

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BOOKLOCKER.COM, INC.)
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)
 Plaintiff)
 vs.)
)
) Civil Action No. CV-08-00160-JAW
)
 AMAZON.COM, INC.)
)
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 Defendant)
)
)

**DEFENDANT'S MOTION TO DISMISS
WITH INCORPORATED MEMORANDUM OF LAW**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF FACTS	3
A. Overview of POD publishing.....	3
B. Direct sales by Amazon.com and sales through the Amazon Marketplace	3
C. Sales of POD books on the Amazon.com website and elsewhere	4
D. The Amazon.com policy that is the subject of the complaint.....	6
III. ARGUMENT	8
A. Booklocker.com has not alleged concerted action between separate entities, which is a required element under Section 1 of the Sherman Act	9
B. The complaint should be dismissed because Booklocker.com has not alleged an unreasonable restraint of trade.....	11
1. Booklocker.com has not alleged a tying claim	12
2. The Supreme Court and the First Circuit have consistently refused to apply per se treatment to vertical supply relationships such as the relationship alleged in the complaint	14
C. Booklocker.com has not alleged an antitrust injury.....	16
D. Booklocker.com’s damage claim must be dismissed because it has not alleged any injury to its business or property	18
E. Booklocker.com’s claim for restitution or disgorgement must be dismissed because it has not conferred any benefit on Amazon.com.....	19
IV. CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases	Page
<i>Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 267 F.3d 30 (1st Cir. 2001).....	5
<i>Atlantic Richfield Co. v. USA Petroleum Co.</i> , 495 U.S. 328 (1990).....	16, 17
<i>Bell Atl. Corp. v. Twombly</i> , 127 S. Ct. 1955 (2007).....	8, 9, 11, 19
<i>Brunswick Corp. v. Pueblo Bowl-O-Mat</i> , 429 U.S. 477 (1977).....	8, 16, 17, 19
<i>Copperweld Corp. v. Independence Tube Corp.</i> , 467 U.S. 767 (1984).....	9, 15
<i>Eastern Food Servs. v. Pontifical Catholic Univ. Servs. Assoc.</i> , 357 F.3d 1 (1st Cir. 2004).....	12, 15, 16
<i>Eastern States Retail Lumber Dealers’ Ass’n v. United States</i> , 234 U.S. 600 (1914).....	10
<i>Euromodas, Inc. v. Zanella, Ltd.</i> , 368 F.3d 11 (1st Cir. 2004).....	8, 10, 12
<i>Gerlinger v. Amazon.com, Inc.</i> , 311 F. Supp. 2d 838 (N.D. Cal. 2004).....	4
<i>In re New Motor Vehicles Canadian Export Antitrust Litig.</i> , 350 F. Supp. 2d 160 (D. Me. 2004).....	20
<i>Jefferson Parish Hosp. Dist. No. 2 v. Hyde</i> , 466 U.S. 2 (U.S. 1984).....	13, 14
<i>Kartell v. Blue Shield of Massachusetts</i> , 749 F.2d 922 (1st Cir. 1984).....	10
<i>Leegin Creative Leather Prods. v. PSKS Inc.</i> , 127 S. Ct. 2705 (2007).....	11, 12
<i>Monahan’s Marine, Inc. v. Boston Whaler, Inc.</i> , 866 F.2d 525 (1st Cir. 1989).....	9
<i>Monsanto Co. v. Spray-Rite Serv. Corp.</i> , 465 U.S. 752 (1984).....	passim

Northern Pac. Ry. Co. v. United States,
356 U.S. 1 (1958)..... 13

Serpa Corp. v. McWane, Inc.,
199 F.3d 6 (1st Cir. 1999)..... 16, 17, 18

Sheridan v. Marathon Petroleum Co.,
__ F.3d __, 2008 WL 2486581 (7th Cir. June 23, 2008)..... 12, 13

Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.,
373 F.3d 57 (1st Cir. 2004)..... 11, 14, 15

Suzuki of Western Mass., Inc. v. Outdoor Sports Expo, Inc.,
126 F. Supp. 2d 40 (D. Mass. 2001)..... 9, 10

Tampa Electric Co. v. Nashville Coal Co.,
365 U.S. 320 (1961)..... 14

U.S. Healthcare, Inc. v. Healthsource, Inc.,
986 F.2d 589 (1st Cir. 1993)..... 13, 14

United States v. Colgate & Co.,
250 U.S. 300 (1919)..... 10

Wells Real Estate v. Greater Lowell Bd. of Realtors,
850 F.2d 803 (1st Cir. 1988)..... 13, 14

Zenith Radio Corp. v. Hazeltine Research, Inc.,
395 U.S. 100 (1969)..... 19

Statutes

15 U.S.C. § 1..... 9

15 U.S.C. § 15..... 19

Other Authorities

Areeda & Hovenkamp, *Antitrust Law* ¶ 381c (Supp. 1999)..... 18

Federal Trade Comm’n, “Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace,”
1996 WL 293773 (1996)..... 16

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and for the reasons stated in the following memorandum, defendant Amazon.com, Inc. (“Amazon.com”) hereby moves the Court for an order dismissing the plaintiff’s complaint for failure to state a claim.

I. INTRODUCTION

This case involves an ordinary business dispute brought by a supplier of books (Booklocker.com) that is unhappy with the terms on which a retailer (Amazon.com) is offering to buy them. Although this case involves Internet-era technologies and modes of product distribution, the business issues that underlie Booklocker.com’s complaint are common in many industries. In essence, Booklocker.com wants to sell its products to Amazon.com in order to take advantage of the services Amazon.com provides to its customers – including Amazon.com’s fast and efficient shipping to consumers – but it does not want to agree to the purchase terms announced by Amazon.com.

Booklocker.com attempts to dress up its complaint in the garb of Section 1 of the Sherman Act, but there is no federal antitrust claim here. It has been well-established for nearly a century that a retailer such as Amazon.com is free to decide unilaterally which suppliers’ products it will purchase, stock, or resell, and the terms on which it will do so. Likewise, the antitrust laws do not require Amazon.com to carry all suppliers’ products, or to purchase products on terms dictated by suppliers.

