No. 22-CV-657

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

CORRECTED BRIEF FOR APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Court of Appeals Rule 26.1, appellee Amazon.com, Inc., states that it has no parent company, and no publicly held company owns 10% or more of Amazon's stock.

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INTRODUCTION

In the intensely competitive retail industry, customers shop and compare prices across many options until they find the best value. Amazon operates an online store, in which it sells products alongside third-party sellers. Amazon's objective is to create a positive shopping experience by offering the "largest selection" at the "lowest price" with the "fastest delivery." JA 107. By creating a positive shopping experience, Amazon earns—and preserves—customer trust. Customers choose to return to Amazon's store—among their many retail store options—for their next purchases, which benefits all sellers in Amazon's store.

The District's dismissed complaint attacks a Parity Provision that, until March 2019, required sellers in Amazon's store not to discriminate against Amazon customers by offering them higher prices than other customers, and a Marketplace Fair Pricing Policy that currently prohibits sellers in Amazon's store from engaging in price gouging. The District also attacks Margin Agreements that some wholesale suppliers choose to enter into with Amazon that allow Amazon to negotiate the payment of lower prices to its suppliers, which allows it to reduce prices to consumers. The Superior Court correctly concluded that the District's complaint was riddled with conclusory allegations and did not plausibly allege an antitrust claim under District of Columbia law. Permitting such a complaint to proceed would permit expensive discovery based on a complaint that, on its face, challenges conduct that protects

consumers and encourages competitive prices. The Superior Court's judgment is correct and should be affirmed for several reasons.

First, the Superior Court was correct to hold that the District did not plausibly allege an agreement that unreasonably restrained trade. The District claims that the Parity Provision, Fair Pricing Policy, and Margin Agreements are agreements that restrain trade by creating "a price floor tied to the Amazon price." Br. 9, 10. But the Fair Pricing Policy, Parity Provision, and Margin Agreements do not contain any language establishing or suggesting a price floor. To claim that they mean something different, the District relies on conclusory allegations of a multistep causal chain leading to higher prices. The District asserts that third-party sellers subject to the Fair Pricing Policy or the former Parity Provision are forced to do business with Amazon, that those sellers charge supracompetitive prices on Amazon, and that the same sellers in turn force other online marketplaces to match Amazon's inflated prices—thus raising prices "across the internet." Br. 9. The District similarly alleges that the Margin Agreements cause Amazon's wholesale suppliers to charge supracompetitive prices on "other online marketplaces" to avoid paying rebates to Amazon when Amazon cuts prices in its store to meet lower prices elsewhere. Br. 10. These allegations are not only conclusory but counterintuitive: they depend on the third-party sellers and suppliers having the market power to control the prices that other online marketplaces charge—market power that the District does not allege.

Presented with this multistep speculative theory not supported by specific allegations, the Superior Court correctly held that the District failed to state an antitrust claim because the District has not alleged with non-conclusory allegations an agreement to restrain trade. JA 238, 368-71. Such an agreement requires allegations of a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). The District contends that it has alleged such agreements here because Amazon enters into "millions" of individual agreements to allow sellers to offer products in the Amazon store, Br. 1, but alleging an agreement is not enough, Br. 11. It is the substance of the agreement that matters. A retailer does not violate the antitrust laws when it unilaterally bans price gouging in its retail store, when it prohibits sellers in its store from discriminating against its customers by charging them higher prices than the sellers charge elsewhere, or when it bargains for a lower price from its supplier so that the retailer can offer lower prices in its retail store. No court has held otherwise.

Second, the Superior Court correctly held that the District's complaint contains no non-conclusory factual allegations of anticompetitive effects. JA 252-53, 370-74. As the Superior Court noted, the District does not identify any specific seller of any specific product priced at a supracompetitive level. JA 373. Nor does the District offer any other factual allegations of anticompetitive effects, such as any actual or potential competitors excluded as a result of the challenged policies. The

District also does not explain how higher prices in all of e-commerce are even possible under its theory. The complaint alleges that Amazon's policies cause wholesale suppliers and third-party sellers to raise prices above competitive levels on *other* online marketplaces (which then causes higher prices in Amazon's store). Even accepting the notion that e-commerce could have separate markets from brick-and-mortar stores selling similar or identical products, the District's theory is possible only if the sellers in Amazon's store possessed market power in relevant product markets throughout e-commerce; after all, absent market power, a seller attempting to charge supracompetitive prices for, say, batteries or mattresses would lose business to other sellers looking to win business by cutting prices. The District has not even attempted to allege that any seller has any market power in any product market.

The District would like this appeal to be about its antitrust theories, but the issue on appeal is whether the District satisfied the applicable pleading standard. The Superior Court correctly applied the well-settled pleading requirements from *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and held that the District failed to allege any well-pleaded facts that could allow a court to infer that its theory establishes a "plausible"—not just possible—violation of the antitrust laws, JA 334. The Superior Court correctly ignored the generic and conclusory allegations with which the complaint is replete, correctly applied common sense to the District's theory, and correctly concluded that the District failed to state any plausible claims for relief. This court should affirm.

STATEMENT OF THE ISSUES

1. Whether the pleading standards established by the Supreme Court in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), apply to all of the elements of an antitrust claim under District law.

2. Whether the District has pleaded a plausible antitrust claim.

   A. Whether the District plausibly alleged that Amazon's challenged practices are agreements to restrain trade.

   B. Whether the District plausibly alleged that Amazon's practices have any anticompetitive effects, an essential element of each of its claims.

3. Whether the Superior Court correctly denied leave to amend the complaint.

STATEMENT OF THE CASE

A. Legal Framework

1. The District of Columbia Antitrust Act is designed to "promote the unhampered freedom of commerce and industry" by "prohibiting restraints of trade and monopolistic practices." D.C. Code § 28-4501(b). Section 28-4502 of that chapter prohibits "every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce." Section 28-4503 makes it unlawful for "any person to monopolize, attempt to monopolize, or combine or conspire with any person or persons to monopolize any part of trade or commerce." The language of

these two provisions mirrors the language of sections 1 and 2 of the federal Sherman Act, 15 U.S.C. §§ 1-2, and District law states that the "interpretations given by federal courts" to those statutes should "guide" the interpretation of the District's "comparable antitrust statutes." D.C. Code § 28-4515; *see also* Br. 21-22.[1]

2. Section 1 of the Sherman Act prohibits agreements made "in restraint of trade," and federal courts have long understood the statute "to outlaw only *unreasonable* restraints." *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006)[2]; *accord Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018). To plausibly allege a claim under § 1 (and thus under § 28-4502), a plaintiff must allege that the defendant and any alleged co-conspirators "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). The unlawful objective must be to impose an "unreasonable restraint of trade" in the relevant market. *SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412, 423-24 (4th Cir. 2015). A plaintiff might establish that a restraint is "unreasonable" in one of two ways.

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[1] Unless otherwise stated, citations to "Br." are citations to the District's appeal brief.

[2] With respect to quoted material, unless otherwise indicated, all brackets, ellipses, footnote call numbers, internal quotations, and citations have been omitted for readability. All emphasis is added unless otherwise indicated.

First, there is a narrow category of agreements that are unreasonable "per se," meaning that a court will treat them as "necessarily illegal" regardless of the "reasonableness of an individual restraint in light of the real market forces at work." *Leegin Creative Leather Prods.* v. *PSKS, Inc.*, 551 U.S. 877, 886 (2007). A per se rule should be applied only to the kinds of restraints that "always or almost always tend to restrict competition and decrease output," *Bus. Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988), such as "horizontal agreements among competitors" either "to fix prices" or "to divide markets," *Leegin*, 551 U.S. at 886. The per se rule does not apply until courts have decades of experience with a particular kind of restraint, and it does not ordinarily apply to vertical agreements between businesses at different levels of the supply chain—for example, a manufacturer and a wholesaler, or a wholesaler and a retailer. *See Leegin*, 551 U.S. at 886-87, 907.

Second, the "rule of reason" is the "accepted standard for testing whether a practice restrains trade in violation of" § 1 of the Sherman Act, *Leegin*, 551 U.S. at 885, and it "presumptively applies," *Texaco*, 547 U.S. at 5; *see Nat'l Collegiate Athletic Ass'n* v. *Alston*, 141 S. Ct. 2141, 2151 (2021). Under this standard, a court may assess "market power," "market structure," and other factors to determine the restraint's "actual effect on competition." *Am. Express*, 138 S. Ct. at 2284. The test "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best in-

terest." *Leegin*, 551 U.S. at 886. In applying this test, courts require "more persuasive evidence" if "the claim is one that simply makes no economic sense." *Matsushita Elec. Indus. Co*. v. *Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

3. Section 2 of the Sherman Act (and its analog under District law) makes it illegal for entities to "monopolize" or "attempt to monopolize." 15 U.S.C. § 2; D.C. Code § 28-4503. For a monopolization claim, a plaintiff must allege and prove: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). For attempted monopolization, a plaintiff must allege and prove: "(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).

