THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

CASE NO.: 2:23-cv-01495-JHC

PLAINTIFFS' OPPOSITION TO AMAZON'S MOTION TO DISMISS

NOTE ON MOTION CALENDAR: March 22, 2024

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Despite Amazon's attempt to rewrite it, Plaintiffs' Complaint tells a straightforward story of illegal conduct. It lays out how Amazon is a monopolist and explains how Amazon unlawfully maintains its monopoly power, enriching itself while harming its customers. Amazon employs various anticompetitive tactics to prevent third-party sellers and rivals from discounting and coerces sellers into using Amazon's services to fulfill orders, all of which works together to impede free and fair competition. Collectively, Amazon's tactics deny rivals the scale that its founder Jeff Bezos recognized is "necessary to succeed." With rivals foreclosed from gaining scale and competing, Amazon is free to exploit its monopoly power. For example, Amazon has steadily hiked the fees it charges sellers—now taking close to *half* of every dollar from the typical seller that uses Amazon's fulfillment services—while also degrading its search results and extracting over a billion dollars from shoppers through a secret algorithm that quietly raises prices. Though Amazon claims its tactics are "procompetitive," the Complaint's well-pleaded facts demonstrate classic illegal monopoly behavior.

Plaintiffs bring this action on behalf of the American public, seeking to end and remedy Amazon's violations of Section 5 of the FTC Act, Section 2 of the Sherman Act, and state competition and consumer protection laws. Amazon's motion to dismiss this action rests primarily on distortions of Plaintiffs' Complaint, repeatedly mischaracterizing its allegations and asserting different facts.

First, the Complaint pleads that Amazon has unlawfully maintained monopolies through conduct whose collective anticompetitive effect is greater than the sum of its parts. Plaintiffs allege that Amazon's tactics are part of an interconnected and mutually reinforcing strategy to unlawfully maintain its monopolies—and that feedback loops in the relevant markets amplify the cumulative impact of Amazon's unlawful behavior. The law is clear that such a course of conduct must be

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assessed holistically. Amazon's motion fails because it focuses on individual acts in isolation, ignoring the synergistic effect of the challenged conduct. (§ I.A.) Moreover, Amazon's arguments characterizing its conduct as "procompetitive" contradict the Complaint's allegations and cannot be resolved on a motion to dismiss. (§ I.B.)

Second, the Complaint amply alleges that each aspect of Amazon's challenged conduct is anticompetitive, even considered in isolation. Amazon's anti-discounting tactics suppress price competition and inflate prices across much of the internet by penalizing sellers that offer lower prices off Amazon (where Amazon's hefty seller fees do not apply) and disciplining rivals from undercutting Amazon's prices. (§ II.A.) Amazon also coerces sellers into using its fulfillment services, raising sellers' costs of selling on multiple marketplaces and thereby depriving rival marketplaces of scale. (§ II.B.) Preventing discounts and creating barriers to competition, as the Complaint alleges, are not "facially procompetitive," as Amazon contends, but rather prevent Amazon's rivals from gaining the scale necessary to challenge Amazon's monopolies.

Third, the FTC properly asserts claims under the FTC Act, which is broader in scope than the Sherman Act. (§ III.) Ninth Circuit precedent forecloses Amazon's position that this is not a "proper case" under Section 13(b) of the FTC Act. And the detailed allegations that Amazon's conduct is likely to recur undercut Amazon's assertion that one of the FTC's claims is "untimely." (§ IV.)

Fourth, the state law claims are well-pleaded. Amazon's arguments to the contrary rest on multiple misunderstandings of these States' laws and their claims. (§ V.)

Plaintiffs seek to end Amazon's monopoly maintenance scheme, restore the competition Amazon has quashed, and prevent a recurrence of Amazon's illegal behavior. Amazon cannot re-write Plaintiffs' well-pleaded Complaint. Its motion to dismiss should be denied.

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FACTUAL BACKGROUND

Amazon monopolizes two distinct yet related markets: the online superstore market and the online marketplace services market. Online superstores provide shoppers with a unique offering: a single destination for purchases across an expansive variety of goods, reducing the time and effort expended while shopping. (¶¶ 117-83.)[1] Meanwhile, online marketplaces offer a distinct set of services to businesses that wish to sell goods directly to shoppers: access to an established customer base and an interface that facilitates product discovery and sales. (¶¶ 184-208.)

Economies of scale are critical to these markets. As Mr. Bezos has explained, to "build an important and lasting company . . . online in e-commerce . . . you have to have a scale business," because "[t]his kind of business isn't going to work in small volumes." (¶¶ 10, 177, 206-17.) But Amazon's scheme aims to keep rivals from gaining the scale needed to compete effectively against Amazon. (¶¶ 12, 36.)

Amazon prevents rivals from gaining scale in multiple ways, including by blocking price competition. (¶¶ 262-324.) Using an army of web crawlers to monitor prices charged elsewhere online, Amazon prevents third-party sellers from discounting below their prices on Amazon. (¶¶ 262-63, 362.) When Amazon's surveillance network finds a lower price elsewhere for a third-party seller's product, Amazon punishes the seller. For example, Amazon takes away a crucial source of sales—the "Buy Box" from which a shopper can "Add to Cart" or "Buy Now." (¶¶ 83-85, 269, 277.) Nearly 98% of Amazon sales are made through the Buy Box and, as Amazon recognizes, excluding a seller from the Buy Box causes that seller's sales to "tank." (¶¶ 85-89, 284.) Meanwhile, Amazon charges its sellers ever-increasing fees, which sellers account for in their product prices, forcing them to use their inflated Amazon prices as a price floor elsewhere.

[1] "¶" refers to the corresponding paragraph in the Complaint (Dkt. #114).

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(¶¶ 72-73, 251, 306-08.) Sellers cannot simply abandon Amazon altogether, because sellers need access to a large customer base (¶ 212) and Amazon's marketplace has five times the sales of the next largest marketplace (¶ 205).

Amazon also suppresses price competition by algorithmically disciplining rivals that offer prices lower than Amazon's first-party product listings. (¶¶ 325-37.) Amazon deems setting its own prices lower than those of its rivals to be "heretical" and instead relentlessly follows rivals' prices up or down, over and over, teaching rivals that they cannot gain business by undercutting Amazon's prices. (¶¶ 326-32.) As Amazon's leadership has observed, this strategy has the purpose and effect of deterring rivals from discounting. (¶¶ 326-28.) Rivals quickly learn they cannot gain share through lower prices, discounts, and promotions. (¶¶ 330-50.) In short, Amazon's tactic freezes price competition. (¶¶ 22, 330.)

