SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA	:	
	:	
v.	:	Case Number: 2021 CA 001775 B
	:	Judge Hiram E. Puig-Lugo
AMAZON.COM, INC.	:	

ORDER

This order addresses the newest chapter of anti-trust litigation between the District of Columbia and Amazon.com, Inc. It began on April 14, 2022, when the District of Columbia filed Plaintiff's Opposed Motion for Reconsideration, or in the Alternative, For Leave to Amend the Complaint or for a Written Order of Decision ("Motion for Reconsideration"). It gathered momentum on April 27, 2022, when the non-party U.S. Department of Justice submitted a Statement of Interest of the United States of America in Support of Plaintiff's Motion for Reconsideration. It became ripe after the Defendant lodged its opposition to reconsideration on April 28, 2022, and the District countered with a reply on May 5, 2022. For reasons below, the Motion for Reconsideration is denied.

Background

On March 25, 2021, the Plaintiff District of Columbia filed its original Complaint against Defendant Amazon.com, Inc. *See* Compl. On July 20, 2021, the Defendant filed an Opposed Motion to Dismiss Plaintiff District of Columbia's Complaint ("First Motion to Dismiss"). On September 10, 2021, the District filed a First Amended Complaint in response to the Defendant's motions. As a result, Defendant's First Motion to Dismiss was denied as moot. *See* Sept. 16, 2021 Order.

The Plaintiff's First Amended Complaint raised four claims against the Defendant. These claims were (1) Agreements in Restraint of Trade (MFNs) In Violation of the D.C. Code § 28-4502, (2) Agreements in Restraint of Trade (MMA) In Violation of the D.C. Code § 28-4502, (3) Illegal Maintenance of Monopoly in Violation of D.C. Code § 28-4503, and (4) Attempted Monopolization in Violation of D.C. Code § 28-4503.

The First Amended Complaint triggered a series of filings from both sides. On October 25, 2021, the Defendant lodged an Opposed Motion to Dismiss Plaintiff District of Columbia's Amended Complaint ("Second Motion to Dismiss"). On December 15, 2021, the District countered with a written opposition. At that point, the parties respectively filed replies and sur-replies on January 21, 2022, February 10, 2022, and February 8, 2022. Subsequently, at a hearing held on March 18, 2022, Defendant's Second Motion to Dismiss was granted and this matter dismissed.

Now, Plaintiff moves the Court to reconsider the dismissal entered on March 18, 2022, grant Plaintiff leave to file a Second Amended Complaint, or to issue a written order of decision to memorialize the Court's March 18, 2022 ruling. The Court will discuss each request separately.

Reconsideration

I. Legal Standard

"Although the trial court rules do not expressly provide for motions to reconsider . . . we have observed that they are in fact entertained from time to time" and filed pursuant to Rule 59 or Rule 60. *Williams v. Vel Rey Properties, Inc.*, 699 A.2d 416, 419 (D.C. 1997).

D.C. Super. Ct. Civ. R. 59(e) allows a party to file a "motion to alter or amend judgment" within 28 days of the entry of judgment. Generally, a motion made pursuant to D.C. Super. Ct.

Civ. R. 59(e) is appropriate where the movant "is seeking relief from the adverse consequences of the original order on the basis of error of law." *Allstate Ins. Co. v. Ramos*, 782 A.2d 280, 285 n.5 (D.C. 2001). However, a trial court may grant a Rule 59(e) motion only to correct "manifest errors of law or fact." *In re Estate of Derricotte*, 885 A.2d 320, 324 (D.C. 2005); Dist. No. 1 – Pac. Coast Dist., Marine Engineers' *Ben. Ass'n v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 278-79 (D.C. 2001). Such motions are committed to the court's broad discretion. *Wallace v Warehouse Employees Union No. 730*, 482 A.2d 801, 810 (D.C. 1984).