4. Those substantive rules of antitrust liability inform what a plaintiff must allege in its complaint to show "that the pleader is entitled to relief." D.C. Super. Ct. Civ. R. 8(a); *see also* D.C. Code § 11-946 (requiring application of the Federal Rules of Civil Procedure unless other rules have been adopted). "To 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." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009); *accord Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007);

Bereston v. *UHS of Del., Inc.*, 180 A.3d 95, 99 (D.C. 2018); *Sundberg* v. *TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015). While courts accept all well-pleaded facts in the complaint as true, *Close It! Title Servs., Inc.* v. *Nadel*, 248 A.3d 132, 138 (D.C. 2021), they should not accept a "legal conclusion couched as a factual allegation," *Twombly*, 550 U.S. at 555, or a "conclusory allegation" pleading a bare element of the plaintiff's cause of action, *Bereston*, 180 A.3d at 99. Courts also do not accept "unwarranted inferences, unreasonable conclusions, or arguments." *United States ex rel. Oberg* v. *Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014); *see also Mich. Gambling Opposition* v. *Norton*, 477 F. Supp. 2d 1, 5 (D.D.C. 2007) (same).

B. Factual Background

1. Amazon operates an online retail store in which it sells products it purchases at wholesale from suppliers. JA 10-11. Amazon also allows independent businesses—referred to as "third-party sellers"—to sell products in Amazon's store. JA 20. Consumers have multiple retail options, including: (1) other multi-seller online marketplaces like eBay, Walmart.com, and Target, JA 16, 226; and (2) "single-seller online marketplaces," meaning direct-to-consumer websites through which a retailer sells its products to consumers online. JA 10, 23-24. Though the District alleges that consumers consider online marketplaces to be distinct from "brick-and-mortar marketplaces," JA 23-27, the District does not (and could not) allege that consumers cannot acquire substantially similar or identical products—

like batteries, mattresses, light bulbs, or motor oil—whether they shop in an online marketplace or in a big box store, shopping mall, grocery store, or other physical retail store. JA 33.

2. Amazon successfully operates in this highly competitive environment because of its significant investments in its retail store to become "Earth's most customer-centric company." JA 107.[3] Amazon takes actions to prohibit business practices that harm customer trust in its store. Three of these practices are at issue in this case: (1) the Marketplace Fair Pricing Policy applicable to third-party sellers offering goods in Amazon's store, (2) the Parity Provision that was in Amazon's agreements with third-party sellers until March 2019, and (3) Margin Agreements with certain Amazon wholesale suppliers. JA 11.

Fair Pricing Policy: The Fair Pricing Policy, which is currently in effect, prohibits third-party sellers from taking actions that harm "consumer trust." JA 107. For example, a seller cannot charge a "shipping fee" that is "excessive," or sell "multiple units of a product for more per unit than that of a single unit of the same product." *Id.* The Fair Pricing Policy also prohibits third-party sellers from setting prices that are "significantly higher" than recent prices offered "on or off Amazon." *Id.* If

[3] At the motion-to-dismiss stage, courts are permitted to consider documents that were referenced in the complaint and are central to the appellant's case. *Chamberlain* v. *Am. Honda Fin. Corp*., 931 A.2d 1018, 1024-25 (D.C. 2007).

a third-party seller takes any action that "harms consumer trust," Amazon may decline to feature that seller's offer, remove the seller's offer from its store, or suspend or terminate the seller's selling privileges in "serious or repeated cases." *Id*.

The Fair Pricing Policy does not set the prices within or outside Amazon's store; third-party sellers are "responsible for setting their own prices." JA 107. The policy does not require third-party sellers to deal exclusively with Amazon; third-party sellers remain free to offer their goods through other multi-seller online marketplaces, single-seller online marketplaces, or physical stores. Third-party sellers are also free to stop selling in Amazon's store at any time with no penalties and, if they stop, are no longer bound by the Fair Pricing Policy.

Parity Provision: The Parity Provision has not been in effect since March 2019. JA 13, 18. It was a provision in Amazon's Business Solutions Agreement that prohibited third-party sellers from discriminating against Amazon's customers, by requiring them to offer products in Amazon's store at an all-in price that was no less "favorable" than the price offered to other customers. JA 86. If a third-party seller violated the provision, it would be required to "promptly compensate adversely affected customers." *Id*.

Margin Agreements: Certain wholesale suppliers of products that Amazon offers for sale in its store choose to enter into Margin Agreements as a way to incentivize Amazon to carry more of their products. JA 14. These agreements establish

a minimum profit margin that Amazon is entitled to receive when it sells goods purchased from the supplier; if that margin is not met, the supplier agrees to reimburse Amazon for a portion of the purchase price. *Id*. As the complaint explains, the "typical" situation in which these agreements are triggered is when "Amazon lowers its retail price for a product on its online marketplace because it has identified a lower price for the product" from a competing retailer. JA 23. In those circumstances, the supplier may be required to pay Amazon for the portion of the profits Amazon lost by selling the product to consumers at the lower price. *Id.*

C. Proceedings Below

1. On May 25, 2021, the District filed its initial complaint challenging the former Parity Provision and the Marketplace Fair Pricing Policy. JA 1. The original complaint alleged that Amazon violated the provisions of the District of Columbia Antitrust Act that are analogous to §§ 1 and 2 of the federal Sherman Act. JA 1; Original Complaint 23-27, 2021-CA-001775-B (D.C. Super. Ct. May 25, 2021) [hereinafter Compl.]; *compare* D.C. Code §§ 28-4502, 28-4503, *with* 15 U.S.C. §§ 1, 2. For the restraint of trade claim, the District alleged that one of Amazon's violations was a per se violation. *See* Compl. 23-24. On July 20, 2021, Amazon moved to dismiss the original complaint because the District's antitrust claims based on Amazon's former Parity Provision and its Fair Pricing Policy failed as a matter of law on several grounds, including that the complaint did not plausibly allege that Amazon's policies had an anticompetitive effect. JA 3.

Rather than oppose Amazon's motion, on September 10, 2021, the District filed the operative amended complaint, again alleging that Amazon violated the same provisions of the District of Columbia Antitrust Act. JA 3, 36-41. The District, as in its initial complaint, asserted that the former Parity Provision and the Fair Pricing Policy violated the antitrust laws. JA 36-37. The District also added a new allegation, challenging as anticompetitive Amazon's Margin Agreements with certain wholesale suppliers. JA 37-38.

Regarding D.C. Code § 28-4502 (the analog to section 1 of the Sherman Act): the District alleged that the Fair Pricing Policy and the Parity Provision constitute agreements that unreasonably restrain trade, but unlike in the initial complaint, the District did not allege that they constituted per se violations. *Compare* JA 36-37, *with* Compl. 23-24. The District alleged that, because of these policies, third-party sellers agree not to "offer their products through other competing online marketplace at prices lower than the prices they offer them on Amazon's online marketplace," which establishes a "price floor" across all such online marketplaces. JA 36; *see also* Br. 9. The District did not disaggregate the precise terms and practical effects of the two different policies, instead giving each policy the conclusory label of "most-favored-nation" clause. JA 13-14; Br. 1, 8.

The District also alleged that Amazon's Margin Agreements with certain suppliers unreasonably restrain trade. JA 37-38. Amazon purchases some of the products it sells to customers from suppliers, and it negotiates the wholesale prices it pays

to suppliers for those products. JA 14. Some suppliers choose to enter Margin Agreements as part of their wholesale price negotiations with Amazon. In doing so, suppliers agree to make "true up" payments to Amazon if Amazon does not earn a negotiated minimum margin when it sells the supplier's goods to customers in its store. JA 14. The District expressly alleged that such agreements come into play when Amazon *lowers* prices for consumers to match lower prices elsewhere. JA 23. The District alleged that these agreements create an "incentive" for suppliers "to maintain higher prices on other online marketplaces" to avoid owing "true up" payments to Amazon, and further alleged that suppliers have "asked" other retailers that they supply to "raise prices to online consumers." JA 14.

