UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BOOKLOCKER.COM, INC.	:	
	:	CIVIL ACTION NO.
Plaintiff,	:	1:08-CV-160-JAW
	:	
vs.	:	
	:	
AMAZON.COM, INC.	:	
	:	
Defendant	:	
	:	

PLAINTIFF BOOKLOCKER.COM'S MEMORANDUM IN OPPOSITION TO DEFENDANT AMAZON.COM'S MOTION TO DISMISS

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Plaintiff BookLocker.com ("Plaintiff"), on behalf of itself and all others similarly situated, respectfully submits this Memorandum in Opposition to the Motion to Dismiss with Incorporated Memorandum of Law (the "Motion") filed by Defendant Amazon.com ("Amazon") on June 30, 2008.

I. INTRODUCTION

In February 2008, Amazon began a scheme to illegally take advantage of its undisputed market dominance in one service – the *sale* of books over the internet through Amazon's online bookstore – in order to obtain greater market share with a wholly separate service – the *printing* of print-on-demand ("POD") books by On Demand Publishing LLC, d/b/a BookSurge ("BookSurge"), Amazon's wholly-owned subsidiary. As set forth in Plaintiff's Complaint and Jury Demand (the "Complaint"), Amazon's misconduct constitutes an illegal tying arrangement in violation of Section 1 of the Sherman Antitrust Act. Amazon's illegal tie forces POD book publishers who wish to sell POD books through Amazon's highly successful sales channel service also to pay Amazon to use its POD printing service. By doing so, Amazon is destroying the competitive market for POD printing services – the exact harm that the Sherman Act anti-tying provisions are designed to prevent. As direct customers of the POD book printing market, Plaintiff and the Class members have been harmed and will continue to be harmed as long as the improper tying arrangement remains in place.

As discussed below, the Complaint properly alleges all elements of a tying claim. The Complaint alleges specific facts that show (i) that book sales and book printing are separate services; (ii) that Amazon has tied those services by requiring POD publishers (like Plaintiff) to pay Amazon to print the POD publishers' books as a condition to the

purchase of Amazon's sales services; (iii) that Amazon has sufficient market power (70%) in the market for online book sales services to harm competition by distorting POD book publishers' choices with respect to POD book printing services; and (iv) that this tie has a substantial effect on interstate commerce (over 1 million POD books are printed every month by over 4,300 publishers). Nothing further is needed to properly allege a tying claim.

In its Motion, Amazon essentially forgoes any discussion of the elements of a tying claim as articulated by the First Circuit. Moreover, the arguments in Amazon's Motion are without merit. First, contrary to Amazon's argument, it is well established that Plaintiff need not allege "concerted action" among multiple wrongdoers for a tying claim (and, indeed, such a requirement would defeat the entire purpose of a tying claim, which is intended to prevent a single seller from conditioning the purchase of one service on the purchase of another). Second, Plaintiff has adequately alleged an illegal tie between Amazon's sales and printing services, not just a routine supply dispute. Moreover, Plaintiff has specifically alleged that the alternative sales programs offered by Amazon (such as the "Amazon Advantage" program) are not economically viable; at most, Amazon's arguments concerning those programs raise a fact-based affirmative defense, which is not amenable to resolution on a motion to dismiss. Finally, Plaintiff has alleged both standing and an "antitrust injury." Accordingly, Plaintiff respectfully requests that the Court deny Amazon's Motion in its entirety.

II. COUNTERSTATEMENT OF FACTS

This case arises from Amazon's decision to implement an illegal tie through which Amazon conditions, or ties, the right to purchase its book *sales* services to those POD publishers who agree to purchase Amazon's separate book *printing* services.[1]

A. Plaintiff and the POD Industry

Plaintiff is a POD publisher. ¶ 3.[2] There are at least 4,300 other POD publishers, who together print at least 1 million books every month. ¶ 27. Plaintiff and other POD publishers use a variety of printing companies to print their books. ¶ 5. For example, Plaintiff chooses to print its books through Lightning Source, Inc. ("Lightning Source"), currently the leading printer of POD books. ¶ 5.

