

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BOOKENDS & BEGINNINGS LLC, on behalf
of itself and all others similarly situated,

Plaintiff,

**REPORT AND
RECOMMENDATION**

AMAZON.COM, INC.; HACHETTE BOOK
GROUP, INC., HARPERCOLLINS
PUBLISHERS L.L.C.; MACMILLAN
PUBLISHING GROUP, LLC; PENGUIN
RANDOM HOUSE LLC; SIMON &
SCHUSTER, INC.,

21-cv-02584 (GHW) (VF)

Defendants.

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VALERIE FIGUEREDO, United States Magistrate Judge

TO THE HONORABLE GREGORY H. WOODS, United States District Judge

Plaintiff Bookends & Beginnings LLC (“Bookends”) brings this putative antitrust class-action lawsuit against Defendants Amazon.com, Inc. (“Amazon”), and the five largest book publishers in the United States—Hachette Book Group, Inc. (“Hachette”), HarperCollins Publishers LLC (“HarperCollins”), Macmillan Publishing Group, LLC (“Macmillan”), Penguin Random House LLC (“Penguin”), and Simon & Schuster, Inc. (“Simon & Schuster,” and collectively with the other publisher-defendants, the “Publishers”). Plaintiff asserts claims, on behalf of itself and all other similarly situated retail and online booksellers (the putative class), for (1) discriminatory pricing in violation of the Robinson-Patman Act, 15 U.S.C. § 13; (2)

unlawful restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1; (3) monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, against only Amazon; and (4) conspiracy to monopolize under Section 2 of the Sherman Act. Amazon and the Publishers separately moved to dismiss the Amended Class Action Complaint (“CAC”).¹ See ECF Nos. 75, 77. For the reasons that follow, I respectfully recommend that Defendants’ motions to dismiss be **GRANTED**.

BACKGROUND

A. Factual Background²

Amazon is the largest retail bookseller in the sale of “print trade books,” accounting for “over half of all books purchased at retail in the United States, including about 90% of all print books sold online.”³ See ECF No. 65 (“CAC”) ¶¶ 2, 18, 31, 48, 80, 118, 134. Bookends is a bookseller that sells print trade books online and at its brick-and-mortar store in Evanston, Illinois. CAC ¶¶ 1, 30. The Publishers are the five largest publishers in the United States and together account for about “80% of the trade books sold in the United States.” *Id.* ¶¶ 1, 77. Collectively, the Publishers are responsible for many of the biggest titles in fiction and non-fiction, including the vast majority of New York Times Bestsellers. *Id.* ¶ 77.

¹ Amazon separately moved to strike the class allegations in the CAC. See ECF No. 79. The Publishers include an argument to strike the class allegations in their brief in support of their motion to dismiss. See ECF No. 76 (Publisher’s Br.) at 23-25. Plaintiff filed a separate opposition to Amazon’s motion to strike. See ECF No. 98. I will issue a separate report and recommendation addressing Defendants’ motions to strike the class allegations.

² The factual allegations recounted herein are taken from the Amended Class Action Complaint and documents integral to it. Because the case is before the Court on Defendants’ motion to dismiss, I accept the well-pled factual allegations of the complaint as true and draw all reasonable inferences in Plaintiff’s favor. *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

³ “Trade books” is a term of art referring to “general interest fiction and non-fiction books,” distinguished from “non-trade books” like academic textbooks or reference materials. CAC ¶ 1.

This lawsuit concerns the sale of print trade books (hardbacks, paperbacks, and mass-produced). Id. ¶¶ 1 n.3, 60. The Publishers are “horizontal competitors” in the publication of print trade books and in the sale, at the wholesale level, of print trade books. Id. ¶ 7. The Publishers sell print books to retailers, like Plaintiff and Amazon, under a wholesale model—which is defined as a discount from the list price of a book. Id. ¶ 3. A publisher’s “list price” is the suggested retail price for a book; it is the price at which “a substantial number of sellers sell trade books” to consumers. Id. ¶¶ 11, 54-55. The list price is also used to determine the wholesale price for a book. Id. ¶ 3. Higher list prices generally mean that booksellers, like Plaintiff, pay a higher wholesale price and consumers pay a higher “retail price[.]” Id. ¶¶ 3, 53. Higher wholesale prices also lead to “lower total market output of books.” Id. ¶ 53; see also id. ¶ 56. Plaintiff purchases books from the Publishers at Plaintiff’s “standard discount price of up to 46%” off of the list price. Id. ¶ 94.

