HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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DEBORAH FRAME-WILSON, CHRISTIAN
SABOL, SAMANTHIA RUSSELL, ARTHUR
SCHAREIN, LIONEL KEROS, NATHAN
CHANEY, CHRIS GULLEY, SHERYL
TAYLOR-HOLLY, ANTHONY COURTNEY,
DAVE WESTROPE, STACY DUTILL,
SARAH ARRINGTON, MARY ELLIOT,
HEATHER GEESEY, STEVE MORTILLARO,
CHAUNDA LEWIS, ADRIAN HENNEN,
GLENDA R. HILL, GAIL MURPHY,
PHYLLIS HUSTER, and GERRY
KOCHENDORFER, on behalf of themselves
and all others similarly situated,

Case No. 2:20-cv-00424-RAJ

ORDER

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            Plaintiffs,

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      v.

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AMAZON.COM, INC., a Delaware corporation,

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            Defendant.

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I.   INTRODUCTION

This matter comes before the Court on Defendant's Motion to Dismiss. Dkt. # 18. Plaintiffs oppose the motion. Dkt. # 19. Having reviewed all the briefing, including the parties' supplemental authorities, the remaining record, and relevant law, the Court finds that oral argument is unnecessary. For the reasons below, the motion to dismiss is **DENIED in part** and **GRANTED in part**.

II.   BACKGROUND

Defendant Amazon.com, Inc. ("Defendant" or "Amazon") is "the world's largest online retailer." Dkt. # 15 ¶ 2. Sales conducted on its online platform account for almost half of all retail e-commerce in the United States. *Id.* Plaintiffs are consumers from 18 states, including Alabama, Arkansas, Arizona, California, Florida, Illinois, Iowa, Maine, Nevada, New Hampshire, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin, who purchase consumer goods online. *Id.* ¶ 46–67.

Amazon operates as an online retailer, selling its own products directly to its customers, and as an online platform for third-party sellers ("sellers") and their customers. *Id.* Amazon sells many of the same products that sellers sell on Amazon's platform. *Id.* To sell products on the Amazon.com platform, sellers register with Amazon Marketplace and agree to the terms of Amazon Services Business Solutions Agreement ("BSA") and its policies. *Id.* ¶ 4. The BSA contains rules for selling on the Amazon.com platform, and any seller with an Amazon Seller Account must comply with them. *Id.* Sellers pay a $40 registration fee and a commission charge or referral fee of approximately 15% for each product sold on the platform. *Id.* ¶ 74. Sellers also pay a per-item fee or a monthly subscription and a fee for any refunds when a customer returns a seller's product. *Id.* Sellers may also, for an additional fee, employ Fulfillment by Amazon ("FBA") to store, pick, pack, and ship orders, as well as to manage returns and customer service. *Id.*

Until March 2019, the BSA included a "price parity" provision, or "platform most

1   favored nation" ("PMFN") provision. *Id.* ¶ 5. The PMFN required sellers to "maintain

2   parity" between the products they listed on the Amazon platform and those on external

3   platforms by ensuring that "the purchase price and every other term of sale . . . is at least

4   as favorable to Amazon Site users as the most favorable terms" on the sellers' other sales

5   channels. *Id.* Amazon officially withdrew the PMFN provision in March 2019 under

6   threat of investigation by the Federal Trade Commission ("FTC"). *Id.* ¶ 6.

7   Still, on August 30, 2020, Plaintiffs filed an amended class action complaint

8   against Amazon alleging federal and state antitrust violations. *Id.* Plaintiffs allege that

9   Amazon continues to enforce its PMFN provision through its current "fair pricing"

10   provision. *Id.* Plaintiffs claim that under this provision, "Amazon regularly monitors the

11   prices of items on [sellers'] marketplaces," and that if it sees "pricing practices" on the

12   Amazon.com platform "that harm[] customer trust, Amazon can remove the Buy Box

13   [*i.e.*, the coveted one-click-to-buy button], remove the offer, suspend the ship option, or,

14   in serious or repeated cases, suspend[] or terminat[e] selling privileges." *Id.* The

15   provision states that "[a]ny single product or multiple products packages must have a

16   price that is equal to or lower than the price of the same item being sold by the seller on

17   other sites or virtual marketplaces." *Id.* ¶ 7. Plaintiffs allege that sellers receive "price

18   alerts" with a warning from Amazon if the products they sell on Amazon.com have been

19   found offered for a lower price on a different platform. *Id.* Plaintiffs allege that both

20   PMFN and "fair pricing" policies have "the effect of getting sellers to raise prices

21   elsewhere, rather than risk lower revenue from Amazon." *Id.*

22   Plaintiffs allege that Amazon injures consumers by driving up the price of goods.

23   *Id.* ¶ 12. The products at issue, or "class products," consist of approximately 600 million

24   consumer products, defined as products that must be sold through an ecommerce channel

25   other than the Amazon.com platform, such as eBay or Walmart.com, and concurrently

26   offered by Amazon's sellers on the Amazon.com platform. *Id.* ¶¶ 33–34.

