

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

AMAZON’S MOTION TO DISMISS

NOTE ON MOTION CALENDAR:
March 22, 2024

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

INTRODUCTION AND SUMMARY 1

STATEMENT OF THE CASE..... 4

 A. The Complaint’s Allegations 4

 B. The Complaint’s Claims 8

ARGUMENT 8

I. THE COMPLAINT FAILS TO STATE A CLAIM OF ANTICOMPETITIVE
MONOPOLY MAINTENANCE UNDER SECTION 2 OF THE SHERMAN ACT 8

 A. The Complaint Attacks Well-Established Forms of Competition on the Merits.... 9

 B. The Complaint Alleges No Plausible Anticompetitive Effects 13

II. COUNTS III AND IV SHOULD BE DISMISSED BECAUSE THE FTC MAY
NOT BRING STANDALONE SECTION 5 CLAIMS IN DISTRICT COURT 15

III. COUNT IV ALSO SHOULD BE DISMISSED AS IRRECONCILABLE WITH
SETTLED PRECEDENT AND AS UNTIMELY 18

IV. THE STATE LAW CLAIMS ALSO SHOULD BE DISMISSED 20

 A. State-Law Equivalentents Fall with the Sherman Act Claims..... 20

 B. Pennsylvania Does Not Recognize a Sherman Act Section 2 Equivalent 21

 C. The Complaint Does Not Allege Violations of State Consumer-Protection
Statutes 21

 D. Claims Based on Territorially Limited State Laws Fail 22

 E. Count XV (New York) Should Be Dismissed 23

CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases

1

2

3 *Alfred Dunhill Ltd. v. Interstate Cigar Co.,*

4 499 F.2d 232 (2d Cir. 1974).....23

5 *AMG Cap. Mgmt., LLC v. FTC,*

6 141 S. Ct. 1341 (2021).....20

7 *Ashcroft v. Iqbal,*

8 556 U.S. 662 (2009).....15

9 *Atl. Ref. Co. v. FTC,*

10 381 U.S. 357 (1965).....17

11 *Atl. Richfield Co. v. USA Petrol. Co.,*

12 495 U.S. 328 (1990).....10

13 *Bell Atl. Corp. v. Twombly,*

14 550 U.S. 544 (2007).....8, 13, 14, 18

15 *Boise Cascade Corp. v. FTC,*

16 637 F.2d 573 (9th Cir. 1980)16, 19

17 *Brantley v. NBC Universal, Inc.,*

18 675 F.3d 1192 (9th Cir. 2012)13, 14

19 *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,*

20 509 U.S. 209 (1993)..... *passim*

21 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,*

22 429 U.S. 477 (1977).....9

23 *Cal. Comput. Prod., Inc. v. Int’l Bus. Machs. Corp.,*

24 613 F.2d 727 (9th Cir. 1979)9

25 *Cargill, Inc. v. Monfort of Colo., Inc.,*

26 479 U.S. 104 (1986).....9, 10

Coronavirus Rep. v. Apple, Inc.,

2021 WL 5936910 (N.D. Cal. Nov. 30, 2021), *aff’d*, 85 F.4th 948 (9th Cir. 2023).....12

Coronavirus Rep. v. Apple, Inc.,

85 F.4th 948 (9th Cir. 2023)1, 9

1 *Dreamstime.com, LLC v. Google LLC*,
 2 54 F.4th 1130 (9th Cir. 2022) 11

3 *E.I. du Pont de Nemours & Co. v. FTC*,
 4 729 F.2d 128 (2d Cir. 1984)..... 19

5 *Epic Games, Inc. v. Apple, Inc.*,
 6 67 F.4th 946 (9th Cir. 2023) 12

7 *FTC v. Abbott Lab’ys*,
 8 853 F. Supp. 526 (D.D.C. 1994) 17

9 *FTC v. Food Town Stores, Inc.*,
 10 539 F.2d 1339 (4th Cir. 1976) 17

11 *FTC v. Qualcomm Inc.*,
 12 969 F.3d 974 (9th Cir. 2020) 12, 13, 20

13 *FTC v. Shire Viropharma, Inc.*,
 14 917 F.3d 147 (3d Cir. 2019)..... 20

15 *FTC v. Sperry & Hutchinson Co.*,
 16 405 U.S. 233 (1972)..... 17

17 *Hicks v. PGA Tour, Inc.*,
 18 897 F.3d 1109 (9th Cir. 2018) 7

19 *Hunt v. U.S. Tobacco Co.*,
 20 2006 WL 2619806 (E.D. Pa. Sept. 11, 2006), *vacated on other grounds*,
 21 538 F.3d 217 (3d Cir. 2008), *as amended* (Nov. 6, 2008) 22

22 *In re Musical Instruments & Equip. Antitrust Litig.*,
 23 798 F.3d 1186 (9th Cir. 2015) 19

24 *Island Mortg. of N.J. v. 3M (Minn. Mining & Mfg. Co.)*,
 25 860 A.2d 1013 (N.J. Super. Ct. 2004) 21

26 *Lavoie v. Bayer Corp.*,
 2002 WL 230962 (Conn. Super. Ct. Jan. 23, 2002)..... 22

Long v. Dell, Inc.,
 93 A.3d 988 (R.I. 2014) 22

Md. Staffing Servs., Inc. v. Manpower, Inc.,
 936 F. Supp. 1494 (E.D. Wis. 1996)..... 22

1 *Murphy Tugboat Co. v. Crowley*,
 2 658 F.2d 1256 (9th Cir. 1981) 10

3 *N. Secs. Co. v. United States*,
 4 193 U.S. 197 (1904)..... 21

5 *New Jersey v. Lawn King, Inc.*,
 6 375 A.2d 295 (N.J. Super. Ct. Law. Div. 1977), *rev'd on other grounds*,
 7 404 A.2d 1215 (N.J. Super. Ct. App. Div. 1979)..... 22, 23

8 *Newcal Indus., Inc. v. Ikon Off. Sol.*,
 9 513 F.3d 1038 (9th Cir. 2008) 7, 8

10 *O'Donnell v. Bank of Am., Nat'l Ass'n*,
 11 504 F. App'x 566 (9th Cir. 2013) 23

12 *Ohio v. Am. Express Co.*,
 13 138 S. Ct. 2274 (2018)..... 10

14 *Prentice v. Title Ins. Co. of Minn.*,
 15 500 N.W.2d 658 (Wis. 1993)..... 20

16 *Sambreel Holdings LLC v. Facebook, Inc.*,
 17 906 F. Supp. 2d 1070 (S.D. Cal. 2012)..... 12

18 *Sheet Metal Workers Loc. 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*,
 19 737 F. Supp. 2d 380 (E.D. Pa. 2010) 22

20 *Smith v. Wells Fargo Bank, N.A.*,
 21 158 F. Supp. 3d 91 (D. Conn.), *aff'd*, 666 F. App'x 84 (2d Cir. 2016) 22

22 *Spectrum Sports, Inc. v. McQuillan*,
 23 506 U.S. 447 (1993)..... 9

24 *Stearns Airport Equip. Co. v. FMC Corp.*,
 25 170 F.3d 518 (5th Cir. 1999) 12

26 *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*,
 998 F.2d 1073 (1st Cir. 1993)..... 20

Br. for the United States, United States v. Am. Express,
 No. 15-1672 (2d Cir. filed Sept. 14, 2015), 2015 WL 5450937 2, 11

United States v. AT&T Inc.,
 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019)..... 14

1 *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP,*
 2 540 U.S. 398 (2004).....9

3 *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,*
 4 549 U.S. 312 (2007).....10