Regarding D.C. Code § 28-4503 (the analog to section 2 of the Sherman Act): the District alleged that Amazon "possessed monopoly power among online marketplaces" with "between 50-70% of all online sales"; that it "willfully maintained and enhanced its market power" through its anticompetitive agreements, including the Fair Pricing Policy, the Parity Provision, and the Margin Agreements; and that, if Amazon "has not already" obtained "monopoly power," there is a "dangerous probability" that Amazon will obtain it. JA 38-41.

2. On October 25, 2021, Amazon again moved to dismiss the District's complaint for failure to state a claim. JA 5, 45-71. *First*, Amazon argued that the District's claims should all be dismissed because they did not plausibly allege any anticompetitive conduct. JA 58-64. Amazon argued that, on the facts alleged, the

Fair Pricing Policy and Parity Provision sought to "lower consumer retail prices," JA 58-60, and the Margin Agreements governed only the price Amazon received from certain of its suppliers and likewise fostered "low prices for consumers," JA 61-63. *Second*, Amazon argued that all of the claims also failed because the District failed to allege any "plausible relevant product market in which competition was harmed." JA 52, 64-67. *Third*, Amazon argued that the District's conclusory and speculative allegations could not suffice to show that the challenged policies had any anticompetitive effect. JA 67-69. And *fourth*, Amazon argued that the District failed to allege concerted action—that is, "a conscious commitment to a common scheme designed to achieve an unlawful objective." JA 69 (quoting *Monsanto*, 465 U.S. at 768). The District did not allege that any third-party seller or supplier participated in forming the Parity Provision or the Fair Pricing Policy; instead, the District only alleged terms unilaterally established by Amazon. JA 69. And for the Margin Agreements, the District does not allege that the agreements are anything other than lawful price negotiations between a buyer and seller. JA 61.

On December 15, 2021, the District opposed Amazon's motion. JA 7, 109-43. In its brief, the District did not cite factual allegations plausibly demonstrating that Amazon's policies prohibit sellers from lowering their prices outside of Amazon's store, require sellers to raise their prices in Amazon's store, exclude rivals, or increase consumer prices. While the words "per se" appeared nowhere in the

amended complaint, JA 36-41, the District argued that, notwithstanding that removal, its restraint-of-trade claim was still based on per se violations of the antitrust laws. JA 125-27 & n.8.

3. At a hearing on March 18, 2022, the Superior Court granted Amazon's motion to dismiss. JA 212-54. During that hearing, after considering the arguments of the parties, the Superior Court began by articulating the pleading standard announced by the Supreme Court in *Iqbal*, 556 U.S. at 677-80, and *Twombly*, 550 U.S. 544. JA 232-36. The court then reviewed the terms of the Fair Pricing Policy, concluding that "sellers are free to set prices" and that "the only limit" in the policy is that sellers "cannot set a price that is significantly higher than recent prices offered on or off Amazon." JA 236-38. Nothing in the policy, the court added, establishes a "floor" on prices. JA 238.

After responding to the District's arguments, JA 238-51, the Superior Court rejected the District's theory that it had plausibly alleged the "anticompetitive effect" of Amazon's policies. JA 252. The Superior Court discounted the "conclusory allegation" that the policies would lead to "higher prices," and explained that the District's theory was inconsistent with "how the market works" for third-party sellers: "Nobody's forcing them to do business through Amazon." *Id.* The Superior Court concluded that "no fact presented" supported the claim that "Amazon's policies are creating a floor for products sold through other retail channels," and it further found

that the District's complaint failed to "allege anti-competitive effects from these policies." *Id.* The Superior Court did not rule on Amazon's other grounds for dismissal relating to market definition. JA 252-53.

4. Following dismissal of the case, on April 14, 2022, 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 8, 255-77. The District repackaged many of the arguments raised or rejected in its brief or in the oral hearing, urging that the Superior Court misapplied *Iqbal* and *Twombly* and ignored or failed to accept as true certain allegations in the complaint. JA 262-73. Amazon opposed the motion. JA 326-46.

5. The Superior Court denied the District's motion for reconsideration or for leave to amend, and it dismissed the request for a written order as moot. JA 361-78. The Superior Court again explained that the District did not plausibly allege that the Fair Pricing Policy and the Parity Provision were agreements "setting a price floor." JA 369. The prices available on other online marketplaces, the Superior Court explained, were "equally likely" to be "the result of lawful, unchoreographed free-market behavior." JA 369-70. And the court reiterated that basic economic logic contradicted the District's theory: if other "online marketplaces offer lower fees or commissions," then third-party sellers "may simply choose not to sell on Defendant's marketplace." JA 370. The Superior Court concluded again that the District did not plausibly allege a violation of § 28-4502. JA 371.

The Superior Court then addressed the remaining counts in the complaint "for the sake of thoroughness," even though it had concluded that each failed on the ground that the District lacked "allegations of anti-competitive policies and effects." JA 371. It rejected the argument that the Margin Agreements were anticompetitive because (among other reasons) the complaint "contained no allegation that any specific product was available at a supracompetitive price in Amazon's store, or in any competing retailer's store, as a result of" the various agreements. JA 371-74. And where the District did name specific products, the court found its assertions "vague and conclusory." JA 373. As to the District's monopolization and attempted-monopolization claims, the Superior Court noted the District's acknowledgment of the "existence of competitive online marketplaces from strong corporate entities such as Walmart, Target, and eBay," and concluded that the District's allegations that Amazon "merely controlled a dominant share of the market" did not "satisfy" the "pleading requirements for anti-trust actions." JA 375.

Because the Superior Court affirmed its earlier dismissal of the District's complaint with prejudice pursuant to Rule 12(b)(6), it also denied the District's motion for leave to file a second amended complaint. JA 376-77. It reasoned that the prior complaint was dismissed with prejudice and that the complaint could not be amended after the judgment issued. JA 377. This appeal followed. JA 379-81.

SUMMARY OF THE ARGUMENT

I. The Superior Court correctly applied the standard announced in *Iqbal* and *Twombly*, which this court has adopted, to determine whether the District stated a claim on which relief could be granted. That standard applies to all civil actions and to all the elements of a legal claim, and it required the Superior Court to discount legal conclusions pleaded as facts; to ignore conclusory allegations lacking in specific factual content; and to determine whether the remaining well-pleaded allegations establish a *plausible*—not just *possible*—claim for relief. The Superior Court applied the correct standard, and it correctly concluded that the District failed to allege a plausible antitrust violation.

II. Applying that standard on de novo review, this court should affirm.

A. Initially, the Superior Court correctly held that the District failed to make plausible allegations that any of Amazon's three challenged practices—the Fair Pricing Policy, the former Parity Provision, or the Margin Agreements—are agreements to restrain trade. *First*, the Fair Pricing Policy prohibits third-party sellers from engaging in price gouging (or other deceptive practices) in Amazon's store; it is not an agreement between Amazon and third-party sellers to establish a "price floor" in all of e-commerce. *Second*, the former Parity Provision required third-party sellers in Amazon's store to offer *low* prices for consumers shopping in the store. It is not anticompetitive for a retailer such as Amazon to insist that sellers do not discriminate against Amazon's customers by charging them higher prices.

Third, the Margin Agreements establish wholesale prices Amazon pays for products it purchases from its suppliers; negotiating for lower prices in the form of margin "true up" payments is just as legal as negotiating for lower prices. Moreover, the District alleges that Amazon is entitled to such margin payments when Amazon *lowers* prices for consumers.

Fourth, to the extent the District characterizes these agreements as "horizontal pricing agreements" that are "per se illegal" simply because Amazon sometimes sells the same products as third-party sellers, the District abandoned that claim in its amended complaint. The claim fails anyway because the challenged policies are not in the category of price or supply agreements that, because of decades of experience, courts condemn without further consideration. To the contrary, the District does not cite a single case where a court has condemned a retailer for offering consumers the best prices in its retail store. Moreover, the millions of individual agreements here between Amazon and sellers are vertical arrangements or, at a minimum, partially vertical arrangements to which the rule of reason applies.

B. In addition, the Superior Court correctly held that the District failed to make plausible allegations of anticompetitive effects in a relevant market—a necessary element of the District's restraint of trade, monopolization, and attempted-monopolization claims. The District's argument assumes that Amazon's suppliers and third-party sellers have the market power to raise prices "across the internet," Br. 9, but the District has not even tried to allege that any particular supplier or third-party

seller has market power to set anything other than a competitive price. The District has also made no effort to identify any specific supplier or third-party seller, any product sold by a seller, or any product that is priced at a supracompetitive level. Other than conclusory allegations, the District has not alleged specifics of any type to allege an anticompetitive effect. The complaint is lacking in any well-pleaded allegations that would allow a court to plausibly infer anticompetitive harm, and therefore the Superior Court correctly dismissed all of the District's claims on that basis.

