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December 5, 2022

VIA ECF FILING

Hon. Gregory H. Woods, United States District Judge
Hon. Valerie Figueredo, United States Magistrate Judge
United States District Court for the Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse, 500 Pearl St.
New York, NY 10007-1312

Re: *In re Amazon.com, Inc. eBook Antitrust Litig.*, No. 1:21-cv-0351-GHW-VF

Dear Judge Woods and Magistrate Judge Figueredo:

On behalf of Defendant Amazon.com ("Amazon"), I write pursuant to Rule 2.C of the Court's Individual Rules of Practice to request a pre-motion conference regarding Amazon's intention to file a motion to dismiss Plaintiffs' Second Consolidated Amended Class Action Complaint ("SCAC"), ECF No. 175. While the SCAC has swelled Plaintiffs' allegations by more than 30 pages and 100 paragraphs, those additions overwhelmingly consist of repetitions of the same alleged facts from the Consolidated Amended Complaint ("CAC") that the Court has already determined do not state a claim. *See* ECF Nos. 161, 170. Plaintiffs' only substantive amendment is an attempt to re-define the alleged market for purposes of their monopolization claims, including a new attempted monopolization theory. Those amended allegations similarly fail to state a claim.

Background

Plaintiffs filed their initial Class Action Complaint against Amazon in January 2021, asserting two causes of action for violation of sections 1 and 2 of the Sherman Act, respectively. *See* ECF No. 1. Plaintiffs voluntarily amended their Complaint in February 2021 to name the Publisher Defendants as additional defendants responsible for the same two causes of action. *See* ECF No. 7. Through the CAC, Plaintiffs amended their Complaint a second time in June 2021 to join additional Plaintiffs and assert a new third cause of action, the alleged conspiracy to monopolize in violation of section 2 of the Sherman Act. *See* ECF No. 67. Defendants moved to dismiss Plaintiffs' CAC, and the parties thoroughly briefed all pertinent issues. *See* ECF Nos. 96-100 (Motions); No. 123 (Consolidated Opposition); Nos. 136-37 (Replies). Magistrate Judge Figueredo heard argument on the motions, and issued a 54-page Report and Recommendation, recommending the dismissal of all claims on multiple independent grounds. *See* ECF No. 161.

The Court adopted "in full" the "thoughtful and well-reasoned Report and Recommendation" on September 29, 2022, and dismissed the CAC. *See* ECF No. 170. The Court granted Plaintiffs leave to file a fourth-amended Complaint, and granted their request for additional time to prepare that amendment. *See* ECF No. 174.

The SCAC contains scarcely any alleged facts that were not already alleged in the CAC. To the best of Amazon's current understanding, the SCAC adds only the following:

- "Amazon's . . . commission[] for each sale of a trade eBook on its Kindle platform is at least 30% and, routinely exceeds 40% for trade eBooks published by the Big Five that Sell for more than $9.99." SCAC ¶ 3; *see also id.* ¶ 53 (similar);

- "Smashwords charges a 15% transaction fee for eBook transactions" as does "Aerbook Retail," while "Google and Apple . . . charge a flat 30% transaction fee[.]" *Id.* ¶ 100;

- "On average, it costs Amazon only $0.06 to deliver each eBook plus Amazon's low transaction processing costs." *Id.* ¶ 4;

- "During the relevant period, Penguin Random House sold at least 30% to 35% of trade eBooks." *Id.* ¶ 56.

- In a paragraph that otherwise repeats verbatim CAC ¶ 102, the allegation that: "In that same period, eBook sales declined by 24%."[1]

All of the other paragraphs added to the SCAC contain either more voluminous repetition of previously alleged facts based upon the same alleged sources;[2] discussion of an unrelated legal opinion enjoining the proposed merger of two defendant publishers;[3] minor wordsmithing changes that do not change the substance of the allegations;[4] and changes to Plaintiffs' legal theory, primarily its definition of the alleged product market for monopolization purposes, as well as the inclusion of a new cause of action for attempted monopolization.[5]

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[1] On top of the limited and immaterial nature of those additions, two of them are impermissibly speculative and need not be credited. *Id.* ¶ 53 n.29 (alleged 40% commission is an "estimate" that was "inferred from available information"); *id.* ¶ 56 n.34 ("Plaintiff infers [PRH]'s eBook market share").