Amazon further blocks rivals from gaining scale through its fulfillment conduct. Amazon coerces sellers into using its fulfillment service, Fulfillment by Amazon ("FBA"), by conditioning Prime eligibility—which can triple a product's sales on Amazon (¶¶ 361-74)—on the use of FBA. (¶¶ 351-52.) FBA, however, serves only Amazon sales (¶ 388), forcing sellers who use it to either fulfill orders themselves or add a second fulfillment service to sell on rival marketplaces. (¶¶ 364-74.) By forcing sellers to use FBA for Prime-eligible orders, Amazon adds costs for sellers that they would not incur if they could use a single fulfillment service to sell both on and off Amazon. (¶¶ 375-91.) Amazon's coercion also deprives independent fulfillment providers of the opportunity to compete for the large volume of Prime-eligible orders, keeping them artificially small in a business where scale is important. (¶¶ 384-85, 392-94.) Sellers who wish to operate across multiple online stores must inefficiently split their inventory and, in some cases, use artificially small fulfillment providers, which limits rival marketplaces' ability to attract sellers and stunts their growth. (¶¶ 368-69, 384-89, 395-96.)

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Amazon has also raised prices directly with another algorithm—codenamed "Project Nessie"—that studied other retailers' pricing algorithms and predicted when they would follow Amazon's price hikes. (¶¶ 419-20.) Amazon used Project Nessie to raise its own prices and induce rivals to follow. (¶ 420.) Amazon estimated that this algorithm increased Amazon's profits by a billion dollars within three years. (¶ 423.)

Amazon's interconnected course of conduct artificially keeps sellers and shoppers on Amazon and away from Amazon's competitors. And because feedback loops in the relevant markets amplify the cumulative effect of anticompetitive tactics, Amazon's conduct creates a self-reinforcing cycle of dominance and harm. (¶¶ 209-27, 410-15.) Overall, Amazon's scheme prevents rivals from gaining the scale needed to meaningfully compete against Amazon and challenge its monopolies, inflating prices and degrading quality for both shoppers and sellers. (¶¶ 433-41.)

STANDARD OF REVIEW

A complaint "does not need detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 911 (9th Cir. 2012) (en banc) (cleaned up). Furthermore, "Rule 12(b)(6) may not be used to challenge specific allegations in a complaint." *Fairhaven Health, LLC v. BioOrigyn, LLC*, 2021 WL 5987023, at *5 (W.D. Wash. Dec. 17, 2021). In other words, "a motion to dismiss under Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims; the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief." *Id.* (cleaned up).

ARGUMENT

Plaintiffs challenge Amazon's monopoly maintenance and unfair methods of competition under Section 2 of the Sherman Act, 15 U.S.C. § 2 (Counts I, II, V, and VI), Section 5 of the FTC

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Act, 15 U.S.C. § 45(a)[2] (Counts III and IV), and state laws (Counts VII-XX). For the reasons below, Amazon's arguments do not warrant dismissal of any of Plaintiffs' claims.

I. THE COMPLAINT PLAUSIBLY ALLEGES AN ANTICOMPETITIVE COURSE OF CONDUCT.

"A Section 2 monopolization claim 'has two elements: (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 historic accident.'" *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 998 (9th Cir. 2023) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). Amazon does not contest either element with respect to Plaintiffs' overall course of conduct allegations, which alone prevents dismissal of Plaintiffs' monopolization claims. (§ I.A.) Instead, Amazon resorts to characterizing its conduct as "procompetitive"—an affirmative defense that cannot be resolved on a motion to dismiss. (§ I.B.)

A. Amazon's conduct must be assessed holistically.

Amazon does not contest that Plaintiffs have adequately pleaded monopoly power. (Motion to Dismiss, Dkt. # 127 ("Mot.") at 1 n.1, 7-8.) To satisfy the second element of a Section 2 monopolization claim, a plaintiff "must show that the defendant acquired or maintained its monopoly through anticompetitive conduct." *Epic Games*, 67 F.4th at 998 (cleaned up). Anticompetitive conduct consists of acts that "tend[] to impair the opportunities of rivals" and "do[] not further competition on the merits or do[] so in an unnecessarily restrictive way." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008). Monopolists have "myriad"

[2] Section 5 of the FTC Act prohibits "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a). Unfair methods of competition include, but are not limited to, practices that violate the Sherman Act. *FTC v. Cement Inst.*, 333 U.S. 683, 694-95 (1948).

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"means of illicit exclusion," *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam); anticompetitive conduct "can come in too many forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties," *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998). "[T]he existence of market power . . . casts an anticompetitive shadow over a party's practices." *Epic Games*, 67 F.4th at 983 (cleaned up). Indeed, a company possessing monopoly power is "precluded from employing" even "otherwise lawful practices" when those practices "unnecessarily exclude[] competition." *Greyhound Comput. Corp. v. IBM Corp.*, 559 F.2d 488, 498 (9th Cir. 1977). Accordingly, in assessing alleged anticompetitive conduct, "it would not be proper to focus on the specific individual acts of an accused monopolist while refusing to consider their overall combined effect." *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992). Instead, a court must always "deal with what has been called the synergistic effect of the mixture of the elements." *Id.* (cleaned up).

Here, Plaintiffs adequately allege that Amazon has implemented an "overarching strategy" to "keep rivals from gaining the scale needed to compete effectively against Amazon." (¶ 12.) The Complaint details how rivals cannot grow by competing for shoppers on price due to Amazon's set of anti-discounting tactics, and how rivals cannot effectively grow by competing for third-party sellers due to both those tactics and Amazon's "coercive tactics involving its order fulfillment service to prevent rivals from gaining the scale they need to meaningfully compete." (¶¶ 12, 18.) The various components of Amazon's scheme work together to perpetuate Amazon's monopoly position. (*See, e.g.*, ¶¶ 33-34, 257, 260-61, 291-93, 410-15, 445, 451, 467, 474.) These allegations underscore why Amazon's multipronged scheme cannot "be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

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The "impact of scale and related network effects" in the relevant markets, where "a denial of scale in one market can make it harder to grow in the other," further amplify the anticompetitive effects of Amazon's conduct. (¶ 210; *see also* ¶¶ 8-10, 119, 177-83, 206-08, 209-27.) Amazon's combined "set of anticompetitive tactics" allows it to "unlawfully deny its rivals access to both shoppers and sellers, artificially stunting their growth by starving them of the feedback loops across the relevant markets that would benefit shoppers and sellers alike." (¶ 227.) Amazon thus illegally uses its monopoly power "to foreclose competition, to gain a competitive advantage, [and] to destroy . . . competitor[s]." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997).