III. The Superior Court correctly denied leave to amend. A motion for leave to amend a complaint cannot be granted after judgment is issued unless a plaintiff first establishes that the court should grant a motion to amend the judgment. *See* D.C. Super. Ct. Civ. R. 59(e). The Superior Court's oral ruling was a dismissal of the complaint with prejudice; there was therefore no longer a complaint to amend. *Johnson* v. *District of Columbia*, 244 F.R.D. 1, 4-5 (D.D.C. 2007), *aff'd in part*, 552 F.3d 806 (D.C. Cir. 2008). In any event, granting leave to amend would be futile; the District's few additional allegations do not cure the deficiencies in the operative complaint.

For these reasons, the orders of the Superior Court dismissing the District's claims with prejudice and denying leave to amend should be affirmed.

ARGUMENT

I. THE SUPERIOR COURT APPLIED THE CORRECT STANDARD IN DISMISSING THE DISTRICT'S CLAIMS.

The District's lead argument on appeal incorrectly contends that the Superior Court misapplied the standard the Supreme Court set forth in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), when dismissing its complaint. Br. 35-37.

A. As the Superior Court correctly explained, the Supreme Court has held that "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" and to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556, 570. That standard applies to all civil actions. *Iqbal*, 556 U.S. at 684. And this court has squarely held that the standard announced in *Iqbal* and *Twombly* governs the application of the Superior Court Rules of Civil Procedure. *See Bereston* v. *UHS of Del., Inc.*, 180 A.3d 95, 99 (D.C. 2018); *Sundberg* v. *TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015).

Accordingly, *Iqbal* and *Twombly* establish the standard here for determining whether the District successfully stated a claim for relief under the District of Columbia's antitrust laws.[4] The Superior Court was required to disregard allegations

[4] The Attorney General of the District of Columbia suggested in congressional testimony that its complaint in this case was based on the investigation it had con-

asserting a "legal conclusion couched as a factual allegation," *Twombly*, 550 U.S. at 555, as well as any "conclusory allegation" that baldly asserts the elements of a cause of action, *Bereston*, 180 A.3d at 99. And in determining whether it could "infer" from the remaining well-pleaded factual allegations that the claim crossed the line from "possible" to "plausible," the Superior Court could draw on its "judicial experience and common sense." *Iqbal*, 556 U.S. at 678-79.

B. Despite this body of law, the District and some of its amici contend that "*Twombly*'s plausibility discussion has no application to this case" and that the Superior Court erred by "transposing *Twombly*'s discussion of parallel conduct to the second element of the claim, whether the agreement was anticompetitive." Br. 35-36; *see also* Antitrust Law Professors and Economists Br. 8 (suggesting that "*Twombly* is inapplicable here").[5] This argument would require this court to reject

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ducted. *See* Promoting Competition, Growth, and Privacy Protection in the Technology Sector: Hearing Before the Subcomm. on Fiscal Responsibility and Economic Growth, 117th Cong. (December 7, 2021) (statement of Karl A. Racine).

Given that States and the District can investigate suspected violations of law and, if desired, request documents through civil investigative demands and subpoenas, there is no need for a State or the District to file complaints that lack sufficient detail to state a plausible claim for relief. *See* Br. of Virginia et al. at 14-15, *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2503552.

[5] Before *Twombly* and *Iqbal* settled any debate over those pleading standards, numerous amici supported the standards established there, including the American Bar Association, a group of legal scholars, and the American Petroleum Institute. *E.g.*, Br. for American Bar Association, *Bell Atl. Corp*. v. *Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2503551; Br. of Legal Scholars, *Bell Atl. Corp*. v. *Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2474080; Br. for American

both its own holdings and those of the Supreme Court, and it would transform the District into a haven for complaints based on conclusory and implausible allegations.

One would expect the District to know and acknowledge established law. The argument that *Twombly* has "no application," Br. 35, to an element of an antitrust or any other claim has been rejected by both the Supreme Court and this court. The Supreme Court's decisions in *Iqbal* and *Twombly* are based on an "interpretation and application of Rule 8" of the Federal Rules of Civil Procedure, which applies "in all civil actions and proceedings in the United States district courts." *Iqbal*, 556 U.S. at 684. The standard announced in those cases also applies in the District of Columbia. *See Potomac Dev. Corp.* v. *District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (holding that, pursuant "to D.C. Code § 11-946, we interpret Superior Court Rule 8(a) to include this plausibility standard"). To state a "plausible claim for relief" under those decisions, a plaintiff must plausibly allege each of the *elements* of the claim with well-pleaded facts. *See Chamberlain* v. *Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007) ("a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory").[6]

Petroleum Institute, *Bell Atl. Corp*. v. *Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2474078.

[6] The federal courts of appeals have consistently applied the pleading standard announced in *Twombly* and *Iqbal* in assessing whether plaintiffs have stated other elements of antitrust claims. *See, e.g.*, *Spinelli* v. *Nat'l Football League*, 903 F.3d 185, 212 (2d Cir. 2018); *Prime Healthcare Servs., Inc.* v. *Serv. Emps. Int'l Union*,

The District also suggests that the Superior Court misapplied "*Twombly*'s discussion of parallel conduct"; it asserts that, where concerted conduct is alleged, *Twombly*'s requirements concerning the pleading of parallel conduct are inapplicable, and the Superior Court erred by applying that discussion "to the second element of the claim, whether the agreement was anticompetitive." Br. 36. The objection appears to be that the Superior Court misunderstood the substantive holding of *Twombly* and held that "a written agreement is not anticompetitive just because the same conduct theoretically could have occurred without an agreement." *Id.*

That argument is also incorrect. When the Superior Court referenced "lawful, unchoreographed free-market behavior," JA 370, it was rejecting the District's speculative assertion that the agreements between third-party sellers and Amazon set a "price floor." JA 369 (quoting JA 36). The Superior Court had already explained that there is nothing in the "fair policy agreement that refers to a floor," JA 238, and the District utterly failed to allege any facts demonstrating that the written policy reveals a "conscious commitment" to "an unlawful objective," *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).[7] The Superior Court also explained why the agreements did not have any anticompetitive effects: it is "equally

642 F. App'x 665, 666-67 (9th Cir. 2016); *Brantley* v. *NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012); *Jacobs* v. *Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1338-40 (11th Cir. 2010).

[7] The District's reference to *Robertson* v. *Sea Pines Real Estate Cos.*, 679 F.3d 278 (4th Cir. 2012), is inapposite for the same reason. Br. 36. There, the Fourth Circuit stated that "*Twombly*'s requirements with respect to allegations of illegal

likely" that prices on other competing online marketplaces would be established by normal market activities—i.e., by "lawful" and "unchoreographed free-market behavior." JA 369-70. In light of that alternative explanation, the District's "repeated assertion" that there was a price floor could not satisfy the plausibility standard. JA 370.

II. THE DISTRICT FAILED TO ALLEGE A PLAUSIBLE ANTITRUST VIOLATION.

Applying the standard in *Iqbal* and *Twombly*, the Superior Court correctly concluded that the District failed to allege plausible antitrust violations. *See* JA 252-53, 371, 374, 376. This court reviews that decision de novo. *See, e.g.*, *Grayson* v. *AT&T Corp.*, 15 A.3d 219, 228 (D.C. 2011) (en banc).[8]

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parallel conduct are inapplicable where" the "concerted conduct is not a matter of inference or dispute." *Robertson*, 679 F.3d at 290. But all of the defendants had agreed to "develop, implement, enact, and facilitate the enforcement of" certain rules governing their joint venture that arguably restrained trade. *Id.* at 289. In this case, whether there is illegal concerted conduct is in dispute. While there are millions of agreements between Amazon and sellers, these agreements do not establish a "conscious commitment" to "an unlawful objective," *Monsanto*, 465 U.S. at 764, rather than the permissible "establishment or enforcement" of legal terms by Amazon, *Toscano* v. *Pro. Golfers Ass'n*, 258 F.3d 978, 984 (9th Cir. 2001).

