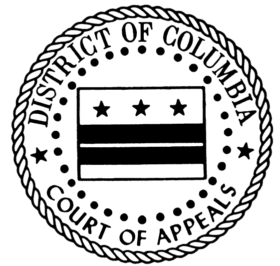


Clerk of the Court
Received 01/23/2023 05:32 PM
Filed 01/23/2023 05:32 PM

No. 22-CV-657

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT,

v.

AMAZON.COM, INC.,
APPELLEE.

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

**BRIEF FOR APPELLANT**

BRIAN L. SCHWALB
Attorney General for the District of Columbia

*CAROLINE S. VAN ZILE
Solicitor General

GRAHAM E. PHILLIPS
Deputy Solicitor General

JEREMY R. GIRTON
Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-2029
jeremy.girton@dc.gov

*Counsel expected to argue

## TABLE OF CONTENTS

INTRODUCTION ..... 1

STATEMENT OF THE ISSUES ..... 4

STATEMENT OF THE CASE ..... 4

STATEMENT OF FACTS ..... 5

1. Amazon's Contracts With Its Sellers Regarding Price ..... 5

2. The District Sues To Enjoin Amazon's Anticompetitive Agreements ..... 11

3. The Superior Court Orally Dismisses The District's Lawsuit ..... 12

4. The Superior Court Denies Reconsideration ..... 15

STANDARD OF REVIEW ..... 18

SUMMARY OF ARGUMENT ..... 19

ARGUMENT ..... 21

I. The District Adequately Pleaded That Amazon's Contracts Are Unreasonable Restraints Of Trade ..... 21

A. The first amended complaint alleges that Amazon executes written contracts with sellers that are anticompetitive ..... 23

1. The Price Parity Provision, Fair Pricing Policy, and minimum margin agreements are all express, written contracts ..... 24

2. The District plausibly alleged that Amazon's contracts with third-party sellers and suppliers are anticompetitive ..... 25

a. The District plausibly alleged that the MFNs fail the rule of reason ..... 26

b. Amazon's MFNs are horizontal pricing agreements and thus *per se* illegal .......................32

c. The District plausibly alleged that the minimum margin agreements fail the rule of reason.................................................................33

B. The Superior Court erred by conflating the two elements of a restraint-of-trade claim and ignoring the District's factual allegations ...................................................................34

1. *Twombly*'s plausibility discussion has no application to this case..................................................35

2. The first amended complaint contains factual allegations that, if accepted as true, describe anticompetitive effects...................................................37

II. The District Adequately Pleaded That Amazon Has Established Or Attempted To Establish A Monopoly ...........................................44

III. The Superior Court Abused Its Discretion In Denying The District Leave To Amend The Complaint.........................................47

CONCLUSION ........................................................................................50

## TABLE OF AUTHORITIES*

*Cases*


*Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171 (9th Cir. 2016)............ 22

*Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010) ......................... 22

*Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332 (1982)................................. 37

**Ashcroft v. Iqbal*, 556 U.S. 662 (2009)........................................ 14, 15, 35, 37, 41

*Associated Radio Serv. Co. v. Page Airways, Inc.*,
624 F.2d 1342 (5th Cir. 1980) ........................................................................ 45

**Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)........... 15, 24, 35, 36, 37, 41

*Bell v. First Invs. Servicing Corp.*, 256 A.3d 246 (D.C. 2021) ............................. 18

*Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*,
651 F.2d 122 (2d Cir. 1981) .......................................................................... 45

*Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) ................................. 27, 29

*Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) ............................. 22

*Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).................................................. 27

*Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980)............................... 32, 37

*Chao v. Rivendell Woods, Inc.*, 415 F.3d 342 (4th Cir. 2005)............................... 41

*Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132 (D.C. 2021)............................... 5

*Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984)............................. 32

*Crowley v. N. Am. Telecomms. Ass'n*, 691 A.2d 1169 (D.C. 1997)........... 19, 47, 48

*CSR Ltd. v. Fed. Ins. Co.*, 40 F. Supp. 2d 559 (D.N.J. 1998)................................ 26


---

* Authorities upon which we chiefly rely are marked with asterisks.

*Distance Learning Co. v. Maynard*,
No. 19-cv-03801, 2020 WL 2995529 (N.D. Cal. June 4, 2020) ........................ 28

*Erickson v. Pardus*, 551 U.S. 89 (2007) ................................................................ 41

*Eskofot A/S v. E.I. Du Pont De Nemours & Co.*,
872 F. Supp. 81 (S.D.N.Y. 1995) ..................................................................... 24

*Firestone v. Firestone*, 76 F.3d 1205 (D.C. Cir. 1996) .......................................... 49

*Foman v. Davis*, 371 U.S. 178 (1962) .............................................................. 49, 50

**Frame-Wilson v. Amazon.com, Inc.*,
591 F. Supp. 3d 975 (W.D. Wash. 2022) .......... 13, 14, 15, 28, 31, 32, 37, 40, 42

*FTC v. AbbVie Inc.*, 976 F.3d 327 (3d Cir. 2020) ................................................. 45

*FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) .......................... 28

*Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566 (D.C. 2011) ............... 49

*In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003)........................ 33

*In re High-Tech Emp. Antitrust Litig.*,
856 F. Supp. 2d 1103 (N.D. Cal. 2012)............................................................ 26

*In re Tyree*, 493 A.2d 314 (D.C. 1985)................................................................... 47

*Iodice v. United States*, 289 F.3d 270 (4th Cir. 2002)............................................ 41

*Laber v. Harvey*, 438 F.3d 404 (4th Cir. 2006) ...................................................... 49

*Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*,
762 F.3d 1114 (10th Cir. 2014) ....................................................................... 45

*Lorain J. Co. v. United States*, 342 U.S. 143 (1951) ............................................. 42

*Moehrl v. Nat'l Ass'n of Realtors*, 492 F. Supp. 3d 768 (N.D. Ill. 2020) .............. 26

*Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)............................. 22

*Moradi v. Protas, Kay, Spivok & Protas, Chartered*,
494 A.2d 1329 (D.C. 1985) .......................................................................... 48

*Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co.*,
838 F.3d 421 (3d Cir. 2016) ........................................................................ 45

*NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) ............................ 32

*Newcal Indus., Inc. v. Ikon Off.*, 513 F.3d 1038 (9th Cir. 2008) ............................ 27

*Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*,
472 U.S. 284 (1985)...................................................................................... 22

*Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) ............................... 23, 26, 29, 31

*Origami Owl LLC v. Mayo*,
No. CV-15-00110, 2015 WL 4747101 (D. Ariz. Aug. 7, 2015) ....................... 28

*Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990)............................................ 37

*PBTM LLC v. Football Nw., LLC*, 511 F. Supp. 3d 1158 (W.D. Wash. 2021)...... 26

*PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824 (9th Cir. 2022)......... 26, 27

*Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962)................................... 18

**Robertson v. Sea Pines Real Est. Cos.*,
679 F.3d 278 (4th Cir. 2012) .................................................... 23, 24, 36, 41, 42

*SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015)................ 19

*Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).................................... 44

*Stancil v. First Mount Vernon Indus. Loan Ass'n*, 131 A.3d 867 (D.C. 2014)...... 39

*Starr v. Sony BMG Music Ent.*, 592 F.3d 314 (2d Cir. 2010).......................... 38, 39

*State Oil Co. v. Khan*, 522 U.S. 3 (1997) ............................................................. 21

*Swarthmore Radiation Oncology, Inc. v. Lapes*,
812 F. Supp. 517 (E.D. Pa. 1992)................................................................... 26

*Toscano v. Pro. Golfers Ass'n*, 258 F.3d 978 (9th Cir. 2001) ............................... 25

*U.S. Bank Tr., N.A. v. Omid Land Grp., LLC*, 279 A.3d 374 (D.C. 2022)....... 48, 50

*United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956)................ 45

*United States v. Grinnell Corp.*, 384 U.S. 563 (1966)..................................... 44, 46

*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) ............................ 34

*Vazquez-Ramos v. Triple-S Salud, Inc.*, 55 F.4th 286 (1st Cir. 2022).................... 24

*W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010) ... 22, 24

*WAKA LLC v. DC Kickball*, 517 F. Supp. 2d 245 (D.D.C. 2007).......................... 19

*Wallace v. Warehouse Emps. Union No. 730*, 482 A.2d 801 (D.C. 1984)............. 49

*Williams v. Citigroup Inc.*, 659 F.3d 208 (2d Cir. 2011)....................................... 50

*Woods v. District of Columbia*, 63 A.3d 551 (D.C. 2013) .................................... 18

*ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012) ............................ 38

*Statutes and Court Rules*

*D.C. Code § 28-4502 ......................................... 1, 4, 11, 19, 20, 21, 22, 24, 25, 34

*D.C. Code § 28-4503 ..................................................................... 2, 4, 12, 21, 44

D.C. Code § 28-4515 ........................................................................................ 21