5 *Young v. Seaway Pipeline, Inc.,*
 6 576 P.2d 1148 (Okla. 1977).....23

7 **Statutes**

8 15 U.S.C. § 45.....17, 21

9 15 U.S.C. § 53.....17, 19

10 Conn. Gen. Stat. § 35-44b.....20

11 Md. Code Ann. Com. Law § 11-20220

12 Md. Code, Com. Law § 11-20422

13 Mich. Comp. Laws § 445.784(2).....20

14 N.J. Stat. § 56:9-4(a).....22

15 N.J. Stat. §§ 56:9-18, 56:8-420

16 Nev. Rev. Stat § 598A.05020

17 New York Executive Law § 63(12).....23

18 79 Okla. Stat. § 203.....22, 23

19 79 Okla. Stat. § 212.....20

20 Or. Rev. Stat. § 646.715(2).....20

21 R.I. Gen. Laws § 6-13.1-1(6).....22

22 R.I. Gen. Laws § 6-36-2(b).....20

23 **Other**

24 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust*
 25 *Principles and Their Application* ¶ 1436a (2023)19

26 *Antitrust Laws and Trade Regulation* § 138.0321

1 H. Subcomm. on Antitrust, Com. & Admin. Law of the Comm. on the Judiciary, 116th
2 Cong., *Investigation of Competition in Digital Markets* 397 (Comm. Print 2020)11

3 Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 Yale L.J. 710, 805 (2017)3, 5, 6

4 FTC, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under*
5 *Section 5 of the FTC Act* (Nov. 10, 2022),
6 https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.....16

7 *Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute*
8 (Aug. 13, 2015), [https://www.ftc.gov/news-events/news/press-releases/2015/08/ftc-](https://www.ftc.gov/news-events/news/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act-competition-statute)
9 [issues-statement-principles-regarding-enforcement-ftc-act-competition-statute](https://www.ftc.gov/news-events/news/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act-competition-statute)16

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

INTRODUCTION AND SUMMARY

Amazon competes every minute of every day with thousands of online and brick-and-mortar retailers. To meet that competition, Amazon has relentlessly innovated, delivering previously unimagined benefits for consumers and pushing competitors to do likewise, all to make every penny of a consumer’s purchase count for more. Amazon promptly matches rivals’ discounts, features competitively priced deals rather than overpriced ones, and ensures best-in-class delivery for its Prime subscribers. Those practices—the targets of this antitrust Complaint—benefit consumers and are the essence of competition. Because “[a]ntitrust law does not seek to punish economic behavior that benefits consumers,” *Coronavirus Rep. v. Apple, Inc.*, 85 F.4th 948, 957 (9th Cir. 2023), the Complaint should be dismissed.

1. Sherman Act claims. To state a Sherman Act claim, the Complaint must plausibly allege facts showing, among other things, that Amazon engaged in anticompetitive *conduct* that has an anticompetitive *effect*.¹ It fails on both fronts.

Failure to allege anticompetitive conduct. The conduct challenged in the Complaint consists of common retail practices that presumptively benefit consumers. The Complaint labels these practices “anticompetitive,” but the facts alleged rebut that epithet. Consider the Complaint’s allegation that Amazon “rapidly” matches competitors’ price cuts. Complaint (“Compl.”) ¶ 20, ECF No. 1. Matching rivals’ discounts is not, in Plaintiffs’ jargon, an “anti-discounting tactic”; it *is* discounting, and the antitrust laws affirmatively encourage it. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-24 (1993). The Complaint also faults Amazon for featuring competitively priced offers, and declining to feature uncompetitive ones, in the “Featured Offer” or “Buy Box.” Compl. ¶ 16. As the government previously (and correctly) confirmed, these types of purchasing recommendations from retailers to consumers are “both pro-competitive and

¹ Plaintiffs also must prove that Amazon has monopoly power in a properly defined antitrust market, and the Complaint’s highly gerrymandered market is unlikely to survive that test. *See infra* p. 7. That factual dispute need not be resolved in this motion.

1 ubiquitous.” Br. for the United States at 46, *United States v. Am. Express*, No. 15-1672 (2d Cir.
2 filed Sept. 14, 2015), 2015 WL 5450937, at *46 (“U.S. Amex Br.”). Under the Complaint’s theory,
3 Amazon would be required to feature what it knows are bad deals.

4 Finally, the Complaint takes issue with Amazon’s practice of highlighting with the Prime
5 badge only those offers that it is confident will meet customers’ expectations for fast, free, and
6 reliable delivery. It alleges that Amazon does so to push sellers to use Amazon’s fulfillment
7 services. Even if that allegation were true (it is not), such seller recommendations—made to protect
8 trust in a retailer’s brand and to deliver products to consumers with unprecedented speed, service,
9 and reliability—are presumptively procompetitive.

10 ***Failure to allege plausible anticompetitive effects.*** Because the challenged conduct is
11 facially procompetitive, Plaintiffs face an even greater challenge to plead facts showing that the
12 conduct nonetheless harmed consumers. The Complaint does not carry that burden.

13 For Amazon’s practice of matching other retailers’ discounts, the Complaint cannot meet
14 that burden because such above-cost discounting is not only procompetitive but also categorically
15 lawful.

16 As to the other challenged practices, the Complaint does not acknowledge the facially
17 procompetitive effects of featuring well-priced offers, let alone assert facts plausibly showing that
18 despite those effects, market-wide prices have risen—whether on average or for any particular
19 product. Indeed, the Complaint does not identify a single product or product category for which
20 prices have risen as a result of the challenged conduct. Instead, it implausibly, and illogically,
21 assumes that Amazon’s efforts to keep featured prices low on Amazon somehow raised consumer
22 prices across the whole economy. At most, the Complaint contains vague allegations that a handful
23 of sellers have responded, not by lowering their prices in Amazon’s store, but by raising them
24 elsewhere. But anecdotes are insufficient to plead a claim under antitrust law’s rule of reason.

25 The Prime-badge allegations fare no better. The Complaint claims that Amazon’s conduct
26 “raises the cost of multihoming” for sellers who offer their products both in Amazon’s store and

1 elsewhere, and somehow harms “rival ... marketplaces” and “independent fulfillment providers.”
2 Compl. ¶¶ 355, 396. But it does not, as it must, allege facts that support these conclusory assertions.
3 It provides no factual support at all for its (incorrect) assertion that multihoming sellers “must
4 maintain a separate supply of inventory” for Amazon customers and “a separate fulfillment
5 provider to serve” other customers. *Id.* ¶ 354. And it does not identify a single supposedly
6 “foreclosed” rival. That is no surprise. It defies common sense to suggest that Amazon’s use of the
7 Prime badge could have marginalized retail heavyweights like Walmart and Target or delivery
8 incumbents like UPS, FedEx, and the U.S. Postal Service—some of which Amazon uses to deliver
9 orders today—let alone any other entity.

10 Precisely because Amazon’s conduct falls well within settled Sherman Act precedent, the
11 Federal Trade Commission’s (“FTC’s”) current Chair candidly acknowledged in 2017 that it
12 would be necessary to “revise antitrust law” to condemn Amazon’s actions. Lina M. Khan,
13 *Amazon’s Antitrust Paradox*, 126 Yale L.J. 710, 805 (2017). Six years later, antitrust law remains
14 unchanged, but the FTC has sued Amazon under the Sherman Act anyway. Those claims are
15 untenable and should be dismissed.

16 **2. “Standalone” FTC Act claims.** The weakness of the Complaint’s Sherman Act
17 claims explains why the FTC has asked this Court alternatively to condemn the alleged conduct
18 under Section 5 of the FTC Act even if it does not violate the Sherman Act. By bringing these
19 “standalone” claims (Counts III and IV), the FTC implicitly recognizes that it cannot meet its
20 burdens of proof under the Sherman Act. But such claims must be dismissed because the FTC
21 lacks statutory authority to ask a district *court*, in the first instance, to determine whether conduct
22 that would not otherwise violate the antitrust laws is “unfair” under Section 5 of the FTC Act. The
23 FTC must first make such a novel “unfairness” determination in its administrative court. Indeed,
24 this Court would be the first Article III court ever to decide in the first instance that a defendant’s
25 competitive methods are “unfair” under Section 5 of the FTC Act even though they do not violate
26 the Sherman Act. Count IV also should be dismissed on two additional grounds: the FTC’s

1 because it has “delivered enormous benefits to [them]—not to mention revolutionized
2 e-commerce.” Khan, *supra* p. 3, at 714, 716.