[2] *Compare, e.g.,* CAC ¶ 87 ("Business-model parity" allegations), *with* SCAC ¶¶ 61-69 (same); *id.* CAC ¶ 85 ("Selection parity" allegations), *with* SCAC ¶¶ 70-81 (same).

[3] *Id.* ¶¶ 168-78 (allegations about the findings made in *United States v. Bertelsmann SE & Co.*).

[4] *Compare, e.g.,* CAC ¶ 157 (alleging that Publishers had a "motive to enter into agency pricing as a means to control trade eBook pricing in the industry"), *with* SCAC ¶ 269 (otherwise identical paragraph alleging that Publishers instead had "a motive to increase the price of eBooks").

[5] *Id.* ¶¶ 194-97 (alleging the existence of a sub-market described as a "two-sided market for trade-eBook platform transactions"); *Id.* ¶¶ 235-43 (newly alleged Second Cause of Action).

Discussion

The SCAC should be dismissed with prejudice for all of the same reasons that the CAC was dismissed, plus additional reasons created by Plaintiffs' change in legal theory.

The alleged conspiracy in violation of Section 1 of the Sherman Act (Fourth Cause of Action), and the alleged conspiracy to monopolize (Third Cause of Action), are immaterially different from the same causes of action alleged in the CAC, and none of the additional facts pled in the SCAC render those alleged conspiracies more plausible today than when dismissed. As before, Plaintiffs base these causes of actions on the same defective allegations about the *Apple* litigation, the parties' alleged motives and opportunity to conspire, alleged signaling, and other matters that the Court has already thoroughly addressed. *See* ECF No. 161, at pp. 18-42, 48-49. Moreover, while Plaintiffs have now speculatively alleged the market share of one Publisher Defendant, SCAC ¶ 53, that alleged share (30% to 35%) is still too small when combined with Amazon's alleged market share (90%) to support a vertical agreement in restraint of trade. ECF No. 161, at p. 48 (citing, *inter alia*, *AD/SAT, Div. of Skylight, Inc. v. Assoc. Press*, 181 F.3d 216, 229 (2d Cir. 1999)). In any event, Plaintiffs still have not alleged "that any single Publisher's agreement with Amazon harmed competition in the relevant market." *Id.* at 46. As before, the SCAC alleges increases only to the prices of the individual publishers' own books. *Compare* CAC ¶¶ 99-103, *with* SCAC ¶¶ 108-114. Those allegations are insufficient to state a claim for a vertical agreement in restraint of trade. *See* ECF No. 161, at 46.

As for Plaintiffs' Monopolization and (new) Attempted Monopolization causes of action, SCAC ¶¶ 224-43, the SCAC changes Plaintiffs' legal theory but nevertheless fails to state any claim upon which relief may be granted. Plaintiffs nominally allege that Amazon has monopolized or attempted to monopolize a market in which it provides "distribution services to trade eBook consumers." SCAC ¶ 186; *id.* ¶¶ 224-43. But cutting through the jargon and faddish references to a "two-sided" market, Plaintiffs' core allegation is that Amazon has monopolized or attempted to monopolize a market in which it charges *eBook publishers* (i.e., the Publisher Defendants and their competitors) a commission for facilitating their "direct" eBooks sales to consumers. SCAC ¶¶ 52, 220. That claim fails for two straight-forward reasons. First, Plaintiffs, as eBook *purchasers of eBooks*, are neither consumers or competitors in a supposed market for "*distribution services" provided to eBook publishers*. As such, they lack standing to complain of antitrust violations in such a market. *See In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 158 (2d Cir. 2016) ("Generally, only those that are participants in the defendants' market can be said to have suffered antitrust injury."); *Hughes v. Tobacco Inst., Inc*., 278 F.3d 417, 423 (5th Cir. 2001) ("Parties whose injuries . . . are experienced in another market do not suffer antitrust injury."); *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) (same).

Second, Plaintiffs' alleged injury is that the prices they pay for eBooks, which are directly set by the publishers from whom they purchase, have been inflated by "excessive commissions" charged by Amazon to eBook publishers. SCAC ¶¶ 11-12. As such, Plaintiffs' alleged injury is a classic indirect pass through injury that is non-recoverable as a matter of law. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Apple, Inc. v. Pepper*, 139 S.Ct. 1514 (2019).

Sincerely,

/s/ John E. Schmidtlein
John E. Schmidtlein