[8] Amazon also argued below that the District's claims failed because it did not allege a facially plausible market. JA 64-67. As the District acknowledges, antitrust claims may be dismissed at the pleading stage if the "market definition is facially unsustainable." Br. 27; *see also Newcal Indus., Inc.* v. *Ikon Off. Sols.*, 513 F.3d 1038, 1045 (9th Cir. 2008); *Queen City Pizza, Inc.* v. *Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997). Amazon argued below that the District's proposed market of "online retail marketplaces," Br. 27, was implausibly gerrymandered. As the Supreme Court has explained, a relevant market must include all products "reasonably interchangeable by consumers for the same purposes," *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956), and thus it makes no sense to exclude

A. The District Failed To Make Plausible Allegations Of An Agreement To Restrain Trade.

A violation of D.C. Code § 28-4502 (like a violation of § 1 of the Sherman Act) requires a showing that the alleged conspirators "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764. To plead a violation of § 28-4502, a plaintiff must allege not just that there is an "agreement" of some kind, but that the agreement involves a "conscious commitment" to a scheme that would violate the antitrust laws—that is, an agreement to raise prices or restrict output. *Id.* at 764-65; *see also Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006) (the agreement must be an "*unreasonable*" restraint of trade (emphasis in original)).

Though the District spends much of its brief arguing that it has identified "express, written contracts," Br. 24-25, that argument misses the point because the District has failed to identify an agreement with the unlawful objective *to restrain trade*. *See Procaps S.A.* v. *Patheon, Inc*., 845 F.3d 1072, 1081 (11th Cir. 2016) (explaining that the "simple existence of the contract . . . standing alone" does not "satisfy

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brick-and-mortar retail stores from the market when consumers can purchase similar or even identical products whether they shop online or in a physical store, or to include in a single product market products as far ranging as refrigerators and basketballs that are not reasonably interchangeable. JA 64-65. The Superior Court did not rule on the argument that the District failed to identify a plausible product market because it dismissed all of the District's claims on other grounds. JA 252-53. But if this court reverses the Superior Court's order dismissing all of the District's claims, or any portion of the order denying leave to amend, Amazon intends to renew this argument on remand.

the concerted action requirement"). Critically, the District does not allege any agreement between Amazon and other multi-seller online marketplaces (like eBay or Walmart.com), which might (if plausibly alleged) constitute a horizontal agreement among competitors. Nor does the District allege any agreement among third-party retailers in competition with one another to fix prices (or otherwise restrain trade) at the direction of Amazon; this case thus differs from a "hub-and-spokes conspiracy" in which many entities at one level of a supply chain (the "rim") agree to restrain trade at the direction or instigation of one entity at another level (the "hub"). *See Marion Diagnostic Ctr., LLC* v. *Becton Dickinson & Co.*, 952 F. 3d 832, 841-42 (2020); *see also Howard Hess Dental Labs. Inc.* v. *Dentsply Int'l, Inc.*, 602 F.3d 237, 254-55 (3rd Cir. 2010) (requiring plausible allegations that there was "an agreement among" the many entities on the "rim" of the conspiracy).

The only "agreements" alleged are the Fair Pricing Policy, the Parity Provision, and the Margin Agreements, which include millions of past and current agreements between Amazon and its suppliers or its third-party sellers. The question is whether the District has plausibly alleged that any of *those* agreements between Amazon and its suppliers and the millions of third-party sellers offering goods in its store reflect a conscious commitment to a common scheme to restrain trade. The District has not done so for any of the three categories of alleged agreements.

1. The District Has Not Plausibly Alleged That The Fair Pricing Policy Was An Agreement To Restrain Trade.

The Superior Court correctly held that the District did not plausibly allege that the Fair Pricing Policy is an agreement to restrain trade by "setting a price floor below which the product will not be sold online." JA 369 (quoting JA 36). As noted, the Fair Pricing Policy does not prohibit third-party sellers from setting their own prices or from reducing their prices on or off Amazon; does not prohibit third-party sellers from selling their products through Amazon's competitors, through their own online stores, or in physical retail stores of any kind; does not set a "price floor"; and does not require the sellers to commit to doing business with Amazon for any period of time. The limited price-related requirement in the agreement is that the third-party sellers' prices not be "significantly higher" than recent prices on Amazon or elsewhere.

The District and some of its amici label the Fair Pricing Policy a "most-favored-nation" provision and make arguments about its economic consequences without references to any specifics in the complaint. *See, e.g.*, Br. 7, 9-11; Antitrust Law Professors and Economists Br. 15-24; Open Markets Institute Br. 8-13. As the Superior Court correctly noted, however, the price-related provision in the Fair Pricing Policy is not a most-favored-nation provision according to its plain terms. A most-favored-nation provision with a supplier would mean that Amazon would receive the supplier's best price, a price at least equivalent to that offered to others. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust*

Principles and Their Application ¶ 1807b1 (4th & 5th eds., 2021 Cumulative Supp.). Here, the actual policy states that the price on Amazon cannot be "*significantly* higher" than elsewhere. JA 107. A complaint such as this cannot survive by simply slapping an incorrect label on a policy. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557.

What the Fair Pricing Policy does is to prevent price gouging in Amazon's store by prohibiting third-party sellers from offering a product at a price "significantly higher" than elsewhere, and to preserve consumer trust by prohibiting unfair pricing practices such as deceptive pricing or excessive shipping fees. JA 107. Many jurisdictions have anti-price-gouging statutes that prohibit charging "excessive" or "excessively unreasonable" prices using similar language,[9] and the District itself prohibits charging more than the "normal average retail price" during an emergency. D.C. Code § 28-4102(a). The Fair Pricing Policy tracks the language in those statutes and is designed to achieve that lawful result for sales to consumers in Amazon's Store. *See* JA 107. And contrary to the District's conclusory allegations, the express terms of the policy allow third-party sellers to do exactly what the District alleges the sellers would do were it not for Amazon's current policy: to cut into

[9] *See, e.g.*, Idaho Code § 48-603(19); La. Stat. Ann. § 29:732 (prohibiting prices higher than those "ordinarily charged" during emergency); Iowa Admin. Code r. 61-31.1(714) (prohibiting "excessive" prices during an emergency); N.C. Gen. Stat. § 75-38(a) (prohibiting "unreasonably excessive" prices during emergency); Tex. Bus. & Com. Code Ann. § l7.46(b)(27) (prohibiting "excessive" prices during a disaster).

Amazon's market share by offering lower prices on the seller's own website or on the sites of other multi-seller online marketplaces with lower commissions.

The District responds that, whatever the Fair Pricing Policy says, Amazon *enforces* it whenever it "catches a seller offering the same or similar product through another online marketplace at a lower price"—not only when that price is "significantly" lower. Br. 39 (citing JA 18). The District's only allegation on that point states without elaboration that unspecified third-party sellers receive notices from Amazon if they offer their products elsewhere "at a lower price," JA 18, but the Superior Court correctly held that the District's "general conclusive" allegations on this point should be disregarded, JA 248. In any event, Amazon's unilateral conduct is irrelevant: Amazon's enforcement of the policy contrary to its terms is *unilateral* conduct that cannot be considered in determining whether the third-party sellers and Amazon *agreed* to restrain trade. As the Superior Court correctly explained, the District's position "suggested that the agreement is not what results in the alleged price floor." JA 369.

2. The District Has Not Plausibly Alleged That The Parity Provision Is An Agreement To Restrain Trade.

The District also claims that the Parity Provision—which is no longer in effect—was an agreement to restrain trade. *See* Br. 26-32. That provision required third-party sellers to "compensate" consumers if the seller's "term[s] of offer or sale"—including the item's price—were not "at least as favorable to Amazon Site users" as they were to others. JA 86.

The Parity Provision was not an agreement to restrain trade. The District cites no court that has held it is anticompetitive for a retailer to insist that sellers in its store must not discriminate against the retailer's customers. Best prices in a retail store are commonly advertised, and federal courts have explained that it is not anti-competitive for firms to insist on lower prices *for consumers*. For example, in *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 928-29 (1st Cir. 1984), the First Circuit upheld, as a matter of law, an insurer's competitive price provision prohibiting doctors from charging consumers fees in addition to what the insurer paid the doctor. Writing for the court, then-Judge Stephen Breyer explained that such a provision could not be an antitrust violation: "how can it be unlawful" for a buyer to "insist that no additional charge be made" to the insured consumer? *Id.* As Judge Breyer further noted, even accepting a complaint's allegations of market power, "courts have unanimously upheld contracts" where "those who directly provide goods or services" to consumers "have agreed to cap or forego completely additional charges to those" consumers. *Id.* at 925-26. That is because a "legitimate buyer is entitled to use its market power to keep prices down." *Id.* at 929.[10] Other courts

[10] Most-favored-nation clauses that are questioned in cases cited by the District concern a dominant firm negotiating for the best prices for *itself*, not consumers. *See, e.g.*, *United States* v. *Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 669, 674-75 (E.D. Mich. 2011). Even those most-favored-nation provisions are rarely condemned. As the leading antitrust treatise explains, courts "would not usually condemn" even "a dominant firm's insistence that it obtain the lowest generally available price for a product." Areeda & Hovenkamp, *supra*, ¶ 768a6.