B. Amazon Dominates the POD Book Sales Market

POD books are predominantly sold through online bookstores over the Internet. ¶ 6. Amazon is widely recognized as being the largest Internet retailer in the world. *Id*. This market dominance extends to Amazon's sale of books through its online bookstore (the "Bookstore"), where Amazon enjoys a market share of up to 70%. ¶¶ 6, 23.

The vast majority of POD books purchased from the Bookstore are purchased directly from Amazon, through a prominent button labeled "Add to Shopping Cart" (the "Direct Amazon Sales Channel"). ¶ 24. As Amazon has publicly admitted, the ability of

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[1] "Print on demand" refers to both a printing technology and a business process in which copies of a book are only printed when an order has been received from a customer or retail bookseller, and only the number of books that have been ordered are printed. ¶ 3.

[2] All references to "¶ _" and "¶¶ _" throughout this brief are citations to Plaintiff's Complaint.

a POD publisher to sell a POD book through the Direct Amazon Sales Channel is "a distinction proven to lift sales." *Id.* [3]

C. Amazon Enters the (Separate) Book Printing Market

In April 2005, Amazon acquired BookSurge. BookSurge provides, *inter alia,* POD book *printing* services. ¶¶ 7, 26.

D. Amazon Ties Its Book Sales Services to its Book Printing Services

In the three years since Amazon acquired BookSurge, BookSurge has only managed to secure a limited market share through legitimate competitive methods. *See* ¶ 6. To remedy the failure of BookSurge to succeed in the competitive market for POD book printing services, Amazon, beginning no later than February 2008, began notifying print-on-demand publishing companies (such as Plaintiff) that Amazon effectively would no longer allow POD book publishers to continue to sell POD books through the Direct Amazon Sales Channel service unless the publisher agreed that BookSurge (*i.e.,* Amazon itself, rather than any competing printing company) would print those books. ¶¶ 29, 30.[4] Books printed by Lightning Source, or any other competing POD printer, would have their "Add to Shopping Cart" buttons removed. *Id*.[5]

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[3] As alleged in the Complaint (¶ 25) and discussed further below, the Amazon Marketplace (by which third party vendors can sell books on the Amazon website) is not an effective sales channel because the consumer must provide shipping and order information to the third-party vendor (raising privacy concerns) and cannot take advantage of Amazon's free shipping programs. As a result, only a small fraction of POD book Bookstore sales are effectuated through the Amazon Marketplace.

[4] For example, on March 26, 2008, Amazon representative John Clifford notified Plaintiff that Amazon would only continue to sell Plaintiff's POD books through the Direct Amazon Sales Channel if Plaintiff agreed to print its books through Amazon's printing service, BookSurge, rather than Lightning Source. ¶ 30.

[5] The implementation of this policy is undisputed. In its Motion (at 7), Amazon acknowledges publishing an "open letter" on March 31, 2008 (attached as Exhibit C to the Motion) confirming Amazon's new policy.

Amazon has continued to inform POD publishers that the Direct Amazon Sales Channel service will not be available for any books not printed by Amazon through BookSurge. ¶ 31. As a result, the market for POD printing services has been improperly distorted. *See* ¶¶ 32-33. In addition, Plaintiff and other POD publishers have already lost business or otherwise been injured by Amazon's anti-competitive conduct. *Id*.[6]

III. STANDARD OF REVIEW

Plaintiff has met the pleading standards of Rule 8 of the Federal Rules of Civil Procedure by alleging facts sufficient to state a claim for illegal tying under the Sherman Act. Fed. R. Civ. P. 8(a) requires, in pertinent part, that Plaintiff 's Complaint include "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." A motion to dismiss under Rule 12(b)(6) must be denied so long as the factual allegations in a complaint, if true, are "enough to raise a right to relief above the speculative level." *Bell Atlantic v. Twombly,* 127 S.Ct. 1955, 1965 (2007). Although this standard requires more than bare "labels and conclusions" or "a formulaic recitation of the elements of a cause of action," a court should "not require heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." *Id.* at 1965, 1974. Moreover, when evaluating a motion to dismiss under Rule 12(b)(6), the court is to "accept[] the complaint's well-pleaded facts as true and indulge[] all reasonable inferences in the plaintiff's favor." *Cook v. Gates,* 528 F.3d 42, 48 (1st Cir. 2008). Accordingly, "the motion to dismiss under Rule 12(b)(6) is viewed with disfavor."