27   Plaintiffs contend that the seller fees on Amazon are substantial and built into the

1   prices that sellers charge their customers for products on the Amazon platform. *Id.* ¶ 82.

2   On other platforms, Plaintiffs allege, it costs less to sell the same products, but the BSA

3   precludes sellers from selling those goods at lower prices despite the cost structure. *Id.*

4   ¶ 4. For example, Plaintiffs point to Molson Hart, a seller who claims that he would have

5   sold a product sold on Amazon for $150 on his own company website for $40 less, but

6   for Amazon's pricing provision. *Id.* ¶ 12 ("Were it not for Amazon, this item would be

7   $40 cheaper. And this is how Amazon's dominance of the industry hurts consumers.").

8   The pricing restraint, Plaintiffs contend, thus prevents sellers from reducing prices of

9   their products on external platforms with lower fees. *Id.* ¶ 13. For example, eBay,

10   Amazon's nearest competitor, charges a seller about 16% to sell a $30 book, while

11   Amazon charges 23%. *Id.* Similarly, eBay charges a seller 21% to sell a $15 DVD on its

12   platform, while Amazon charges 31%. *Id.* Plaintiffs contend that "[t]hrough its price-

13   fixing agreement with its third-party sellers and its abuse of its monopoly power, Amazon

14   has suppressed competition and caused supracompetitive prices in the ecommerce retail

15   market." *Id.* ¶ 36.

16   Plaintiffs claim that many of the two million retailers who sell on the Amazon.com

17   platform do so reluctantly. *Id.* ¶ 17. Plaintiffs allege that Amazon's ownership of the

18   "largest retail marketplace platform" gives Amazon the power to restrict sellers from

19   competing on price on external platforms. *Id.* Plaintiffs note that sellers generate 81% to

20   100 % of their revenue from sales on the Amazon.com platform, which restricts their

21   power and, as one seller stated, they "have nowhere else to go and Amazon knows it."

22   *Id.*

23   Amazon now moves to dismiss Plaintiffs' complaint with prejudice for lack of

24   antitrust standing and failure to state a claim under Rule 12(b)(6) of the Federal Rules of

25   Civil Procedure. Dkt. # 18. Amazon denies Plaintiffs' allegations, arguing that its

26   policies are, in fact, pro-competitive and "encourage[e] low prices in its stores." Dkt.

27   # 18 at 8-9.

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III. LEGAL STANDARD

2   Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint

3   for failure to state a claim. The court must assume the truth of the complaint's factual

4   allegations and credit all reasonable inferences arising from those allegations. *Sanders v.*

5   *Brown*, 504 F.3d 903, 910 (9th Cir. 2007). A court "need not accept as true conclusory

6   allegations that are contradicted by documents referred to in the complaint." *Manzarek v.*

7   *St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Instead, the

8   plaintiff must point to factual allegations that "state a claim to relief that is plausible on

9   its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). The complaint avoids

10 dismissal if there is "any set of facts consistent with the allegations in the complaint" that

11 would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S. 662, 678

12 (2009).

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IV. DISCUSSION

14 Amazon moves to dismiss Plaintiffs' claims, alleging various grounds for

15 dismissal: (1) Plaintiffs lack antitrust standing; (2) Plaintiffs fail to allege a Section 1 *per*

16 *se* claim because such a claim is limited to certain types of conduct between horizontal

17 competitors; (3) Plaintiffs' Section 1 rule of reason and Section 2 claims fail because

18 Plaintiffs fail to properly define relevant antitrust markets, which is required for such

19 claims; (4) Plaintiffs' Section 2 claims fail because they do not allege anticompetitive,

20 exclusionary conduct; (5) Plaintiffs' Section 1 rule of reason and Section 2 claims fail

21 because Plaintiffs fail to allege plausible anticompetitive harm; (6) Plaintiffs' state law

22 claims are inadequately pled; and (7) Plaintiffs' unjust enrichment claim is deficient.

23 Dkt. # 18 at 9-11, 31. The Court addresses each argument in turn.

24 **A. Antitrust Standing**

25 Amazon claims that Plaintiffs' Sherman Act claims must be dismissed because

26 Plaintiffs lack antitrust standing. *Id.* at 15. Specifically, Amazon asserts that "[o]nly

27 consumers who purchase products directly from a defendant have standing to sue under

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