15 U.S.C. § 1 ..................................................................................................... 21

15 U.S.C. § 2 ..................................................................................................... 44

Super. Ct. Civ. R. 15 ................................................................................ 47, 48, 49

*Other*

Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 Yale L.J. 2176 (2018) ................................................ 29, 42

Ben Bloodstein, *Amazon and Platform Antitrust*, 88 Fordham L. Rev. 187 (2019) ........................................................................ 29

Maj. Staff of H. Subcommittee on Antitrust, *Investigation of Competition in Digital Markets* (July 2022), https://bit.ly/3GFVcLQ................................. 40, 43

Molson Hart, *How Amazon's Business Practices Harm American Consumers*, Medium (Jul. 18, 2019), https://bit.ly/3WK6d4f..................... 30, 31

*VIAHART Brain Flakes*, Amazon.com, https://amzn.to/3GBEuNs ....................... 30

*VIAHART Brain Flakes*, Viahart.com, https://bit.ly/3WYTri4 .............................. 30

*VIAHART Brain Flakes*, Walmart.com, https://bit.ly/3QdzfXN .............................30

## INTRODUCTION

Amazon is the largest internet retail marketplace in the United States, controlling 50% to 70% of all online retail purchases. Amazon wields its enormous market power by requiring its millions of third-party sellers to agree that the listed price on Amazon for any product will be the lowest available, agreements known as most-favored-nations clauses or MFNs. While at first it might seem like MFNs would lower prices for consumers, they in fact do the opposite. Because Amazon has much higher fees than other marketplaces, sellers could profitably charge a lower price on competing websites were it not for Amazon's MFNs. The MFNs establish a price floor tied to Amazon's supracompetitive price, insulating Amazon from competition and harming consumers.

Amazon also buys products wholesale that it then sells retail. Amazon requires its suppliers to agree to "minimum margin agreements," contracts that require the supplier to make up the difference if Amazon fails to realize a particular profit margin on its retail products. These agreements incentivize suppliers to keep the sales price of their goods high on competing online marketplaces like Target and Walmart, to avoid having to pay Amazon enormous true-up fees. The result, much like with Amazon's MFNs, is higher prices across the board.

Like the federal Sherman Act, District law prohibits anticompetitive conduct. D.C. Code § 28-4502 bans agreements that unreasonably restrain trade and create

higher prices for consumers, and D.C. Code § 28-4503 prohibits creating or attempting to create a monopoly. Amazon's conduct violates both prohibitions. Its MFNs and minimum margin agreements are written contracts that stifle competition and raise prices for consumers. And those agreements have helped Amazon create and maintain a monopoly over online retail sales. The District of Columbia accordingly sued to stop Amazon's anticompetitive conduct.

But the Superior Court perfunctorily dismissed the District's first amended complaint, first in a truncated oral ruling and then in a written denial of a motion to reconsider. Those decisions contain two principal errors.

First, the Superior Court misread caselaw related to what is necessary to allege an *agreement* (which Amazon's written contracts satisfy) and applied it to the *unreasonableness* prong of a restraint-of-trade claim. The court appeared to reason that a written agreement to restrain trade cannot be anticompetitive if it was economically rational for the parties involved. That is not the law. Many agreements are prohibited by antitrust law precisely *because* they are highly beneficial to the conspirators but detrimental to the market and consumers. The Superior Court's ruling conflicts with settled antitrust jurisprudence prohibiting agreements that, even if rational from the conspirators' perspective, unreasonably restrain trade.

Second, the Superior Court ignored or discounted the District's well-pleaded factual allegations. Although the District carefully described each of Amazon's contracts and how they raise consumer prices, the Superior Court waved off these factual allegations as mere conclusions, faulting the District for not naming particular sellers who raised their prices on particular products. But an antitrust plaintiff need not include that level of detail to plausibly allege anticompetitive effects, particularly here where the District logically explained how Amazon's agreements work and where merchants face real concerns of retaliation if they publicly criticize Amazon's behavior.

Nonetheless, faced with the Superior Court's ruling, the District offered a proposed second amended complaint that does include details about particular sellers and how they raised their prices as a result of Amazon's agreements. The Superior Court refused to consider this amended pleading without conducting any analysis of whether the proposed amendments would make the complaint viable. The court's ruling appeared to be based on a mistaken view that it could not grant a motion to amend following dismissal. That is incorrect; a court can (and should) grant a post-judgment motion to amend if the proposed amendment would be viable. The court's failure to consider the factors relevant to amendment was an abuse of discretion.

## STATEMENT OF THE ISSUES

1. Whether the Superior Court erred in dismissing the District's Section 28-4502 claims alleging that Amazon enters into written contracts with its third-party sellers and suppliers that raise prices across online marketplaces, harm competition, and reduce consumer choice.

2. Whether the Superior Court erred in dismissing the District's Section 28-4503 claims alleging that Amazon's anticompetitive conduct insulates its monopoly power or threatens to create a monopoly over online marketplaces.

3. Whether the Superior Court abused its discretion when it refused to allow the District to amend its complaint without analyzing any of the factors for permissive amendment.

## STATEMENT OF THE CASE

The District filed its original complaint on May 25, 2021 and its first amended complaint on September 10, 2021. JA 1, 3, 10-44. Amazon moved to dismiss, and the Superior Court orally granted that motion on March 18, 2022. JA 45-108, 212-54. On April 14, 2022, the District moved for reconsideration, or, in the alternative, for leave to amend the complaint or a written order of decision. JA 255-317. The Superior Court denied the District's motion on August 1, 2022. JA 361-78. On August 25, 2022, the District timely appealed. JA 379-81.

## STATEMENT OF FACTS

Unless otherwise noted, the following facts are drawn from the District's first amended complaint and must be presumed true on a motion to dismiss. *Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 138 (D.C. 2021).

### 1. Amazon's Contracts With Its Sellers Regarding Price.

Amazon is the largest online retail marketplace in the United States. JA 10-11, 16, 23, 28-29. When shopping online, the vast majority of Americans turn to Amazon first. JA 11, 16-17. Millions of third-party sellers sell products on Amazon; its next largest competitors, Walmart.com and eBay, have only a fraction that many sellers. JA 11, 16, 23, 28-29, 38. It is estimated that a staggering 50-70% of all online retail sales are made through Amazon. JA 10-11, 16, 23, 28-29, 38. By every conceivable measure—consumer visits, products, sellers, sales, or profits—Amazon is the dominant online retail marketplace. JA 11, 16, 23, 28-29, 38.

As an online marketplace, Amazon differs fundamentally from a physical store, and neither consumers nor economists consider online and physical marketplaces to be substitutes. JA 24-27. Unlike a brick-and-mortar store, online retailers have no geographic location, no limits on hours of service, and generally lower overhead and advertising costs. JA 24-27. Even if some of the same products are available on Amazon and in physical stores, the entire consumer experience of shopping online differs from that of shopping in person. JA 25-26.

Amazon generates revenue through the fees and commissions that it charges to its third-party sellers for using its website, which can be as high as 40% of the product's total retail price. JA 12, 20. Amazon's commissions and fees generated over $80 billion in 2020 alone, making up about 21% of its total corporate revenue. JA 22. Amazon's fees are substantially higher than those of its rivals. JA 21. Unlike Amazon, Walmart.com charges no setup, subscription, or listing fees, only a referral fee on each sale, and significantly lower fulfillment and delivery fees. JA 21. eBay generally charges lower product listing fees and commissions than Amazon. JA 21. Despite its higher fees, Amazon has seen little seller attrition, a testament to its market power. JA 21-22, 31.

Amazon also generates revenue through direct retail sales. Amazon competes directly against more than half of its third-party sellers by offering many products (e.g., batteries, mattresses, lightbulbs, cookware, computer accessories, luggage, exercise equipment, and motor oil, among others), under its own brand names or otherwise. JA 10-11, 23-24, 33, 36. In these product submarkets, Amazon is a retailer in direct competition with the third-party sellers who use Amazon. Amazon thus competes for web traffic and sales against other online multi-seller and single-seller marketplaces, including its third-party sellers' own websites, and against third-party sellers on the Amazon platform itself. JA 10, 23-24.

Amazon fiercely protects its market dominance, including by engaging in anticompetitive practices. JA 11-12. Until at least 2019, Amazon's contracts with its third-party sellers in the United States included a most-favored-nation clause ("MFN") called the "Price Parity Provision." JA 12. This provision expressly prohibited sellers from offering their products through other online marketplaces, including their own websites, at a lower price or on better terms than offered on Amazon's marketplace. JA 12-13. The provision ensured that the consumer price on Amazon for any particular product (which incorporates, and enables the maintenance of, Amazon's high fees and commissions) would be the lowest price for that product online. JA 12. In other words, even if a seller could profitably offer consumers a lower price for a particular product on another marketplace like Walmart.com or its own website, the Price Parity Provision prohibited it from doing so. JA 12.