D.C. Super. Ct. Civ. R. 60(b) states in relevant part that an order or judgment may be vacated for "(1) mistake, inadvertence, surprise, or excusable neglect; . . . [or] (6) any other reason justifying relief from the operation of the judgment." D.C. Super. Ct. Civ. R. 60(b) (emphasis added). Determining whether a party's neglect is excusable is at bottom an equitable one, taking into account all relevant circumstances surrounding the party's omission. *See In re Estate of Yates*, 988 A.2d 466, 468 (D.C. 2010) (citations omitted). "The disposition of a D.C. Super. Ct. R. Civ. P. 60(b) motion lies within the sound discretion of the trial court. However, because courts universally favor trial on the merits, even a slight abuse of discretion in refusing to set aside a judgment may justify reversal. Each case must be evaluated in light of its own particular facts taking into consideration whether the movant: (1) had actual notice of the proceedings; (2) acted in good faith; (3) took prompt action; and (4) presented an adequate defense. Prejudice to the non-moving party is also relevant." *See Starling v. Jephunneh Lawrence & Associates*, 495 A.2d 1157, 1159 (D.C. 1985) (citations omitted).

"Whether a motion is properly classified as a Rule 59(e) motion or a Rule 60(b) motion 'is determined by the relief sought, not by its label or caption.'" *Amatangelo v. Schultz*, 870 A.2d 548, 553 (D.C. 2005) (quoting *Wallace v. Warehouse Employees Union #730*, 482 A.2d

801, 804 (D.C. 1984) (internal citations omitted)). While Rule 59(e) and Rule 60(b) overlap, the difference lies in

> whether, for the first time, the movant is requesting consideration of additional circumstances; if so, the motion is properly considered under Rule 60(b), but if the movant is seeking relief from the adverse consequences of the original order on the basis of error of law, the motion is properly considered under Rule 59(e).

Wallace, 482 A.2d at 803. Here, Plaintiff is seeking review under both rules, as well as under Rule 15(a). Pl. Mot. at 3.

II. Discussion

In its request for reconsideration, Plaintiff argues that the Court erred by "(i) misinterpreting and misapplying the plausibility standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); (ii) ignoring or failing to accept as true detailed factual allegations in the complaint; and (iii) incorrectly applying *Twombly* and *Iqbal* where there was direct evidence of agreement." Pl. Mot. at 1.

A. Plausibility Standard

First, Plaintiff argues that the Court incorrectly found that Plaintiff's allegations in the First Amended Complaint were too conclusory to be plausible. Pl. Mot. at 7. Plaintiff asserts that the First Amended Complaint "is replete with detailed factual allegations of how the implementation and enforcement of the PPP, FPP, and MMA increases prices, stifle innovation and growth in the online marketplace market, and reduce choice for online consumers." *Id.* (citing to Pl. First Amended Compl. ¶¶10, 11, 34, 62, 64, 71, 73-74, 77). Plaintiff contends that the allegations suffice to defeat a motion to dismiss pursuant to the standards laid out in *Twombly* and *Iqbal*, which Plaintiff claims the Court misinterpreted and misapplied.

The Supreme Court in *Twombly* stated that "Federal Rule of Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal quotations and citations omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds is his entitlement to relief requires more than labels and conclusions . . ." *Id.* (internal quotations and citations omitted). The Supreme Court in *Iqbal* clarified that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotations and citations omitted). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This requirement has become known as the "plausibility standard," which the Supreme Court distinguishes from a "probability requirement." *See id.* The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," but is not akin to a probability requirement. *Id.*

The Supreme Court notes that although a court must accept as true all the allegations contained in a complaint, that acceptance does not extend to legal conclusions nor to "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* Specifically, the Supreme Court states that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678-79. Additionally, the Supreme Court explains that "determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. However, "where the well-

pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.*

"When a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint. Post-*Twombly* appellate courts have often been called upon to correct district courts that mistakenly engaged in this sort of premature weighing exercise in antitrust cases." *SD3, LLC v. Black Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015). The issue of confusing probability and plausibility arose in *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85 (3rd Cir. 2010). In that case, the Third Circuit reviewed a decision where the trial court "opined that judges presiding over antitrust and other complex cases must act as gatekeepers and must subject pleadings in such cases to heightened scrutiny." *Id.* 627 F.3d at 98 (internal quotations omitted). The court in *UPMC* declared that the trial court's "gloss on Rule 8, however, is squarely at odds with Supreme Court precedent," and pointed out that "[a]lthough *Twombly* acknowledged that discovery in antitrust cases can be expensive, it expressly rejected the notion that a heightened pleading standard applies in antitrust cases." *Id.* Indeed, the court interpreted *Iqbal* to "ma[k]e clear that Rule 8's pleading standard applies with the same level of rigor in all civil actions." *Id.*

Closer to home, the District of Columbia Circuit has proclaimed that "[t]o survive a 12(b)(6) motion to dismiss a claim in an antitrust case, plaintiffs must do more than simply paraphrase the language of the antitrust laws or state in conclusory terms that the non-movant has violated those laws." *WAKA, LLC v. DC Kickball*, 517 F.Supp.2d 245, 249 (D.D.C. 2007). However, "because the proof is largely in the hands of the alleged conspirators, dismissal procedures should be used sparingly in complex antitrust litigation until the plaintiff is given

ample opportunity for discovery." *Id* (citing to *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)).

Here, it is essential to review the factual allegations within Plaintiff's First Amended Complaint and determine whether they satisfy the plausibility standard consistent with the pleading requirements set forth in Rule 8.

(1) Count I

In Count I, Plaintiff asserts the presence of Agreements in Restraint of Trade (MFNs) In Violation of D.C. Code §28-4502. *See* First Amended Compl. Section 28-4502 states that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce all or any part of which is within the District of Columbia is declared to be illegal." D.C. Code § 28-4502. To survive a motion to dismiss, Plaintiff "must allege that defendants entered into some contract, combination, conspiracy, or other concerted activity that unreasonably restricts trade in the relevant market." *WAKA, LLC* 517 F.Supp.2d at 250. There is no prohibition on "unilateral or independent conduct by one organization, no matter how anticompetitive it might be." *Id.* "Moreover, an organization cannot conspire with its own officers nor can officers within one organization conspire to restrain trade." *Id.*

Here, Plaintiff alleges that Defendant's Price Parity Provision ("PPP") and Fair Pricing Policy ("FPP"), collectively the Most-Favored Nation agreements ("MFNs"), are agreements with Third-Party Sellers ("TPSs"). Specifically, Plaintiff alleges that the PPP is an agreement that TPSs "would not offer their products through other online marketplaces, including TPS's [*sic.*] own websites, at a lower price or on better terms than TPSs offered their products through Amazon's marketplace." First Amended Compl. ¶5. Plaintiff alleges that TPSs agree to "abide by the FPP, which permits Amazon to impose sanctions on a TPS that offers a product for a

lower price or on better terms through a competing online marketplace." *Id.* ¶9. Plaintiff summarizes that "Amazon and TPSs agree that the TPS will not sell their products through any other online marketplace—including TPSs' *own* websites—for lower prices, or on better terms, than offered through Amazon's online marketplace." *Id.* ¶10.

Thus, Plaintiff contends the MFNs "insulate Amazon from competition as both an online marketplace and as a retailer of products that compete with TPS products, cause prices to consumers across all online marketplaces to be higher than they would be otherwise, and enable Amazon to charge TPSs higher commissions and fees" than would be possible in a competitive market. *Id.* ¶10.

On March 18, 2022, the Court read the FPP on the record to show that its contents did not align with the District's allegations. The language clearly stated that "[s]ellers are responsible for setting their own prices." Def. Mot., Ex. B at 1. The Court explained that "based on what the policy says, sellers are free to set prices within the marketplace . . . the only limit is that they cannot set a price that is significantly higher than recent prices offered on or off Amazon." Mar. 18, 2022 Hearing at 11:12:35-59. The Court explicitly rejected Plaintiff's counsel's argument that the FPP implies a prohibition on TPSs setting lower prices on other online marketplaces. In response, Plaintiff's counsel stated that the

> Language of the agreement, *plus* all of the detailed allegations that the District has included in its complaint from TPSs that indicate how Amazon implements this policy, that it implements it in an even more a restrictive way than the language in the policy, all of that needs to be looked at together to determine whether or not there is a plausible claim of agreement here.

