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BY ECF FILING

Hon. Gregory H. Woods
United States District Judge
Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, NY 10007

Hon. Valerie Figueredo
United States Magistrate Judge
Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, NY 10007

Re: *In Re Amazon.com, Inc. eBook Antitrust Litigation*,
No. 1:21-cv-00351-GHW-VF – Pre-Motion Conference Request

Dear Judge Woods and Magistrate Judge Figueredo:

Pursuant to Judge Woods' Individual Rules, the Publisher Defendants[1] respectfully request a pre-motion conference regarding their planned motion to dismiss Plaintiffs' Second Consolidated Amended Class Action Complaint ("SCAC") for failure to state a claim. The SCAC fails to address the deficiencies already identified by this Court and should therefore be dismissed with prejudice.

Adopting a 54-page report and recommendation, the Court rejected each claim in Plaintiffs' Consolidated Amended Class Action Complaint ("CAC") and held that Plaintiffs failed to state a claim under Section 1 or 2 of the Sherman Act. Dkt. No. 161 ("R&R"). Despite the benefit of that thorough opinion, the principal difference between the CAC and the SCAC is cosmetic: Plaintiffs invert the order of their claims to assert monopolization against Amazon first. But changing up the order is not enough state a plausible claim.

The Court previously found that Plaintiffs failed to plead direct evidence of an agreement among the Publisher Defendants, R&R at 22-23, or any circumstantial evidence from which a conspiracy could be inferred, R&R at 24-43. Instead, the Court determined that each Publisher Defendant acted in its economic self-interest in entering an individual agreement with Amazon, a "crucial bookselling partner." R&R at 30.

After being given the opportunity to amend, Plaintiffs still fail to plead direct or circumstantial evidence from which a conspiracy might be inferred or provide reason to alter the R&R's fundamental conclusions. Plaintiffs' theories remain unsupported by facts. The Publisher

[1] The "Publisher Defendants" are Hachette Book Group, Inc., HarperCollins Publishers LLC, Macmillan Publishing Group, LLC, Penguin Random House LLC, and Simon & Schuster, Inc.

Defendants' actions remain better explained as independent, self-interested business decisions than as an illogical conspiracy to entrench Amazon at the Publisher Defendants' expense.

I. Plaintiffs Still Fail to Adequately Allege Either a Horizontal Antitrust Conspiracy or a Violation of the Rule of Reason Under Section 1 of the Sherman Act

Despite the Court's clear guidance outlining the deficiencies of Plaintiffs' conspiracy claims in the CAC, the SCAC repeats the very same claims without alleging new facts to support them. Plaintiffs again offer the already-rejected notion of the existence of similar vertical distribution agreements between each Publisher Defendant and Amazon as supposedly "direct" evidence of conspiracy. *Compare* SCAC ¶ 122 *with* R&R, at 22-23. The SCAC adds no other alleged direct evidence of an illegal agreement.

Nor do Plaintiffs allege any new facts from which a conspiracy could plausibly be inferred. The R&R described in detail the CAC's failure to provide circumstantial evidence of a conspiracy, including its rejection of Plaintiffs' claim that the Publisher Defendants acted against their individual self-interest in entering agency agreements with Amazon. R&R at 25-31. As the R&R explained, "[e]ach Publisher could have rationally concluded that it was in its own self-interest to reach an agency agreement with Amazon, a crucial bookselling partner, to preserve its ability to distribute eBooks through the largest retailer in the United States, even if it required acceding to Amazon's request for an MFN clause." R&R at 30.