Under intense scrutiny from regulators, Amazon removed the Price Parity Provision from its U.S. contracts in 2019 but replaced the clause with an effectively identical substitute, the "Fair Pricing Policy." JA 13. Under the Fair Pricing Policy, Amazon may impose sanctions on a seller who engages in any pricing practice that Amazon determines "harms consumer trust," which can include "setting a price on a product" on Amazon "that is significantly higher than recent prices offered on or

off Amazon." JA 17. Sanctions for violating the policy can include cancellation of listings or even banishment of the seller from the Amazon marketplace. JA 17.

The only ostensible difference between the two MFNs is that the Price Parity Provision prohibited sellers from setting a "lower" price on other marketplaces, whereas the Fair Pricing Policy inverts the formula and prohibits sellers from setting a "significantly higher" price on Amazon compared to other marketplaces. But in practice the two MFNs operate in the same way. JA 18, 27. Amazon aggressively enforces the Fair Pricing Policy against sellers who offer products at any price lower than what is offered on Amazon. JA 18. As the policy explicitly acknowledges, "Amazon regularly monitors the prices of items on [its] marketplace . . . and compares them with other prices available to [its] customers." JA 17-18. If Amazon discovers that a seller is offering the same product (or even one that is merely similar) through another channel for less than it is charging on Amazon, it will immediately sanction the seller under the Fair Pricing Policy. JA 19. Sellers "report regularly receiving these types of alerts," and "regularly increase their prices on other online marketplaces in order to avoid these sanctions." JA 18.[1]

---

[1] As the complaint explains in detail, one method of punishing third-party sellers who violate the Fair Pricing Policy is by restricting access to the "Buy Box," the white box on the right side of the website containing the familiar "Add to Cart" and "Buy Now" buttons. JA 20. If a seller violates the policy, they can become ineligible to be the seller listed in the Buy Box and instead relegated to a far less

The Price Parity Provision and Fair Pricing Policy restrict competition and hurt consumers by establishing a price floor tied to the Amazon price. Other online marketplaces cannot effectively compete with Amazon by lowering their fees and commissions because doing so would have no effect on the final consumer price for that product, which is pegged to the Amazon price. JA 12. This artificially raises the price of goods to consumers across the internet above competitive levels and enables Amazon to charge sellers higher commissions and fees than it could in a truly competitive market. JA 12, 14, 27. And by inflating prices for particular products across all online marketplaces, the MFNs reduce price competition on Amazon's own retail offerings that directly compete with those products. JA 13, 27.

To illustrate how the MFNs operate in practice, imagine a product that costs a seller $10.00 to produce, meaning it could profitably sell the product for $10.01 on its own website. Selling the product on Amazon, however, requires the seller to incur $4.00 in commissions and fees, so it must charge at least $14.01. Because of the MFNs, the seller must charge at least $14.01 for the product across *all* online marketplaces. This means an Amazon rival like Walmart.com cannot effectively

---

prominent location further down the product page. JA 18. Loss of access to the Buy Box is critical because 82% of all sales are made through the Buy Box and most consumers will not even see the other offers located further down the page. JA 21. The item selected for the Buy Box is frequently not the lowest priced; about three-quarters of the time Amazon selects the product that will generate the most fees for Amazon rather than the one that is the best deal for consumers. JA 21.

draw consumers away by lowering its fees (say, to $2.00 instead of Amazon's $4.00) because that lower fee does not result in a lower consumer price. The result is higher prices and less competition among marketplaces. And if the good is a type that Amazon sells itself, it can safely charge a price that appears to the consumer to be competitive (say, $14.00) but is in reality higher than what a truly competitive price would be absent Amazon's MFNs.

Another of Amazon's anticompetitive practices is its minimum margin agreements that it executes with wholesalers and manufacturers (sometimes called "first-party sellers") who supply products to Amazon for eventual resale. JA 22. Under the minimum margin agreement, suppliers must guarantee that Amazon will recoup a minimum profit margin on the resale of the products; if a sale fails to generate the minimum margin, the supplier must reimburse Amazon the difference. JA 22-23. The typical scenario in which the minimum margin agreement operates is if Amazon discovers the product is available for sale on another online marketplace at a lower price, Amazon will lower its price to match, and any corresponding loss in profit margin will be borne by the supplier. JA 23. This incentivizes suppliers to keep prices high across competing marketplaces (or not offer products to other online marketplaces at all) to avoid owing millions of dollars to Amazon in "true up" payments. JA 23. The complaint alleges that suppliers "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." JA 14. This price inflation further insulates Amazon from competition. JA 23, 27-28.

These anticompetitive agreements directly harm consumers by forcing them to pay higher prices across online marketplaces. JA 34-35. The MFNs and minimum margin agreements also entrench and maintain Amazon's monopoly over online marketplaces, enabling Amazon to charge higher fees and commissions than it would in a truly competitive environment. JA 34-36. They also reduce the incentive for competing online marketplaces to attract sellers through lower fees or greater innovation. JA 34-36.

**2. The District Sues To Enjoin Amazon's Anticompetitive Agreements.**

In May 2021, the District sued Amazon to enjoin its anticompetitive agreements that unfairly raise prices for consumers. JA 1. After Amazon moved to dismiss the complaint, the District filed its first amended complaint in September 2021. JA 3. The District alleged four violations of the D.C. Antitrust Act: First, Amazon's MFNs (the Price Parity Provision and Fair Pricing Policy) establish Amazon's price as the price floor across online marketplaces, restraining competition in violation of D.C. Code § 28-4502. JA 36-37. Second, Amazon's minimum margin agreements also violate Section 28-4502 by incentivizing

suppliers to keep prices higher on (or not sell to) other online marketplaces to avoid owing "true up" payments to Amazon. JA 37-38. Third, by engaging in these anticompetitive practices, Amazon has illegally maintained a monopoly in violation of D.C. Code § 28-4503. JA 38-39. Fourth, if Amazon has not already obtained monopoly power, its actions evidence an intent to create a monopoly in violation of Section 28-4503. JA 39-41. As relief, the District sought an injunction and a declaratory judgment against Amazon's anticompetitive acts, as well as equitable relief, civil penalties, and damages, as appropriate. JA 41-42.

**3. The Superior Court Orally Dismisses The District's Lawsuit.**

Amazon moved to dismiss the first amended complaint for failure to state a claim. JA 5. In its motion, Amazon acknowledged the existence of the Price Parity Provision, Fair Pricing Policy, and minimum margin agreements, but argued they were not anticompetitive. *See* JA 58-64. Amazon claimed that the agreements protect consumers from price gouging, despite the District's allegations that the policies result in higher consumer prices across all online marketplaces. JA 58-60. Amazon also argued that the District failed to include physical stores in its definition of the relevant market even though the District explained why physical stores are not substitutes for online marketplaces. JA 64-67. It also contended that the District failed to allege anticompetitive effects, dismissing the District's allegations of higher prices as "conclusory." JA 58-64. Finally, Amazon briefly argued that the

agreements did not qualify as concerted action because Amazon unilaterally set the terms of the agreements. JA 69.

Shortly after Amazon's motion was briefed, a federal district court in Washington state declined to dismiss federal and state antitrust claims against Amazon that challenge the same MFNs as the District's suit. *See Frame-Wilson v. Amazon.com, Inc.*, 591 F. Supp. 3d 975, 988-94 (W.D. Wash. 2022). The *Frame-Wilson* court treated as undisputed that Amazon's MFNs with sellers satisfied the "agreement" requirement of a restraint-of-trade claim. *See id.* at 984, 988. It held that the "ecommerce retail market" was a plausible market for antitrust purposes and that the plaintiffs had plausibly alleged that Amazon's MFNs create anticompetitive effects in that market. *Id.* at 988-92. Because Amazon's fees and commissions "are built into the product cost on the Amazon.com platform," requiring that price to be the lowest available effectively "requires sellers to add Amazon's fees to the cost of their products when they sell them on all external platforms." *Id.* at 991. It was thus plausible that Amazon's MFNs "raise the cost of products on external platforms that charge lower fees than Amazon" in violation of federal and state antitrust laws. *Id.*

The District notified the Superior Court of the *Frame-Wilson* decision and urged it to apply the same analysis to deny Amazon's motion to dismiss. JA 175-77.[2]

The Superior Court orally granted Amazon's motion to dismiss. The court acknowledged that the Fair Pricing Policy restricted sellers from setting a price on Amazon that is significantly higher than on other online marketplaces. JA 237 ("There are limits regarding higher prices."), 238 ("[T]he only limit is that they cannot set a price [on Amazon] that is significantly higher than recent prices offered on or off Amazon."). However, the court seemed to reason that this requirement did not operate as a price floor because the policy did not expressly "refer[] to a floor." JA 238. The court stated that it did not "agree" that prohibiting sellers from *raising* prices on Amazon by definition also prohibits sellers from *lowering* them on other marketplaces relative to Amazon's price. JA 239.