3 “[S]hopper[s] browsing on Amazon” observe “no obvious differences” between Amazon
4 Retail listings (where Amazon sets the price and controls the delivery experience) and third-party
5 seller listings (where third-party sellers set the price and control the delivery experience). Compl.
6 ¶¶ 19, 76, 192-96. Moreover, in many instances, a single product offered for sale in Amazon’s
7 store—such as a 5-pack of “Pilot G2 Premium Gel Roller Pens”—is “offered by more than one
8 seller.” *Id.* ¶¶ 83-84. To make the experience of choosing among these offers more convenient,
9 Amazon developed a method of featuring the offer most likely to be preferred by customers. *Id.*
10 ¶ 84. Amazon “calls this displayed offer the ‘Featured Offer’” and “[b]eing chosen as the Featured
11 Offer is commonly known as ‘winning’ the Buy Box.” *Id.*; *compare id.* Fig. 4a (displaying
12 Amazon’s Featured Offer for 5-pack of “Pilot G2 Premium Gel Roller Pens”), *with id.* Fig. 5a
13 (displaying additional offers for 5-pack of “Pilot G2 Premium Gel Roller Pens” with different
14 prices, ship speeds, sellers, and seller star ratings).

15 Amazon works hard to ensure that the Featured Offer it selects for any given product will
16 provide a good experience for customers. Third-party sellers in Amazon’s store set their own prices
17 for the products they offer, and Amazon generally makes all such offers available to customers.
18 Compl. ¶¶ 19, 86. But Amazon will not select a third-party seller’s offer to be the Featured Offer
19 if it knows that another reputable retailer is offering the same product for less elsewhere. *Id.* ¶ 277.
20 Indeed, Amazon would rather feature no offer—and therefore not display a “Buy Box” at all for
21 certain products—if doing so risks losing a customer’s trust. *Id.* According to the Complaint,
22 Amazon also has required that certain “important” sellers offer competitive prices, wide selection,
23 and reliable in-stock availability to help maintain Amazon’s reputation for a great customer
24 experience. *Id.* ¶¶ 288, 291-92.²

25 _____
26 ² Under this policy, Amazon may source certain sellers’ products at wholesale, and offer them directly to customers.
See Standards for Brands Selling in the Amazon Store, <https://sellercentral.amazon.com/help/hub/reference/external/G201797950?locale=en-US>.

1 ***Amazon develops fulfillment services and launches Amazon Prime.*** Amazon also
2 invested in a fulfillment infrastructure to give customers access to two-, one-, and sometimes same-
3 day delivery. “[F]ulfillment is a significant business cost.” Compl. ¶ 110. Thus, in 2006, Amazon
4 made the lower-cost infrastructure it had developed for its own offerings available to third-party
5 sellers, in a program known as “Fulfillment by Amazon” (“FBA”). *Id.* ¶ 108. A seller’s voluntary
6 participation in FBA—through which sellers send products to Amazon fulfillment centers, and
7 Amazon then stores, retrieves, packages, and coordinates delivery of the product, *id.* ¶¶ 109-12—
8 allows sellers to ship goods quickly and reliably without paying the higher fees it would otherwise
9 have to pay the shipping incumbents. *Id.* ¶ 110; *see also* Khan, *supra* p. 3, at 779 (FBA “offer[ed]
10 independent sellers the ability to ship goods more cheaply and quickly than they could by using
11 UPS and FedEx directly”). Participation in FBA also assures that the seller meets Amazon’s high
12 standards for delivery speed and reliability, although sellers are free to demonstrate their
13 commitment to those standards through other means.³

14 Amazon launched Prime in 2005 as a service for customers that includes free two-day
15 shipping in exchange for a membership fee. Compl. ¶ 98. Only certain of the products in Amazon’s
16 store, however, meet the criteria to be Prime-eligible. *Id.* ¶¶ 98, 104. To assist customers looking
17 for the fast, free, and reliable shipping associated with Prime, Amazon therefore “displays a ‘Prime
18 Badge’ to show Prime subscribers which items are eligible.” *Id.* ¶ 103. And to help assist customers
19 looking for products with fast, free shipping, Amazon also allows customers to “filter their
20 searches to display only Prime-eligible offers.” *Id.* ¶ 104.

21 ***Amazon’s competition.*** Amazon developed these innovations because it faces competition
22 from thousands of rivals across its product categories. These competitors range from countless
23

24 ³ Amazon does not in fact condition the Prime Badge on use of FBA. In 2015, Amazon created a program called Seller
25 Fulfilled Prime (“SFP”), Compl. ¶ 398, which it maintains today, *id.* ¶ 409. SFP permits third-party sellers to obtain
26 the Prime badge on offers even if they do not use FBA. The Complaint misleadingly states that Amazon “shuttered
SFP” in 2019, *id.*, but elsewhere acknowledges that Amazon merely paused “*new enrollment* in SFP,” *id.* ¶ 404, a
temporary step taken to address speed and performance issues. Amazon has reopened new enrollment in SFP. *See*
Seller Fulfilled Prime, <https://sell.amazon.com/programs/seller-fulfilled-prime>.

1 smaller retailers to massive online and brick-and-mortar operations of household names like
2 Walmart, Target, Best Buy, Home Depot, Kroger, Costco, Staples, Walgreens, Nike, Apple, and
3 many others. Amazon competes with these retailers on a number of dimensions. As alleged in the
4 Complaint, for example, retailers compete by “offering shoppers lower prices,” Compl. ¶ 264;
5 offering “features that meaningfully reduce the time and effort shoppers expend online,” such as
6 those that help consumers “compare different items,” *id.* ¶¶ 122, 126; developing “long-term
7 relationships with shoppers” that “encourage them to come back again,” *id.* ¶ 126; “maintaining
8 the perception among shoppers that [the retailer] has the lowest prices,” *id.* ¶ 262 (emphasis
9 omitted); and providing “a convenient and consolidated post-purchase experience,” *id.* ¶ 138. The
10 Complaint likewise alleges that the customer believes a retailer can cultivate—such as “a positive
11 reputation” and whether “the shopper finds the online store particularly trustworthy and
12 reliable”—improve a retailer’s ability to compete. *Id.* ¶¶ 130, 149.

13 The Complaint nonetheless alleges that there is a separate relevant market within retail that
14 includes only “online superstores.” Compl. ¶ 122. That notional market excludes (1) the online
15 stores of all retailers except the few alleged to be “superstores” and (2) the brick-and-mortar stores
16 of all retailers, even including the brick-and-mortar stores of alleged “superstores.” By alleging a
17 market around certain “stores,” the Complaint fails to allege a *product* market that “encompass[es]
18 the product at issue as well as all economic substitutes for the product.” *Hicks v. PGA Tour, Inc.*,
19 897 F.3d 1109, 1120 (9th Cir. 2018) (quoting *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038,
20 1045 (9th Cir. 2008)). Apart from that fatal flaw, the Complaint’s “online superstore” market is
21 implausible because it suggests, for example, that consumers would not consider buying a low-
22 priced TV on bestbuy.com only because Best Buy does not also sell shoes or cosmetics and is thus
23 not a “superstore.”⁴ Nonetheless, because “the validity of the ‘relevant market’ is typically a factual
24

25 _____
26 ⁴ The “online superstores” market also assumes customers seeking cough medicine might comparison-shop between Amazon.com and Walmart.com, but not call their local Walgreens, even if it offered lower prices and was a short walk away.