A business “of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Section 1 of the Sherman Act, under which Booklocker.com has asserted its claim, simply does not apply to independent action – including where a business unilaterally

announces the terms on which it will deal with others and “refuse[s] to deal with those who fail to comply.” *Id.* at 760. Booklocker.com has alleged nothing more than that here.

In addition, even if Booklocker.com had alleged concerted action, the complaint should still be dismissed because it does not allege an unreasonable restraint of trade – another essential element of a Section 1 claim. Booklocker.com asserts that this case involves a per se unlawful “tying” arrangement, but this case does not involve tying at all. Moreover, the First Circuit and the Supreme Court have repeatedly held that vertical supply relationships such as that alleged here (if there were concerted action at all) are not suitable for per se treatment because they are likely to generate efficiencies that benefit consumers. Finally, Booklocker.com has not even alleged a threat of harm to competition in a relevant market, a basic requirement of an antitrust claim.

At its core, Booklocker.com’s complaint is not about any threat to competition. Rather, it is about Amazon.com’s announcement of changes to the manner in which it acquires products, and a complaint that those changes allegedly favor a vendor other than Booklocker.com’s preferred vendor. But Booklocker.com’s purported injury from this business decision is not the type of claim the antitrust laws were designed to address. It is commonplace for companies to be faced with some adverse consequences when a trading partner makes changes to its supply chain aimed at improving efficiency, such as Amazon.com’s policy here. The antitrust laws simply do not prevent Amazon.com from making unilateral changes to its supply chain, and they do not provide relief for trading partners that claim to be unhappy with those changes.

II. STATEMENT OF FACTS

Solely for purposes of this motion to dismiss, Amazon.com has assumed all of the factual allegations in the complaint to be true.

A. Overview of POD publishing.

Plaintiff Booklocker.com is an “independent print on demand (‘POD’) publishing company.” Compl. ¶ 3. In print-on-demand publishing, physical copies of a publisher’s books “are only printed when an order has been received from a consumer or retail bookseller, and only the number of books that have been ordered are printed.” *Id.*

Booklocker.com does not actually print its POD books. Rather, “Plaintiff and other POD publishers use a variety of printing companies to print physical copies of the books in their catalogs as those books are ordered.” *Id.* ¶ 5. As Booklocker.com alleges, “[a]t present, Lightning Source” – which is not related to Amazon.com – “is the dominant POD printing service.” *Id.* ¶ 27. Booklocker.com “presently prints its books through Lightning Source.” *Id.*

In 2005, Amazon.com acquired BookSurge, “a company that . . . provides printing services to POD publishers.” *Id.* ¶ 26.

B. Direct sales by Amazon.com and sales through the Amazon Marketplace.

Defendant Amazon.com is an “online retailer” of many products, including books. *Id.* ¶¶ 6, 11. The complaint makes reference to two different means through which consumers can purchase products via the Amazon.com website.

First, consumers may purchase “directly from Amazon itself.” Compl. ¶ 24. The complaint describes this as the “Direct Amazon Sales Channel.” *Id.* When consumers buy directly from Amazon.com through the so-called “Direct Amazon Sales Channel,” Amazon.com is the seller of record, it is selling products over which it has title and possession, and it is responsible for shipping the products to consumers. *See id.*

Second, consumers may purchase from third-party retailers who offer their books on the Amazon.com website through the “Amazon Marketplace.” Compl. ¶ 25. When consumers buy from an Amazon Marketplace vendor, the third-party (and not Amazon.com) is the seller of record, Amazon.com does not have title to or possession of the products, and the third-party is responsible for shipping products to consumers. *See id.* (“a consumer must provide shipping information to the third-party vendor”). As another district court explained:

[b]eyond selling its own products on its website, Amazon.com operates Amazon Marketplace where sellers of new and used books (among other products) offer their products for sale on the Amazon.com website. When a visitor to the Amazon.com website searches for a book title, they will be provided with both the Amazon.com offering for that title as well as any available Marketplace seller’s offering and prices for that title, even if the price is lower than that offered by Amazon.com.

Gerlinger v. Amazon.com, Inc., 311 F. Supp. 2d 838, 840 (N.D. Cal. 2004).

C. Sales of POD books on the Amazon.com website and elsewhere.

As alleged in the complaint, publishers of POD books have several different options for printing POD books and selling those books to consumers.

First, publishers can sell directly to consumers via the Amazon Marketplace, or they can sell to online retailers that offer books to consumers via the Amazon Marketplace. Compl. ¶ 25. The complaint does not allege that Amazon.com has (or attempts to exert) any control over the POD printing services used in connection with such transactions. As described above, consumers searching for a book on the Amazon.com website will be provided with both the Amazon.com offering for that title (if any) as well as the Marketplace sellers’ offerings and prices for that title.

Second, publishers can sell to Amazon.com, which resells to consumers through the “Direct Amazon Sales Channel,” if they use BookSurge to print their POD books. Compl. ¶ 29.

Third, publishers can sell to Amazon.com for resale through the “Direct Amazon Sales Channel” and use any POD printing service – of their own choosing – as long as “they agree to enroll in a program known as ‘Amazon Advantage.’” Compl. ¶ 30.