Id. at 11:15:04-36.

Plaintiff's counsel stated that "Amazon doesn't implement this policy only when prices are *significantly* higher, Amazon implements this policy when TPS are selling at *any* level below

the price that they sell on Amazon, when they're selling on another platform." Mar. 18, 2022 Hearing at 10:59:32-55. Interestingly, Plaintiff's counsel's commentary suggested that the agreement is not what results in the alleged price floor, rather it is Defendant's incorrect implementation of the policy.

Next, Plaintiff's counsel recalled the Court's reading of *Iqbal* during the hearing, and distinguished the instant dispute from that in *Iqbal*, arguing that "here, there is no question that there is an agreement, this is Amazon's policy, the TPSs agree to it, the only question is whether or not it should be considered an *unreasonable* restraint of trade. There is no question there is an agreement here."[1] *Id.* 11:16:05-25. The Court responded that "in *Twombly*, the court found that the agreement could be explained by lawful, unchoreographed, free-market behavior. And the Supreme Court said that it was okay for the court to have done that." 11:27:20-28:05. Indeed, *Iqbal* states that even when "[a]cknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that the alleged agreement did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 567).

Here, a plain reading of the FPP and lack of factual details in the complaint do not make plausible, on its face, Plaintiff's claim that MFNs are agreements between Defendant and TPS that TPS "will not offer their products through other competing online marketplaces at prices lower than the prices they offer them on Amazon's online marketplace, setting a price floor below which the product will not be sold online." First Amended Compl. ¶77. It is equally

[1] Defendant's counsel maintains that while there are agreements between individual TPSs and Defendant when the Business Solutions Agreement ("BSA") is signed, there are not agreements amongst TPSs nor among Defendant and "many TPSs." Mar. 18, 2022 Hearing at 11:32:54-33:15.

likely the prices are the result of lawful, unchoreographed free-market behavior. If other online marketplaces charge lower fees than Defendant, including charging lower commission, sellers may simply choose not to sell on Defendant's marketplace. Moreover, the fact that competing online marketplaces offer lower fees or commissions than Defendant only underscores the notion that there is a free market in effect, and further contradicts the claim that Defendant's policies create a price floor. Simply put, the District's repeated assertion of probable facts does not turn them into plausible propositions for purposes of satisfying pleading requirements.

As explained by the Court on March 18, 2022, Plaintiff's reliance on the ProPublica article, Senator Blumenthal's letter to the U.S. Department of Justice and Federal Trade Commission, and statements from European regulators prior to 2013, are misplaced. Mar. 28, 2022 Hearing at 11:33:48-36:04. The ProPublica reports regarding Defendant's prioritization of profits over customer service represents that entity's opinions and conclusion. *Id.*; *see* First Amended Compl. ¶32. Similarly, Senator Blumenthal's opinion that the Sherman Act "may" require investigations is speculative and does not arise to a factual assertion for pleading purposes. *See* Mar. 28, 2022 Hearing at 11:33:48-36:04; *see* First Amended Compl. ¶23. Finally, the statements of European investigators amount to legal conclusions premised on British and German legal frameworks which may or may not be consistent with the legal, procedural and evidentiary requirements applicable in the United States. *See* Mar. 28, 2022 Hearing at 11:33:48-36:04; *see* First Amended Compl. ¶22.