1 element,” *Newcal Indus.*, 513 F.3d at 1045, this motion focuses on the other reasons the Complaint
 2 fails to state a claim even under its contrived market definition.

3 **B. The Complaint’s Claims**

4 The FTC asserts Sherman Act claims in Counts I and II; the States have filed parallel
 5 Sherman Act claims in Counts V and VI. All of those claims rest on allegations related to three
 6 business practices. First, the Complaint condemns Amazon Retail for competing on price by
 7 matching its rivals’ discounts. Compl. ¶¶ 266-68. Second, the Complaint attacks Amazon’s
 8 practice of seeking to highlight only competitively-priced products. *Id.* ¶¶ 272-85 (featured offer
 9 policies); *id.* ¶¶ 286-304 (ASB policy). Third, the Complaint alleges that Amazon gives undue
 10 preference, when assigning the Prime badge, to third-party sellers who use Amazon’s fulfillment
 11 services. *Id.* ¶¶ 351-409. The Complaint does not specify a remedy, identify the alternative conduct
 12 it believes Amazon should have engaged in (such as still featuring offers when it knows a customer
 13 could buy the same product for less elsewhere), or allege how any alternative “but for” world
 14 would be better for consumers.

15 The FTC alternatively alleges in Count III that the same three business practices violate
 16 Section 5 of the FTC Act even if they do not violate the Sherman Act. And Count IV challenges
 17 the discontinued “Nessie” automated pricing experiment under the FTC Act alone (the Complaint
 18 does not allege that it violated the Sherman Act).

19 Finally, Counts VII–XX allege various state law violations.

20 **ARGUMENT**

21 **I. THE COMPLAINT FAILS TO STATE A CLAIM OF ANTICOMPETITIVE**
 22 **MONOPOLY MAINTENANCE UNDER SECTION 2 OF THE SHERMAN ACT.**

23 The three business practices attacked in the Sherman Act claims are far from
 24 anticompetitive: they are, instead, the very essence of competition. It is thus no surprise that the
 25 Complaint fails to allege *facts* that could transform Plaintiffs’ conclusory assertions of harm to
 26 consumers from “conceivable” to “plausible.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

1 (2007) (dismissing complaint for failing plausibly to allege necessary element of Sherman Act
2 claim). These deficiencies require dismissal of Counts I, II, V, and VI.

3 **A. The Complaint Attacks Well-Established Forms of Competition on the Merits.**

4 “Antitrust law does not seek to punish economic behavior that benefits consumers.”
5 *Coronavirus Rep.*, 85 F.4th at 957. And it does not target businesses for succeeding due to “a
6 superior product” or “business acumen.” *Cal. Comput. Prod., Inc. v. Int’l Bus. Machs. Corp.*, 613
7 F.2d 727, 742 (9th Cir. 1979) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71
8 (1966)). Therefore, even the alleged possession of monopoly power will “not be found unlawful
9 unless it is accompanied by an element of anticompetitive *conduct*” because to conclude otherwise
10 would chill “the incentive to innovate.” *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko,*
11 *LLP*, 540 U.S. 398, 407 (2004). The antitrust laws are directed “not against conduct which is
12 competitive, even severely so, but [only] against conduct which unfairly tends to destroy
13 competition itself.” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

14 Each policy challenged by the Complaint is facially procompetitive, and Plaintiffs’ efforts
15 to obstruct such procompetitive conduct would chill retail competition and harm consumers.

16 ***Competing on price.*** The Complaint condemns Amazon Retail for matching rivals’
17 discounts so that it can offer its customers similarly low prices. Compl. ¶ 20. The Complaint does
18 not claim that Amazon has engaged in predatory below-cost pricing. It alleges only that Amazon’s
19 discounting “limits rivals’ ability to gain customers by undercutting Amazon’s prices,” leaving
20 them with “lower margins.” *Id.* ¶¶ 330, 332. “The antitrust laws, however, were enacted for ‘the
21 protection of competition not competitors.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429
22 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *accord*
23 *Brooke Grp.*, 509 U.S. at 223 (“To hold that the antitrust laws protect competitors from the loss of
24 profits due to ... price competition would, in effect, render illegal any decision by a firm to cut
25 prices in order to increase market share. The antitrust laws require no such perverse result.”
26 (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986))).

1 As the Supreme Court has made clear for decades, “competition for increased market
2 share[] is not activity forbidden by the antitrust laws.” *Cargill*, 479 U.S. at 116 (cleaned up);
3 *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1259 (9th Cir. 1981) (“The antitrust laws do not
4 require the erection of a price umbrella for the benefit of inefficient competitors.”). Nor can a
5 plaintiff escape this black letter law by alleging, as the Complaint does, that a defendant’s price-
6 matching “deters rivals from even attempting to compete.” Compl. ¶ 330. “Even in an oligopolistic
7 market”—from which retail is a far cry—“when a firm drops its prices to a competitive level to
8 demonstrate to [rivals] the unprofitability” of a price cut, “it would be illogical to condemn the
9 price cut” because “[t]he antitrust laws then would be an obstacle to the chain of events most
10 conducive to ... the onset of competition.” *Brooke Grp.*, 509 U.S. at 223-24; *see also Atl. Richfield*
11 *Co. v. USA Petrol. Co.*, 495 U.S. 328, 337 (1990) (“When a firm ... lowers prices but maintains
12 them above predatory levels, the business lost by rivals cannot be viewed as an ‘anticompetitive’
13 consequence of the claimed violation.”).

14 The import of this well-settled law is clear: attempting to distinguish between a “good”
15 price cut and a “bad” price cut would encourage retailers toward *no* price cuts, thus “chill[ing] the
16 very conduct the antitrust laws are designed to protect.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274,
17 2287 (2018) (quoting *Brooke Grp.*, 509 U.S. at 226); *accord Weyerhaeuser Co. v. Ross-Simmons*
18 *Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007) (“We are particularly wary of allowing recovery
19 for above-cost price cutting because allowing such claims could, perversely, chill legitimate price
20 cutting, which directly benefits consumers.” (cleaned up)). The Complaint’s contrary approach
21 would expose retailers to legal risk whenever they lowered their prices to meet competition, and
22 prices would predictably rise as a result. Fortunately, that is not the law. Indeed, precisely because
23 *Brooke Group* forecloses the type of Sherman Act Section 2 claim asserted here, a House
24 Subcommittee previously urged Congress to “overrid[e] the Supreme Court’s decision[] in ...

1 *Brooke Group*.⁵ But Congress has enacted no such legislation, and *Brooke Group* remains the
2 law. A Sherman Act claim based on Amazon’s discount-matching practices is thus untenable.

3 ***Competing by offering a better in-store experience.*** The Complaint next criticizes
4 Amazon for how it seeks to provide a good experience for shoppers in its store. In particular, while
5 still making the offer available for purchase in its store, Amazon does not *feature* an offer when it
6 knows a customer could obtain the product from a reputable competitor elsewhere for less money.
7 Compl. ¶¶ 272-85. For “especially important” sellers, Amazon may restrict their “privilege” to
8 “operate as a seller in the Amazon store” altogether. *Id.* ¶¶ 286-304.⁶ Those alleged policies, too,
9 are procompetitive on their face. By featuring offers it thinks a customer will like, Amazon reduces
10 the inconvenience and time associated with sorting through many offers, without taking away
11 consumers’ ability to do so if they would prefer. And by not featuring offers when it knows a
12 competitor is offering a better price in another store, Amazon both builds trust with consumers and
13 facilitates the comparison-shopping that the Complaint itself acknowledges is necessary for
14 retailers to compete. *Id.* ¶¶ 122, 126, 130, 149, 181, 265, 338.