The complaint alleges in conclusory fashion that “the terms and conditions of participating in [the Amazon Advantage] program are so onerous so as to preclude it from being an economically viable option for POD book publishers,” (Compl. ¶ 30), but it alleges no specifics about the program and does not identify the terms and conditions that are supposedly “onerous.” The terms and conditions of the Amazon Advantage program are described in two documents, the “Advantage Membership Agreement” and the “Advantage Instructions and Rules,” which are available on Amazon.com’s website and appended hereto as Attachments A and B, respectively.¹ The following are some of the terms of the program:

- The fee for the Amazon Advantage program is an “annual membership fee of \$29.95.” *See* Attachment A at ¶ 4.
- The publisher sets the “List Price” for its titles, and Amazon.com sets the retail price at which it sells the books to Amazon.com’s customers. *See* Attachment A at ¶ 8.
- The publisher receives 45% of the list price for any items sold through the Amazon Advantage program. Amazon.com retains the difference between the retail sale price and that amount (*i.e.*, if Amazon.com discounts the retail price below the publisher’s list price, the customer discount comes out of Amazon.com’s percentage). *See* Attachment B at ¶ 7.2.
- Amazon.com stores the publisher’s products until they are sold, and assumes the risk of loss for products in its inventory. *See* Attachment A at ¶ 6.

Fourth, publishers can offer their books through online retailers other than Amazon.com. Although Booklocker.com acknowledges (as it must) that Amazon.com is not the only online retailer of POD books (Compl. ¶ 23), it does not offer allegations regarding the share of POD

¹ Because the complaint expressly references the terms of the Amazon Advantage program and because the authenticity of these publicly available documents should not be subject to serious challenge, the Court may consider these documents in connection with this motion to dismiss. *See Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33-34 (1st Cir. 2001).

books sold by Amazon.com. Nor does Booklocker.com offer allegations regarding the number of other online booksellers that sell POD books. Booklocker.com itself operates a website that sells POD books directly to consumers. As Booklocker.com explains on its website:

Our POD books are available for special order through numerous online bookstores and through most brick and mortar bookstores. Online book stores include Amazon.com, BarnesandNoble.com, Borders.com, booksamillion.com, chapters.ca and numerous others. You'll undoubtedly find your book for sale on sites you've never heard of before. This simply means they have an account with Ingram, the book distributor.

See <http://publishing.booklocker.com/what-we-do/>.

Finally, consumers can order POD books “through most brick and mortar bookstores.”

Id. In addition, POD publishers can have physical copies of their POD books printed and sold through brick-and-mortar retailers.

D. The Amazon.com policy that is the subject of the complaint.

The complaint alleges that “beginning no later than February 10, 2008, Amazon began notifying POD publishers that Amazon would only continue to sell POD books through the Direct Amazon Sales Channel if the publisher agreed to print its books through BookSurge rather than a competing service.” Compl. ¶ 29. As Booklocker.com acknowledges, however, publishers that use other POD printers “may keep the Direct Amazon Sales Channel active if they agree to enroll in . . . ‘Amazon Advantage.’” Compl. ¶ 30. Booklocker.com also acknowledges that “Amazon allows third-party vendors to sell books on Amazon through a program known as ‘Amazon Marketplace.’” Compl. ¶ 25. And Booklocker.com does not (and cannot) allege that Amazon.com requires any POD publisher to use BookSurge exclusively. POD publishers may use any POD printer of their choice for sales to any other retailer, including retailers who sell on the Amazon Marketplace.

The policy that is the subject of the complaint is described in an open letter that has been posted on Amazon.com's website. *See* Attachment C.² That open letter explains the rationale for this policy:

Modern POD printing machines can print and bind a book in less than two hours. If the POD printing machines reside inside our own fulfillment centers, we can more quickly ship the POD book to customers – including in those cases where the POD book needs to be married together with another item. If a customer orders a POD item together with an item that we're holding in inventory – a common case – we can quickly print and bind the POD item, pick the inventoried item, and ship the two together in one box, and we can do so quickly. If the POD item were to be printed at a third party, we'd have to wait for it to be transhipped to our fulfillment center before it could be married together with the inventoried item.

Id. The open letter further explains:

Speed of shipping is a key customer experience focus for us POD items printed inside our own fulfillment centers can make our Amazon Prime cutoff times. POD items printed outside cannot. Simply put, we can provide a better, more timely customer experience if the POD titles are printed inside our own fulfillment centers. In addition, printing these titles in our own fulfillment centers saves transportation costs and transportation fuel.

Id.

The open letter states that “[a]ny publisher can use Amazon’s POD service just for those units that ship from Amazon and continue to use a different POD service provider for distribution through other channels.” *Id.* Consistent with the allegations in the complaint, the letter also states that “[a]lternatively, you can use a different POD service provider for all your units. In that case, we ask that you pre-produce a small number of copies of each title (typically five copies), and send those to us in advance” for sale through the Amazon Advantage program.

Id. The reason for this requirement is that a “small cache of inventory allows us to provide the

² For the reasons discussed in footnote 1, the Court may consider this document in connection with this motion to dismiss.

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.” *Id.*

III. ARGUMENT

To state a claim under Section 1 of the Sherman Act, Booklocker.com must allege that (1) there was concerted action between two or more actors, and (2) “the actors’ agreement must involve either restrictions that are per se illegal or restraints of trade that fail scrutiny under the rule of reason.” *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 16 (1st Cir. 2004) (citing *Monsanto*, 465 U.S. at 761). In addition, Booklocker.com must allege that it has suffered antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977).

Booklocker.com contends that Amazon’s decision about how it sources POD books is a tying arrangement that is per se unlawful under Section 1. Compl. ¶ 39. Other than conclusory labels, however, the complaint does not allege concerted action, a tying violation or other unreasonable restraint of trade, or antitrust injury. The complaint must be dismissed because it fails with respect to each of these required elements.

As the Supreme Court stated last year, conclusory allegations will not suffice – a complaint brought under Section 1 must include “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). The Court emphasized that “proceeding to antitrust discovery can be expensive,” and it is therefore important that a district court “tak[e] care to require allegations that reach the level suggesting” the existence of a violation before a case is allowed to proceed. *Id.* at 1967. Booklocker.com has offered no such allegations here.

A. Booklocker.com has not alleged concerted action between separate entities, which is a required element under Section 1 of the Sherman Act.