Plaintiff argues in the instant motion that the factual allegations "are indistinguishable from those found to pass muster in the substantively identical private case against Amazon in federal court, *Frame-Wilson v. Amazon, Inc.*, No. 2:20-CV-00424-RAJ, 2022 WL 741878, at *10 (W.D. Wash. Mar. 11, 2022) ("*Frame-Wilson*")." Pl. Mot. at 2. A review of the *Frame-Wilson*

decision does not support the District's contention. Specifically, the allegations in the *Frame-Wilson* Amended Complaint directly quote language from a policy allegedly stating that "any single product or multiple products packages must have a price that is equal to or lower than the price of the same item being sold by the seller on other sites or virtual marketplaces." *Frame-Wilson*, Dkt. #15 ¶7. In contrast, the FPP here contains different language regarding "significantly higher" prices and makes no mention of setting a pricing floor. Thus, the allegations in Count I do not satisfy the plausibility standard required to survive a motion to dismiss under *Twombly* and *Iqbal*.

The Court did not analyze Counts II, III, and IV during the hearing on March 18, 2022 because each claim requires allegations of anti-competitive policies and effects. The claims were dismissed because that condition had not been met. However, for the sake of thoroughness, those pointes are addressed below.

B. Factual Allegations in the Complaint

Plaintiff argues that the Court failed to accept as true the "detailed" factual allegations of anticompetitive effects described in the Complaint. The District misrepresents the ruling it continues to dispute. The problem with the Complaint was that the District recited conclusory statements while failing to identify information which supported the conclusions it reached. The mere repetition of conclusions does not convert conclusions into facts. Nevertheless, the Court finds that all claims should be dismissed due to insufficient factual allegations beyond the failure to allege anticompetitive effects.

(2) Count II

Plaintiff's Count II alleges Agreements in Restraint of Trade (MMA) In Violation of D.C. Code §28-4502. *See* First Amended Compl. Plaintiff alleges that Defendant's Minimum

Margin Agreement ("MMA") are agreements with First-Party Sellers ("FPSs"). Plaintiff explains that FPSs "sell their products to Amazon to sell, either as its own brand or otherwise, as a retailer through its online marketplace." *Id.* ¶11. Plaintiff asserts that the MMA is an agreement "that the FPS guarantees Amazon a certain minimum profit when Amazon sells the products it purchased from the FPS on Amazon's online marketplace." *Id.* Plaintiff points out that if Defendant sells an FPS product at a lower price than would garner the agreed-upon minimum profit, "the FPS must compensate Amazon for the difference," which "can at times result in a FPS incurring millions of dollars in "true up" costs to Amazon." *Id.* Effectively, Plaintiff claims that the MMA incentivizes FPS to "maintain higher prices on other online marketplaces," and "FPSs have raised their prices to competing online marketplaces to prompt the maintenance of higher prices on those marketplaces and even asked those marketplaces to raise prices to online consumers to avoid triggering Amazon's minimum margin protection." *Id.* Plaintiff contends that the "MMA results in reduced competition among online marketplaces and higher prices to consumers." *Id.*

Although Plaintiff's previous oral arguments and instant motion repeatedly assert that the First Amended Complaint is replete with "detailed factual allegations," **the Court could not find (1) the name of any TPS or FPS; (2) the name of any TPS or FPS sale item: (3) the price point for any TPS or PFS item, on either Defendant's marketplace or another online marketplace; or (4) any language of warning from Defendant to a TPS or FPS mentioned in, or appended to, the complaint.** *See* Mar. 18, 2022 Hearing at 11:24:43-57 ("We also have detailed factual allegations that those sanctions and those warnings by Amazon have prompted TPSs to raise prices on those other vehicles."); *id.* at 11:25:31-56 ("We have detailed factual allegations of not only a written agreement, but a written agreement that is implemented in a way

that creates a price restraint that is clearly anticompetitive. . . At the very least, the detailed factual allegations that we have supplied entitle us to discovery."); *id.* at 11:24:18-35("We have detailed factual allegations that TPSs have received sanctions based on any lower price on any other vehicle in the marketplace, not even anything that is significantly lower, but anything that is lower period"). The District simply repeated vague conclusion after vague conclusion devoid of facts to support the vague conclusions it repeatedly stated.