The court also acknowledged that there was "no dispute here that there was an agreement" between Amazon and its sellers, but nonetheless read the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp.*

---

[2] The *Frame-Wilson* court did dismiss the plaintiffs' Section 1 claim to the extent it pursued a *per se*, rather than rule-of-reason, theory. 591 F. Supp. 3d at 984-88. As the District explained in its notice of supplemental authority, this conclusion was premature since courts generally do not opine on the applicable theory at the pleadings stage. *See* JA 176-77; *infra* at 25-26. Moreover, the District's *per se* theory differed from that of the plaintiffs in *Frame-Wilson*, since the District alleges that Amazon is a horizontal competitor with its third-party sellers' own websites, which the *Frame-Wilson* plaintiffs did not allege. *See infra* at 32-33.

*v. Twombly*, 550 U.S. 544 (2007), to mean that an agreement is not anticompetitive if it "could be explained by lawful . . . unchoreographed free market behavior." JA 247-48. The court also dismissed as "conclusory" the District's allegations that these practices lead to higher prices. JA 251-52. The court did not address the Price Parity Provision or the minimum margin agreements, or the District's monopolization and attempted monopolization claims. Although the court acknowledged having received the *Frame-Wilson* decision, JA 217, it did not address the case in its ruling.

**4. The Superior Court Denies Reconsideration.**

The District moved for reconsideration, or in the alternative, for leave to file a second amended complaint or for a written order of decision. JA 255-77. In its motion, the District explained how the court had ignored dozens of allegations about anticompetitive effects caused by Amazon's agreements with its sellers, focusing instead on the absence of particular words like "price floor" in the Fair Pricing Policy. JA 262-73. Allegations that the agreements caused sellers to raise prices on competing online marketplaces are allegations of fact, not law, so they were entitled to the presumption of truth. JA 267. The District also explained how *Iqbal*'s discussion of "unchoreographed free market behavior" has no application to a case like this founded on express, written agreements, which by definition mean that the parties are not acting independently. JA 274-76.

In the alternative, the District sought leave to file a second amended complaint to add further allegations of anticompetitive effects flowing from Amazon's agreements. JA 276. In particular, the District proposed to add several specific examples of sellers who raised their prices on competing marketplaces to comply with the conditions imposed by Amazon. JA 289-90, 292-95. One seller explained that when a competing marketplace lowered the price of one of his products from $44.00 to $39.99, Amazon sanctioned him within minutes for violating the Fair Pricing Policy and he was forced to increase the sales price on the competing marketplace back to $44.00. JA 289-90. Another seller, toy manufacturer Viahart, explained that it "could reduce its price by 15%" when selling on its own website "and make roughly the same profit" but instead "must inflate the cost on its website to avoid" sanctions for violating Amazon's Fair Pricing Policy. JA 292-93. Sellers also explained how they have no choice but to list their products on Amazon because of its dominant market position. JA 293-94. The second amended complaint also added allegations from one of Amazon's suppliers that, due to the minimum margin agreements, "Amazon has asked him to ask [competing marketplaces Walmart and Target] to increase the prices they are charging" and that the supplier did so "in order to avoid true-up payments" under the minimum margin agreement. JA 295.

The District's motion was supported by the U.S. Department of Justice, which filed a statement of interest explaining that the Superior Court had misapplied

antitrust law in its oral ruling. JA 318-25. The United States noted that the Superior Court had "incorrectly blended" the two elements of a restraint-of-trade claim by applying caselaw about the concerted action element to the anticompetitive effects element. JA 320. Because the District challenged Amazon's written contracts with sellers and suppliers, "the restraint meets the 'concerted action' requirement" and there is no need for "further analysis." JA 321. Moreover, the United States explained that, contrary to the Superior Court's statements, whether a restraint is "explainable by lawful, unchoreographed behavior" is not "relevant to deciding [its] reasonableness." JA 323. The United States urged the court to reconsider its decision that, "[i]f left uncorrected, . . . could jeopardize the enforcement of antitrust law by improperly raising the bar on plaintiffs challenging anticompetitive contractual restraints." JA 321.

The Superior Court declined to reconsider its oral decision. JA 361-78. In its ruling, it again "rejected" the District's allegation that the MFNs in practice prohibit sellers from "setting lower prices on other online marketplaces." JA 368. It doubled down on its view that Amazon's agreements could not be unlawful because it "is equally likely the prices are the result of lawful, unchoreographed free-market behavior"—even though Amazon enters into express contracts that restrain what price sellers may set. JA 369-70. It also ignored the District's allegations of market power, hypothesizing that sellers "may simply choose not to sell on [Amazon's]

marketplace," contrary to the allegations that Amazon's market dominance makes that economically infeasible. JA 370. The court also repeated its criticism that the first amended complaint did not "name" any individual sellers or products affected by the challenged agreements. JA 372. Finally, the Superior Court rejected the District's contention that Amazon had created or threatened to create a monopoly because controlling 50-70% of the market means that "thirty to fifty percent of the market is beyond Amazon's control." JA 376.

The Superior Court acknowledged that the District had moved to file a second amended complaint to add more detailed allegations but concluded that the District "may not amend the First Amended Complaint" because the court had already dismissed it with prejudice. JA 377. The court refused to analyze any of the proposed amendments or whether they would cure any deficiencies it had identified.

On August 25, 2022, the District timely appealed. JA 379-81.

## STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss de novo, presuming the complaint's factual allegations to be true and construing them in the light most favorable to the plaintiff. *Bell v. First Invs. Servicing Corp.*, 256 A.3d 246, 251 (D.C. 2021). "To survive a motion to dismiss, a complaint must set forth sufficient facts to establish the elements of a legally cognizable claim." *Woods v. District of Columbia*, 63 A.3d 551, 552-53 (D.C. 2013). The Court reviews the denial of a

motion for leave to amend for an abuse of discretion. *Crowley v. N. Am. Telecomms. Ass'n*, 691 A.2d 1169, 1174 (D.C. 1997).

Courts caution against hasty dismissal of antitrust claims at the pleadings stage. Because "'the proof is largely in the hands of the [defendants],' dismissal procedures 'should be used sparingly in complex antitrust litigation' until the plaintiff is given ample opportunity for discovery." *WAKA LLC v. DC Kickball*, 517 F. Supp. 2d 245, 249 (D.D.C. 2007) (quoting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). Where trial courts have improperly applied a heightened pleading requirement to antitrust cases, "appellate courts have often been called upon to correct" the error, recognizing that it is not a court's task to determine whether a lawful explanation appears "more likely" from the facts of the complaint, but merely whether the plaintiff's explanation is plausible. *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015).

## SUMMARY OF ARGUMENT

The Superior Court erred in dismissing the District's first amended complaint, which plausibly alleges violations of the D.C. Antitrust Act, and it abused its discretion in refusing to consider the District's proposed second amended complaint.

1. The first amended complaint plausibly alleges that Amazon's MFNs and minimum margin agreements are agreements that unreasonably restrain trade in violation of Section 28-4502. There can be no reasonable dispute that these

agreements qualify as concerted action because they are express, written contracts. The District explained how those agreements in practice create anticompetitive effects. The MFNs violate the rule of reason because they cause higher consumer prices and restrict competition among online marketplaces. They are also illegal *per se* because Amazon is a horizontal competitor with its third-party sellers for sales and web traffic, and also a retail competitor within several product submarkets. Finally, Amazon's minimum margin agreements also fail the rule of reason because they lead to higher consumer prices both on and off Amazon.

In dismissing the first amended complaint, the Superior Court conflated the two elements of a Section 28-4502 claim and failed to credit the District's well-pleaded allegations of anticompetitive effects. It improperly applied language from cases about inferring concerted action through indirect evidence (which are inapposite here, where the agreements are express) to the issue of whether the agreements unreasonably restrain trade. In suggesting that agreements cannot be illegal if they are economically rational, the Superior Court's decision contradicts well-established principles of antitrust law. And the Superior Court's refusal to credit the District's factual allegations of higher prices and reduced competition amounts to the baseless imposition of a heightened pleading standard in antitrust cases.

2. The District also alleged violations of Section 28-4503. Among online marketplaces, Amazon already possesses monopoly power, or there is a dangerous probability that it soon will. That monopoly is maintained (or is being acquired) through anticompetitive conduct like Amazon's MFNs and minimum margin agreements. The Superior Court's dismissal of these claims, like its dismissal of the District's Section 28-4502 claims, failed to accept as true the District's well-pleaded factual allegations and drew unwarranted inferences in Amazon's favor.

3. The Superior Court's refusal to analyze the District's proposed second amended complaint was an abuse of discretion. The court appeared to view amendment as impossible following dismissal with prejudice, but that is incorrect. At a minimum, the Superior Court was obligated to analyze the factors that this Court has established for permissive amendment.