15 This alleged retail practice of “steer[ing],” Compl. ¶ 86, customers towards good deals and
16 away from bad ones “is both pro-competitive and ubiquitous,” U.S. Amex Br. at 46. As the
17 government explained previously: “Merchants routinely attempt to influence customers’
18 purchasing decisions, whether by placing a particular brand of cereal at eye level rather than on a
19 bottom shelf, discounting last year’s fashion inventory, or offering promotions such as ‘buy one,
20 get one free.’ ... [T]hat is normally called ‘competition.’” *Id.* (quoting *United States v. Am. Express*
21 *Co.*, 88 F. Supp. 3d 143, 150 (E.D.N.Y. 2015)). Courts, for their part, agree that this type of
22 procompetitive behavior is difficult to challenge under the antitrust laws. *See, e.g.*,
23 *Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130, 1141 (9th Cir. 2022) (affirming dismissal
24

⁵ Majority Staff of H. Subcomm. on Antitrust, Com. & Admin. Law of the Comm. on the Judiciary, 116th Cong.,
25 *Investigation of Competition in Digital Markets* 397 (Comm. Print 2020); *see id.* at 2 (identifying FTC Chair Khan as
Committee Counsel).

26 ⁶ *See supra* note 2.

1 because allegation defendant “favored” some contractual partners by making their products more
2 prominently visible was “not anticompetitive conduct under Section 2”); *Sambreel Holdings LLC*
3 *v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1075-76 (S.D. Cal. 2012) (recognizing defendant’s “right
4 to control its own product” and “the manner in which its website will be viewed” in granting
5 motion to dismiss Sherman Act claims); *Coronavirus Rep. v. Apple, Inc.*, 2021 WL 5936910, at
6 *13 (N.D. Cal. Nov. 30, 2021) (“The effect of ‘suppression’ in search rankings affects the relative
7 positions among products in the market; but there is no showing of harm to competition across the
8 market.”), *aff’d*, 85 F.4th 948 (9th Cir. 2023).

9 ***Competing through better delivery experiences.*** The Complaint also attacks
10 procompetitive conduct when it alleges that Amazon displays the Prime badge to third-party sellers
11 only if they enlist Amazon to handle fulfillment under the FBA program.⁷ The Prime badge
12 represents Amazon’s promise that customers will receive fast and reliable delivery on that product,
13 which the Complaint acknowledges makes the products “more attractive.” Compl. ¶ 352. Such
14 branding is presumptively procompetitive because it points consumers to offers that will be quickly
15 and dependably delivered, which Plaintiffs acknowledge is something customers want. *See id.*
16 ¶ 138 (recognizing competition to offer “a convenient ... post-purchase experience”).

17 By improving a customer’s delivery experience, Amazon is simply “tapping into consumer
18 demand and differentiating its products from those of its competitors—goals that are plainly
19 procompetitive rationales.” *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 987 (9th Cir. 2023).
20 Once again, courts typically view such behavior as procompetitive. *See, e.g., FTC v. Qualcomm*
21 *Inc.*, 969 F.3d 974, 991 (9th Cir. 2020) (identifying “consumer appeal” as a legitimate
22 procompetitive rationale); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 525 (5th Cir.
23 1999) (“Competition grounded in nonprice considerations such as reliability, maintenance support,
24 and general quality is competition on the merits.”).

25
26

⁷ As noted, sellers may obtain the Prime badge without using FBA. *See supra* note 3.

1 **B. The Complaint Alleges No Plausible Anticompetitive Effects.**

2 The Complaint also fails to allege facts plausibly showing that Amazon’s procompetitive
3 conduct has anticompetitive effects. As the Ninth Circuit explained: “[A] complaint’s allegation
4 of a practice that may or may not injure competition is insufficient to ‘state a claim to relief that is
5 plausible on its face.’” *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012)
6 (quoting *Twombly*, 550 U.S. at 570); *see also Qualcomm*, 969 F.3d at 990 (plaintiff must plausibly
7 allege conduct has “an ‘anticompetitive effect’” and thus “harms consumers” as opposed to “one
8 or more competitors” (emphasis omitted) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34,
9 58 (D.C. Cir. 2001) (per curiam))).

10 ***Matching rivals’ discounts.*** As discussed, antitrust law conclusively presumes that
11 Amazon’s strategy of matching discounts offered by other retailers is procompetitive and lawful.
12 *Supra* Section I.A; *Brooke Grp.*, 509 U.S. at 223-24. The Complaint cannot allege facts to make
13 that conduct an antitrust violation.⁸

14 ***Featuring low-priced offers.*** Amazon’s Featured Offer and ASB policies are
15 procompetitive practices aimed at encouraging third-party sellers, who are responsible for setting
16 their own prices in Amazon’s store, to offer low prices. When sellers respond by lowering their
17 prices—as the policies contemplate—that effect is a pro-consumer benefit, and the Complaint does
18 not contend otherwise. Instead, the Complaint ignores this price-reducing effect and alleges only
19 that a *handful* of Amazon’s more than 560,000 third-party sellers purportedly responded to these
20 policies by increasing their prices on, or removing products from, other sales channels. *See* Compl.
21 ¶ 314 (alleging that a single seller “increased the price” of a single unnamed product “to a really
22 high number”); *id.* ¶¶ 311, 313, 319, 321 (alleging actions from “one” or “some sellers” without
23 any detail as to, for example, the quantity of sellers, volume of products, or type of products

24 _____
25 ⁸ The Complaint’s efforts to nonetheless do so underscore the conclusory nature of the allegations throughout. *See*
26 Compl. ¶¶ 333-37. The Complaint references a *single* competitor and purported effects from “one point in 2019.” *Id.*
Notably, the Complaint does not allege that this competitor or any other still discounts fewer products. Nor does it
allege that other retailers offering those (unnamed) products also stopped discounting them, such that prices for those
products rose marketwide at that “point in 2019” or anytime thereafter.

1 affected). Indeed, despite most of these allegations focusing on the actions of third-party sellers
2 who sell on both Amazon and another marketplace, *id.* ¶¶ 320-22, the Complaint simultaneously
3 alleges that there are “relatively few” such sellers, *id.* ¶ 321.

4 These vague allegations are insufficient to state a plausible claim. *See Twombly*, 550 U.S.
5 at 567-70 & n.13. Moreover, the Complaint fails to plead, as it must, that these allegedly
6 anticompetitive effects predominated over the more obvious price-reducing effects of the policy
7 for customers who purchased in Amazon’s store. *See, e.g., Brantley*, 675 F.3d at 1198 (dismissing
8 complaint for alleging no more than “a practice that may or may not injure competition”); *United*
9 *States v. AT&T Inc.*, 310 F. Supp. 3d 161, 197-98 (D.D.C. 2018) (concluding government failed
10 to show consumers overall would pay higher average prices after factoring in likely price
11 reductions for the defendant’s customers), *aff’d*, 916 F.3d 1029 (D.C. Cir. 2019). The Complaint
12 does not include a single assertion—vague, conclusory, or otherwise—to that effect. Indeed, the
13 Complaint does not identify a single product for which any consumer paid more as a result of these
14 challenged policies.

15 ***Prime badge policies.*** The alleged effects from Amazon’s purported reservation of the
16 Prime Badge for FBA sellers likewise are insufficient. The Complaint asserts that Amazon’s
17 policies have raised the costs to sellers of offering products through multiple marketplaces (“multi-
18 homing”), thereby supposedly limiting the growth of “rival ... marketplaces.” Compl. ¶¶ 354-55,
19 366, 395-96. But the Complaint does not contain even the most basic facts needed to plausibly
20 allege such a claim. For example, it alleges no facts to support the conclusory (and inaccurate)
21 assertion that sellers must have two fulfillment providers to sell in Amazon and other stores—
22 which is the only theoretical reason identified as to why sellers’ costs may be higher.⁹ It identifies
23 not a single seller—let alone a competitively significant percentage of otherwise multi-homing
24 sellers—that responded by selling only through Amazon. It alleges no facts suggesting so-called

25 ⁹ As the Complaint appears to acknowledge, sellers can use FBA to fulfill orders in other sales channels. *See* Compl.
26 ¶ 354 (using qualifier “principally,” presumably to account for this option); *see also* FBA Multi-Channel Fulfillment,
<https://sell.amazon.com/fulfillment-by-amazon/fba-multi-channel>.