have reached similar conclusions in similar situations sheltering consumers from higher prices.[11]

3. The District Has Not Plausibly Alleged That The Margin Agreements Are Agreements To Restrain Trade.

The Margin Agreements are likewise not agreements to restrain trade. Some suppliers choose to enter these agreements as part of wholesale price negotiations when selling their products to Amazon: the agreements establish a process for potential rebates to Amazon if Amazon lowers its retail prices to consumers. The Margin Agreements ensure that Amazon will receive a certain minimum profit margin on goods purchased from the seller and sold in Amazon's store. In this respect, the Margin Agreements function as agreements about wholesale prices between Amazon and its suppliers to *lower* the wholesale price Amazon pays for its supply, thereby allowing it to cut prices for consumers. As the complaint alleges, the "typical" reason these agreements kick in is that Amazon "lowers its retail price for a product on its online marketplace" after it "has identified a lower price for the product on a competing online marketplace." JA 23. Absent the Margin Agreements,

[11] *See Ocean State Physicians Health Plan, Inc.* v. *Blue Cross & Blue Shield of R.I.*, 883 F. 2d 1101, 1110 (1st Cir. 1989); *Tennessean Truckstop, Inc.* v. *NTS, Inc.*, 875 F.2d 86, 90 (6th Cir. 1989); *Westchester Radiological Ass'ns, P.C.* v. *Empire Blue Cross & Blue Shield, Inc.*, 707 F. Supp. 708, 713 (S.D.N.Y. 1998), *aff'd*, 884 F.2d 707 (2d Cir. 1989) (per curiam); *Finkelstein* v. *Aetna Health Plans of N.Y., Inc.*, 1997 WL 419211, at *5 (S.D.N.Y. July 25, 1997), *aff'd*, 152 F. 3d 917 (2d Cir. 1998).

Amazon could respond to lower retail prices in the future by refusing to buy from the wholesaler or paying less for the wholesaler's goods.

It is a fundamental premise of the antitrust laws that "low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atl. Richfield Co*. v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990). The District has not alleged that Amazon's prices are predatory. Absent that, antitrust laws do not prohibit a purchaser—even a monopolist (which Amazon decidedly is not, *see* pp. 44-46, *infra*)—from "bargaining for the best deal possible" in wholesale price negotiations. *Brillhart* v. *Mut. Med. Ins., Inc.*, 768 F.2d 196, 201 (7th Cir. 1985); *see also Austin* v. *Blue Cross & Blue Shield of Ala.*, 903 F.2d 1385, 1391 (11th Cir. 1990).[12] The complaint alleges, JA 14, 22-23, only that Amazon negotiates "the prices, terms, and conditions" on which it deals with suppliers—conduct that occurs every day and is lawful under the antitrust laws. *Pac. Bell Tel. Co.* v. *linkLine Commc'ns, Inc*., 555 U.S. 438, 448 (2009).

This remains true whether wholesale prices are negotiated up front or renegotiated individually or through agreements that trigger changes in payments to protect retailer margins. In *Lewis Service Center, Inc.* v. *Mack Truck*, 714 F.2d 842, 843-

[12] The antitrust laws do not interfere in wholesale price negotiations, even where the buyer is alleged to possess market power, because "a firm that has substantial power on the buy side of the market . . . is generally free to bargain aggressively when negotiating the prices it will pay for goods and services." *W. Pa. Allegheny Health Sys., Inc.* v. *UPMC*, 627 F. 3d 85, 103 (3d Cir. 2010).

44, 848 (1983), for example, the Eighth Circuit upheld as lawful under the rule of reason a "sales assistance" program through which a supplier, Mack Truck, agreed to reduce its contracted wholesale price to allow dealers to offer competitive retail prices while maintaining their profit margin. As with the Margin Agreements, the sales assistance program was triggered when Mack Truck's retailers faced competition that required them to lower their prices to remain competitive. *See id.* at 843-44. Such a program, the Eighth Circuit held, did not violate the Sherman Act and could not "be characterized as anything other than procompetitive," because it allowed dealers to respond to price competition. *Id.* at 848.

Similarly, in *AAA Liquors, Inc*. v. *Joseph E. Seagram & Sons, Inc*., 705 F.2d 1203, 1207 (1982), the Tenth Circuit held that a margin-protection program in which the wholesaler asked the manufacturer to agree to lower prices and guarantee a 10.5% profit margin for the wholesaler was lawful and not price fixing under Sherman Act § 1. The court explained that "a retailer who believes its prices are not competitive must be allowed to ask the wholesaler or manufacturer to lower its prices so that the retailer can offer competitive prices." *Id*.

The District's specific allegations regarding the Margin Agreements are also conclusory. The District alleged that suppliers "raised their prices to competing online marketplaces," and "asked those marketplaces to raise prices." Br. 41 (quoting JA 14). Those allegations that unspecified suppliers raised prices on unspecified products sold on unspecified marketplaces are exactly the kinds of "naked assertions

devoid of further factual enhancement" that cannot state a plausible claim. *Iqbal*, 556 U.S. at 678.

To the extent that the District conclusorily alleges that the "practical effect" of these agreements is that suppliers cannot offer lower or better terms on competing online marketplaces, JA 23, 35, 37, that result stems from lawful negotiations for lower prices. The plaintiff in *Lewis* similarly claimed that Mack Truck, the wholesaler, set its "standard wholesale price artificially high." 714 F.2d at 844. But that could not and did not transform the sales assistance program into an antitrust violation because, regardless of the wholesale price, "Lewis presumably would not be able to offer a competitive price without sales assistance." *Id.* at 848. And if true, the District's argument would be that a firm had a duty to negotiate for higher (or not lower) prices. Thus, the District's allegations that Amazon negotiates for "true-up payments" to reduce what it pays suppliers do not establish that Amazon and the third-party sellers had a "conscious commitment" to establish a price floor or otherwise retrain trade. *Monsanto*, 465 U.S. at 764.

4. The District Has Not Plausibly Alleged Any Horizontal Price-Fixing Agreements.

The District briefly argues that it has alleged horizontal agreements that are per se unlawful. It claims that Amazon has "horizontal pricing agreements" both because it competes with "third-party sellers' own websites" and because it competes with the same third-party sellers as "a retailer in several product submarkets

(e.g., batteries, mattresses, and lightbulbs)." Br. 6, 32-33. Those arguments also fail.

As an initial matter, the District abandoned its allegation of a per se violation. Its original complaint alleged that the Parity Provision and Fair Pricing Policy were "a per se violation of D.C. Code § 28-4502." Compl. 23-24. But the amended complaint excluded all references to a per se violation. JA 36-41. An "amended complaint renders any previous complaints a legal nullity" unless expressly incorporated by reference. *Zanders* v. *Baker*, 207 A.3d 1129, 1136 (D.C. 2019). By excising allegations of a per se violation, the District abandoned that claim.

On the merits, the agreements here should not be assessed under the per se rule. Per se liability is "reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality," *Texaco*, 547 U.S. at 5, like naked agreements between competitors to fix prices or to allocate geographic markets, *Leegin*, 551 U.S. at 886. A court labels a restraint per se unlawful only after developing "considerable experience with the type of restraint at issue" that allows the court to "predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886-87; *see also Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9-10 (1979). This is because there are "inherent limits on a court's ability to master an entire industry" and "hard-to-see efficiencies attendant to complex business arrangements." *Nat'l Collegiate Athletic Ass'n* v. *Alston*, 141 S. Ct. 2141, 2156

(2021). Cautioning against inappropriate application of the per se rule, the Supreme Court recently acknowledged that "it can take economists years, sometimes decades, to understand why certain business practices work and determine whether they work because of increased efficiency or exclusion." *Id.* There is no historical record of condemnation of the agreements and policies in this case. The District cites no cases finding antitrust liability for retailers having policies like those at issue here.

Unlike horizontal agreements among competitors to fix prices and limit supply, vertical agreements—even vertical *price* restraints—are judged under the rule of reason and not under a per se rule. *See Leegin*, 551 U.S. at 907-08. The agreements here are vertical. The District does not allege that Amazon has agreed with other online marketplaces (like Walmart, eBay, or Target) to fix prices at a particular level, nor has the District alleged any agreement *among* third-party sellers to charge a particular price for a given product. *Cf. United States* v. *Apple*, 791 F.3d 290, 318, 322 (2d Cir. 2015) (finding that Apple played a "key role" in orchestrating "express collusion" among major eBook publishers to "set ebook prices"); pp. 27-28, *supra*. Instead, the District has alleged agreements that govern a vertical relationship between Amazon, which operates a retail store, and third-party sellers, which sell goods to customers in Amazon's store and purchase services from Amazon to facilitate those sales. JA 11-15. Because Amazon and the third-party seller operate "at different levels of distribution," the agreement between the two parties is a classic

"vertical" arrangement that does not warrant review under the per se rule. *Bus. Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 729 (1988).