[6] Several publishers have already acquiesced to Amazon's demands, and have incurred costs to convert their current inventory to a form and format suitable for printing by BookSurge.

Landy v. D'Alessandro, 316 Fed. Supp. 2d 49, 75 (D.Mass. 2004) (internal brackets and citation omitted)*; c.f. Twombly,* 127 S.Ct. at 1970-74 (affirming dismissal of antitrust claim where no factual allegations whatsoever indicating violation of antitrust laws.) As set forth below, Plaintiff has provided more than enough factual allegations to satisfy the *Twombly* standard.

IV. ARGUMENT

A. The Policy and Elements of a Tying Claim

The Sherman Act's prohibition against tying serves a fundamental public policy. "Section 1 of the Sherman Act prohibits a seller from 'tying' the sale of one [service] to the purchase of a second [service] if the seller thereby avoids competition on the merits of the 'tied' [service]." *Data General Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1178 (1st Cir. 1994). "[B]y conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market." *George Lussier Ent., Inc. v. Subaru of New England,* No. Civ. 99-109-B, 2001 WL 920060, at *8 (D.N.H. Aug. 3, 2001) (*quoting Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 605 (1953)).

As articulated by the First Circuit, a *per se* tying claim has four elements:

> (1) the tying and tied products are actually two distinct products; (2) there is an agreement or condition, express or implied, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product.

Data General Corp., 36 F.3d at 1178-79. Amazon does not directly address these elements in its Motion.[7] Notwithstanding Amazon's omission, Plaintiff has properly alleged each and every element of a tying claim, and thus has adequately pled a *per se* violation of Section 1 of the Sherman Act.

B. Plaintiff Has Adequately Alleged Two Distinct Services

Plaintiff has satisfied the first element of a tying claim by specifically alleging that Amazon offers two completely distinct services – book sales (the tying service) and book printing (the tied service).[8] *See* ¶¶ 6-7, 21-28. Amazon does not contest that Plaintiff has adequately alleged this element of the claim (indeed, Amazon's brief does not address this element at all). Nor could it, as each service can be – and, for several years, had been – offered entirely separately from the other. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 22 (1984) (requirement of pleading distinct product or services satisfied where plaintiff can "identify a distinct product market in which it is efficient to offer the [tied service] separately from [the tying service]"); *Data General Corp.*, 36 F.3d at 1179 (separate products adequately established where there is evidence of sufficient consumer demand for each individual product) (internal quotation marks and citations omitted). Therefore, Plaintiff has adequately alleged the first element of a *per se* tying claim.

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[7] Rather than directly address the elements of a *tying* claim, Amazon instead cites to *Euromodas, Inc. v. Zanella, Ltd.,* 368 F.3d 11, 16 (1st Cir. 2004) for the general (and inapplicable) elements to plead a Sherman Act *conspiracy* claim. (Motion at 8) Should Amazon seek to "ambush" Plaintiff by discussing the actual elements of a tying claim – which plainly should have been raised in Amazon's opening Motion – for the first time in Amazon's Reply brief, Plaintiff reserves the right to move to strike the improper arguments or, in the alternative, to seek to file an appropriate sur-reply.

[8] It is well established – and Amazon does not dispute – that the tying and tied "products" can be services rather than physical goods. *See, e.g., Data General Corp.*, 36 F.3d at 1179-80 (computer support services are a product for purposes of tying analysis).

C. Plaintiff Has Adequately Alleged a Tying Condition

Plaintiff has satisfied the second element of a tying claim by specifically alleging that Amazon has expressly tied its separate book sales and printing services. As discussed above, Amazon has instituted an express policy that Amazon will only sell the Direct Amazon Sales Channel service to POD publishers who agree to buy printing services from BookSurge, Amazon's wholly-owned subsidiary. ¶¶ 8, 29-33; Motion at page 7 and Exhibit C attached thereto. It is well established that "when a seller announces that he will condition the purchase of a tied product on the purchase of a tying product, any sale made subsequent to that announcement is presumed to be a tied sale because the announcement creates the impression among buyers that the tying condition exists. Thus, proof of the announcement creates an inference of conditioning." *George Lussier Ent., Inc.,* 2001 WL 920060 (D.N.H.), at *9-10 (granting class certification on tying claims because "an announcement, assuming it explicitly states the tying condition, is itself sufficient to create an inference of conditioning"); *Little Caesar Enterprises, Inc. v. Smith,* 172 F.R.D. 236, 265 (E.D. Mich. 1997) (granting certification of injunctive and damages classes in tying claim because, *inter alia*, "[t]he commonality of proofs of a tie-in is an easy issue where there is . . . an announced tie-in"). Plaintiff has thus adequately alleged the second element of a *per se* tying claim.