Amazon ignores these allegations, segregating the Complaint's allegations into "three business practices" and arguing that each—considered separately—is "procompetitive" and lacks "anticompetitive effects." (Mot. 8-15.) While Amazon fails to demonstrate that each category of alleged conduct is not independently anticompetitive (§ II below), its motion also fails to address the overall *combined* effects of the challenged conduct. Amazon's compartmentalized analysis cannot justify dismissal of Plaintiffs' monopoly maintenance claims. *See, e.g.*, *Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1180-84 (N.D. Cal. 2012) (Koh, J.) (relying on *City of Anaheim* in evaluating the "overall combined effect" of alleged anticompetitive conduct and denying motion to dismiss); *Simon & Simon, PC v. Align Tech., Inc.*, 533 F. Supp. 3d 904, 912-20 (N.D. Cal. 2021) (same).

B. Amazon's claims of procompetitive benefits are premature.

Rather than engage with Plaintiffs' detailed, plausible allegations of anticompetitive conduct, Amazon previews its likely affirmative defenses. Amazon's motion repeatedly contradicts the Complaint's factual allegations, insisting that the challenged conduct has "legitimate procompetitive rationale[s]" and "procompetitive effects," including increased

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"consumer appeal" and "lower[] . . . prices." (*E.g.*, Mot. 2, 12-14; *cf., e.g.*, ¶¶ 433-41.) Amazon argues that the Complaint must establish that the alleged anticompetitive effects "predominated" over the purported procompetitive justifications Amazon presents in its motion (Mot. 14), but "whether the alleged procompetitive benefits of [conduct challenged under the Sherman Act] outweigh its alleged anticompetitive effects is a factual question that the district court cannot resolve on the pleadings." *PLS.com, Inc. v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 839 (9th Cir. 2022).

Amazon's arguments about the purported "procompetitive" effects of its conduct—which repeatedly rely on citations to merits-stage decisions—are therefore "misplaced." *In re eBay Seller Antitrust Litig.*, 545 F. Supp. 2d 1027, 1033 (N.D. Cal. 2008). While a "procompetitive benefit may rebut a *prima facie* case," plaintiffs need only "establish a *prima facie* case" to survive a motion to dismiss monopolization claims. *Id.*; *see United Food & Com. Workers Local 1776 v. Teikoku Pharma USA, Inc.*, 74 F. Supp. 3d 1052, 1067 & n.16 (N.D. Cal. 2014) (collecting cases); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (reversing dismissal of claims where district court's decision was "rooted in defendants' factual assertions").

Applying this standard, *four* different courts in this District have recently rejected as premature similar arguments from Amazon at the motion to dismiss stage. *See Frame-Wilson v. Amazon.com, Inc.*, 591 F. Supp. 3d 975, 992 (W.D. Wash. 2022) (Jones, J.) ("Amazon's argument that its pricing provision has procompetitive justifications may be used to rebut Plaintiffs' claims once a *prima facie* case has been established, but the Court need not consider such rebuttals on a motion to dismiss."); *De Coster v. Amazon.com, Inc.*, 2023 WL 372377, at *3 (W.D. Wash. Jan. 24, 2023) (Martinez, J.) ("Amazon argues that its policies 'provide for competitive prices to consumers, rather than for itself' . . . . To the extent Amazon is asking the Court to construe the facts in an unfavorable light, such is contrary to Rule 12(b)(6) and premature given the

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underdeveloped factual record."); *Floyd v. Amazon.com, Inc.*, 2023 WL 3891973, at *5 (W.D. Wash. June 8, 2023) (Coughenour, J.) ("While Defendants assert that the [challenged conduct], and its subsequent effects, are the result of pro-competitive and anti-counterfeit motivations, the Court . . . cannot address that countervailing fact at this time."); *Brown v. Amazon.com, Inc.*, 2023 WL 5793303, at *4 (W.D. Wash. Sept. 7, 2023) (Chun, J.) ("[T]he Court need not consider Amazon's justifications on a motion to dismiss."). These decisions underscore that considering Amazon's asserted justifications would be premature here.

II. THE COMPLAINT PLAUSIBLY ALLEGES THAT EACH PART OF AMAZON'S MONOPOLISTIC SCHEME IS ANTICOMPETITIVE.

Even setting aside the above deficiencies in Amazon's arguments, the Complaint amply alleges how each part of Amazon's monopolistic scheme, considered separately, violates the law. It is enough that each "reasonably appears capable of making a significant contribution to maintaining monopoly power." *Microsoft*, 253 F.3d at 79 (cleaned up).

A. Amazon stifles price competition.

Amazon designed its anti-discounting tactics to deprive rivals of scale and exert control over pricing at rival stores, with the intention of deterring sellers and rivals from lowering prices. (¶¶ 262-65, 316, 328, 365.) For Amazon's marketplace, when Amazon detects a lower price elsewhere, it punishes third-party sellers by removing their offers from the all-important Buy Box. For Amazon's first-party sales, Amazon uses an algorithmic pricing strategy designed to deter price competition and "avoid 'a perfectly competitive market.'" (¶ 327.)

Third-Party Sellers. Amazon's tactics to prevent third-party sellers from offering discounts on other sites are anticompetitive because they foreclose price competition from those sellers elsewhere, such as on marketplaces that charge lower fees. (¶¶ 17, 285.) For certain important sellers, Amazon uses contractual restraints to prevent price competition. (¶¶ 291, 302.)

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For all sellers, Amazon threatens disqualification from the Buy Box—where nearly 98% of Amazon sales are made—if they offer discounts elsewhere. (¶¶ 85-86, 269, 297.) Amazon further threatens to bury discounting sellers in its search results or conceal those sellers' prices, even if a seller's price is the best deal available on Amazon. (¶¶ 16, 283.) As a result, the price on Amazon—which often includes Amazon's bloated fees—effectively becomes the price floor market-wide. (¶¶ 17, 309-12.)