## ARGUMENT

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

D.C. Code § 28-4502 prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce" within the District of Columbia. Like Section 1 of the federal Sherman Act, 15 U.S.C. § 1, upon which it was modeled, this language is understood to "outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *see* D.C. Code § 28-4515 (instructing courts to use federal Sherman Act jurisprudence "as a guide" to interpreting the D.C. Antitrust

Act). To plead a violation of Section 28-4502, a plaintiff must allege "(1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016).

"The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 186 (2010). A plaintiff may establish that defendants acted in concert through either "direct or circumstantial evidence." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). "If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled." *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010).

Once an agreement is established, a plaintiff may prove that the agreement unreasonably restrains trade in one of two ways. Certain types of agreements—such as horizontal price restraints—are *per se* illegal because they "always or almost always tend to restrict competition and decrease output." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985)). All other arrangements are reviewed under the rule of reason, which requires "a fact-specific

assessment of market power and market structure" to determine whether the restraint creates anticompetitive effects that are "harmful to the consumer" or instead stimulates competition. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (internal quotation marks omitted). Because application of the rule of reason is fact-intensive, it is "best conducted with the benefit of discovery" rather than on a motion to dismiss. *Robertson v. Sea Pines Real Est. Cos.*, 679 F.3d 278, 292 (4th Cir. 2012).

### A. The first amended complaint alleges that Amazon executes written contracts with sellers that are anticompetitive.

The District alleged that Amazon makes two types of agreements that unreasonably restrain trade. First, through its MFNs (the Fair Pricing Policy, and formerly, the Price Parity Provision), third-party sellers agree not to charge a lower consumer price on other online marketplaces than they do on Amazon. This raises retail prices for specific products above what would otherwise be competitive because prices on all online marketplaces must reflect Amazon's fees and commissions, which are higher than those of its competitors. Second, through the minimum margin agreements, Amazon's suppliers agree to reimburse Amazon if Amazon does not realize a certain agreed-on profit for the product. These agreements incentivize suppliers to keep prices high on competing online marketplaces to avoid Amazon lowering its prices and realizing less profit. Because the first amended complaint alleges the existence of (1) express, written agreements

(2) that unreasonably restrain trade, either under the rule of reason or *per se*, it states plausible violations of the D.C. Antitrust Act.

#### 1. The Price Parity Provision, Fair Pricing Policy, and minimum margin agreements are all express, written contracts.

The challenged agreements here all qualify as "contract[s]." D.C. Code § 28-4502. The Fair Pricing Policy is part of the contract that third-party sellers must sign to use Amazon's marketplace, as was the Price Parity Provision until 2019. JA 12-14. Likewise, minimum margin agreements are written contracts between Amazon and its suppliers. JA 14. The first amended complaint quotes directly from these written agreements and includes extensive details about how they operate in practice to restrain competition and inflate consumer prices. JA 12-14, 17-36. These allegations of "direct evidence of an agreement" are more than adequate to plead that Amazon entered into a "contract" under Section 28-4502. *W. Penn*, 627 F.3d at 99; *see also Vazquez-Ramos v. Triple-S Salud, Inc.*, 55 F.4th 286 (1st Cir. 2022) (direct allegation of exclusive dealing arrangement plausibly alleged concerted action); *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81, 93 (S.D.N.Y. 1995) (direct allegation of "specific contracts" was sufficient to satisfy the concerted action prong). Because this is a challenge to Amazon's express written contracts—not a case seeking to infer an agreement through parallel activity, as in *Twombly*—there "is no . . . uncertainty here about the terms of the agreement, let alone whether one was made." *Robertson*, 679 F.3d at 289.

That Amazon dictates many of the terms of these agreements only demonstrates its market power; it does not suggest that the challenged conduct constitutes unilateral, rather than concerted, action. Cases like *Toscano v. Professional Golfers Association*, 258 F.3d 978 (9th Cir. 2001), are therefore inapposite. In *Toscano*, the Ninth Circuit held that sponsors of golf tournaments "did not commit to a common scheme to act in restraint of trade" when they signed agreements that incorporated by reference tournament conditions unilaterally set and enforced by the tour. *Id.* at 984. Agreeing to the tour's terms, the court reasoned, was no different than a buyer agreeing "to purchase products or provide a service under conditions set by the other party." *Id.* Unlike *Toscano*, sellers are not operating independently of the MFNs; the MFNs constrain how sellers can price their products on Amazon and on other, competing online marketplaces. Likewise, the minimum margin agreements are negotiated contracts between Amazon and its suppliers over how they will allocate the risk of price fluctuations. In both instances, the parties are agreeing to certain restraints regarding how the products will be priced, which is a classic example of a "contract . . . in restraint of trade or commerce." D.C. Code § 28-4502.

2. The District plausibly alleged that Amazon's contracts with third-party sellers and suppliers are anticompetitive.

In determining whether the District has plausibly stated a claim, the Court need not decide what mode of antitrust analysis will ultimately apply to the

challenged contracts. *See PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 837 (9th Cir. 2022). Federal courts routinely hold that it is appropriate to deny a motion to dismiss if the complaint states a plausible antitrust claim under any theory, leaving to "later stages in th[e] litigation" what framework to apply. *Id.*[3] Thus, even though the first amended complaint alleges that Amazon's contracts are illegal both *per se* and under the rule of reason, the case should be allowed to proceed to discovery so long as it states any plausible legal theory.

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

The District has plausibly alleged that the MFNs are anticompetitive under the rule of reason. To state a claim under the rule of reason, a plaintiff must allege "that the challenged restraint has a substantial anticompetitive effect that harms consumers," which can ultimately be proved using direct evidence such as "increased prices," or indirect evidence. *Am. Express*, 138 S. Ct. at 2284.[4]

---

[3] *See, e.g.*, *PBTM LLC v. Football Nw., LLC*, 511 F. Supp. 3d 1158, 1178 (W.D. Wash. 2021); *Moehrl v. Nat'l Ass'n of Realtors*, 492 F. Supp. 3d 768, 782-87 (N.D. Ill. 2020); *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012); *CSR Ltd. v. Fed. Ins. Co.*, 40 F. Supp. 2d 559, 564 (D.N.J. 1998); *Swarthmore Radiation Oncology, Inc. v. Lapes*, 812 F. Supp. 517, 520 (E.D. Pa. 1992).

[4] Proving such effect establishes a prima facie case and shifts the burden to the defendant to show a procompetitive rationale for the restraint. *Am. Express*, 138 S. Ct. at 2284. If the defendant meets its burden, the plaintiff must "demonstrate that the procompetitive efficiencies could be reasonably achieved through less

Amazon's agreements may also be analyzed using "quick look" scrutiny, an abbreviated form of the rule-of-reason standard that bypasses a detailed market analysis when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999).

Analysis under the rule of reason typically begins with definition of the relevant market. A market is defined as "the area of effective competition," which must be assessed based on "the commercial realities of the industry." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (cleaned up). Although a complaint may be dismissed if its market definition is "facially unsustainable," the validity of a relevant market "is typically a factual element" more appropriate for testing at summary judgment or trial, not a motion to dismiss. *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008).

The first amended complaint plausibly contends that Amazon exerts substantial power over the market for online retail marketplaces, controlling 50-70% of all online retail transactions. The District described how consumers and

---

anticompetitive means." *Id.* At the pleadings stage, all that is required is that the complaint plausibly state a prima facie claim. *See PLS.Com*, 32 F.4th at 839 ("[W]hether the alleged procompetitive benefits . . . outweigh its alleged anticompetitive effects is a factual question that the district court cannot resolve on the pleadings.").

economists view online marketplaces as distinct from physical marketplaces, a different channel of sale. *See* JA 23-27. An online marketplace has unique features, since it has no physical location and is never closed, that make consumers unlikely to switch to a physical store in response to small price increases. JA 25-27. Even if some products are available in both places, that does not undermine the validity of the market definition. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1040 (D.C. Cir. 2008) ("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."). In light of these differences, federal courts have recognized distinct online vs. brick-and-mortar markets. *See, e.g.*, *Frame-Wilson*, 591 F. Supp. 3d at 988-90 (finding plausible distinction between "the ecommerce retail market and the physical retail market"); *Distance Learning Co. v. Maynard*, No. 19-cv-03801, 2020 WL 2995529, at *6-7 (N.D. Cal. June 4, 2020) (finding plausible market for online traffic schools distinct from brick-and-mortar schools); *Origami Owl LLC v. Mayo*, No. CV-15-00110, 2015 WL 4747101, at *2-3 (D. Ariz. Aug. 7, 2015) (finding plausible "online market for customized, ornamental, and low-priced jewelry" that does not include physical jewelry stores).

The District also alleged that Amazon competes as a retailer in particular product submarkets, specifically batteries, mattresses, lightbulbs, cookware, computer accessories, luggage, exercise equipment, and motor oil. JA 12-13, 33. In

these submarkets, Amazon competes against its own third-party sellers by offering its own brands of various products and by retailing other brands. Ben Bloodstein, *Amazon and Platform Antitrust*, 88 Fordham L. Rev. 187, 201 (2019). These are traditional markets for retail products that are reasonably substitutable with one another, and thus also qualify as viable markets for antitrust purposes. *See Brown Shoe Co.*, 370 U.S. at 325.