1 “rival marketplaces” face any significant degree of foreclosed business, let alone a degree large
2 enough to drive them below efficient scale. And most importantly, as elsewhere, the Complaint
3 contains no facts to plausibly allege that Amazon’s Prime-badge policies have increased prices to
4 consumers for any identifiable product or line of products.

5 The Complaint also alleges that Amazon’s conduct somehow “deprives independent
6 fulfillment companies of an important source of scale that is necessary to develop efficient
7 fulfillment networks.” Compl. ¶ 366. Once again, that assertion is entirely conclusory and thus
8 entitled to no weight, even at the pleading stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
9 (“conclusory statements” concerning “elements of a cause of action” are insufficient to withstand
10 motion to dismiss). The Complaint asserts no facts to support the implausible notion that leading
11 providers like UPS, FedEx, and the U.S. Postal Service—some of which Amazon itself continues
12 to use—are operating below efficient scale. The Complaint does not identify a single provider
13 allegedly foreclosed, indicate how much of the alleged market has been foreclosed, or even try to
14 plead facts indicating that the alleged foreclosure resulted in anticompetitive effects such as higher
15 prices, reduced output, or degraded services.

16 **II. COUNTS III AND IV SHOULD BE DISMISSED BECAUSE THE FTC MAY NOT**
17 **BRING STANDALONE SECTION 5 CLAIMS IN DISTRICT COURT.**

18 As a fallback to its Sherman Act claims, the FTC contends in Count III that the very same
19 conduct is an “unfair method of competition” under Section 5 of the FTC Act even if it complies
20 with the Sherman Act. *Compare* Compl. ¶¶ 447, 453 (alleging, in Counts I and II, that Amazon’s
21 conduct violates the Sherman Act and the FTC Act), *with id.* ¶ 455 (alleging, in Count III, that the
22 same conduct violates only the FTC Act). In Count IV, the FTC also claims that a long-
23 discontinued automated pricing experiment (“Nessie”) violates Section 5 even though the FTC
24 does not allege that it violates the Sherman Act. *Id.* ¶ 462.

25 As an initial matter, the substantive pleading failures identified above also require dismissal
26 of the claim in Count III. The FTC may not use Section 5 of the FTC Act to condemn practices

1 that are lawful under “well forged” Sherman Act doctrine. *Boise Cascade Corp. v. FTC*, 637 F.2d
2 573, 582 (9th Cir. 1980). That is true regardless of where the FTC sues—*i.e.*, in federal court or in
3 its administrative tribunal—and is particularly true where, as here, it may “blur the distinction
4 between guilty and innocent commercial behavior.” *Id.* Count IV must be dismissed for similar
5 reasons. *See infra* Section III.

6 Independently, Counts III and IV should be dismissed because they improperly attempt to
7 side-step the procedures the FTC must use to develop new policy and instead ask this Court to do
8 what no federal district court has done: become an administrative policy-maker for the FTC by
9 defining new meanings of “unfair” competition. When bringing claims under Section 5 of the FTC
10 Act,¹⁰ the FTC has for decades relied on judicially established Sherman Act principles to define
11 what competitive methods are “unfair” under Section 5. In 2015, for example, the FTC issued a
12 policy statement confirming that “consistent with FTC precedent,” it was “formally align[ing]
13 Section 5 with the Sherman ... Act.”¹¹

14 A year ago, the FTC reversed course. In a new policy statement, it announced that a wide
15 range of competitive methods may be “unfair” under the FTC Act even if they do not violate the
16 Sherman Act.¹² The FTC also observed that the agency itself was the entity tasked by Congress
17 with making such a determination. *See* 2022 FTC Policy Statement at 6-8 (describing FTC as the
18 “expert body charged with elucidating the meaning of Section 5”). Yet, it now asks this Court to
19 make that substantive policy determination in the first instance. We are aware of only one other
20 case in the FTC’s 109-year history where, as here, it asked a district court in the first instance to

22 ¹⁰ The FTC uses Section 5 of the FTC Act to bring its antitrust claims because it cannot sue under the Sherman Act
23 itself.

24 ¹¹ FTC, Press Release, *FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition*
Statute (Aug. 13, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act-competition-statute>.

25 ¹² FTC, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act*
26 (Nov. 10, 2022) (“2022 FTC Policy Statement”), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

1 expand the meaning of Section 5 of the FTC Act beyond the scope of established law—and it lost
2 that case. *See FTC v. Abbott Lab’ys*, 853 F. Supp. 526 (D.D.C. 1994).

3 The reason for that dearth of authority is clear. When a Section 5 allegation is premised on
4 a violation of some other well-developed source of law—such as the Sherman Act—district courts
5 can apply existing legal standards to adjudicate the claim. That is not true for “standalone” claims
6 like those alleged here.¹³ In those circumstances, “label[ing] a practice ‘unfair’” is “a determination
7 of policy or judgment which the agency alone is authorized to make” in its administrative forum.
8 *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972) (quoting *SEC v. Chenery Corp.*, 318
9 U.S. 80, 88 (1943)); *accord Atl. Ref. Co. v. FTC*, 381 U.S. 357, 367 (1965) (“Congress
10 intentionally left development of the term ‘unfair’ to the Commission ...”); *FTC v. Food Town*
11 *Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976) (single judge order) (“Th[e] adjudicatory function
12 is vested in FTC in the first instance.”). That conclusion accords with the plain text of Section 5
13 itself. *See* 15 U.S.C. § 45(b), (c) (granting the Commission responsibility to decide conduct is
14 “unfair” and, following notice and a hearing, determine whether “it” is “of the opinion that the ...
15 practice in question is prohibited”).

16 In 1973, Congress added Section 13(b) to the FTC Act, but that does not alter the analysis
17 here. Section 13(b) is a procedural provision that outlines when the FTC may seek an injunction
18 in district court. 15 U.S.C. § 53. It does not authorize or provide a substantive standard for a district
19 court to determine in the first instance whether such standalone conduct qualifies as an “unfair
20 method of competition” under the FTC Act. *Id.* That policy-laden determination still is governed
21 by Section 5 and must be adjudicated by the FTC in the first instance.

22 The text of Section 13(b) reinforces this conclusion: it explicitly recognizes that there are
23 limits on the FTC’s ability to pursue claims directly in district court. *See* 15 U.S.C. § 53(b)
24 (permitting the FTC to seek a permanent injunction only “in proper cases”). That there exist

25 _____
26 ¹³ The term “standalone” refers to claims in which the FTC asserts that conduct is an “unfair” method of competition
under Section 5 of the FTC Act even though it does not violate the Sherman Act. For purposes of this motion, Amazon
takes no position on whether the FTC may bring *non*-“standalone” claims directly in district court.

1 “proper” cases necessarily means there also are “improper” cases. Standalone claims like those in
2 Counts III and IV must fall on the “improper” side of the line because, by definition, they ask a
3 Court to make a policy judgment reserved for the Commission itself, without reference to judicially
4 developed standards.

5 In short, the FTC asks this Court to be the first Article III court ever to decide in the first
6 instance that a defendant’s competitive methods are “unfair” under Section 5 of the FTC Act even
7 though they do not violate the Sherman Act. The Court should decline that invitation. Instead,
8 because the Commission has not followed the statutorily prescribed procedures for determining
9 whether the challenged conduct is “unfair” under the FTC Act, the Complaint’s standalone Section
10 5 claims (Counts III and IV) should be dismissed.