The allegation that Amazon sells products to consumers as a retailer, while also providing services to third-party sellers, also does not bring the challenged policies within the scope of any per se rule. Even if the agreements here could be said to be both horizontal *and* vertical, courts have repeatedly held that the rule of reason applies if a plaintiff alleges "both a vertical and horizontal relationship." *Beyer Farms, Inc.* v. *Elmhurst Dairy, Inc.*, 35 F. App'x 29, 29 (2d Cir. 2002); *see also 2238 Victory Corp.* v. *Fjallraven USA Retail, LLC*, 2021 WL 76334, at *5 (S.D.N.Y. Jan. 8, 2021); *Ogden* v. *Little Caesar Enters.*, 393 F. Supp. 3d 622, 636 (E.D. Mich. 2019); *Integrated Sys. & Power, Inc.* v. *Honeywell Int'l, Inc.*, 713 F. Supp. 2d 286, 291 (S.D.N.Y. 2010).

And even if these agreements were considered horizontal, the per se rule would still not apply, because Amazon's policies are not horizontal agreements to fix prices. Describing an agreement as "horizontal establishes nothing about whether it is competitive or anticompetitive," and some horizontal agreements benefit consumers "by reducing price and increasing output." Areeda & Hovenkamp, *supra*, ¶ 1901d. And an agreement among competitors—even one touching on prices—does not necessarily require per se treatment. *See Broad. Music*, 441 U.S. at 7-8. Here, under the challenged agreements between Amazon and the third-party sellers, both Amazon and the sellers maintain full authority to establish their own

prices for their own goods. It is not "price fixing" for buyers to "bargain for low prices" by insisting that sellers "agree to treat them as favorably as any of their other customers," *Blue Cross & Blue Shield United of Wis.* v. *Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995), and it is surely not price fixing when Amazon bargains for low prices not for itself but for its customers.

The District relies on *Frame-Wilson* v. *Amazon.com, Inc.*, 591 F. Supp. 3d 975 (W.D. Wash. 2022), to support its complaint. *E.g.*, Br. 13-15, 31-32, 40-42. Even assuming that *Frame-Wilson* was correctly decided, the Superior Court carefully distinguished the allegations in that case from the conclusory allegations here. JA 373-74 (noting that the *Frame-Wilson* complaint included "detailed factual allegations" not present here). The District also has not identified a single case in which a retailer's insistence on the lowest prices for customers has been evaluated as a horizontal price-fixing agreement even if the retailer happens to sell its own products. Even the court in *Frame-Wilson* declined to apply the per se rule not once but twice, dismissing the per se claim without leave to amend. *See* 591 F. Supp. 3d at 987; *Frame-Wilson* v. *Amazon.com, Inc.*, 2023 WL 2632513, at *4 (W.D. Wash. Mar. 24, 2023).[13]

[13] To state a rule of reason claim, a plaintiff must allege anticompetitive effects in a relevant market. "While every pleading stands on its own footing, pleadings alleging rule of reason violations are frequently dismissed for failure to adequately allege market harm." *In re Google Digital Advertising Antitrust Litig.*, 2022 WL 4226932, at *18 n.18 (S.D.N.Y. Sept. 13, 2022) (citing examples).

B. The District Failed To Plausibly Allege Anticompetitive Effects, Which Is An Essential Element Of Each Of Its Claims.

The Superior Court also held that all of the District's claims must be dismissed because its complaint did not contain any plausible non-conclusory allegations of anticompetitive effects. JA 252-53, 371. *See Am. Express*, 138 S. Ct. at 2284 (requiring a showing of anticompetitive effects for § 1 claims); *United States* v. *Microsoft Corp*., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (same for § 2 claims).

1. The District's theory of anticompetitive effects is essentially the same for each of the three challenged policies. The District argues that, while Amazon's policies "seem like" they would "lower prices for consumers," Br. 1, they in fact raise prices "across the internet" because the policies prevent other online retailers from cutting prices. Br. 9; Br. 33-34.

The District's theory rests on conclusory allegations of a speculative chain of causality. The absence of well-pleaded allegations is particularly telling in a complaint ambitiously alleging broad anticompetitive effects across tens of millions of different consumer products, ranging from batteries to mattresses to light bulbs. As the Superior Court noted, the complaint says virtually nothing about actual sellers or sales; it does not identify any "name" of any wholesale supplier or third-party seller; any "sale item"; or any "price point" for any "sale item," whether on Amazon or on "another online marketplace." JA 372-73. The complaint does not identify any product market in which the sellers compete—besides the exceptionally generic sug-

gestion that they sell "batteries, mattresses, light bulbs, cookware, computer accessories, luggage, exercise equipment, and motor oil," JA 36—and does not include any other allegations about those product markets.

In determining whether a complaint plausibly states a claim for relief, a court may also consult its "judicial experience and common sense." *Iqbal*, 556 U.S. at 679. An assumption of the District's theory of anticompetitive effects is that wholesale suppliers and third-party sellers, faced with supracompetitive fees in Amazon's store, will attempt to raise prices on *other* platforms. *See, e.g.*, Br. 34, 40. As the Superior Court also noted, the complaint fails to allege that any of the unspecified companies operating in unspecified product markets could possibly have market power that would allow them "to require major retail competitors—e.g., Walmart, Costco, and Target—to raise their retail prices or refrain from matching Amazon's prices." JA 373 (quoting JA 330). Absent such power, consumers' ability to "turn to other suppliers" will prevent "a firm from raising prices above the competitive level." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc*., 792 F.2d 210, 218 (D.C. Cir. 1986). Because of the competitive threats to the hundreds of millions of products sold by the millions of first- and third-party sellers, those sellers could not charge supracompetitive prices on other websites unless *they* have market power such that they need not fear price competition for all of those countless products. And there are no allegations in the complaint that any seller has market power.

The Superior Court rightly explained why the District's theory that the challenged policies increased prices in *other* multi- or single-seller online marketplaces "across the internet," Br. 9, rests on an assumption that does not comport with "how the market works." JA 252. If the prices charged in the Amazon store were above competitive levels, then consumers would have every incentive to purchase from other multi- or single-seller online marketplaces. As a result, any attempt by Amazon to charge supracompetitive prices would allow multi- or single-seller marketplaces "to cut prices in order to increase market share." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986). And the sellers could migrate to marketplaces such as Walmart, Target, and eBay. As the Court recognized: "Nobody's forcing them to do business through Amazon." JA 252; *see also* JA 375-76.

2. The District complains, Br. 39-43, that the Superior Court "failed to address" its well-pleaded allegations, but its efforts expose the weakness of its case. As to the third-party sellers: the District cites an allegation that "sellers 'report regularly receiving . . . alerts' from Amazon that the seller is being sanctioned" for violating the Fair Pricing Policy or the Parity Provision. Br. 39-40 (quoting JA 18). But that allegation does not identify any specific seller of any particular product, does not explain how the unspecified sellers responded to these notices, does not identify any product sold at an increased price because of such a warning, and does not explain why a seller would have the ability to raise prices. The District next notes an allegation that "Walmart routinely fields requests" from third-party sellers

to "raise prices on Walmart's online marketplace." Br. 40 (quoting JA 31). But it again does not identify any particular seller or product, does not allege that Walmart ever *agreed* to any of those requests, and does not allege a specific instance in which prices have been raised because of Amazon's policies. And again, the District does not allege that any third-party seller had market power to raise prices on any online marketplace. Finally, the District quotes a statement in a House of Representatives report that "sellers will raise the price on competitor sites to match Amazon's price." Br. 40 (quoting JA 32). But another entity's conclusory statement does not suffice to meet the District's burden in this case to make well-pleaded, plausible factual allegations.

The District also asserts that it has explained why the "*expected* result of the challenged agreements" would be higher prices across the internet. Br. 42 (emphasis in original). The District's theory assumes that Amazon has market power, but market power can be assessed only after defining the relevant market, and Amazon raised significant issues about the definition offered by the District. *See, e.g.*, JA 64-67; *supra* note 8.

