not address several arguments at issue on the motion to dismiss here. Amazon's motion to dismiss in this Court also clarifies that the Fair Pricing Policy is not an MFN, but rather an anti-price gouging policy because it merely prohibits "significantly higher" prices in Amazon's Store. Amazon's MTD Brief at 10. The *Frame-Wilson* court also did not consider the issue raised in this motion as to whether the District has alleged concerted action. *Id.* at 19. In addition, the court in *Frame-Wilson* did not consider any claims based on the Gross Minimum Margin Agreements because the plaintiffs there did not make such claims.

Dated: March 15, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

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