Other courts in this District have found similar allegations sufficient to state a Sherman Act claim, rejecting many of the same arguments Amazon makes here. *See Frame-Wilson*, 591 F. Supp. 3d at 992; *De Coster*, 2023 WL 372377, at *3; *see also People v. Amazon.com, Inc.*, 2023 WL 8719823 (Cal. Super. Ct. L.A. Cnty. Mar. 30, 2023) (applying California competition law). These courts and others have recognized that preventing price competition by ensuring price uniformity across providers, as Amazon's strategy does, can be anticompetitive. *See, e.g.*, *Wolfire Games, LLC v. Valve Corp.*, 2022 WL 1443744, at *3-4 (W.D. Wash. May 6, 2022) (denying motion to dismiss claims that price-parity clauses constituted anticompetitive conduct); *United States v. Delta Dental of R.I.*, 943 F. Supp. 172, 176 (D.R.I. 1996) (price-parity clauses can "produce substantial anticompetitive effects").

Amazon contends its anti-discounting policies are "facially procompetitive" (Mot. 2, 11) because they improve the in-store experience by not featuring "bad deals," but that assertion is both premature (*see* § I.B above) and mischaracterizes the Complaint. The Complaint alleges that Amazon penalizes sellers for off-Amazon discounts "even if the [seller's] offer is the best deal available on Amazon" (¶ 16) and even if the off-Amazon price is only a penny less than the price on Amazon (¶ 277). Hiding the best deal on Amazon from Amazon's customers merely because a better deal is available elsewhere does not improve the Amazon in-store experience. Amazon's citations to cases involving steering customers to good deals (Mot. 11-12) are inapposite.

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Amazon's claim that the Complaint inadequately alleges anticompetitive effects flowing from its third-party anti-discounting strategies also fails. (Mot. 13-14.) Conduct has an anticompetitive effect when it "harm[s] the competitive *process*," an inquiry which may be informed by the impact on customers. *FTC v. Qualcomm Inc.*, 969 F.3d 974, 990 (9th Cir. 2020) (quoting *Microsoft*, 253 F.3d at 58). Amazon asserts that its policies have "obvious price-reducing effects" (Mot. 14) and that "the Complaint does not contend otherwise" (Mot. 13). That is plainly false. The Complaint details how Amazon has nearly doubled its seller fees over the past decade (¶¶ 34, 252, 308) and requires sellers to charge at least as much off Amazon (where those fees do not apply) as on Amazon (where sellers must recoup those fees) (¶¶ 17, 309). The "obvious" effect of that requirement, as Amazon was told by sellers, is higher prices on competing sites, not lower prices on Amazon. (*E.g.*, ¶ 300 (seller informing Amazon executive that its anti-discounting policies may "cause us to raise prices in other sales channels in order to keep Amazon offers").)[3]

First-Party Pricing Strategy. When Amazon acts as a seller, its use of surveillance and pricing algorithms to deter rivals from offering lower prices constitutes anticompetitive conduct. Amazon uses an "extensive surveillance network" to track prices online and "immediately cop[ies]—but never undercut[s]" other stores' prices, "automatically increas[ing] its Retail price to copy" other online stores or marketplaces, even if that means higher prices for Amazon shoppers. (¶¶ 325-29.) This strategy is a "game theory approach" (¶ 328) that Amazon devised to teach rivals that it is committed to not let them win share from Amazon by lowering prices. If prices do not affect a rival's share relative to Amazon, the rival's incentives to offer lower prices

[3] Amazon's citation to merits-stage decisions involving a balancing of procompetitive and anticompetitive effects, such as *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), does not support its position at the pleadings stage. (*See* § I.B above.) Amazon also cites *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012) (Mot. 14) in support of a predominance requirement at the pleading stage, but that case does not even discuss balancing pro- and anti-competitive effects to determine which predominates.

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are diminished, and its incentives to raise prices increase. (¶¶ 330-31.) In the words of a senior executive, Amazon designed this system deliberately to avoid a "perfectly competitive market" in which stores undercut each other to win customers. (¶ 327.) When Amazon implemented the strategy, it predicted that "prices will go up" (¶ 328), and afterward observed that the strategy "work[ed]" (¶ 332).

Amazon's strategy uses its monopoly power to eliminate the normal incentives for firms to compete on price, harming the competitive process. *See Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986) (when a monopolist's "rivals will be chastened sufficiently to abandon competitive behavior," its conduct violates Section 2). The faster and more consistently automatic price matching occurs, the more it reduces price competition. *See, e.g.*, Aaron S. Edlin & Eric R. Emch, *The Welfare Losses from Price-Matching Policies*, 47 J. INDUS. ECON. 145, 162 (1999) ("It has long been observed that when rivals' reaction times decrease sufficiently, undercutting becomes unprofitable."). Amazon estimates it can identify price changes for many products "virtually anywhere on the internet within hours" (¶ 267), allowing its pricing responses to occur "immediately" (¶ 329). Amazon's tactics discipline price cutters and freeze price competition (¶¶ 21-22, 258), clearly harming the competitive process.

Amazon tellingly ignores the Complaint's detailed allegations that eliminating these incentives was the *intended* effect of its conduct. (¶¶ 327-32.) A defendant's intent is "relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). In a monopolization case, intent evidence "may help the court interpret facts and predict consequences" of the alleged anticompetitive conduct and "understand the likely effect of the monopolist's conduct." *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *see Image Tech. Servs.*, 125 F.3d at 1211; *Greyhound Comput.*, 559 F.2d at 499.

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Amazon argues that its first-party anti-discounting policy is "facially procompetitive" (Mot. 9-11) and "conclusively presume[d]" to be procompetitive because it involves above-cost pricing (Mot. 13) by mischaracterizing the Complaint and applying the law to its preferred facts. Amazon's arguments address an imagined predatory pricing claim (which depends on below-cost pricing), rather than the Complaint's challenge to Amazon's use of monopoly power to automatically and immediately match both price cuts *and price increases*, with the overarching goal and effect of *eliminating price competition*. As the Supreme Court has made clear, whether prices are above cost (the "price-cost test") only matters when "a plaintiff seek[s] to establish competitive injury resulting from a rival's *low prices*." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (emphasis added); *see also, e.g.*, *Church & Dwight Co. v. Mayer Lab'ys, Inc.*, 2011 WL 1225912, at *8-10 (N.D. Cal. Apr. 1, 2011) ("[*Brooke Group*] line of cases is inapposite" where the relevant claim "is not a predatory pricing claim"). Conduct involving above-cost pricing may be anticompetitive. *See, e.g.*, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 279 (3d Cir. 2012) (*Brooke Group* did not "overturn decades of other precedent holding that conduct that does not result in below-cost pricing may nevertheless be anticompetitive."). This is true even if the challenged conduct involves a pricing strategy. *See, e.g.*, *Pulse Network, LLC v. Visa, Inc.*, 30 F.4th 480, 493 (5th Cir. 2022) (*Brooke Group* inapplicable because plaintiff "isn't challenging . . . low or below-cost pricing" but rather claims defendant is "manipulating prices in a way that excludes competitors from the market"). Apart from the inapplicable *Brooke Group* principle (Mot. 13), Amazon does not seriously challenge the sufficiency of the Complaint's well-pleaded allegations of anticompetitive effect (*e.g.*, ¶¶ 332 (Amazon observed its effectiveness), 333-50 (specific instances of stifled price competition)).