11 **III. COUNT IV ALSO SHOULD BE DISMISSED AS IRRECONCILABLE WITH**
12 **SETTLED PRECEDENT AND AS UNTIMELY.**

13 Count IV invokes the FTC Act to challenge a long-discontinued, experimental automated
14 pricing program (“Nessie”) that the FTC does not allege violates the Sherman Act. The FTC claims
15 that Amazon Retail employed Nessie to match the second-lowest price offered by competitors for
16 certain products rather than the absolute lowest. (The Sherman Act counts attack Amazon for
17 matching rivals’ lowest prices too often, while Count IV attacks Amazon for not matching rivals’
18 lowest prices often enough.) Beyond the reasons for dismissal discussed in the preceding section,
19 which apply equally to both Counts III and IV, Count IV should be dismissed for two additional
20 and independent reasons.

21 *First*, the FTC’s legal basis for attacking Nessie contradicts settled precedent under both
22 the Sherman Act and the FTC Act. The Complaint asserts this discontinued program prompted
23 parallel responses from other retailers. Compl. ¶ 420. But a theory of liability based upon other
24 firms’ uncoordinated conduct in response to Amazon’s unilateral setting of its own prices has no
25 basis in law. Such parallel pricing, ubiquitous throughout the economy, is lawful in the absence of
26 an anticompetitive agreement, which the Complaint nowhere alleges. *See, e.g., Twombly*, 550 U.S.

1 at 553-54; *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1193 (9th Cir. 2015)
2 (mere allegations of parallel conduct are insufficient); *see also Brooke Grp.*, 509 U.S. at 227
3 (competitors may “recogniz[e] their shared economic interests and their interdependence with
4 respect to price and output decisions” to reach consciously parallel decisions). That doctrine
5 reflects important judicial values about the limits of antitrust intervention in a free economy. In
6 the words of the leading antitrust treatise, non-collusive parallel pricing “cannot be remedied
7 without making antitrust tribunals price control agencies, without incongruently controlling
8 oligopoly pricing more intensively than the more dangerous monopoly price, or without
9 restructuring markets on an enormous scale exceeding the ability or mandate of those tribunals.”
10 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and*
11 *Their Application* ¶ 1436a (2023).

12 “These same policy reasons also dictate that mere interdependent pricing is not an unfair
13 method of competition in violation of FTC Act § 5,” even in cases heard by the FTC as an
14 administrative body. *Id.* ¶ 1436b3. The Second Circuit made exactly that point when it vacated an
15 FTC administrative order holding a company liable under a standalone Section 5 theory for
16 conduct the FTC described in terms strikingly similar to its criticisms of *Nessie*. *See E.I. du Pont*
17 *de Nemours & Co. v. FTC*, 729 F.2d 128, 137-40 (2d Cir. 1984). As the Court explained, “labelling
18 one producer’s price change in [an oligopolistic] market as a ‘signal,’ parallel price changes as
19 ‘lock-step,’ or prices as ‘supracompetitive,’ hardly converts its pricing into an ‘unfair’ method of
20 competition.” *Id.* at 139. Any contrary rule, the Court held, would create intractable “doubt as to
21 the types of otherwise legitimate conduct that are lawful and those that are not.” *Id.*; *see also Boise*
22 *Cascade*, 637 F.2d at 582 (FTC Act cannot condemn practices lawful under “well forged” Sherman
23 Act doctrine).

24 *Second*, the claim is untimely. The FTC concedes that Amazon used *Nessie* only “[f]rom
25 2015 to 2019.” Compl. ¶ 416. But the FTC may seek an injunction only when the defendant “is
26 violating, or is about to violate” a relevant provision of law. 15 U.S.C. § 53(b). Courts demand

1 strict adherence to this requirement and have dismissed FTC complaints for only alleging a past
2 violation. *See AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1348 (2021) (“[T]he words ‘is
3 violating’ and ‘is about to violate’ (not ‘has violated’) set[] forth when the Commission may
4 request injunctive relief.”); *Qualcomm*, 969 F.3d at 1005 (“As a general rule, past wrongs are not
5 enough for the grant of an injunction.” (cleaned up)); *FTC v. Shire Viropharma, Inc.*, 917 F.3d
6 147, 158-59 (3d Cir. 2019) (same). The FTC tries to deal with that precedent by alleging that
7 Amazon “considered” reviving Nessie two years ago. Compl. ¶ 431. Putting aside the Complaint’s
8 misinterpretation of a document to leap to that allegation, Amazon *did not revive the Nessie*
9 *experiment*, as the Complaint concedes. *Id.* The Complaint cites no other basis for concluding that
10 Amazon is “about to” revive Nessie. Count IV should be dismissed.

11 **IV. THE STATE LAW CLAIMS ALSO SHOULD BE DISMISSED.**

12 The state plaintiffs also bring several state-specific claims. These claims should be
13 dismissed, in some cases for multiple independent reasons.

14 **A. State-Law Equivalents Fall with the Sherman Act Claims.**

15 Most state plaintiffs bring monopolization claims under their state’s equivalent to Section
16 2 of the Sherman Act. These state laws track the elements of, and are interpreted consistent with,
17 Section 2 liability. *See* Conn. Gen. Stat. § 35-44b; Md. Code Ann. Com. Law § 11-202(a)(2)(i);
18 Mich. Comp. Laws § 445.784(2); Nev. Rev. Stat § 598A.050; N.J. Stat. §§ 56:9-18, 56:8-4; 79
19 Okla. Stat. § 212; Or. Rev. Stat. § 646.715(2); 6 R.I. Gen. Laws § 6-36-2(b); *Tri-State Rubbish,*
20 *Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1081 (1st Cir. 1993) (Maine law); *Prentice v. Title Ins.*
21 *Co. of Minn.*, 500 N.W.2d 658, 662 (Wis. 1993). Accordingly, for the reasons discussed above,
22 *supra* Section I, all Counts brought solely under state equivalents of the Sherman Act must be
23 dismissed in their entirety—Counts VIII (Maine), IX (Maryland), X (Michigan), XI (Nevada),
24 XII-XIII (New Jersey), XVII (Oregon), and XX (Wisconsin)—and Counts that raise multiple
25 causes of action must be dismissed to the extent they allege violations of the state equivalents of
26 the Sherman Act—Counts VII (Connecticut), XVI (Oklahoma), and XIX (Rhode Island).

1 **B. Pennsylvania Does Not Recognize a Sherman Act Section 2 Equivalent.**

2 Unique among the plaintiff states, the Commonwealth of Pennsylvania has no statutory
3 equivalent to the Sherman Act. Pennsylvania thus attempts to bring a common law
4 “monopolization” claim. Compl. ¶ 554. But common law prohibits only unreasonable “restraint[s]
5 of trade”—i.e., agreements between two entities addressed by Section 1 of the Sherman Act; it has
6 no counterpart to modern Section 2 principles. *See N. Secs. Co. v. United States*, 193 U.S. 197,
7 404 (1904) (Holmes, J., dissenting). Count XVIII therefore fails because the conduct alleged here
8 (monopolization under Section 2) is not cognizable under common law. *See 7 Antitrust Laws and*
9 *Trade Regulation* § 138.03 (2d ed.) (noting that “[t]here are no cases concerning unilateral
10 monopolization under Pennsylvania common law”). If Pennsylvania law does authorize a plaintiff
11 to bring a monopolization claim analogous to Section 2, that claim would fail with the Sherman
12 Act claims. *See supra* Sections I, IV(A).