Section 1 of the Sherman Act proscribes any “contract, combination . . . or conspiracy” in unreasonable restraint of trade. 15 U.S.C. § 1. “Independent action is not proscribed” by Section 1. *Monsanto*, 465 U.S. at 761; *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 767, 767-68 (1984) (“The Sherman Act contains a ‘basic distinction between concerted and independent action.’ . . . The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization.”). Accordingly, to state a claim under Section 1, a complaint must contain “enough factual matter (taken as true) to suggest that an agreement was made.” *Twombly*, 127 S. Ct. at 1965.

Booklocker.com’s claim arises from a *unilateral* decision by Amazon about from whom it will purchase POD products, not any sort of *agreement*. Booklocker.com makes no effort to demonstrate any concerted action between Amazon.com and anyone else. The complaint simply describes the unilateral decisions allegedly announced by Amazon.com. *See, e.g.*, Compl. ¶ 8 (“Amazon began notifying POD publishing companies that Amazon and the Bookstore would only directly sell to consumers POD Books that were printed by BookSurge.”). Such unilateral conduct is not actionable under Section 1 of the Sherman Act. *See, e.g., Monahan’s Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 530 (1st Cir. 1989) (Breyer, J.) (allegedly unlawful termination of dealer “was the unilateral act of Whaler alone, so it cannot be ‘concerted action’ in violation of § 1”); *Suzuki of Western Mass., Inc. v. Outdoor Sports Expo, Inc.*, 126 F. Supp. 2d 40, 46 (D. Mass. 2001) (“Plaintiff concedes that [defendant] unilaterally adopted its priority dealer rule. This concession is fatal to its Section One Claim.”).

Nor does Booklocker.com allege concerted action by contending that Amazon.com has “threatened” POD publishers “that unless they convert their inventory to BookSurge printing,

their Direct Amazon Sales Channel will be discontinued.” Compl. ¶ 31. It has been clear for nearly a century that “[a] retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself.” *Eastern States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 614 (1914). Likewise, a business may “announce in advance the circumstances under which he will refuse” to do business with others. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). In such circumstances, there is no agreement under Section 1 of the Sherman Act. *Id.*

The “*Colgate* doctrine” continues to be a cornerstone of Sherman Act Section 1 jurisprudence. The Supreme Court and the First Circuit have repeatedly emphasized that “[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.” *Monsanto*, 465 U.S. at 761 (citations omitted); *see also, e.g., Kartell v. Blue Shield of Massachusetts*, 749 F.2d 922, 932 (1st Cir. 1984) (Breyer, J.) (“Blue Shield’s independent determination of the terms on which it will deal, of the customers to whom it will sell, and of the suppliers from whom it will purchase is a manifestation of the competitive process, not an effort to suppress or to destroy that process”).

The *Colgate* doctrine guarantees Amazon.com the right to announce the terms on which it will deal with others and the right to refuse to deal with companies that do not agree to those terms. Such conduct does not establish the requisite agreement under Section 1. *See, e.g., Euromodas*, 368 F.3d at 17-18 (“[S]ection 1 is not intended to prohibit entrepreneurial action, and a manufacturer, acting independently, ordinarily has a right to sell (or not to sell) to whichever customer(s) it chooses”); *Suzuki of Western Mass.*, 126 F. Supp. 2d at 46 (“[Defendant] determined, on its own, the terms it would apply in selecting exhibitors and announced those terms in advance of receiving applications from dealers. Such unilateral action,

no matter what its motivation, cannot violate Section One.” (internal quotations omitted)).

Booklocker.com has alleged nothing more than that here. Accordingly, its claim under Section 1 must be dismissed.

B. The complaint should be dismissed because Booklocker.com has not alleged an unreasonable restraint of trade.

Even if Booklocker.com had alleged concerted action, its claim under Section 1 would still fail because it has not alleged an unreasonable restraint of trade. Although Section 1 of the Sherman Act prohibits “every contract, combination . . . or conspiracy in restraint of trade,” it is well-established that Section 1 prohibits only *unreasonable* restraints of trade. *See, e.g., Leegin Creative Leather Prods. v. PSKS Inc.*, 127 S. Ct. 2705, 2712 (2007) (“the Court has repeated time and again that § 1 outlaws only unreasonable restraints” (internal quotations omitted)).

There are two ways in which a plaintiff can show that a restraint of trade is unreasonable: either by showing that (i) it is a type of restraint that is presumptively unreasonable – *i.e.*, it is per se unlawful – or (ii) it should be condemned under the rule of reason. *See Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 61 (1st Cir. 2004).

Booklocker.com has not even attempted to state a claim under the rule of reason.³

³ Nor could Booklocker.com state a rule of reason claim on the facts alleged. To state a rule of reason claim, the plaintiff must show “that the alleged agreement involved the exercise of power in a relevant economic market, that this exercise had anti-competitive consequences, and that those detriments outweighed efficiencies or other economic benefits.” *Stop & Shop*, 373 F.3d at 61. The only relevant market alleged in the complaint is the purported “Online Book Market,” (Compl. ¶ 21), but the complaint identifies no plausible harm to such a market. The complaint likewise identifies no harm to competition among providers of POD printing services. To the contrary, Booklocker.com alleges that a competitor of BookSurge – Lightning Source – is the “dominant” provider of POD printing services. Compl. ¶ 27. And Booklocker.com does not allege that BookSurge has any prospect of unseating Lightning Source, becoming the “dominant” provider, or otherwise eliminating competition in this segment. Thus, although Booklocker.com has alleged in conclusory fashion that Amazon’s conduct “unreasonably restrains trade,” (Compl. ¶ 39), its recitation of this element of a Section 1 claim comes nowhere close to satisfying its pleading burden. *See Twombly*, 127 S. Ct. at 1964-65 (“a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do”).