Moreover, Amazon's strategy to foreclose price competition from sellers and rivals alike depends on both its first- and third-party anti-discounting strategies, and the price-cost test does

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not apply to just one element of a larger course of conduct. *See, e.g.*, *In re Suboxone Antitrust Litig.*, 622 F. Supp. 3d 22, 66 (E.D. Pa. 2022) (price-cost test inapplicable where low prices were "part of a broader and more extensive exclusionary scheme"); *see also Pulse Network*, 30 F.4th at 492-93 (declining to apply price-cost test where "artificially deflate[d]" prices were just one part of an "integrated program" that "raises overall prices for merchants" while "excluding competitors from the market"). Amazon's goal of preventing comparison shopping depends on blocking price competition from both rivals and third-party sellers. (¶ 265.) Because the Complaint alleges several types of anticompetitive conduct working together to eliminate price competition, the price-cost test does not apply and cannot support dismissal.

B. Amazon's conditioning of Prime eligibility on use of Amazon's fulfillment services is anticompetitive.

The Complaint sufficiently alleges that Amazon coerces sellers into using its fulfillment services and thereby forecloses competition. Amazon accomplishes this by conditioning Prime eligibility on the use of FBA. (¶¶ 351-53.) Amazon recognizes that "[s]ellers may not have wanted to buy [FBA] but they did so in order to 'buy increased sales that come with Prime eligibility'" (¶ 361), which regularly triples sellers' sales (¶¶ 359-60). Absent this policy, "many sellers would prefer to use an independent fulfillment provider" that would allow sellers to seamlessly fulfill orders across multiple online sales channels. (¶ 355.)

The Complaint details how this challenged conduct unlawfully maintains Amazon's monopolies: by conditioning Prime eligibility on FBA use, Amazon raises the costs of selling off Amazon and limits multihoming, as sellers must maintain separate inventory pools and find another fulfillment solution to sell off Amazon. (¶¶ 368-69.) This makes it harder for Amazon's rivals to attract sellers to their online stores and, in turn, makes it harder for rivals to attract shoppers seeking the wide selection offered by third-party sellers. (¶¶ 364-74.) Amazon's conduct

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also limits the growth of independent fulfillment providers that could facilitate sellers offering their goods across multiple marketplaces, thereby preserving Amazon's monopoly position. (¶¶ 375-94.)

Courts have long recognized that coercion by a dominant firm to force customers to purchase unwanted products may be anticompetitive. *See, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465, 483 (1992) (Kodak "took exclusionary action to maintain its . . . monopoly" over repair parts, including by "forc[ing] unwilling consumption" of related repair services); *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 467-76 (7th Cir. 2020) (monopolist "engaged in exclusionary conduct forbidden by Section 2" by coercing customers into purchasing related services). This is particularly true when that strategy deprives rivals of the scale they need to compete effectively, including by choking off growth of related products that might support the development of competitors. *See, e.g.*, *Microsoft*, 253 F.3d at 60, 65-66 (Microsoft maintained its Windows monopoly by coercing customers to use Internet Explorer, thereby "keeping rival browsers from gaining the critical mass of users necessary to attract developer attention away from Windows").

Amazon's arguments that limiting Prime eligibility is about improving delivery (Mot. 12) and does not produce anticompetitive effects (Mot. 14) again ignore the Complaint's allegations. Contrary to Amazon's claims of improved delivery, the Complaint alleges that when sellers were given the chance to enroll in "Seller Fulfilled Prime," many sellers enrolled, and some chose independent fulfillment providers (¶¶ 398-400) while successfully meeting Amazon's delivery metrics (¶ 401). Relaxing the FBA requirement for Prime eligibility worried Amazon because, as it said internally, Prime order fulfillment would be an "enabler" for independent fulfillment providers to "get to scale," which would then benefit "other retailers." (¶ 402.) Accordingly, Amazon pressed sellers to stop using independent fulfillment providers for Prime-eligible orders.

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(¶¶ 403-05.) Amazon's attempts to present an alternative explanation for its conduct must fail on a motion to dismiss. *See, e.g.*, *Heck v. Amazon.com, Inc.*, 2024 WL 248712, at *3 (W.D. Wash. Jan. 23, 2024).

Amazon's arguments concerning the anticompetitive effects of its coercion rewrite the law (inventing a list of pleading requirements) and the facts (mischaracterizing the Complaint and relying on factual claims not alleged). (Mot 14-15.) Without supporting authority, Amazon claims that the Complaint must identify a host of details: specific sellers deterred from multihoming, the fraction of sellers who would multihome, consumer price effects for specific products, and analogous details for foreclosed fulfillment services. This level of detail is not required. *See, e.g.*, *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (a complaint "need only give the defendant fair notice of what the claim is and the grounds upon which it rests" (cleaned up)); *FTC v. Qualcomm Inc.*, 2017 WL 2774406, at *25 (N.D. Cal. June 26, 2017) (Koh, J.) ("Although FTC has not identified by name any *specific* competitor that was excluded . . . , the case law does not suggest that this degree of specificity is required at the motion to dismiss stage."). The Complaint's allegations that Amazon's coercion harmed competition are entirely plausible: Amazon itself was concerned that allowing independent providers to fulfill Prime orders would "enable[]" those providers to "get to scale" and help "other retailers." (¶ 402.)

