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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 ELIZABETH DE COSTER et al., on behalf of
7 themselves and all others similarly situated,

8 Plaintiffs,

9 v.

10 AMAZON.COM, INC., a Delaware
11 corporation,

12 Defendant.

Case No. C21-693RSM

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS

13
14 **I. INTRODUCTION**

15 This matter comes before the Court on Defendant Amazon.com, Inc. (“Amazon”)’s
16 Motion to Dismiss, Dkt. #35. Plaintiffs have filed an opposition brief, Dkt. #39. The parties
17 have filed numerous notices of supplemental authority. Dkts. #44, #45, #47, #51, #52, and #55.

18 The Court can rule on this Motion without oral argument. For the reasons stated below,
19 the Court GRANTS IN PART AND DENIES IN PART Amazon’s Motion.

20
21 **II. BACKGROUND**

22 For purposes of this 12(b)(6) Motion, the Court will accept all facts in the Consolidated
23 Amended Complaint (“CAC” or “Amended Complaint”), Dkt. #20, as true. Unless stated
24 otherwise, the following facts are drawn from that pleading.

25 Defendant Amazon operates the largest online retail marketplace in the United States.
26 Amazon sells its own goods, but also designed its marketplace to be a platform where third-
27 party merchants can register and list their goods for Amazon to sell.
28

1 Third-party merchants post their products on the platform, which Amazon presents to
2 users together with its own goods according to a certain algorithm that takes the form of a
3 ranking list.

4 At the time the pleading was drafted, Amazon’s marketplace accounted for over 50% of
5 all online retail sales revenue in the United States. By comparison, Amazon’s two closest
6 competitors, eBay and Walmart, accounted for only 6.1% and 4.6%, respectively, of that
7 revenue.
8

9 Many third-party merchants listing their goods on Amazon’s marketplace also sell their
10 goods on other platforms—including on their own websites and on competing online
11 marketplaces.
12

13 Amazon competes both (a) as a retailer against the third-party merchants that list their
14 goods on Amazon’s marketplace, and (b) as a marketplace, against other online retail
15 marketplaces, such as eBay and Walmart, where third-party merchants can list their goods.
16

17 Amazon is critical to the financial success of its third-party merchants. Almost half of
18 the third-party merchants who list their goods on Amazon’s marketplace generate between 81%
19 and 100% of their revenues on it.

20 The Amended Complaint asserts that Amazon charges higher fees for third-party
21 merchants than competitor marketplaces and that these inflated fees are passed on to customers
22 like Plaintiffs through higher prices.
23

24 In a competitive market, third-party merchants would be able to sell their products for
25 less in competitor marketplaces. Amazon bars this type of competition by imposing on third-
26 party merchants Platform “Most Favored Nation (“MFN”) policies, or did so during the
27
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1 relevant time period. Amazon’s MFN policies forbid third-party merchants from listing their
2 goods anywhere else on the internet at prices lower than their Amazon list prices.

3 An investigation by the House of Representatives Judiciary Committee’s Subcommittee
4 on Antitrust, Commercial, and Administrative Law (the “House subcommittee on antitrust”)
5 found that “Amazon has a history of using MFN clauses to ensure that none of its suppliers or
6 third-party sellers can collaborate with an existing or potential competitor to make lower-priced
7 or innovative product offerings available to consumers.”

9 Amazon imposes its MFN policies on third-party merchants through the Amazon
10 Business Solutions Agreement (BSA). Every third-party merchant that registers to list goods
11 on Amazon’s marketplace must “agree[] to the terms of the [BSA] and the policies
12 incorporated in that agreement.”

14 Until March 2019, Amazon enforced its MFN policies through BSA’s “Price Parity
15 Clause,” which expressly prohibited third-party merchants from listing goods on other online
16 retail platforms—whether marketplaces or single-merchant websites—at prices lower than their
17 Amazon list prices. In late 2013, because of German and United Kingdom antitrust
18 proceedings, Amazon voluntarily abandoned its price parity clause on an EU-wide basis.
19 Amazon continued to enforce that clause in the United States for six more years.

21 Even after withdrawing this clause, Amazon continues to enforce MFN-type policies
22 through its so-called “Fair Pricing” Policy. This policy in the BSA states that, if a third-party
23 merchant engages in pricing practices with regard to “a marketplace offer that harms customer
24 trust,” Amazon may impose sanctions. According to the policy, a “pricing practice that harms
25 customer trust” occurs if a merchant lists goods on a competing online retail platform at prices
26 that are significantly below its Amazon list prices. Sanctions include making the merchant’s
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1 product ineligible for a feature (the “Buy Box” button) that would make the product the most
2 visible and easiest to purchase among similar goods; removing the third-party merchant’s
3 goods from Amazon’s marketplace; suspending shipping options for the merchant’s goods; and
4 terminating or suspending the merchant’s ability to have any goods sold on Amazon’s
5 marketplace.

6
7 The intent and effects of the “Fair Pricing” Policy are the same as those of the former
8 Price Parity Clause. These effects can be anticompetitive by, e.g., preventing merchants from
9 listing their goods at lower prices on other platforms that charge lower (or no) fees, and
10 preventing other online retail marketplaces from competing with Amazon by hosting those
11 third-party merchants’ products at lower prices. Taking these pled facts as true, Amazon’s
12 MFN policies cause Amazon customers to pay more for goods purchased on its marketplace
13 than they would pay in a competitive market.
14

15 Amazon enforces these policies by, e.g., systematically monitoring the prices listed by
16 third-party merchants on other online retail platforms.
17

18 Named Plaintiffs are residents of Maryland, Washington, D.C., Illinois, Texas,
19 Tennessee, and Connecticut who purchased numerous goods from Amazon’s marketplace,
20 including those listed by third-party merchants. They bring this action on behalf of themselves,
21 and as a class action on behalf of all persons who, on or after May 26, 2017, purchased one or
22 more goods on Amazon’s marketplace.
23

24 The Amended Complaint includes causes of action for per se and not per se violation of
25 the Sherman Act under 15 U.S.C. § 1 (First and Second Causes of Action), violation of the
26 Sherman Act under 15 U.S.C. § 2 for monopolization (Third Cause of Action), and violation of
27 the Sherman Act under 15 U.S.C. § 2 for attempted monopolization (Fourth Cause of Action).
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III. DISCUSSION

A. Legal Standard under Rule 12(b)(6)

In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as true, and makes all inferences in the light most favorable to the non-moving party. *Baker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted). However, the court is not required to accept as true a “legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678. This requirement is met when the plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The complaint need not include detailed allegations, but it must have “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Absent facial plausibility, a plaintiff’s claims must be dismissed. *Id.* at 570.

B. Analysis

Amazon’s first argument for dismissal is that its MFN policies are legal as a matter of law. Dkt. #35 at 16. Amazon recharacterizes the policies found in the Amended Complaint as a “Retail Competitive Price Provision” and an “Anti-Gouging Policy.” *Id.* Amazon argues that its policies “provide for competitive prices to consumers, rather than for itself” and that “[n]o court has ever condemned competitive price policies like these.” *Id.*

The fact that no Court has ever found a policy like these to violate the Sherman Act does not, in itself, render these claims implausible. Amazon goes on to argue that certain cases

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