Even accepting the District's market definition for all online transactions, the Superior Court correctly concluded that the District has not included well-pleaded allegations that indicate market power. *See* JA 375-76. The District's bare allegation that Amazon has 50 to 70 percent of the market conveniently corresponds to a

number that is sometimes deemed sufficient to establish market power for a monopolization claim. *Compare* JA 16, *with* Br. 45 (citing, among others, *Broadway Delivery Corp.* v. *United Parcel Service of Am., Inc.*, 651 F.2d 122, 129 (2d Cir. 1981) ("market share between 50% and 70% can occasionally show monopoly power")). The District's assertions of the "bare elements" of a "cause of action" must be disregarded. *Iqbal*, 556 U.S. at 687. Likewise, the District's repeated allegations that Amazon's policies raise prices or reduce consumer choice, *see, e.g.*, JA 11, 15, 18, 22, 23-24, 27, 34-35, 36-37, 39, are "naked assertions devoid of further factual enhancements" that "must be discarded, *Iqbal*, 556 U.S. at 678. And the same is true of the District's repeated suggestions that third-party sellers or wholesale suppliers are somehow "forced" to do business with Amazon. *See* JA 12. In any event, even if Amazon possessed market power, the District's theory requires it plausibly to allege that third-party sellers and suppliers have market power to raise prices in other online marketplaces. The District has not even attempted to so allege; its argument that it has plausibly alleged the "*expected* results" of Amazon's policies thus fails.

Finally on this score, the District and one of its amici suggest that the District should not be required to identify specific sellers and specific prices that are anticompetitive. Br. 43; Committee to Support the Antitrust Laws Br. 8-17. But the District's problem is not merely that it failed to identify specific sellers or prices, even though retail prices are readily available; it failed to identify any specific allegations at all. As the Superior Court explained, the District failed not only to identify

any seller, any product, and any price. JA 369. It failed to identify any other well-pleaded allegations establishing that Amazon's policies raised prices or caused an anticompetitive effect: "Other than the conclusion that that's happening, there's no fact presented." JA 252.[14]

III. THE SUPERIOR COURT CORRECTLY DENIED LEAVE TO AMEND THE COMPLAINT.

The District argues that it should have been permitted to file a second amended complaint after judgment was entered because, under Rule 15(a), leave to amend should be freely granted. *See* Br. 47-50. The District's theory fails because a motion to amend the pleadings cannot be entered after final judgment unless the District can establish that the judgment should be reopened. *See* D.C. Super. Ct. Civ. R. 59(e). In any event, the District's argument fails because amendment would be futile.

In this case, judgment was entered when the Superior Court granted Amazon's motion to dismiss all of the District's claims in the oral ruling. *See* JA 252-53. Amazon's motion to dismiss had requested dismissal with prejudice. *See* JA 69. The Superior Court's oral ruling therefore dismissed the claims with prejudice, and this

[14] The arguments of one of the District's amici that monopolists should be subjected to "special antitrust scrutiny" and that Amazon has monopoly power miss the point. Open Markets Institute Br. 4-8. Even assuming that Amazon has monopoly power (which it does not, and which Amazon would disprove if any portion of this case were remanded, *see supra* note 8), the District has failed to allege anticompetitive conduct or effects that would justify antitrust liability even if the District were to establish that Amazon has market power.

court has explained that a dismissal of claims is with prejudice unless otherwise stated. *See Colvin* v. *Howard Univ.*, 257 A.3d 474, 485 (D.C. 2021); *see also* D.C. Super. Ct. Civ. R. 41(b)(1)(B). It was only after that judgment that the District made its request to amend its complaint again.

Courts have repeatedly held that Rule 15(a) has "no application once the district court has dismissed the complaint and entered a final judgment for the defendant." *Johnson* v. *District of Columbia*, 244 F.R.D. 1, 4-5 (D.D.C. 2007), *aff'd in part*, 552 F.3d 806 (D.C. Cir. 2008).[15] Instead, after judgment, "the plaintiff may seek leave to amend" a complaint only if he is entitled to relief "under Rule 59(e)." *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1361 n.22 (11th Cir. 2006) (discussing federal rule).[16]

The District must therefore show that it satisfied the requirements to obtain relief from the judgment under Rule 59(e), *see Firestone* v. *Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996), but it cannot establish that the Superior Court committed "manifest errors of law or fact," *In re Estate of Derricotte*, 885 A.2d 320, 324 (D.C.

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[15] This court construes Rule 15 consistent with cases analyzing the federal analog. *E.g.*, *Onyeneho* v. *Allstate Ins. Co.*, 80 A.3d 641, 646 n.6 (D.C. 2013).

[16] *See also Jacobs*, 626 F.3d at 1344-46; *Katyle* v. *Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 470-71 (4th Cir. 2011); *Foster* v. *DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008); *Yuhasz* v. *Brush Wellman, Inc.*, 341 F.3d 559, 569-70 (6th Cir. 2003). Because Rule 59 of the D.C. Rules of Civil Procedure is substantively identical to its federal analog, this court "may look to federal court decisions as persuasive authority in interpreting" the rule. *Davis* v. *Abbuhl*, 461 A.2d 473, 476 n.6 (D.C. 1983).

2005). The District does not attempt to meet that standard, arguing instead that the Superior Court "by definition" "abused its discretion" because the initial decision was incorrect. Br. 47. But the Superior Court's decision was correct, and it certainly did not commit any "manifest" errors.

Even if the District's request were procedurally proper, the proposed amendments do not adequately cure the additional defects identified in Amazon's motion to dismiss, and the judgment can be upheld on the independent ground that amendment would be futile. *See, e.g.*, *Miller-McGee* v. *Wash. Hosp. Ctr.*, 920 A.2d 430, 436 (D.C. 2007).

An amendment is "futile" when it would not survive a motion to dismiss. *Colvin*, 257 A.3d at 484. Here, the handful of proposed additional allegations do not suffice to save the complaint from dismissal. The majority of the District's proposed amendments focus on the allegation that an individual third-party seller is "forced to charge higher prices" because of Amazon's Fair Pricing Policy. JA 292-93. The proposed amended complaint alleges that the seller must charge $150 on Amazon to make a profit of $51 per unit, but it need only charge $113 on its own website to make the same profit. JA 293. It also alleges that those numbers somehow show that the seller has no choice but to raise prices on its own website. *Id*. The example makes no sense, because the numbers show that the seller could lower prices on Amazon to $113 and still make a profit of $14 per unit. *Id.* The proposed complaint does not explain why the seller must raise prices on its own website rather than cut

prices on Amazon, and in particular it does not explain why—assuming Amazon's prices are "artificially high"—the seller would prefer to charge a supracompetitive price that would subject it to price competition. The proposed complaint also makes no allegations that this hypothetical actually occurs in practice. Nothing about the hypothetical establishes that Amazon's policies compel the seller to raise prices on its website, and there is no reason to think that other sellers would have the same economic incentive to do so.

The remaining allegations are insufficient too. For example, the District alleges that third-party sellers have gone to "great lengths" not to "run afoul" of the Parity Provision and Fair Pricing Policy, and that Amazon enforces those provisions. JA 289. But the actions of third-party sellers are unilateral conduct, and those allegations do not alter the fact that the Fair Pricing Policy does not require equal prices. Nor do the allegations address the issue of whether there is a conscious agreement among millions of sellers and Amazon to achieve an illegal purpose or whether there is an anticompetitive effect.

The District also alleges that a single, unidentified Amazon supplier asked Target and Walmart to "increase the prices they are charging" to avoid Amazon lowering the prices and potentially triggering Amazon's Margin Agreements. JA 295. That allegation does not establish that Amazon's suppliers have the market power necessary to cause Target and Walmart to raise their retail prices above competitive levels, that Target and Walmart in turn have the power to increase their

prices, or that the companies actually raised prices above competitive levels in response to this alleged request; in fact, it does not allege that the companies raised prices at all. The handful of new allegations in the District's new complaint similarly disregard the plain terms and practical effect of Amazon's policies, and they fail plausibly to allege anticompetitive effects from Amazon's policies.

Whether because the motion for leave to amend was procedurally defective or because amendment would be futile, this court should uphold the Superior Court's decision to deny the District leave to amend. And it should affirm the Superior Court's dismissal of the District's complaint.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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April 24, 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;
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     (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/ Kannon K. Shanmugam	22-CV-657
Signature	Case Number
Kannon K. Shanmugam	April 24, 2023
Name	Date

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CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellee and a member of the Bar of this court, certify that, on April 26, 2023, a copy of the attached corrected brief was filed and served through the court's electronic filing system to:

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