Nor may Amazon revise the well-pleaded facts. Citing its own website, Amazon says the Complaint is "conclusory (and inaccurate)" when it alleges that sellers must use a non-FBA option to fulfill orders from other stores, thereby raising costs for sellers on rival marketplaces. (Mot. 14 n.9.) But the Complaint explains that "Sellers cannot use FBA to fulfill orders off Amazon" because doing so requires "pay[ing] an additional fee for a separate Amazon fulfillment service" and Amazon "does not provide custom packaging, [or] standard integration with non-Amazon platforms." (¶ 388.) Likewise, Amazon suggests, without citation to the Complaint, that "delivery

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incumbents" like UPS, FedEx, and the U.S. Postal Service operate at efficient scale in *delivery* services and that this somehow negates the Complaint's allegations regarding the anticompetitive effects of denying scale to independent *fulfillment* providers. (Mot. 3, 15.) Whether or not UPS, FedEx, and the U.S. Postal Service offer delivery services at large scale, the Complaint explains how fulfillment services, a critical input for online sales, do not include delivery—only "preparing items for shipping . . . [including] storing, picking (retrieving from storage), packaging, and preparing items purchased from online retail stores for delivery." (¶¶ 109-11.) Amazon's factual contentions and unsupported demands for detail do not merit dismissal of Plaintiffs' claims.

III. THE COMPLAINT PLAUSIBLY ALLEGES STANDALONE UNFAIR METHOD OF COMPETITION CLAIMS UNDER THE FTC ACT.

The Supreme Court has long recognized that the prohibition of "unfair method[s] of competition" in Section 5 of the FTC Act reaches beyond the prohibitions in the Sherman Act. *See, e.g.*, *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *Cement Inst.*, 333 U.S. at 694 ("[T]here are many unfair methods of competition that do not assume the proportions of Sherman Act violations."). Amazon ignores this well-established principle, arguing that the purported deficiencies in Plaintiffs' monopolization claims also require dismissal of Count III. (Mot. 15-16.) Amazon's arguments for dismissal of the monopolization claims fail for the reasons explained above (*see* §§ I-II), which is justification enough to reject Amazon's passing argument regarding Count III.

Even a failure to adequately plead monopolization claims would not warrant dismissal of claims under Section 5, whose prohibitions extend beyond the Sherman Act. *See, e.g.*, *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320-22 (1966); *Qualcomm*, 2017 WL 2774406, at *8. Congress "deliberately" used the general term "unfair method of competition" in Section 5 because Congress knew "that [t]here is no limit to human inventiveness in this field; that consequently, a definition

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that fitted practices known to lead towards an unlawful restraint of trade today would not fit tomorrow's new inventions in the field." *Cement Inst.*, 333 U.S. at 708-09 (cleaned up). The Complaint's detailed allegations regarding the anticompetitive character of Amazon's conduct challenged under Count III suffice to state a standalone unfair method of competition claim. *See, e.g.*, *id.* at 713 (pricing system that was "a handy instrument to bring about elimination of any kind of price competition" violated Section 5); *Atl. Refin. Co. v. FTC*, 381 U.S. 357, 367-70 (1965) (coercive actions by powerful oil company against its dealers violated Section 5).

The Complaint also properly states a standalone unfair method of competition claim regarding Amazon's Project Nessie (Count IV). Contrary to Amazon's argument that this claim conflicts with precedent, the Ninth Circuit has concluded that Section 5 reaches strategic pricing practices that can have the effect of maintaining prices at an elevated level. *See Boise Cascade Corp. v. FTC*, 637 F.2d 573, 575 (9th Cir. 1980); *see also E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139-40 (2d Cir. 1984) (conduct may be "unfair" if there are "indicia of oppressiveness . . . such as . . . evidence of anticompetitive intent or purpose"); *Cement Inst.*, 333 U.S. at 708. Although the court in *Boise Cascade* reversed an FTC order enjoining manufacturers' use of a particular pricing system, its decision turned on the absence of proof of anticompetitive effects after trial and not—as Amazon suggests—on whether the FTC Act reached the challenged conduct. 637 F.3d at 579-80. Amazon's citation to cases examining the presence or absence of an agreement on prices in the context of Sherman Act claims (Mot. 18-19) say nothing about the scope of the FTC Act or the FTC's claim here.

The Complaint alleges in detail that Amazon's Project Nessie pricing algorithm was expressly designed to—and did—result in higher prices for millions of shoppers on both Amazon and other online stores. (¶¶ 419-25.) Amazon's conduct involves precisely the type of "systematic matching of prices" that, as the Ninth Circuit warned in *Boise Cascade*, threatens free and fair

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competition. 637 F.2d at 579; *see also* Zach Y. Brown & Alexander MacKay, *Competition in Pricing Algorithms*, 15 AM. ECON. J.: MICROECONOMICS 109, 110 (2023) ("[P]ricing algorithms can generate supracompetitive prices through novel, non-collusive mechanisms.").

IV. THE FTC ACT CLAIMS MAY BE PURSUED IN FEDERAL COURT.

Without basis, Amazon argues that the FTC cannot seek a permanent injunction in federal court under Section 5 of the FTC Act on a standalone basis without first concluding an administrative proceeding. (Mot. 16-18.) No such requirement exists. Section 13(b) of the FTC Act provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). In *FTC v. H.N. Singer, Inc.*, the Ninth Circuit held that Section 13(b) authorizes "permanent injunctions in proper cases even though the Commission does not contemplate any administrative proceedings." 668 F.2d 1107, 1111 (9th Cir. 1982). The Ninth Circuit long ago rejected the argument that "proper cases" are only routine fraud cases—similar to Amazon's argument here. *See FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985). The court recognized that a "proper case" under Section 13(b) is one involving "violations of *any provisions of law enforced by the Commission*." *Id.* (quoting *Singer*, 668 F.2d at 1113); *see also, e.g.*, *FTC v. Hoyal & Assocs., Inc.*, 859 F. App'x 117, 120 (9th Cir. 2021) (case against defendants likely to violate law in future was "'proper case" under Section 13(b)); *FTC v. Noland*, 2021 WL 4127292, at *17 (D. Ariz. Sept. 9, 2021) ("[A] permanent injunction may issue under § 13(b) without regard to the existence of administrative proceedings.").

The FTC is aware of no court that has dismissed an FTC action for not being a "proper case," let alone individual *claims* in an action, as Amazon seeks here. To the contrary, district courts have routinely heard standalone Section 5 cases challenging unfair or deceptive acts or practices, without prior administrative proceedings—even as to issues of first impression. *See, e.g.*, *FTC v. Willms*, 2011 WL 4103542 (W.D. Wash. Sept. 13, 2011) (deceptive marketing tactics);

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FTC v. D Squared Sols., LLC, 2003 WL 22881377 (D. Md. Oct. 30, 2003) (first FTC action alleging that use of computer program to barrage consumers with pop-up ads was unfair). And for good reason. Amazon's interpretation of Section 13(b) would require wasteful threshold litigation about whether a Section 5 claim is sufficiently "well-developed" to be heard in district court, before any evidence has been presented.