Instead, Booklocker.com contends that Amazon.com's conduct is "unlawful per se." Compl. ¶ 39. But the alleged conduct here does not fall within any per se rule. The Supreme Court has emphasized that per se rules are limited to restraints that "have manifestly anticompetitive effects and lack any redeeming virtue." *Leegin*, 127 S. Ct. at 2713 (internal quotations, alterations, and citations omitted). A "per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Id.* (internal quotations and citations omitted). Thus, for example, the courts have consistently recognized that *vertical* relationships, which involve persons at different levels of distribution (such as a manufacturer and a distributor), can promote competition "by allowing a manufacturer to achieve certain efficiencies in the distribution of its products." *Euromodas*, 368 F.3d at 16. "For this reason, such restraints generally are not deemed per se illegal, but, rather, are tested under a rule of reason analysis." *Id.*; *see also Eastern Food Servs. v. Pontifical Catholic Univ. Servs. Assoc.*, 357 F.3d 1, 4 (1st Cir. 2004) ("Almost the only important categories that reliably deserve [the per se label] today are those among competitors that amount to 'naked' price fixing, output restriction, or division of customers or territories.").

As discussed in more detail below, Booklocker.com has not alleged conduct that is per se unlawful. Accordingly, its claim must be dismissed.

1. Booklocker.com has not alleged a tying claim.

Booklocker.com attempts to support its contention that a per se rule applies by labeling Amazon.com's alleged conduct a "tying" arrangement. Compl. ¶ 39. While tying arrangements in limited circumstances can be subject to a per se rule, (*see, e.g., Sheridan v. Marathon Petroleum Co.*, ___ F.3d ___, 2008 WL 2486581, at *3 (7th Cir. June 23, 2008) (Posner, J.) (describing limited nature of the per se rule)), the mere invocation of a label such as "tying" does

not justify applying a per se rule. As the Supreme Court has explained, “[t]he legality of petitioners’ conduct depends on its competitive consequences, not on whether it can be labeled ‘tying.’” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21 n.34 (1984); *see also U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993) (rejecting plaintiffs’ attempt to characterize an exclusive vertical relationship as a “group boycott” to invoke a per se rule; explaining that “per se condemnation is not visited on every arrangement that might, as a matter of language, be called a group boycott or concerted refusal to deal”).

Booklocker.com’s attempt to invoke the “tying” label in this case is particularly inapt, because this case does not involve “tying” at all. A tying arrangement is “an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.” *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958). Booklocker.com, however, does not allege that Amazon.com was selling anything on the condition that a customer buy a “tied” product. Instead, the complaint simply alleges that Amazon.com specified the terms on which it is willing to *purchase* POD books from publishers.

In addition, the complaint acknowledges that Amazon.com will purchase from a publisher that uses *any* POD printer – of the publisher’s choice – as long as the publisher provides copies of the book to Amazon.com under the Amazon Advantage program. Again, that is not a tying arrangement at all. *See, e.g., id.; Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 814 (1st Cir. 1988) (first element of a tying claim is showing “that an actual tie exists between two separate products, such that purchase of one is conditioned on purchase of the other”); *see also Sheridan*, 2008 WL 2486581 at *5 (affirming dismissal for failure to allege a tying arrangement, where “[a]ll [defendant] has done is require its franchisees

to honor Marathon credit cards and to process sales with them through the system designated by Marathon so that customers of Marathon who use its card have the same processing experience no matter which Marathon gas station they buy from”).

Moreover, even if the conduct at issue could properly be characterized as a “tying arrangement,” a per se rule still would not apply. It is well-established that not all tying arrangements are per se unlawful. *See, e.g., U.S. Healthcare*, 986 F.2d at 593 n.2 (“Tying is sometimes . . . described as a per se offense but, since some element of power must be shown and defenses are effectively available, ‘quasi’ per se might be a better label.”). Booklocker.com has failed to allege that Amazon.com’s alleged conduct will harm competition in any relevant market, which dooms its claim to failure – no matter what label it attaches to its claim. *See, e.g., Jefferson Parish*, 466 U.S. at 21 n.34 (“If the competitive consequences of this arrangement are not those to which the per se rule is addressed, then it should not be condemned irrespective of its label.”); *Wells Real Estate*, 850 F.3d at 815 (to allege an unlawful tying arrangement, a plaintiff must allege “anti-competitive effects in the market for the tied product”).

2. The Supreme Court and the First Circuit have consistently refused to apply per se treatment to vertical supply relationships such as the relationship alleged in the complaint.

Notwithstanding Booklocker.com’s attempt to characterize this case as involving a tying arrangement, Booklocker.com cannot escape from its own allegations, which describe nothing more than a vertical supply relationship between a publisher, a printer, and a retailer. *See, e.g., Compl. ¶ 30* (“Amazon would only continue to sell BookLocker’s POD books through the Direct Amazon Sales Channel if Plaintiff agreed to print its books through BookSurge”).

It is well-established that agreements relating to vertical supply relationships are not subject to per se prohibitions – even where they involve exclusive supply relationships. *See, e.g., Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961); *Stop & Shop*, 373 F.3d at 62

(Blue Cross’s closed pharmacy network “is simply an exclusive dealing arrangement which is not a per se violation of the antitrust laws”). Because such arrangements “can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices), no presumption against such agreements exists today.” *Stop & Shop*, 373 F.3d at 65.

In *Eastern Food Services*, the First Circuit addressed a complaint alleging “an exclusive dealing arrangement by which one supplier . . . [was] given the sole right . . . to supply and stock vending machines” in the alleged market. 357 F.3d at 5. In affirming dismissal of the complaint, the court evaluated the claim under the rule of reason. *Id.* The court explained that “exclusive dealing contracts are not disfavored by the antitrust laws. Rather, it is widely recognized that in many circumstances they may be highly efficient – to assure supply, price stability, outlets, investment, best efforts or the like – and pose no competitive threat at all.” *Id.* at 8.⁴

Under the same approach, Amazon.com could have designated an exclusive supplier of POD services and such an arrangement would not be subject to any per se prohibition. It follows, *a fortiori*, that Amazon.com’s alleged policy – which is more open than an exclusive policy, because publishers are free to use other POD providers for sales to all other retailers (including retailers who sell on the Amazon Marketplace) and for sales to Amazon.com itself through the Amazon Advantage program – cannot be subject to a per se prohibition.