13 **C. The Complaint Does Not Allege Violations of State Consumer-Protection**
14 **Statutes.**

15 Five states—Connecticut, Oklahoma, Pennsylvania, Rhode Island, and New Jersey—bring
16 claims under their state consumer-protection statutes, asserting that Amazon engaged in deceptive
17 commercial practices. Tellingly, the FTC—the nation’s leading consumer-protection agency—
18 asserts no such claim under its own consumer-protection authority (which is the federal statute on
19 which these state-law schemes are based).¹⁴ That is because the Complaint focuses solely on claims
20 of anticompetitive (not deceptive) conduct. The relevant counts allege in general and conclusory
21 terms that Amazon has somehow deceived consumers by calling its prices “low” and its
22 marketplace “competitive.” Compl. ¶¶ 513, 542-43. That is insufficient even to allege deception,
23 let alone the other necessary elements of such a claim, such as reliance or materiality. *See Island*
24 *Mortg. of N.J. v. 3M (Minn. Mining & Mfg. Co.)*, 860 A.2d 1013, 1016 (N.J. Super. Ct. 2004)

25 _____
26 ¹⁴*See* 15 U.S.C. § 45(a)(1). Section 5 of the FTC Act prohibits both “unfair methods of competition”—which
corresponds to the FTC’s antitrust authority—and “unfair or deceptive acts or practices”—which corresponds to the
FTC’s consumer-protection authority.

1 (dismissing consumer protection claim); *Hunt v. U.S. Tobacco Co.*, 2006 WL 2619806, at *2 (E.D.
 2 Pa. Sept. 11, 2006), *vacated on other grounds*, 538 F.3d 217 (3d Cir. 2008), *as amended* (Nov. 6,
 3 2008) (same); *Smith v. Wells Fargo Bank, N.A.*, 158 F. Supp. 3d 91, 102-03 (D. Conn.), *aff'd*, 666
 4 F. App'x 84 (2d Cir. 2016) (same); *Sheet Metal Workers Loc. 441 Health & Welfare Plan v.*
 5 *GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380, 420 (E.D. Pa. 2010) (same for an Oklahoma
 6 consumer protection claim); *see also Long v. Dell, Inc.*, 93 A.3d 988, 1003 (R.I. 2014) (applying
 7 the same standard).

8 Connecticut, Pennsylvania, and Rhode Island also allege that Amazon violated their
 9 respective consumer protection statutes by employing “unfair methods of competition.” Compl.
 10 ¶¶ 482, 536, 560. But neither Pennsylvania nor Rhode Island define “unfair methods of
 11 competition” any differently than they define “unfair or deceptive acts or practices,” and so these
 12 allegations fail for the same reasons. *See* 73 Pa. Stat. and Cons. Stat. Ann. § 201-2(4); 6 R.I. Gen.
 13 Laws § 6-13.1-1(6). As for Connecticut, because its claim stands only upon its deficient antitrust
 14 allegations, its “[f]ailure to state a claim under the antitrust act bars recovery for an antitrust
 15 violation under CUTPA,” no matter how it characterizes Amazon’s acts. *Lavoie v. Bayer Corp.*,
 16 2002 WL 230962, at *10 (Conn. Super. Ct. Jan. 23, 2002).

17 This Court should therefore dismiss Counts VII (Connecticut), XVI (Oklahoma), XVIII
 18 (Pennsylvania), and XIX (Rhode Island) to the extent they rely on consumer protection statutes,
 19 and it should dismiss Count XIV (New Jersey) in its entirety.

20 **D. Claims Based on Territorially Limited State Laws Fail.**

21 Maryland, New Jersey, and Oklahoma rely on state laws with language limiting their
 22 territorial reach (e.g., “within this state”). *See* Md. Code, Com. Law § 11-204(a)(2); N.J. Stat.
 23 § 56:9-4(a); 79 Okla. Stat. § 203(B). Courts have interpreted these statutes as not capturing
 24 conduct that is predominantly interstate in nature. *See Md. Staffing Servs., Inc. v. Manpower, Inc.*,
 25 936 F. Supp. 1494, 1504-05 (E.D. Wis. 1996) (holding that the activities “were of an interstate
 26 nature” and not subject to Maryland’s antitrust statute); *New Jersey v. Lawn King, Inc.*, 375 A.2d

1 295, 303 (N.J. Super. Ct. Law. Div. 1977), *rev'd on other grounds*, 404 A.2d 1215 (N.J. Super.
2 Ct. App. Div. 1979) (suggesting that New Jersey's antitrust statute cannot be invoked against
3 activities that "substantially affec[t] interstate commerce"); *Young v. Seaway Pipeline, Inc.*, 576
4 P.2d 1148, 1151 (Okla. 1977) (finding that Oklahoma's antitrust statute does not reach
5 "industr[ies]" that "operat[e] as an aspect of interstate commerce"). Plaintiffs allege
6 monopolization only of nationwide markets, *see* Compl. ¶¶ 123, 164-65, 187, 203, and the alleged
7 conduct is inherently national in scope as it depends on the existence of marketwide effects, *see*,
8 *e.g., id.* ¶¶ 209, 356. This Court should therefore dismiss Counts IX (Maryland) and XII (New
9 Jersey), and dismiss Count XVI with respect to the alleged violations of the Oklahoma Antitrust
10 Reform Act, 79 Okla. Stat. § 203.

11 **E. Count XV (New York) Should Be Dismissed.**

12 Count XV (New York) alleges violations of Section 63(12) of New York's Executive Law,
13 which allows the New York Attorney General ("NYAG") to sue for violations of state or federal
14 law. The violations alleged, however, are based on the federal Sherman Act and FTC Act; there is
15 no allegation that the conduct violates a state law. These derivative claims should therefore be
16 dismissed for the same reasons. *Supra* Section I, IV(A). Additionally, New York is precluded from
17 pursuing its FTC claims under Section 63(12) because Section 5 of the FTC Act preempts any
18 state law purporting to authorize a non-federal party—here, the NYAG—to bring a claim under
19 the statute. *See O'Donnell v. Bank of Am., Nat'l Ass'n*, 504 F. App'x 566, 568 (9th Cir. 2013)
20 ("The [FTC Act] doesn't create a private right of action." (citing *Carlson v. Coca-Cola Co.*,
21 483 F.2d 279, 280 (9th Cir. 1973))); *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237
22 (2d Cir. 1974) ("[T]he Federal Trade Commission Act may be enforced only by the Federal Trade
23 Commission.").

24 **CONCLUSION**

25 The Complaint, which attacks pro-consumer and procompetitive conduct, should be
26 dismissed in its entirety.

1 DATED this 8th day of December, 2023.

2 *I certify that this memorandum contains 8,316*
3 *words, in compliance with the Local Civil Rules.*

4 **WILLIAMS & CONNOLLY LLP**

5 By: s/ Heidi K. Hubbard
6 Heidi K. Hubbard (*pro hac vice*)
7 Kevin M. Hodges (*pro hac vice*)
8 Carl R. Metz (*pro hac vice pending*)
9 Carol J. Pruski (*pro hac vice pending*)
680 Maine Avenue SW
10 Washington, DC 20024
11 Phone: (202) 434-5000
12 Email: hhubbard@wc.com
khodges@wc.com
cmetz@wc.com
cpruski@wc.com

13 **MORGAN, LEWIS & BOCKIUS LLP**

14 By: s/ Patty A. Eakes
15 Patty A. Eakes, WSBA #18888
16 Molly A. Terwilliger, WSBA #28449
17 1301 Second Avenue, Suite 2800
18 Seattle, WA 98101
19 Phone: (206) 274-6400
20 Email: patty.eakes@morganlewis.com
molly.terwilliger@morganlewis.com

21 **COVINGTON & BURLING LLP**

22 Thomas O. Barnett (*pro hac vice*)
23 One CityCenter
24 850 Tenth Street, NW
25 Washington, DC 20001-4956
26 Phone: (202) 662-5407
Email: tbarnett@cov.com

Attorneys for Defendant Amazon.com, Inc.