As noted in the Defendant's Opposition, the First Amended Complaint "contained no allegation that any specific product was available at a supra-competitive price in Amazon's store, or in any competing retailer's store, as a result of the parity provision, Fair Pricing Policy, or margin agreements." Def. Opp'n at 3. Further, Plaintiff "failed to plead that any individual wholesaler supplier had the market power to require major retail competitors—e.g., Walmart, Costco, and Target—to raise their retail prices or refrain from matching Amazon's prices." *Id.*

The Court agrees with Defendant, and finds that where Plaintiff *did* name specific products, its assertions were vague and conclusory. First, Plaintiff states that "Amazon and TPS compete to sell certain products directly to consumers (*e.g.*, Amazon sells its own brand of batteries against TPSs who sell Duracell and Energizer batteries on Amazon's and other online marketplaces)." First Amended Compl. ¶7. Second, Plaintiff states that "Amazon sells its own brand of batteries in competition with TPSs that sell their own batteries through Amazon's and other online marketplaces." *Id.* ¶66. "Similarly, Amazon also sells its own brand of mattresses, light bulbs, cookware, computer accessories, luggage, exercise equipment, and motor oil in competition with TPSs." *Id.* ¶67. Plaintiff does not name the TPS allegedly selling these items, does not state on which other online marketplace these items are being sold, and does not even describe the price differentials for the items.

In contrast, the *Frame-Wilson* Amended Complaint provides numerous examples of the detailed factual allegations in comparison to the insufficient allegations made here:

> For example, Amazon competes with third-party seller Adorama, not only when it sells on the Amazon.com platform, but also when Adorama sells on its own website and through Walmart.com, eBay, and Newegg. In keeping with the previous example, when Adorama prices an Apple watch for sale on the Amazon.com platform, it must take into account the seller fees associated with Amazon's platform. Even though it can sell the same watches profitably at a lower price on other platforms, Adorama must raise the price of these watches on Walmart.com, eBay, Newegg, and its own website to comply with Amazon's price constraint.

Frame-Wilson, Dkt. #15 ¶9. Another instance reads, "Amazon third-party seller Molson Hart reports that a $150 item sold on Amazon would make his company the same profit as an item sold for $37 less on his company website." *Id.* ¶12. The seller's company website is then quoted as saying,

> We designed, manufactured, imported, stores, shipped the item, and then we did customer service. Amazon hosted some images, swiped a credit card, and for $40 for a $150 toy.
> This is a core problem. Were it not for Amazon, this item would be $40 cheaper. And this is how Amazon's dominance of the industry hurts consumers.

Id.

The FPP in this case does not include analogous language. Similarly, the allegations made in this case do not contain comparable assertions. In fact, the FPP here actually contradicts the language the District ascribes to it, rendering the complaint vague and conclusory.

(2) Counts III and IV

Plaintiff's Count III alleges Illegal Maintenance of Monopoly in Violation of D.C. Code § 28-4503, and Plaintiff's Count IV alleges Attempted Monopolization in Violation of D.C. Code § 28-4503. *See* First Amended Compl. Section 28-4503 states, "[i]t shall be unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person

or persons to monopolize any part of trade or commerce, all or any part of which is in the District of Columbia."

In support of Count III, Plaintiff alleges that Defendant "has possessed monopoly power among online marketplaces in the United States," that the "monopoly power is protected though barriers to entry," and that Defendant has "willfully maintained and enhanced its market power through its anticompetitive and exclusionary conduct." First Amended Compl. ¶¶85, 86, 87. "Through Amazon's agreements with TPSs and FPSs to price their products at artificially high levels on other online marketplaces, Amazon forecloses its online marketplace competitors' . . . ability to compete and gain market share," resultantly harming "consumers, TPSs, FPSs, and competition in the Disrict." *Id.* ¶¶88, 89.

At the hearing, Plaintiff acknowledged the existence of competitive online marketplaces from strong corporate entities such as Walmart, Target and eBay. Still, it quibbled with the percentage of the online market which Amazon.com controls in comparison to its competitors. However, merely controlling a dominant share of the market does not satisfy pleading requirements for anti-trust actions, particularly in pandemic times when online delivery sales have increased. In any event, sellers are free to migrate to other online platforms as market dynamics continue to unfold. This possibility undercuts arguments that probable allegations satisfy the plausibility standard for pleading purposes.