Indeed, there is nothing unique or unusual about Amazon.com’s effort to specify the means through which suppliers provide their products to Amazon.com. Retailers in a wide range

⁴ In *Eastern Food Services* and other cases addressing exclusive dealing agreements under Section 1 of the Sherman Act, the agreement between the defendant and an exclusive supplier provided the necessary concerted action for a Section 1 claim. In the present case, however, Amazon.com and BookSurge are part of the same corporate family, and therefore cannot be held to have conspired with each other within the meaning of Section 1. See *Copperweld*, 467 U.S. at 771.

of industries have taken similar steps in order to achieve efficiencies in their supply chains. *See, e.g.,* Federal Trade Comm’n, “Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace,” 1996 WL 293773, at *21 (1996) (describing retailers’ “adoption of lean and flexible systems” for acquiring inventory, which has made “production and purchasing more efficient”). The antitrust laws do not impose per se prohibitions on such conduct, both because the risk of competitive harm from a vertical supply relationship is low and because there are clear efficiencies to be gained where a business is able to manage the manner in which products arrive at its facilities. *See, e.g., Eastern Food Services*, 357 F.3d at 8. When a business is able to take advantage of such efficiencies, competition and consumers are better off. The antitrust laws were not designed to prohibit that sort of efficiency-enhancing conduct.

C. Booklocker.com has not alleged an antitrust injury.

Even if Booklocker.com had alleged conduct that violates Section 1, its complaint is deficient for another independent reason: it fails to allege antitrust injury. *See, e.g., Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 10 (1st Cir. 1999) (affirming dismissal based on failure to plead an antitrust injury). That is, Booklocker.com does not allege an “injury of the type the antitrust laws were intended to prevent.” *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (“*ARCO*”). Private plaintiffs must allege and prove antitrust injury in every case – even where a per se violation has been alleged. *Id.* at 342. Because Booklocker.com has failed to allege antitrust injury here, its claim should be dismissed.

The Supreme Court has explained that the Sherman and Clayton Acts do not permit all persons who suffer any type of injury that might be causally traced to conduct that violates the antitrust laws to recover for their injuries. Instead, an antitrust plaintiff must prove that its alleged injury is “(1) [] of the type the antitrust laws were intended to prevent and (2) [] flows from that which makes defendants’ acts unlawful.” *Brunswick*, 429 U.S. at 489. Requiring

antitrust plaintiffs to allege antitrust injury “ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant’s behavior.” *ARCO*, 495 U.S. at 344. This antitrust injury requirement arises from the oft-quoted principle that “[t]he antitrust laws . . . were enacted for ‘the protection of competition, not competitors.’” *Brunswick*, 429 U.S. at 488.

Booklocker.com’s complaint centers around its suggestion that the terms on which Amazon.com is willing to purchase POD books are unfavorable to Booklocker.com because (a) Booklocker.com would prefer to have its books printed by Lightning Source, and (b) Booklocker.com wants Amazon.com to purchase books printed by Lightning Source on the same terms on which it will purchase books printed in the POD machinery that is integrated in Amazon.com’s fulfillment centers. But regardless of whether the terms announced by Amazon.com are unfavorable to Booklocker.com, Booklocker.com has neither alleged any harm to competition among POD printers (like Lightning Source) nor any injury that results from a diminution of such competition. In other words, Booklocker.com’s alleged injury does not “stem[] from a competition-reducing aspect or effect of the defendant’s behavior.” *ARCO*, 495 U.S. at 344.

The First Circuit addressed a similar situation in *Serpa*. In that case, the plaintiff (*Serpa*) was a distributor that lost its place in the defendant-supplier’s distribution chain when the defendant purchased, and became vertically integrated with, another distributor (*Anaco*) that had been a competitor of *Serpa*’s. *Serpa* asserted antitrust claims, alleging that the defendant’s acquisition of *Anaco* substantially lessened competition. 199 F.3d at 4. The First Circuit affirmed dismissal of *Serpa*’s complaint because its alleged injury (loss of business distributing the defendant’s products) was the result of “the termination of its distributorship, and not from

any anticompetitive effects of defendants' acquisition of Anaco." *Id.* at 12. Accordingly, Serpa had not alleged antitrust injury.

Similarly, Booklocker.com claims to have been harmed because Amazon.com acquired and integrated into its supply chain a POD printer other than the printer favored by Booklocker.com. But Booklocker.com has not suffered an antitrust injury simply because Amazon.com integrated with BookSurge and has generated efficiencies through the integration. Nor has Booklocker.com suffered antitrust injury because Amazon.com provides allegedly more favorable terms for its trading partners that use the more efficient service. The antitrust laws were not designed to stifle such efficiency-enhancing conduct. As the First Circuit explained in *Serpa*, "clearly lacking antitrust injury, and thus having no standing, is the firm whose injury is caused merely by the efficiency effects of a vertical merger." 199 F.3d at 11 (quoting *Areeda & Hovenkamp*, *Antitrust Law* ¶ 381c at 114 (Supp. 1999)).

D. Booklocker.com's damage claim must be dismissed because it has not alleged any injury to its business or property.

Booklocker.com's demand for "damages, penalties and other monetary relief" (Compl. ¶ 40.D) must be dismissed for the simple reason that the complaint is devoid of any allegation that Booklocker.com has suffered any actual injury to its business or property. At the very most, Booklocker.com alleges that it has been "*threatened* that if it does not convert [its] inventory to BookSurge printing, [its] Direct Amazon Sales Channel will be discontinued." Compl. ¶ 31 (emphasis added). But Booklocker.com does not allege that anything actually has been discontinued. Likewise, it does not allege that it has in fact converted any of its inventory to BookSurge printing. To the contrary, Booklocker.com alleges that it continues to print its POD books through Lightning Source. Compl. ¶ 27.