Amazon's cases do not support its position. Instead, they merely describe procedures the FTC and courts may follow in circumstances different from those present here. *See FTC v. Sperry & Hutchinson Co*., 405 U.S. 233, 249 (1972) (pre-dating Section 13(b), outlining appellate review standard for administrative order); *Atl. Refin. Co.*, 381 U.S. at 367 (same); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1341-42 (4th Cir. 1976) (describing standard for issuance of preliminary injunction pending completion of related administrative proceeding). Even in *FTC v. Abbott Laboratories*, 853 F. Supp. 526, 536 (D.D.C. 1994), the district court allowed a standalone unfair method of competition claim to proceed to trial without the FTC first issuing an opinion addressing the conduct.

Amazon's argument that the FTC's Project Nessie claim must be dismissed as "untimely" (Mot. 19-20) also fails. Ninth Circuit precedent makes clear that the FTC may seek injunctive relief in federal court when the conduct challenged is "ongoing or likely to recur." *Evans Prods.*, 775 F.2d at 1087; *see also FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1237 (9th Cir. 1999); *FTC v. Cardiff*, 2021 WL 3616071, at *7 (C.D. Cal. June 29, 2021). In fact, "an inference arises from illegal past conduct that future violations may occur." *FTC v. Elec. Payment Sols. of Am. Inc.*, 2019 WL 4287298, at *9 (D. Ariz. Aug. 28, 2019) (cleaned up). Accordingly, "courts should be wary of a defendant's termination of illegal conduct when a defendant voluntarily ceases unlawful conduct in anticipation of formal intervention." *Id.* (collecting cases).

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Here, the Complaint alleges that Amazon turned "off" Project Nessie during periods of high public scrutiny of its prices, only to turn the pricing algorithm back on again once public attention receded. (¶¶ 426-28 (Amazon considered turning Project Nessie on to "recapture the lost [profit] opportunity" from having temporarily paused it).) Since 2019, when Amazon set aside Project Nessie amid mounting regulatory scrutiny, Amazon has actively considered turning Nessie back on, including as recently as 2022. (¶¶ 430-32.) The FTC has thus plausibly alleged that Amazon's unlawful conduct is "likely to recur." *Evans Prods.*, 775 F.2d at 1087.

Courts in this Circuit have recognized that *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019), on which Amazon relies, is an "out-of-circuit case that conflicts with governing Ninth Circuit precedent." *United States v. MyLife.com, Inc.*, 499 F. Supp. 3d 757, 766 (C.D. Cal. 2020); *see also Elec. Payment Sols.*, 2019 WL 4287298, at *9-10 & n.5 (same); *FTC v. Adept Mgmt. Inc.*, 2019 WL 2433193, at *1 (D. Or. June 7, 2019) (same). Here, the Complaint alleges that Amazon paused its challenged practice in anticipation of government scrutiny (¶ 430) and is "free to return to [its] old ways" the moment Amazon believes it is safe to do so. *Affordable Media*, 179 F.3d at 1237.

V. THE STATE LAW CLAIMS ARE PROPERLY PLEADED.

A. Amazon's conduct violates state consumer protection statutes.

Amazon's arguments for dismissing claims under Connecticut, New Jersey, Oklahoma, Pennsylvania, and Rhode Island consumer protection statutes mischaracterize these States' laws and their allegations.

First, Amazon incorrectly asserts that all five States alleged "that Amazon engaged in deceptive commercial practices." (Mot. 21.) Only New Jersey, Oklahoma, and Pennsylvania raised deception claims. (¶¶ 513, 522(c), 541-52.) However, all five states alleged that Amazon violated their consumer protection statutes in multiple and distinct ways. *See* Okla. Stat. tit. 15, §§ 752(14),

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753(20) (prohibiting unfair *and* deceptive trade practices); Conn. Gen. Stat. § 42-110b(a) (prohibiting unfair and deceptive practices as well as unfair methods of competition); 73 Pa. Cons. Stat. § 201-3(a) (same); R.I. Gen. Laws §§ 6-13.1-1(6), 6-13.1-2 (same); N.J. Stat. Ann. § 56:8-2 (prohibiting deceptive or unconscionable commercial practices and misrepresentations); *id.* § 56:8-4(b) (prohibiting commercial practices violating State or federal law). In particular, Amazon's claim that unfairness and deception are identical in Connecticut, Pennsylvania, and Rhode Island is mistaken. *See Connecticut v. Exxon Mobil Corp.*, 83 F.4th 122, 141 (2d Cir. 2023) (deception and unfairness claims are distinct); *Commonwealth ex rel. Zimmerman v. Nickel*, 26 Pa. D. & C.3d 115, 120, 139 (Pa. C.P. Mercer Cnty. 1983) (same, and statute reaches beyond antitrust laws); *Long v. Dell, Inc.*, 93 A.3d 988, 1000-01, 1003 (R.I. 2014) (distinct definitions of "unfair" and "deceptive"). And courts liberally and broadly construe these statutes to effectuate their underlying purposes. *See Commonwealth v. Monumental Props., Inc.*, 329 A.2d 812, 817 (Pa. 1974); *Soto v. Bushmaster Firearms Int'l*, 202 A.3d 262, 298-99 (Conn. 2019); *Long*, 93 A.3d at 1081; *State ex rel. McCormac v. Qwest Commc'ns Int'l*, 904 A.2d 775, 784-85 (N.J. Super. Ct. App. Div. 2006); *Patterson v. Beall*, 19 P.3d 839, 846 (Okla. 2000).