Finally, in support of Count IV, Plaintiff alleges that "Amazon accounts for between 50-70% of all online sales," and has "engaged in anti-competitive conduct, including through its institution, implementation, and enforcement of its MFNs and MMAs." *Id.* ¶¶92, 93. Plaintiff concludes that "there is a dangerous possibility that Amazon will be successful in achieving its goal of obtaining monopoly power among online marketplaces," and that its anti-competitive

conduct has directly and proximately harmed District Residents. *Id.* ¶¶94, 95. This statement is speculative and lacks sufficient factual information to satisfy the plausibility requirement. Indeed, it represents an admission that thirty to fifty percent of the market is beyond Amazon's control and undercuts the plausible conclusion that Amazon is liable for monopolistic practices.

In sum, Plaintiff's complaint provides repeated and conclusory statements devoid of factual information to support its claims of anticompetitive conduct and harm. Therefore, the request to reconsider dismissal of Counts III and IV is denied.

Leave to Amend Complaint

I. Legal Standard

D.C. Super. Ct. Civ. R. 15(a) provides that a party "may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or 21 days after service of a motion under 12(b). D.C. Super. Ct. Civ. R. 15(a)(1)(A)-(B). Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party… the court should freely give leave when justice so requires." *Id.* at 15(a)(3). In determining whether "justice so requires," the Court considers the following non-exhaustive list of factors: "(1) the number of requests to amend; (2) the length of time that the trial has been pending; (3) the presence of bad faith or dilatory reasons for the request; (4) the merit of the proffered amended pleading; and (5) any prejudice to the non-moving party." *See Johnson v. Fairfax Vill. Condo. IV Unit Owners Ass'n.*, 641 A.2d 495, 501 (D.C. 1994) (internal citations omitted).

II. Discussion

Plaintiff moves for leave to amend the First Amended Complaint to add revisions for claims previously dismissed on March 18, 2022, and for which a motion to reconsider is being denied here. "A dismissal pursuant to Rule 12(b)(6) is a resolution on the merits and is

ordinarily prejudicial." *District of Columbia v. Precision Contr. Solutions, LP*, No. 2019 CA 005047 B, 2020 D.C. Super. LEXIS 31, at *12 (D.C. Super. Ct. Jun. 25, 2020) (Park, J.).

Plaintiff's First Amended Complaint was dismissed with prejudice pursuant to D.C. Super. Ct. Civ. R. 12(b)(6). *See* Mar. 18, 2022 Hearing. Since a judgment on the merits as to Counts I, II, III, and IV has issued, and been affirmed here, Plaintiff may not amend the First Amended Complaint to add the additional of modified claims. For these reasons, the motion to file an amended complaint is denied.

Written Order

I. Legal Standard

D.C. Super. Ct. Civ. R. 58 states that "[e]very judgment and amended judgment must be set out in a separate document, but a separate document is not required" in certain circumstances. D.C. Super. Ct. Civ. R. 58(a). For example, an order is not required for judgment under Rule 50(b); to amend or make additional findings under Rule 52(b); for attorney's fees under Rule 54; for a new trial, or to alter or amend the judgment, under Rule 59; or for relief under Rule 60. D.C. Super. Ct. Civ. R. 58(a)(1)-(5).

II. Discussion

The instant Order provides extensive explanation on the Court's March 18, 2022 ruling. Therefore, the request for a written order is moot.

Accordingly, it is this 1st day of August 2022, hereby:

ORDERED that Plaintiff's Opposed Motion for Reconsideration, or in the Alternative, For Leave to Amend the Complaint or for a Written Order of Decision is **DENIED**.

IT IS SO ORDERED.

Honorable Hiram Puig-Lugo
Associate Judge
Signed in Chambers

Copies via CaseFileXpress to all counsel of record.