Section 4 of the Clayton Act makes damages available only to a person who has been “injured in his business or property” by reason of an antitrust violation. *See* 15 U.S.C. § 15; *see also Brunswick*, 429 U.S. at 485 (antitrust damages provision in Section 4 of the Clayton Act “makes awards available only to injured parties”); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (to recover damages for antitrust violation, plaintiff must offer “proof of some damage flowing from the unlawful conspiracy”).

Booklocker.com’s conclusory allegation that it has “already lost business and been injured” (Compl. ¶ 32) is insufficient to support a damages claim. That contention is both contradicted by Booklocker.com’s factual allegations and insufficient under the pleading requirements described by the Supreme Court. *See Twombly*, 127 S. Ct at 1964-65 (“a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions and a formulaic recitation of the elements of a cause of action will not do”).

According to Booklocker.com’s own allegations, Amazon.com has done nothing more than “threaten” to stop purchasing from Booklocker.com for the Direct Amazon Sales Channel. As a result, Booklocker.com has not – and cannot – allege that it has suffered any damages.

E. Booklocker.com’s claim for restitution or disgorgement must be dismissed because it has not conferred any benefit on Amazon.com.

For similar reasons, Booklocker.com’s claim for restitution or disgorgement must be dismissed. The complaint states in conclusory fashion that Booklocker.com is seeking “an order requiring full restitution of all funds acquired from Amazon’s unfair business practices, including disgorgement of revenues and/or profits.” Compl. ¶ 40.F. Even if such relief were theoretically available under the federal antitrust laws, Booklocker.com has not alleged that it has conferred any benefit on Amazon.com, let alone a benefit that could be disgorged or subject to an order of restitution. Accordingly, its claim for restitution must be dismissed. *See, e.g.,*

In re New Motor Vehicles Canadian Export Antitrust Litig., 350 F. Supp. 2d 160, 209 (D. Me. 2004) (dismissing claim for restitution against defendants as to which the complaint “alleges no benefit . . . that could be disgorged”).

IV. CONCLUSION

Based on the foregoing, Amazon.com respectfully requests that the Court dismiss Booklocker.com’s complaint with prejudice for failure to state a claim.

Respectfully submitted,

Dated: June 30, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2008, I electronically filed Defendant's Motion to Dismiss with Incorporated Memorandum of Law with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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ATTACHMENT A



Your Store | Make Money | See All 34 Product Categories | Your Account | Cart | Wish List | Help

Program Overview | Marketplace | Associates | **Advantage** | Web Services | Paid Placements | On-Demand Publishing



Browse Amazon.com Advantage > Membership Agreement
Before you fill out your Amazon.com Advantage application, please review the following Membership Agreement and Instructions & Rules. If you agree to the terms of this Agreement, just click the button at the bottom of this page and you will be taken through the Advantage application.

Advantage Membership Agreement

Updated January 29, 2008

This Agreement contains the terms and conditions that apply to an individual's or an entity's participation in the Amazon.com Advantage program ("Advantage").

1. General Terms

In this Agreement, "**we**", "**our**", "**us**", and "**Amazon.com**" mean Amazon Fulfillment Services, Inc., and its affiliates and "**you or your**" means you the applicant. "**Product**" means any product that you register to include in Advantage. In Advantage, we pay you for each unit of Product that you ship to us *after* it is sold to a customer. Your participation in Advantage is governed by this Membership Agreement, the Instructions and Rules and the terms, conditions, policies, guidelines, and other information on the Amazon.com website, each of which may be modified from time to time. In the event of any conflicts between any of this information, the terms of this Agreement control your participation.

2. Scope

Amazon.com may sell the Products through any website or other online point of presence through which it or its affiliates offer, advertise or merchandise the Products. Currently, Advantage is limited to Products shipped to and from U.S. fulfillment centers.

3. Enrollment in the Program

In order to enroll in the Program, you must submit a complete Program application, available here, and identify at least one Product for inclusion in Advantage. We will evaluate your application and notify you via email of its acceptance or rejection (which is in our discretion).

4. Membership Fee

We charge a non-refundable annual membership fee of \$29.95 for Advantage. We will assess and automatically debit this fee from your account each year in May; if you establish a new membership after the beginning of the account year, we will prorate the fee and automatically debit it from the first funds payable to your account. If your membership is canceled or terminated, or if this Agreement is otherwise terminated for any reason, you will not be entitled to any refund of the annual membership fee.

5. Operating Requirements

Detailed requirements regarding ordering, inventory maintenance, shipping, returns and other aspects of the Program are contained in the Instructions and Rules. Failure to comply with any of the requirements may result in additional handling fees charged to your account, as explained in the Instructions and Rules.

6. Risk of Loss

The risk of loss for each Product will transfer to us only when we accept the Product. You will be

solely responsible for any loss of or damage to Product units that occurs prior to such acceptance. Each accepted Product will be stored by us or on our behalf until we purchase the Product from you, we return the Product to you, we destroy or liquidate the Product (as described in paragraph 7), or this Agreement is terminated. In the case of loss of or damage to your Products while stored by us or on our behalf, our liability will be limited to the price that we agreed to pay to you for such Products at the time of our order.

7. Rejection

We may reject any Product you send to us that is defective, damaged, overage (meaning that we did not order it from you), not properly registered with Advantage, lacking a bar code, or otherwise fails to meet the requirements specified in the Instructions and Rules. At our discretion, rejected Products will either be (a) returned to you at your expense, and you authorize us to charge your freight account for such returns, or to withhold such shipping charge from payments due to you under this Program; **or**, (b) destroyed, liquidated or otherwise disposed of without compensation to you.

8. Pricing

We will determine, at our sole discretion, the price at which we sell your Products to customers. However, you may choose whatever *suggested retail price* ("List Price") you like when you register a Product, provided that the List Price is (a) at or below the suggested retail price at which you offer or sell that Product via any other online sales channel and (b) in any event does not exceed \$999.99. You will have no security interest, lien or other claim in or to the proceeds that we receive from our sale of your Product(s).