Within these markets, the District alleged that Amazon's MFNs raise prices, stifle innovation, and reduce consumer choice, all of which are allegations of direct evidence of anticompetitive effects. *See Am. Express*, 138 S. Ct. at 2284. Absent the MFNs, many third-party sellers would lower consumer prices for their products on competing marketplaces, including their own websites. Sellers realize a greater percentage of profits from sales made on their own websites and through other marketplaces that charge lower fees, so driving sales to those more profitable avenues makes economic sense. And doing so would likely force Amazon to lower its fees and commissions for its services, which are far higher than those charged by similar multi-seller online marketplaces like eBay and Walmart.com. Thus, elimination of the MFNs would cause prices to go down, fostering greater competition and innovation among marketplaces. *See* Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 Yale L.J. 2176,

2179-82 (2018) (explaining how MFNs like Amazon's create strong incentives for sellers to charge higher prices than they otherwise would).

To illustrate, consider a particular toy that is available for sale through multiple online marketplaces, including Amazon. Toy manufacturer Viahart produces a 500-piece plastic building set called Brain Flakes, which is available for purchase through Amazon for $16.99. *VIAHART Brain Flakes*, Amazon.com, https://amzn.to/3GBEuNs (last visited Jan. 23, 2022). The same product is available at Walmart.com and on Viahart's own website, also for exactly $16.99. *VIAHART Brain Flakes*, Walmart.com, https://bit.ly/3QdzfXN (last visited Jan. 23, 2022); *VIAHART Brain Flakes*, Viahart.com, https://bit.ly/3WYTri4 (last visited Jan. 23, 2022). Viahart's owner has explained that the majority of this toy's price comes from Amazon's commissions, shipping fees, storage fees, and advertising charges. Molson Hart, *How Amazon's Business Practices Harm American Consumers*, Medium (Jul. 18, 2019), https://bit.ly/3WK6d4f. The company could sell the product on Viahart's website for less and make the same profit margin as it does on Amazon, but it is prevented from doing so by Amazon's MFNs. *Id.* Likewise, it could sell the product for less on Walmart.com (which charges lower fees), but again cannot do so due to the contract with Amazon. *Id.* Instead, Viahart must raise the price of the toy across all online marketplaces to match Amazon's price. *Id.*

In this example, Amazon competes with both Viahart's website and Walmart.com as an online marketplace for sales of this toy. By requiring Viahart to agree to restrain the price it charges on its own website and other online marketplaces (thus ensuring that the product will not be available for less than $16.99 anywhere online), Amazon insulates itself from competition from those websites as avenues for consumers to purchase this product. As a result, Amazon can (and does) charge higher fees and commissions than its competitors without risking a corresponding loss in sales from customers purchasing the toy through another website. Because of its enormous market power, Amazon accounts for 98% of Viahart's sales, even though the same product is available from multiple other online sources at the exact same price. *Id.*

The first amended complaint also contains allegations of indirect evidence of anticompetitive effects. Indirect evidence includes "proof of market power plus some evidence that the challenged restraint harms competition." *Am. Express*, 138 S. Ct. at 2284. The District alleged that Amazon has substantial market power, accounting for up to 70% of all online retail sales in the United States. It also alleged that Amazon uses its market power to control prices on other online marketplaces and charge supracompetitive commissions and fees to third-party sellers. These are precisely the types of allegations that federal courts have concluded state a plausible antitrust claim. *See, e.g.*, *Frame-Wilson*, 591 F. Supp. 3d at 990-92 (finding that

Amazon's control of 70% of online sales plus plausible allegations that the MFNs suppress competition and increase prices on other marketplaces stated a claim of anticompetitive effects).

b. Amazon's MFNs are horizontal pricing agreements and thus *per se* illegal.

Amazon is a horizontal competitor with its sellers' own websites, and thus the MFNs are also *per se* illegal under the antitrust laws. It is well established that price restraints among horizontal competitors are "illegal *per se*" because they almost always tend to restrict competition. *NCAA v. Bd. of Regents of Univ. of Okla.,* 468 U.S. 85, 100 (1984). There is therefore no need to conduct an "inquiry into the harm [the agreement] has actually caused." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). Here, Amazon competes horizontally with its sellers' own websites as an avenue for sales, and therefore any agreement to restrain prices that those sellers may charge constitutes an illegal horizontal restraint. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (noting that *any* agreement among horizontal competitors related to pricing is illegal *per se*).

That Amazon provides services to its third-party sellers does not change the analysis. In *Frame-Wilson*, the district court concluded that the plaintiffs had not plausibly alleged that Amazon's MFNs were subject to a *per se* analysis because it construed the plaintiffs' complaint as alleging only a vertical relationship between Amazon and its sellers. *See* 591 F. Supp. 3d at 984-88. Here, the first amended

complaint contains detailed allegations explaining how Amazon competes horizontally with its sellers' own websites as online marketplaces for particular products. Even where Amazon is providing services to businesses like Viahart, it is also competing against those sellers' websites for internet traffic and sales, which is a horizontal relationship.

Amazon's MFNs operate as a horizontal price restraint in another manner too. As noted *supra* at 6, 28, in addition to competing as a marketplace, Amazon also competes as a retailer in several product submarkets (e.g., batteries, mattresses, and lightbulbs). JA 10-11, 23-24, 33, 36. When selling these products as a retailer, Amazon is in competition with its own third-party sellers on and off Amazon.com. And because Amazon can influence the ultimate sales price of its competitor's products through its high commissions and fees, it can ensure that the price of those competing products remains high. Where Amazon acts as both the dominant marketplace and the dominant retailer, its contracts that restrain how competing third-party sellers can price their products are an even more "classic example[]" of a *per se* illegal horizontal price restraint. *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 907 (6th Cir. 2003).

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

Amazon's minimum margin agreements with its suppliers are also illegal under the rule of reason. These agreements encourage Amazon's suppliers to keep

prices for particular products high in order to avoid owing Amazon enormous true-up fees. *See* JA 22-28. As a result, suppliers have raised their prices on competing online marketplaces. JA 14. By raising the price of goods on other online marketplaces, these agreements hamper those rival websites from competing with Amazon on price. Price is "the central nervous system of the economy," and the minimum margin agreements restrict Amazon's competitors from drawing customers away with lower prices. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Because the District alleged that the minimum margin agreements have caused suppliers to raise prices—and because Amazon possesses market power among online marketplaces and competes as a retailer against most of its third-party sellers—the District plausibly alleged anticompetitive effects.

### B. The Superior Court erred by conflating the two elements of a restraint-of-trade claim and ignoring the District's factual allegations.

In dismissing the District's first amended complaint, the Superior Court committed two principal errors. First, it misapplied caselaw about inferring the existence of an agreement (the first element of a Section 28-4502 claim) to the requirement that the agreement be an unreasonable restraint (the second element of the claim). Second, it ignored or refused to accept as true many of the District's detailed factual allegations about the anticompetitive effects of Amazon's agreements. Each error independently warrants reversal.

### 1. *Twombly*'s plausibility discussion has no application to this case.

After acknowledging that "there's no dispute that there was an agreement" between Amazon and its sellers, the Superior Court cited *Twombly* to conclude that the agreements were not anticompetitive because they "could be 'explained by lawful, unchoreographed free market behavior.'" JA 247-48. That was an error. This language comes from *Iqbal* (which was not an antitrust case) summarizing a portion of *Twombly* that addressed whether the plaintiffs had plausibly alleged an *agreement*, not whether that agreement was plausibly *anticompetitive*. *See* 556 U.S. at 680. Here, where no one disputes that Amazon entered into written contracts, this language is inapposite. *See* JA 321-23 (United States explaining that this language is not relevant once an agreement is established).

The question presented in *Twombly* was whether the plaintiffs plausibly alleged an antitrust conspiracy among telecommunications providers by pleading that the providers "engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action." 550 U.S. at 548-49. This alleged conduct included not competing against one another in particular geographic markets and working to inhibit the growth of new startup competitors. *See id.* at 550-51. The Court held that these allegations of parallel conduct—without more—were insufficient to plausibly suggest that the defendants had engaged in a conspiracy because the

conduct, although "consistent with conspiracy," was also "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554. Because proving the existence of concerted action ultimately "must include evidence tending to exclude the possibility of independent action," the complaint's unadorned allegations of parallel activity were insufficient to "plausibly suggest[]" that the defendants had entered into a conspiracy. *Id.* at 554, 557.

This case is essentially the inverse of *Twombly*. In *Twombly*, the complaint did "not set forth a single fact in a context that suggests an agreement" among the defendants. *Id.* at 561-62. Here, as the Superior Court recognized, Amazon does not dispute that it entered into written contracts with its sellers and suppliers. JA 247. Where, "as here, the concerted conduct is not a matter of inference or dispute," "*Twombly*'s requirements with respect to allegations of illegal parallel conduct are inapplicable." *Robertson*, 679 F.3d at 290.