Second, Amazon misconstrues the elements of deception claims in New Jersey, Oklahoma, and Pennsylvania. It urges dismissal of these claims for failure to allege reliance or materiality, but neither is required in government enforcement actions. *See Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 462 (N.J. 1994) (reliance, intent, and harm not required); *Leon v. Rite Aid Corp.*, 774 A.2d 674, 680 (N.J. Super. Ct. App. Div. 2001) (materiality not required); Okla. Stat. tit. 15, §§ 752(13) (prohibiting practices that "could reasonably be expected to deceive or mislead"); *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 222 (3d Cir. 2008) (reliance requirement not applicable to Pennsylvania Attorney General). Amazon also calls these claims "conclusory" (Mot. 21), but they meet the applicable pleading standards. *Talalai v. Cooper Tire & Rubber Co.*, 823 A.2d 888, 899

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(N.J. Super. Ct. Law Div. 2001) (description of scheme sufficient; particulars of underlying conduct "matters of discovery"); *Commonwealth ex rel. Corbett v. Peoples Benefit Servs., Inc.*, 895 A.2d 683, 689-90 (Pa. Commw. Ct. 2006) (same); *Patterson*, 19 P.3d at 848. Advertising best and lowest prices while artificially raising them—as with Project Nessie—constitutes deception. *See, e.g.*, *Leon*, 774 A.2d at 680. As Amazon does not directly challenge New Jersey's misrepresentation and unconscionable commercial practices allegations, per N.J. Stat. Ann. § 56:8-2, or *all* unlawful practices allegations (save as to the Sherman Act), per N.J. Stat. Ann. § 56:8-4, these claims must survive. (*See* ¶ 513.)

Lastly, Amazon argues that Connecticut's unfair methods claim "stands only upon its" antitrust claims (Mot. 22), but Connecticut's allegation that Project Nessie violated the Connecticut Unfair Trade Practices Act (¶¶ 478, 482) does not require a violation of the Sherman Act, the Connecticut Antitrust Act, the FTC Act, or any other statute. *Indiaweekly.com, LLC v. Nehaflix.com, Inc.*, 596 F. Supp. 2d 497, 506-07 (D. Conn. 2009).

B. The relevant state law claims are not territorially limited.

Amazon incorrectly argues that the phrase "within the state" or equivalent language in the antitrust statutes of Maryland, New Jersey, and Oklahoma limits their territorial reach. (Mot. 22-23.) The plain meaning of this phrase requires only that the challenged conduct affect markets within these States; it does not preclude liability when markets outside these States are *also* affected. *See, e.g.*, *California v. Infineon Techs. AG*, 2008 WL 1766775, at *8 (N.D. Cal. Apr. 15, 2008). Here, Amazon's anticompetitive conduct, though nationwide in scope, occurred in part or had effects "within" these States.

Amazon's cited cases do not support its argument. The Oklahoma antitrust statute at issue in *Young v. Seaway Pipeline, Inc.*, 576 P.2d 1148 (Okla. 1977), was repealed and replaced in 1998. 1998 Okla. Sess. Laws ch. 356. Oklahoma's current statute reaches interstate commerce that

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impacts Oklahoma. *See* D. Kent Meyers & Michael Barnett, *Oklahoma's New Antitrust Reform Act*, 24 OKLA. CITY U. L. REV. 187, 204-05 (1999). Moreover, *Seaway Pipeline* addresses only whether Oklahoma state courts had subject matter jurisdiction over the particular claims in that case. 576 P.2d at 1150. Amazon also misreads *State v. Lawn King, Inc.*, which does not limit New Jersey's territorial reach and says it would be "absurd" to rule that state antitrust laws are federally preempted. 375 A.2d 295, 302 (N.J. Super. Ct. Law Div. 1977), *rev'd on other grounds*, 404 A.2d 1215 (N.J. Super. Ct. App. Div. 1979). Finally, Amazon's argument assumes that state and federal antitrust laws cannot overlap. To the contrary, the Supreme Court has held that both can reach the same conduct. *See California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989) (upholding claims under "both the Sherman Act and state antitrust Acts" and rejecting preemption). Moreover, given the nature of the modern economy, a state antitrust statute limited to wholly intrastate conduct would be "a dead letter." *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 157 (Wis. 2005). Amazon asks this Court to effectively nullify state antitrust statutes without any basis for doing so.

C. Pennsylvania common law prohibits Amazon's anticompetitive conduct.

Amazon's argument that Pennsylvania common law does not proscribe monopolization fails. Courts have long held that it does. *See, e.g.*, *In re Condemnation by Susquehanna Area Reg'l Airport Auth.*, No. 2005-CV-1282-CN, Order at 1 (Pa. C.P. Dauphin Cnty. Aug. 14, 2006) (attached as Exhibit A to Declaration of Tracy A. Wertz) (recognizing cause of action for attempted monopolization (citing *Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187*, 14 A.2d 438, 440-41 (Pa. 1940) (monopolies violate common law))); *P.C. Weist Co. v. Weeks*, 35 A. 693, 693 (Pa. 1896) (monopolies "held by the common law to be against public policy"); *Appeal of Cumberland Valley R.R. Co.*, 62 Pa. 218, 222 (1869) (well-settled principles of law against monopoly); *FTC v. Shkreli*, 581 F. Supp. 3d 579, 629 (S.D.N.Y. 2022) (upholding Sherman Act and Pennsylvania common law claims).

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D. New York's Executive Law § 63(12) claim is not preempted.

New York alleges that Amazon violated New York Executive Law § 63(12), which prohibits "persistent . . . illegality in the carrying on, conducting or transaction of business." Courts recognize that "any conduct which violates state *or federal* law or regulation is actionable under Executive Law § 63(12)." *Shkreli*, 581 F. Supp. 3d at 627-28 (cleaned up, emphasis added). Amazon, arguing that FTC Act Section 5 preempts Section 63(12), erroneously assumes that the FTC's exclusive jurisdiction over Section 5, precluding private actions under the *same* federal statute, somehow endows Section 5 with preemptive effect over *different* state statutes that independently authorize state law actions, such as Section 63(12). That is not the law; the FTC's exclusive jurisdiction over FTC Act claims has "never . . . been an obstacle to suits premised on overlapping state statutes or on common law." *United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 78 (D.D.C. 2003).

Amazon's cases provide no support for its position. All deal with the lack of a private right of action under Section 5 itself, saying nothing about Section 5 preempting state law. *See O'Donnell v. Bank of Am., Nat'l Ass'n*, 504 F. App'x 566, 568 (9th Cir. 2013) (Section 5 "doesn't create a private right of action"); *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973) (same for "private litigants"); *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974) (same for "competitors or consumers"). Even if a preemption argument were appropriate, Amazon never offers its basic elements, failing to identify the type of preemption present, whether express, field, or conflict. *See, e.g.*, *Altria Grp. v. Good*, 555 U.S. 70, 76-77 (2008) (types of preemption).

CONCLUSION

Plaintiffs respectfully submit that the Court should deny Amazon's motion to dismiss.

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I certify that this memorandum contains 8,392 words, in compliance with the Local Civil Rules.

Respectfully submitted,

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