The CAC alleges that Defendants acted collectively to “control wholesale prices of print trade books” by “knowingly” entering into “the same price discrimination agreements with Amazon,” the “dominant retailer” through which the Publishers “sell their trade books.” Id. ¶¶ 7-8, 40. In 2014 and 2015, the Publishers executed “book distribution agreements” with Amazon, wherein the Publishers collectively agreed to sell their books to Amazon at prices that were “steep[ly]” discounted and below the standard discounts available to other booksellers, like Plaintiff. Id. ¶¶ 4, 40-41, 112. The “significant difference” between the discounts offered to Amazon and Plaintiff exceeded any cost savings achieved by the Publishers from selling to Amazon. Id. ¶ 101.

The agreement for [REDACTED] Publisher, [REDACTED], expressly stated that [REDACTED] publisher would “[REDACTED]

[REDACTED]—a provision known as a “meeting competition” clause. Id.
 ¶¶ 8-9, 99. Additionally, HarperCollins, Macmillan, and Penguin committed to sell to Amazon at
 [REDACTED]; Macmillan, Penguin,
 and Simon & Schuster [REDACTED]
 [REDACTED]; and Hachette agreed to [REDACTED]
 [REDACTED] Id. ¶¶ 4, 9. Each Publisher understood that the monetary
 and performance terms of its contract with Amazon reflected its competitors’ terms and
 conditioned their pricing “on agreement” by the other Publishers. Id. ¶ 8.⁴ The insertion of the
 meeting-competition clause in [REDACTED]
 [REDACTED]. Id. ¶ 6.

By “the very act of signing” the agreements with Amazon, each Publisher “signaled a
 clear commitment to raise the prices of their print trade books, thereby facilitating collective
 action.” Id. ¶¶ 10, 112. Thus, after negotiating the distribution agreements with Amazon, the
 Publishers raised the list prices of their print trade books. Id. ¶¶ 3, 11-14. Acting alone, none of
 the Publishers could have raised the list price of trade print books or changed public perception
 about the value of books. Id. ¶ 13. “By 2016—after a three-year period when list prices hovered
 around \$16—the average weighted list price” of the Publishers’ bestsellers rose to \$17, where it
 has “largely remained.” Id. ¶ 12; see also id. ¶ 14. The market-wide increase in the price of print
 trade books is “a direct consequence” of the Publishers’ collusion. Id. ¶ 13.

⁴ Although [REDACTED] distribution agreement [REDACTED]
 [REDACTED], Amazon publicly confirmed at the time of the
 contract’s negotiation, that the agreement was the same contract recently signed by the other
 Publishers. CAC ¶ 8. To support its allegations, the CAC includes references to specific
 provisions in the agreements between each of the Publishers and Amazon. See, e.g., CAC ¶¶ 8-9
 nn. 19-22.

The Publishers recognize that Amazon’s “outsized position of power” in the book industry “endangers the distribution of their books and the long-term health of the publishing industry.” Id. ¶ 15. Publicly, the Publishers are “diametrically opposed to Amazon’s consolidation of market power and their dependence on Amazon as their principle distributor of their books.” Id. ¶ 111. Acting individually, none of the Publishers would have had an incentive to enter into “restrictive agreements” with Amazon that consolidated power in Amazon and ceded substantial control over the distribution of their books. Id. ¶¶ 15-16, 39, 111. By knowingly entering into “uniform agreements” with Amazon, the Publishers “created an economic incentive to raise list prices, which was only attractive to the [Publishers] to the extent they acted collectively.” Id. ¶¶ 10-12, 17, 38, 40-41, 53, 110.

For its part, Amazon participated and facilitated the “horizontal agreement” among the Publishers by “coordinating a series of substantially identical agreements with the same anticompetitive terms” and making clear to each Publisher that it was offering each of them the same terms. Id. ¶¶ 8, 115. Amazon “engineered and knowingly received the benefit” of the Publishers’ “price discrimination,” thereby willfully acquiring its monopoly power in the online, retail trade-book market. Id. ¶¶ 6, 18, 48-50, 80. By securing a “substantially lower wholesale price and more favorable contractual terms” than its rivals, Amazon “dominate[s] over its retail competitors” and “gain[s] market share,” because regardless of the list price set by the Publishers, Amazon “faces no meaningful competition from any rival bookseller.” Id. ¶¶ 4, 17, 38, 110.

The Publishers also pay Amazon

[REDACTED]

[REDACTED]

[REDACTED]

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