Although, as discussed above, Amazon does not explicitly address this (or any) of the four *Data General Corp.* elements for stating a *per se* tying violation, some of its arguments obliquely relate to this element.

1. Amazon Sells the Direct Amazon Sales Channel Service

Amazon's argument that "this case does not involve 'tying' at all" because it (purportedly) does not *sell* the Direct Amazon Sales Channel service, but simply decides what books to *buy* (Motion at 13), is without merit and improperly elevates form above substance. "The Supreme Court has on more than one occasion emphasized that economic realities rather than a formalistic approach must govern review of antitrust activities." *United States v. Dentsply International, Inc.*, 399 F.3d 181, 189 (3rd Cir. 2005); *see Podiatrist Ass'n, Inc. v. La Cruz Azul de Puerto Rico,* 332 F.3d 6, 14 (1st Cir. 2003) (test for whether antitrust laws violated is "a functional one" and "'we look at substance rather than form'") (internal citation omitted).

First, Amazon is not a book purchaser; it is the world's largest online bookseller. It sells to the public POD (and other) books on behalf of POD (and other) book publishers. Amazon is *not* in substance a book purchaser, such as a library. For example, with regard to Plaintiff's POD books (as well as other POD books), Amazon contracts with printers like Lightning Source to ship POD books *directly* to Amazon's consumers (*i.e.,* without being routed through Amazon first), in a process known as "drop shipping." Consequently, with many if not all of the books sold by Plaintiff, Amazon does not take title to or possession of the books. Thus, Amazon does not "purchase" POD books, it *sells* POD books, and the relevant product here is Amazon's book selling services.

Second, Amazon *sells* its Direct Amazon Sales Channel service. POD publishers (as do traditional publishers) pay Amazon for the Direct Amazon Sales Channel service by providing their books to Amazon at prices discounted off of list prices. Amazon in effect receives a commission equal to the spread between the price paid by the end

customer to whom the book is ultimately sold and the discount price offered by the publisher. For example, the draft BookSurge printing contract that Amazon has demanded that Plaintiff sign requires Plaintiff (through BookSurge) to give Amazon approximately a *50%* discount. Because the customer pays a higher price to Amazon for the book, the publisher effectively pays Amazon up to 50% of list price for the Direct Amazon Sales Channel service (depending on the price point at which the ultimate customer buys the book).[9]

Under Amazon's tying scheme, the sale of the Direct Amazon Sales Channel service is tied directly to Amazon's sale of book printing services through Amazon's subsidiary, BookSurge. Under its tying program, Amazon refuses to sell the Direct Amazon Sales Channel service unless Plaintiff and other POD publishers also buy Amazon/BookSurge's printing services. Therefore, Amazon's argument that there is no "tie" is without merit. *See Storage Tech. Corp. v. Custom Hardware Engineering & Consulting, Ltd.*, Civil Action No. 02-12102-RWZ, 2006 WL 1766434, at *25 (D. Mass. June 28, 2006) (even in absence of technical "sale" of tying product, plaintiff stated tying claim sufficient to withstand summary judgment where evidence indicated defendant licensed product at issue).

2. Alternate Amazon Sales Channels Are Not Economically Feasible

Amazon's argument that Plaintiff has not adequately alleged an illegal tie because other distribution channels ostensibly exist by which POD publishers may sell their books on Amazon (Motion at 4-5, 13, 15) is also without merit. The Complaint specifically

[9] The discount that Plaintiff currently offers to Amazon through the Lightning Source printing contract is lower than the 50% required by the BookSurge printing contract. Accordingly, Amazon's tying scheme not only requires publishers to use BookSurge printing, but also actually requires publishers to pay a higher distribution discount to Amazon than many are presently paying.

alleges that these alternate sales channels, to the extent they are available, are not economically viable for POD publishers. ¶¶ 24-25, 30.