The Superior Court thus erred by transposing *Twombly*'s discussion of parallel conduct to the second element of the claim, whether the agreement was anticompetitive. Neither *Twombly* nor any other case suggests that a written agreement is not anticompetitive just because the same conduct theoretically could have occurred without an agreement. Quite the opposite. Even if it would be economically rational for two competitors to independently set a particular price for

their goods, an *agreement* to set that price is still illegal. *Catalano*, 446 U.S. at 647 ("A horizontal agreement to fix prices . . . is unlawful *per se*. It is no excuse that the prices fixed are themselves reasonable."); *see Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 351 (1982) (explaining that "all price-fixing agreements" are *per se* illegal "even if procompetitive justifications are offered").

Indeed, if the plaintiffs in *Twombly* had plausibly alleged the existence of a *written contract* among the telecommunications defendants not to compete and to exclude new market entrants, there is little question that such a contract would be illegal. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990). *Iqbal* expressly acknowledged that, had the *Twombly* court "credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce." 556 U.S. at 680. The Superior Court's conflation of the two elements of a restraint-of-trade claim thus conflicts with well-established antitrust principles. *See* JA 321 (United States explaining that the Superior Court's ruling "could jeopardize the enforcement of antitrust law").

2. The first amended complaint contains factual allegations that, if accepted as true, describe anticompetitive effects.

Rather than plucking language from *Iqbal*'s description of *Twombly* and applying it to the wrong element of an antitrust claim, the Superior Court should have analyzed the District's detailed factual allegations to determine whether those facts, if proved, describe anticompetitive effects. *See Frame-Wilson*, 591 F. Supp.

3d at 988-92. It declined to do so, focusing on the lack of specific terms like "price floor" in the relevant agreements and dismissing the District's allegations of real-world effects as "conclusory" without any analysis. *See* JA 252 ("[The complaint] claims that the real-world impact of the MFN relationship is higher prices; that is a conclusory allegation."). In several respects, the Superior Court erred in its application of the pleading standard to the District's claims.

The court appeared to apply a rigid contract analysis that examined only the agreements' language and not the real-world effects that those agreements have produced. In particular, the Superior Court focused on the lack of terms "lower" and "price floor" in the text of the Fair Pricing Policy. *See* JA 231, 238-39, 355. Because the policy states only that sellers are prohibited from setting a price on Amazon that is significantly higher than on another marketplace, the court "explicitly rejected [the] argument that [this] implies a prohibition on [sellers] setting lower prices on other online marketplaces." JA 368. But antitrust claims do not require the defendants to have used any magic words. Courts must "look past the terms of the contract to ascertain the relationship between the parties and the effect of the agreement in the real world." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012) (internal quotation marks omitted). In *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010), for example, the Second Circuit credited the allegation that the defendants "used the[ir] MFNs to enforce a wholesale

price floor," even though the MFNs did not expressly use the term "price floor." *Id.* at 323. The Superior Court erred by not doing the same.

In any event, the court did not explain how a seller could price a product lower on another marketplace without running afoul of the Fair Pricing Policy. If a product's price on Walmart.com is lower than on Amazon, then by definition Amazon's price is higher than Walmart's price. The first amended complaint expressly alleges that if Amazon catches a seller "offering the same or similar product through another online marketplace at a lower price"—not merely "significantly" lower, but *any* lower—it will punish the seller for violating the Fair Pricing Policy. JA 18. Whether this practice is viewed as a fact or a reasonable inference drawn from the policy's text, the Superior Court erred when it "explicitly rejected" this allegation on a motion to dismiss. *See, e.g.*, *Stancil v. First Mount Vernon Indus. Loan Ass'n*, 131 A.3d 867, 870 (D.C. 2014) (on a motion to dismiss, the court must "accept the allegations in the complaint as true and view all facts and draw all reasonable inferences in favor of the plaintiff").

The court also failed to address or dismissed as conclusory the District's factual allegations that Amazon's MFNs and minimum margin agreements actually raise prices on other competing online marketplaces. The District alleged, for example, that sellers "report regularly receiving . . . alerts" from Amazon that the seller is being sanctioned because the seller was caught offering the product for less

on another online marketplace. JA 18. It alleged that Walmart.com "routinely fields requests from [sellers] to raise prices on Walmart's online marketplace because [sellers] worry that a lower price on Walmart's online marketplace will jeopardize their status on Amazon's marketplace." JA 31. It quoted testimony from a House of Representatives investigation that, due to the MFNs, "sellers will raise the price on competitor sites to match Amazon's price." JA 32; *see* Maj. Staff of H. Subcommittee on Antitrust, *Investigation of Competition in Digital Markets* 249 (July 2022), https://bit.ly/3GFVcLQ (summarizing evidence from various individual third-party sellers, interest groups, and labor unions that Amazon's MFNs cause sellers to raise prices on competing online marketplaces). Allegations that third-party sellers raise their prices above a competitive level on other online marketplaces due to Amazon's MFNs are provable allegations of fact, not law, and must be taken as true. *Frame-Wilson*, 591 F. Supp. 3d at 990-92 (concluding that virtually identical factual allegations plausibly allege that Amazon's MFNs raise prices).

As to the minimum margin agreements, the court initially ignored that claim entirely, but in denying reconsideration it criticized the District for not naming specific sellers who raised their prices in response to the agreements. *See* JA 228-29 (acknowledging that Count 2 deals with the minimum margin agreement, but then failing to address the claim in its ruling), JA 371-74 (dismissing all allegations as conclusory). The first amended complaint alleges that Amazon's suppliers "have

raised their prices to competing online marketplaces to prompt the maintenance of higher prices on those marketplaces." JA 14; *see also* JA 35 (alleging that suppliers "are incentivized to *and do* raise and maintain higher prices to and on competing marketplaces than would otherwise exist absent these agreements" (emphasis added)). It also alleges that suppliers have "asked those marketplaces to raise prices to online consumers to avoid triggering Amazon's minimum margin protection." JA 14. Again, allegations of increased prices are direct evidence of anticompetitive effects and must be assumed true for purposes of a motion to dismiss.

To the extent the court viewed *Iqbal* and *Twombly* as requiring an antitrust plaintiff to "name" specific sellers who raised their prices on specific products in response to Amazon's conduct, that was error. JA 372. "*Iqbal* and *Twombly* do not require a plaintiff to prove his case in the complaint." *Robertson*, 679 F.3d at 291. Post-*Twombly*, the Supreme Court has reaffirmed that "[s]pecific facts are not necessary" to survive a motion to dismiss; the complaint "need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (cleaned up) (quoting *Twombly*, 550 U.S. at 555). Accordingly, a plaintiff need not "*forecast evidence* sufficient to *prove*" its claim; it must merely "'*allege facts* sufficient to *state* elements' of the claim." *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 349 (4th Cir. 2005) (quoting *Iodice v. United States*, 289 F.3d 270, 281 (4th Cir. 2002)).

The Superior Court's demand for further details was especially unwarranted here given the District's plausible explanation of why anticompetitive effects would be the *expected* result of the challenged agreements. In an antitrust case, "[i]t is sufficient that the alleged anticompetitive effects are economically plausible in light of the . . . restrictions recounted in the complaint." *Robertson*, 679 F.3d at 291. Antitrust claims are routinely brought prospectively, to "forestall" injury, so the District's explanation of expected effects was more than sufficient. *Lorain J. Co. v. United States*, 342 U.S. 143, 153 (1951). As explained, *supra* at 7-10, Amazon's MFNs and its market dominance will naturally allow it to charge higher commissions and raise consumer prices across online marketplaces. And its minimum margin agreements will logically push suppliers to raise prices to avoid penalties should Amazon's profit margins fall below the agreed threshold. *Supra* at 10-11. Two highly respected economists recently authored an article explaining how MFNs like the ones challenged here are "likely to harm competition" and permit dominant platforms to charge supracompetitive prices for their services. Baker & Morton, *supra*, at 2195-96 (cited in the first amended complaint at JA 35). And at least one federal court, presented with virtually identical allegations about the same Amazon agreements, found them plausibly anticompetitive. *Frame-Wilson*, 591 F. Supp. 3d at 988-94.

Moreover, given Amazon's marketplace dominance (and the dominance of similarly situated antitrust defendants), a rule requiring a complaint to identify by name all businesses harmed would be damaging. Here, sellers and suppliers have a credible fear of retaliation should they speak out against Amazon. The House of Representatives' investigation of Amazon exposed "deep concern" from sellers "that speaking about the dominant platforms' business practices—even confidentially without attribution—would lead a platform to retaliate against them, with severe financial repercussions." *Investigation of Competition in Digital Markets* 58. One witness testified, "If Amazon saw us criticizing, I have no doubt they would remove our access and destroy our business." *Id.* at 59. In light of these concerns, it was more than sufficient for the District to explain how Amazon's agreements work to create anticompetitive effects like higher prices without identifying (before discovery) the particular sellers and products affected.