The SCAC adds rhetoric but no new relevant facts to support Plaintiffs' conclusory assertions of "plus factors." For example, Plaintiffs repeat, using slightly different words, the already-rejected conclusory assertion that entering agency agreements with Amazon with alleged MFNs would not have been in each Publisher Defendant's self-interest unless it "knew and understood" that others entered such an agreement. *Compare* SCAC ¶ 15 *with* R&R at 31. It would, of course, have been in any Publisher Defendant's self-interest to have access to Amazon's important distribution channel, all the more so if that access was exclusive. Nor have Plaintiffs added facts that change the Court's holding that "it is not plausible to infer, absent more factual detail, that the Publishers even had an opportunity to discuss or coordinate taking collusive action" where the agreements with Amazon and communications between the Publisher Defendants were reviewed by the Justice Department under consent decrees. R&R at 41-42.

Plaintiffs attempt to rely on certain irrelevant observations made in *United States v. Bertelsmann SE & Co.*, 2022 WL 16949715 (D.D.C. Nov. 15, 2022), a case involving a proposed merger between two of the Publisher Defendants. SCAC ¶¶ 168-178. Contrary to the suggestions in the SCAC, there was no finding in that case that the Publisher Defendants colluded in violation of the Sherman Act. The legal question there was whether the merger of two publishers could potentially lead to coordinated effects (which can arise from lawful "[p]arallel accommodating

conduct") under Section 7 of the Clayton Act, not whether the publishers and Amazon conspired to violate the Sherman Act. *Compare Bertelsmann*, 2022 WL 16949715, *27 *with* SCAC ¶¶ 244-296. Further, *Bertelsmann* addressed the relevant market for acquiring rights to anticipated top-selling books, not the downstream market for the retail sale of eBooks at issue here. *Bertelsmann*, 2022 WL 16949715, *12. Plaintiffs' reliance on *Bertelsmann* merely repackages their already-rejected reliance on *Apple* to support an inference of present economically irrational collusion. *See* R&R at 33-34. Other allegations Plaintiffs added to support plus factors are substantively identical to the facts the R&R rejected as insufficient and fail to address the original CAC's fundamental flaws. *Compare*, *e.g.*, CAC ¶¶ 62, 131 *with* SCAC ¶¶ 146, 201. The few facts alleged are "no more consistent with a conspiracy than with rational behavior independently adopted by the Publishers." R&R at 42.

Finally, Plaintiffs again fail to allege a cognizable "rule of reason" claim under Section 1. Magistrate Judge Figueredo rejected this claim because Plaintiffs failed to show how an agreement between a single publisher and Amazon had market-wide anticompetitive effects, or that any publisher had market power in the relevant market. R&R at 46-48. And Plaintiffs offer no new allegations of market-wide anticompetitive effects or Publisher Defendants' market power. As such, Plaintiffs have failed to address the flaws that led to dismissal of this claim in the R&R.

II. Plaintiffs Still Fail to Adequately Allege a Section 2 Conspiracy to Monopolize

Plaintiffs similarly fail to allege any new facts supporting their already-rejected conspiracy to monopolize claim against the Publisher Defendants. To state a claim, Plaintiffs must – but fail to – allege concerted action and a specific intent to monopolize. *See Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 246 (2d Cir. 1997). The SCAC offers no new factual allegations supporting an inference that the Publisher Defendants had the specific intent to monopolize any market. It thus provides "no plausible explanation for why the Publishers would have been motivated to participate in a conspiracy that further entrenched Amazon's dominance as an eBook retailer," R&R at 32, and "no facts from which one could plausibly infer that the Publishers would benefit from immunizing Amazon from competition," R&R at 33. Instead, Plaintiffs offer only conclusory speculation about the intent of certain contract terms, offering no actual facts from which such imagined "intent" could be inferred, SCAC ¶¶ 205, 228, 238, and then contradict themselves by alleging that Amazon "continuously imposed contract provisions" on Publisher Defendants. SCAC ¶ 59. Such conclusory, speculative allegations fail to improve upon the allegations already rejected by the Court and, in fact, undermine Plaintiffs' claims.

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For all the foregoing reasons, Publisher Defendants request a pre-motion conference regarding their intent to move to dismiss the SCAC with prejudice.

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Respectfully submitted,

/s/ C. Scott Lent
Scott Lent

cc: All Counsel of Record via ECF