Moreover, Amazon's assertion (in its brief) that an alternate sales channel exists is insufficient and irrelevant. It is well-settled that the availability and economic viability of purported alternate channels is a factual question for the jury and, therefore, inappropriate for resolution on a motion to dismiss. *Storage Tech. Corp.*, 2006 WL 1766434 (D.Mass.), at *25-26 (weighing evidence developed during discovery and concluding that question of economic feasibility should proceed to jury). Even where a defendant claims that the tying and tied products are still separately available, a tying claim must be allowed to proceed where "a reasonable jury could conclude that" the defendant structured the separate purchases in such a way that doing so "was not an economically viable option and that a tie therefore did exist." *Storage Tech. Corp.*, 2006 WL 1766434 (D. Mass), at *25-26 (denying summary judgment on tying claim based on evidence in record that separate purchase option was "prohibitively expensive"). "Even if the products are available separately, an illegal tying arrangement can exist if purchasing the items together is the 'only viable economic option.'" *Marts v. Xerox, Inc.*, 77 F.3d 1190, 1113 (8th Cir. 1996) (internal citation omitted); *Ortho Diagnostic Sys., Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. 455, 471 (S.D.N.Y. 1996) (plaintiff can prove tying claim where defendant's "pricing structure makes purchase of the tying and tied products together the only viable economic option").

For example, Plaintiff strongly contests and will require discovery concerning Amazon's bald factual assertion that its "Amazon Advantage" program is a viable economic alternative for POD publishers (Motion at 5-6, 13-14). Significantly, the

Amazon Advantage program requires POD publishers to provide Amazon with an even *deeper* book discount – 55% (Motion at 5) – than is required under the BookSurge contract (which, as discussed above, is already worse than industry norms). Plaintiff believes that discovery will confirm that this exorbitant fee for the Direct Amazon Sales Channel service under the Amazon Advantage program is economically unjustifiable and/or is intended to frustrate POD publishers from participating in the Amazon Advantage program at all.

The Amazon Advantage program also requires POD publishers to send Amazon five pre-printed copies of each and every book, which defeats the entire economic purpose of POD printing (which is only to print books when ordered by customers (¶ 3)). For example, Plaintiff has 1,200 books in its inventory (¶ 10). Providing 6,000 books will cost tens of thousands of dollars. Furthermore, the stated purpose of this requirement – to allow Amazon "to provide the same rapid fulfillment capability to our customers that we would have if we were printing the titles ourselves on POD printing machines located inside our fulfillment centers" (Motion at 7-8, citing Exhibit C thereto) – is at odds with the fact that, on information and belief, Amazon maintains *fourteen* distribution centers in the United States. One wonders in which of these fourteen distribution centers the five copies would be housed – and Plaintiff anticipates that discovery will demonstrate that the stated purpose of the policy is, in fact, pretextual.

Indeed, Plaintiff already has reason to believe that Amazon's entire argument that it has tied its sales and printing services for necessary operational efficiencies (Motion at 7, 16) is pretextual. Amazon claims that it needs to print all POD books in-house so they can be shipped more quickly from Amazon's fulfillment centers. Motion at 7 ("If the

POD item were to be printed at a third party, we'd have to wait for it to be transshipped to our fulfillment center before it could be" combined with other items in a customer's order and shipped out -- "Speed of shipping is a key customer experience focus for us . . ."). However, as discussed above, Amazon's contract with Lightning Source, for example, already calls for Lightning Source to ship POD books *directly* to Amazon's consumers (*i.e.,* without being routed through Amazon first). Accordingly, there is no time savings from having Amazon print the book itself.