Finally, the Superior Court drew inferences against the District that were unsupported by (or directly contrary to) the District's allegations. For instance, in its reconsideration ruling, the court speculated that sellers could "simply choose not to sell on [Amazon's] marketplace" if they found its high commissions and fees unacceptable. JA 370. But the District explained why that is not true. Because Amazon so dominates the retail ecommerce market, most sellers cannot afford to forgo selling via Amazon. *See* JA 11 ("Most [third-party sellers] believe that to

successfully sell online, it is imperative that they have a presence on Amazon's online marketplace."), 28 (citing the Institute for Local Self-Reliance's conclusion that most sellers "are now compelled to become sellers on Amazon's online marketplace, or [forgo] access to a majority of online shopping traffic"). The Superior Court erred in assuming that sellers could avoid Amazon's anticompetitive conduct, contrary to the District's express allegations about Amazon's market power.

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

The first amended complaint alleges that Amazon uses its illegal agreements to maintain its monopoly in the online marketplace market or has attempted to do so in violation of D.C. Code § 28-4503, which parallels 15 U.S.C. § 2. JA 38-41. A claim for illegal monopoly maintenance requires proof of (1) possession of monopoly power in the relevant market, and (2) the willful maintenance of that power through anticompetitive means. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). A claim of attempted monopolization requires proof "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

There is little question that either Amazon already possesses monopoly power over online marketplaces or there is a "dangerous probability" that it soon will.

Monopoly power is "the power to control prices or exclude competition." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). It can be shown directly through evidence of supracompetitive pricing, or (more commonly) through indirect evidence by showing the firm's dominant market share and barriers to entry. *See Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 434-35 (3d Cir. 2016). Here, the District did both. It directly alleged that Amazon's monopoly power allows it to charge supracompetitive fees to its sellers—significantly higher than Walmart.com or eBay, for example—with no corresponding loss of market share. *See* JA 21-22, 27-28, 31. It also alleged that Amazon controls 50-70% of all online retail sales, JA 28, and that there are significant barriers to marketplace entry, JA 29-31. Federal courts have found firms with similar market shares to possess monopoly power, particularly if there are high barriers to market entry. *See, e.g.*, *FTC v. AbbVie Inc.*, 976 F.3d 327, 373 (3d Cir. 2020) (above 60%); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1123 (10th Cir. 2014) (62%); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1352 (5th Cir. 1980) (between 50% and 64%); *see also Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 129 (2d Cir. 1981) ("[Market] share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power.").

The District also alleged that Amazon maintains its monopoly through anticompetitive conduct—namely, the MFNs and minimum margin agreements it executes with its sellers and suppliers. As already discussed, by raising the overall price of goods, Amazon insulates itself from competition from other marketplaces and protects its dominant position in online retail. *See supra* at 25-34.

The Superior Court's dismissal of the District's monopoly maintenance and attempted monopolization claims suffers from several fatal flaws. First, the court seemed to view the concept of a monopoly as control over 100% of the relevant market, rather than merely the power to control prices or exclude competition. For instance, it characterized the District's allegation that Amazon controls 50-70% of online sales as "an admission that thirty to fifty percent of the market is beyond Amazon's control." JA 376. But proving the existence of a monopoly (let alone a mere attempt to monopolize) does not require showing that the defendant controls the *entirety* of the relevant market. The very purpose of an attempted monopolization claim is to stop the defendant from obtaining monopoly power before it occurs. And it is well established that a monopolist can exert influence over market price with less than 100% market share. *See, e.g.*, *Grinnell Corp.*, 384 U.S. at 571 (noting that control of 87% of the market "leaves no doubt that the congeries of these defendants have monopoly power").

Second, the Superior Court discounted the District's well-pleaded factual allegations and drew unwarranted inferences against the District. It hypothesized that Amazon's dominant position as the online retail marketplace could be explained by "pandemic times when online delivery sales have increased." JA 375. But the District challenges Amazon policies that predate the COVID-19 pandemic. *See* JA 13. And while the pandemic might plausibly explain why online retail sales have increased compared to sales at brick-and-mortar stores, it does not explain why Amazon's share of online sales has grown so dramatically. The Superior Court also speculated that "sellers are free to migrate to other online platforms." JA 375. The District's allegations directly contradict that notion. *See supra* at 43-44.

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

Because the Superior Court committed an error of law by dismissing the District's first amended complaint for failure to state a claim, it by definition also abused its discretion in failing to correct that error when presented with the District's motion for reconsideration. *In re Tyree*, 493 A.2d 314, 318 (D.C. 1985). Additionally, the Superior Court abused its discretion in denying the District leave to file a proposed second amended complaint that *cured* the purported deficiencies that the Superior Court had identified in its oral ruling.

Rule 15 makes clear that "leave to amend the complaint should be given freely 'when justice so requires.'" *Crowley*, 691 A.2d at 1174 (quoting Super. Ct. Civ. R.

15(a)). This Court has emphasized that the rule "must be applied liberally to ensure that cases are decided upon the merits rather than upon technical pleading rules." *U.S. Bank Tr., N.A. v. Omid Land Grp., LLC*, 279 A.3d 374, 380-81 (D.C. 2022) (internal quotation marks omitted); *see also Moradi v. Protas, Kay, Spivok & Protas, Chartered*, 494 A.2d 1329, 1332 (D.C. 1985) (emphasizing "the strong policy favoring the trial of any case on the merits"). In examining whether the Superior Court abused its discretion in denying leave to amend, this Court examines "(1) the number of requests to amend; (2) the length of time that the case 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." *Crowley*, 691 A.2d at 1174.

Each of the factors identified in *Crowley* favored allowing the District to file its second amended complaint. This was the District's first request to amend, after amending once as a matter of course under Rule 15(a)(1)(B). The case had not yet proceeded past the pleadings stage, there was no evidence that the proposed amendment was in bad faith, and Amazon would have suffered no prejudice. As to the merits of the amended pleading, the District proposed adding factual allegations that addressed the precise (purported) deficiencies that the Superior Court identified in its oral ruling, particularly its criticism that the complaint's allegations were too conclusory and failed to name particular sellers and products. The District offered

several examples of particular sellers and products affected by each of the challenged agreements, including products that sellers admitted they made more expensive on competing online marketplaces as a direct result of Amazon's anticompetitive behavior. *See supra* at 16. The amendments thus cured the supposedly problematic lack of specificity.

Instead of undertaking any Rule 15 analysis, however, the Superior Court appeared to believe it was powerless to permit amendment post-judgment. *See* JA 376-77. That is incorrect. The District's motion for reconsideration was filed within 28 days of dismissal, so it was properly treated as a Rule 59(e) motion to alter or amend the judgment. *See Wallace v. Warehouse Emps. Union No. 730*, 482 A.2d 801, 805 (D.C. 1984). Because "dismissal with prejudice is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency," dismissal with prejudice was inappropriate here, where the case was at the pleadings stage and the court's rationale for dismissal was a lack of specificity in the complaint. *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 569 n.3 (D.C. 2011) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)). Accordingly, failure to properly grant the District leave to amend its pleading was "sufficient grounds on which to reverse the district court's denial of a Rule 59(e) motion." *Laber v. Harvey*, 438 F.3d 404, 428 (4th Cir. 2006). Indeed, in *Foman v. Davis*, 371 U.S. 178 (1962), the

Supreme Court ruled that it was an abuse of discretion for a district court to refuse to grant a post-judgment motion for leave to amend "without any justifying reason appearing for the denial." *Id.* at 182; *see Williams v. Citigroup Inc.*, 659 F.3d 208, 214 (2d Cir. 2011). Here, the Superior Court's refusal to entertain the District's motion—without any analysis of whether the amendments would be untimely, futile, or prejudicial—was likewise an abuse of discretion. *See U.S. Bank*, 279 A.3d at 382 ("[A] trial court's action is an abuse of discretion if no valid reason is given or can be discerned for it . . . .").

## CONCLUSION

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

Respectfully submitted,

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

GRAHAM E. PHILLIPS
Deputy Solicitor General

/s/ Jeremy R. Girton
JEREMY R. GIRTON
Assistant Attorney General
Bar Number 888304147
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-2029
(202) 741-8786 (fax)
jeremy.girton@dc.gov

January 2023

**REDACTION CERTIFICATE DISCLOSURE FORM**

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

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

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

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

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

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Jeremy R. Girton
Signature

22-CV-657
Case Number

Jeremy R. Girton
Name

January 23, 2023
Date

jeremy.girton@dc.gov
Email Address

## CERTIFICATE OF SERVICE

I certify that on January 23, 2023, this brief was served through this Court's electronic filing system to:

Karen L. Dunn
William A. Isaacson
Amy J. Mauser

*Counsel for Appellee*

/s/ Jeremy R. Girton
JEREMY R. GIRTON