Similarly, Plaintiff strongly contests (and will require discovery concerning) the viability of Amazon's Marketplace program (*see* Motion at 4, 6), which allows books to be sold by third parties rather than through the Direct Amazon Sales Channel. As alleged in the Complaint, only a small fraction of POD book sales are effectuated through the Amazon Marketplace, because a consumer must provide shipping and order information to third-party vendors (raising privacy concerns) and cannot take advantage of Amazon's free shipping programs in order to purchase books through that channel.[10] Indeed, Amazon *itself* admits (on the BookSurge website) that a POD publisher's use of the Direct Amazon Sales Channel service (as opposed to, for example, the Amazon Marketplace) is "a distinction proven to lift sales." ¶ 24.

3. Amazon's Tying Scheme is not a Permissible Vertical Supply Relationship

Amazon's argument that its tying scheme is simply a (permissible) vertical supply relationship (Motion at 14-16) is also without merit. Indeed, it completely ignores the factual allegations of Plaintiff's Complaint. As explained in the sole case cited by

[10] Similarly, Amazon's argument that it may have other affirmative defenses available to its *per se* liability (Motion at 14) at best raises factual issues that will be tested during discovery.

Amazon, an exclusive vertical supply arrangement exists where "one supplier . . . is given the sole right . . . to supply and stock" a purchaser. *Eastern Food Services, Inc v. Pontifical Catholic Univ. Services Assoc., Inc.,* 357 F.3d 1, 5 (1st Cir. 2004). Such exclusive supply arrangements can be legal under the Sherman Act.[11]

However, *Eastern Food Services* does *not* involve any tying claims, and, contrary to Amazon's argument, Amazon is *not* simply selecting a vertical supply chain or a single external source to be its sole supplier. *See* Motion at 15. Rather, Amazon is creating an illegal tie between two services in which it has an economic interest. It is using its overwhelming market power in internet book sales to force POD publishers to use Amazon's own failing in-house book printing service in order to improperly eliminate competitors and consumer choice in the area (book printing) that Amazon was not able to succeed in through fair competition. Even if vertical supply arrangements can be permissible under antitrust laws, tying arrangements, whereby a company uses its economic dominance in one service to eliminate competition in another market in which it is competing, are not. Amazon's argument concerning vertical supply relationships is simply irrelevant to the claims and allegations of this case.

D. Plaintiff Has Adequately Alleged Amazon's Economic Power in the Book Sales Market

Plaintiff has properly alleged the third element of a tying claim by specifically alleging that Amazon has sufficient economic power in the online sale of books (the tying service) to distort the purchasing choices of POD publishers with respect to book printing

[11] Although exclusive vertical supply relationships do not give rise to a *per se* antitrust violation as tying claims do, such arrangements can still violate antitrust laws where they create "anti-competitive effects outweighing the legitimate economic advantages that it might provide." *Eastern Food Services*, 357 F.3d at 5.

(the tied service). The Complaint specifically alleges that POD books are predominantly sold online (¶ 6) and that Amazon has up to a 70% share of the online book sales market (¶ 23). Notwithstanding Amazon's argument that Plaintiff has several effective options for selling its books online (Motion at 4-6), the allegation of 70% market share is more than adequate to allege that Amazon has sufficient market power with regard to internet book sales (the tying service), and thus has the power to affect POD publishers' purchasing decisions with regard to book printing (the tied service). *Hardy v. City Optical, Inc.*, 39 F.3d 765 (7th Cir. 1994) (30% market power minimum threshold for possible tying claim); *In re Wireless Telephone Services Antitrust Litig.*, 385 F. Supp. 2d 403, 417 (S.D.N.Y. 2005) (same).

E. Plaintiff Has Adequately Alleged That Amazon's Tie Forecloses Substantial Interstate Commerce

Plaintiff has properly alleged the fourth element of a tying claim by specifically alleging that Amazon's illegal tie substantially impacts interstate commerce.[12] As alleged in the Complaint, there are at least 4,300 POD publishers nationwide, who together place orders for the printing of at least 1 million books per month. ¶ 27. Contrary to Amazon's argument (Motion at 2, 14), Plaintiff has alleged that Amazon's improper tie is harming competition in a relevant tied product (book printing) market. Indeed, upon information and belief, several POD publishers have already switched to BookSurge from other printers as a result of Amazon's demands. *See* ¶ 32 and footnote 6, above. Given these

[12] Although the phrasing of this element in *Data General Corp.* itself is a bit unclear – "the tie forecloses a substantial amount of commerce in the market for the tied product" – other case law within this Circuit makes clear that the relevant inquiry is whether the alleged tie involves substantial interstate commerce. *See Wells Real Estate, Inc. v. Greater Lowell Board of Realtors,* 850 F.2d 803, 814 (1st Cir. 1988) (articulating three elements for tying claim, first of which combines elements (1) and (2) from the *Data General Corp.* articulation, and third of which is "that the tie affects a 'not insubstantial' amount of interstate commerce in the market for the tied product"); *George Lussier Ent., Inc.*, 2001 WL 920060, at *8 (fourth element of tying claim under *Data General Corp.* depends upon the tie's "effect on interstate commerce").

allegations, there can be no question – and Amazon does not dispute – that the alleged tie forecloses interstate commerce in a substantial way.

F. Plaintiff Has Adequately Alleged Antitrust Injury and Standing

Although not a formal element of a tying claim, Plaintiff also has properly alleged its standing to pursue this action. Plaintiff (like all POD publisher Class members) directly contracts with POD book printers to print copies of the books it sells as needed. ¶¶ 5, 27. Plaintiff is therefore a direct consumer in the market for book printing services. As a direct consumer, Plaintiff has standing to challenge Amazon's illegal tie distorting that market. *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 745-46 (1977) (direct purchasers have standing under federal antitrust statutes); *In re New Motor Vehicles Canadian Export,* 307 F. Supp. 2d 136, 139 (D. Me. 2004) (same).

Contrary to Amazon's argument (Motion at 16-18), Plaintiff has adequately alleged that it suffered an "antitrust injury" (one of the prerequisites to bringing an antitrust claim). An "antitrust injury" is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977). Here, as discussed above, Plaintiff has alleged that Amazon's illegal tie harms competition in the book printing market. ¶¶ 32-33. As also discussed above, Amazon's use of market dominance in book selling services to reduce competition in the market for book printing services is precisely the type of harm that the anti-tying provisions of the Sherman Act are meant to prevent. *Data General Corp.,* 36 F.3d at 1178 ("[B]y conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the

competitive stresses of the open market"); *George Lussier Ent., Inc.*, 2001 WL 920060, at *8 (D.N.H.). Finally, Plaintiff has alleged that this reduction in competition in the book printing market, forbidden by the antitrust laws, has caused an "injury in [Plaintiff's] business or property." For example, Plaintiff alleges that it has lost business from its own customers (*see* ¶ 32), who are concerned about the impact this reduction of choice in the printing market will have on the quality of Plaintiff's books should Plaintiff capitulate to Amazon's demands (as there are widespread concerns about the quality of BookSurge's printing) or their availability should Plaintiff refuse to submit to those demands. Consequently, Plaintiff is a direct consumer of book printing services who has been directly harmed by Amazon's conduct.[13]

Moreover, contrary to Amazon's argument (Motion at 18-19), the fact that Plaintiff (to its financial detriment) has not acceded to Amazon's demands does not deprive it of standing. "A plaintiff need not have actually consented to the purchase of the tying and tied products in order to bring a claim under the Sherman Act." *Wells Real Estate, Inc. v. Greater Lowell Board of Realtors,* 850 F.2d 803, 814 (1st Cir. 1988). Rather, "[i]n order to have standing . . . the plaintiff need only have been injured by the alleged anti-competitive act – it need not have been injured directly by the very anticompetitive effects sought to be remedied by the statute. The plaintiff [need only]

[13] Amazon's reliance upon *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6 (1st Cir. 1999), for the proposition that Plaintiff has not alleged an antitrust injury, is without merit. *Serpa* held that plaintiff had failed to allege an antitrust injury because the conduct at issue simply constituted a vertical supply arrangement. *Id.* at 11-12. As discussed above, a basic vertical supply arrangement is not the same as, and does not raise the same concerns as, a tying arrangement. Indeed, *Serpa* does *not* address tying arrangements at all. Moreover, the *Serpa* court concluded that the plaintiff lacked standing because, unlike Plaintiff here, the plaintiff in *Serpa* was not a direct consumer (or a competitor) in the relevant market. *Id.* at 12. As discussed above, only direct consumers (or competitors) have standing to pursue claims under the federal antitrust laws.

assert an 'injury in his business or property by reason of anything forbidden in the antitrust laws.'" *Id.* at 815 (citing 15 U.S.C. § 15).

Here, Plaintiff *has* alleged monetary injury to its business and Plaintiff's lost profits are compensable through a tying claim. *L.A.P.D., Inc. v. General Electric Corp.*, No. 94 C 664, 1994 WL 424120, at *3 (N.D. Ill. Aug, 11, 1994) (after refusing to continue to purchase tied products, plaintiff had standing to bring claim for "lost profits, fees and commissions after termination, lost goodwill, and diminution in value of [plaintiff] as a business" because "[a]ny harm suffered would not have occurred 'but for' the alleged [tying] scheme"). In addition, Amazon does *not* challenge Plaintiff's ability to pursue injunctive relief even if Plaintiff has not adequately alleged monetary damages (which it has). *See Thompson v. Metropolitan Multi-List, Inc.*, 934 F.3d 1566 (11th Cir. 1991) (individual realtor who refused to sign up for a realtor association (the tied service) in order to get access to the region's premier real estate listing database (the tying service) had standing to pursue a tying claim: "Thompson applied to use Metro's multilist service but his application was denied because he refused to purchase the tied product, membership in the Realtors. . . . Thompson can litigate the validity of the entry barriers which prevented his use of the multilist service. These entry barriers constitute the bases of the tying claim [and] the injuries which stem from Metro's ability to prevent Thompson from becoming a multilist service user are antitrust injuries and Thompson would be an efficient enforcer of the antitrust laws because the injuries are suffered directly.")[14]

[14] In addition, other Class members have suffered monetary damages. For example, various POD publishers who have already submitted to Amazon's demands have, *inter alia,* faced conversion costs to update their inventory for printing by BookSurge, faced per-title payments to Amazon's printing service, BookSurge, and have had to pay higher distribution discounts to Amazon (as discussed above). Contrary to

G. Plaintiff Need Not Allege Concerted Action Between Separate Entities

Contrary to Amazon's argument (Motion at 9-11), there is no requirement in the context of a tying claim that Plaintiff allege that Amazon conspired with anyone else to implement the illegal tie. Indeed, such a requirement would be nonsensical in the tying context, which, almost by definition, involves a single company tying together the sales of two of *its own* products or services. Accordingly, courts have routinely held that an illegal tie effectively creates concerted action between the improperly tying defendant and the unwilling consumer. "From a buyer's perspective, tying most frequently constitutes a reluctant combination and not an eager conspiracy." *Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d 1137, 1143 (10th Cir. 1997). "As with other concerted activity," product ties "deprive the market of 'independent centers of decision making' by forcing a buyer in need of the tying product to purchase the tied product from the same seller. The concerted action requirement exists to prevent exactly such deprivation." *Id.* As a result, "[w]e reject [defendant's] argument that in imposing a tying arrangement, a producer merely acts independently to establish a unilateral term of sale." *Id; Cargill Inc. v. Budine*, No. CV-F-07-439-LJO-SMS, 2007 WL 4207908, at *3 (E.D. Cal. Nov. 27, 2007) (citing *Systemcare* and rejecting defendant's argument that plaintiff's "tying claims must be dismissed because [plaintiff] cannot satisfy the concerted action requirement").[15]

Amazon's argument (Motion at 19-20), the Class, if successful in this litigation, will be entitled to, among other damages, disgorgement of all of these payments.

[15] Notably, *none* of the cases cited by Amazon in support of its argument on this point involve tying claims.

V. CONCLUSION

For all of the reasons set forth above, Plaintiff respectfully requests that the Court deny Amazon's Motion in its entirety. In the event that the Court determines that any of the allegations in the Complaint are insufficient, Plaintiff respectfully moves for leave to amend the Complaint to remedy any such insufficient allegations.[16]

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[16] As discussed throughout this brief, Plaintiff's Complaint adequately pleads all of the elements of a tying claim. However, in responding to Amazon's specific arguments (which raise facts outside the four corners of the Complaint), Plaintiff has been compelled to incorporate additional facts as well. Plaintiff could allege all of these additional facts in an Amended Complaint if the Court deems it necessary.