9. Purchase and Payment

When we receive a valid customer order for a Product, we will purchase a unit of the Product from your Advantage inventory (except as provided in Paragraphs 7 and 10). For each unit we purchase from you, we will pay you the percentage, specified in the Instructions and Rules, of the suggested retail price you chose when registering the Product. Legal title to each unit of Product automatically transfers to us at the time we purchase it from you. We pay for each unit purchased on a monthly basis, in arrears, in accordance with the Instructions and Rules. Reports on inventory and recent past sales are available online. We can also choose to purchase units of Product at any time, even if we have not received a customer order, by paying you the amount described above.

10. Customer Returns to Us

We retain ownership of Products that are returned by our customers, and we may store those Products in our company-owned inventory. We reserve the right to fulfill customer orders for Products from our inventory of returned Products before we purchase or order additional Products from you.

11. Our Returns to You

If we determine that there is insufficient customer demand for your Product, we may choose to no longer carry it. In such case, we will attempt to return all Products to you. You pay all charges (including packaging, insurance, and freight) incurred to ship each unit from the fulfillment center to your location. Also, if we have an outdated or incorrect address for you, or if we cannot charge to your freight account, we may liquidate the Products and keep the proceeds, destroy the Products, or ship the Products to you and deduct the charges from any payments due to you through Advantage. Please see clause 23 below for additional obligations with regards to returns from us to international addresses.

12. Limited License Grant to Descriptive Materials

You grant to Amazon.com a royalty-free, nonexclusive, worldwide, perpetual, irrevocable right and license to (a) use, reproduce, perform, display, distribute and prepare derivative works from the Descriptive Materials (defined below) and (b) sublicense the foregoing rights.

"Descriptive Materials" means all available information about each Product, including without limitation artwork and text for the packaging (including for example, cover, jacket, jacket flaps, spine and front and back matter); promotional photographs and descriptions, blurbs, author bios,

Library of Congress information, title page information, tables of contents, indices, complete Product descriptions, reviews and any other materials concerning the Product. Aside from those portions of each Product identified in the preceding sentence, for the purposes of this Agreement, Descriptive Materials does not include the internal content contained in the Products, such as the text of a book or the recording or musical compositions contained within a CD.

13. License; Representation and Warranties

You represent and warrant to us that (a) you have full authority to grant the licenses and permission described in this Agreement; (b) you have valid legal title to all Products and all rights necessary to distribute the Products and to otherwise perform this Agreement; (c) your sale of Products to us, and our promotion, distribution, and resale of them, will not violate any contract by which you are bound or any applicable law or regulation; (d) you will deliver all Products to us in new, merchantable condition; and (e) the Products, and our promotion, distribution, and resale of them, will not violate or misappropriate any copyright, trademark or other intellectual property or other rights of any third party. At our option, and at your cost, you will replace or accept the return of any Product that does not comply with these representations and warranties.

14. Indemnification

You indemnify, defend, and hold harmless Amazon.com, its affiliated companies, and their respective officers, directors, employees, and agents against any claim, loss, damage, judgment, settlement, cost, expense, or other liability (including, without limitation, attorneys' fees) arising from or related to (a) the Products; (b) your alleged breach of any representations or warranty contained in this Agreement; or (c) any content you provide (collectively, "Claims"). You will use counsel reasonably satisfactory to us to defend each Claim. If at any time we reasonably determine that any Claim might adversely affect us, we may take control of the defense at your reasonable expense and without affecting your indemnification and hold harmless obligations. You may not consent to the entry of any judgment or enter into any settlement without our prior written consent, which we will not unreasonably withhold.

15. Customer Practices

Customers who purchase Products are exclusive customers of Amazon.com. Accordingly, all of our rules, policies, and operating procedures concerning customer orders, customer service, pricing, and sales will apply to those customers. We may change our policies and operating procedures at any time in our sole discretion.

16. Confidentiality

During the course of your membership in Advantage, you may receive information relating to Amazon.com or Advantage that is not known to the general public ("Confidential Information"). Confidential Information includes, without limitation, information relating to sales consummated under Advantage. You agree that (a) all Confidential Information will remain Amazon.com's exclusive property; (b) you will use Confidential Information only as is reasonably necessary for your participation in Advantage; and (c) you will not disclose Confidential Information to any individual, company, or other third party.

17. Publicity

You may not issue any press release or make any public statement related to Advantage, or use the name, trademarks or logo in any way (including in promotional material) of Amazon.com or any of its affiliates without our advance written permission, or misrepresent or embellish the relationship between us in any way.

18. Revisions; Continued Use

We reserve the right to change any of the terms and conditions contained in this Agreement, including the Instructions and Rules, policies, guidelines, or other information on the site, at any time and in its sole discretion. Any changes are upon posting a change notice or a new agreement on our website or in your account page. You are responsible for reviewing the new agreement and any applicable changes or notices. YOUR CONTINUED MEMBERSHIP IN ADVANTAGE AFTER THE POSTING OF ANY CHANGES CONSTITUTE YOUR ACCEPTANCE OF SUCH CHANGES. IF YOU DO NOT

AGREE TO ANY CHANGES TO THIS AGREEMENT, YOU MUST TERMINATE THIS AGREEMENT IN ACCORDANCE WITH SECTION 19.

19. Term

a. Commencement. The term of this Agreement begins when you receive your notice of acceptance into Advantage and ends when terminated by either party.

b. Termination by you. You may terminate this Agreement at any time, with or without cause, by giving us written notice of such termination. Your termination is effective 30 days from the date we receive your written notice. You must continue to accept, confirm, and fulfill all orders that we send to you prior to the effective date of termination.

c. Termination by us. We may terminate this Agreement at any time, with or without cause, by giving you written notice of such termination, which is effective immediately (or on a later date as specified in the notice).

d. Post-Termination disposition of copies. Following any termination, Amazon.com will have the option to either (1) purchase any or all Products in our possession at the price described in Paragraph 6, or (2) return the Products to you. Unless we terminate this Agreement without cause during the first six months of the term, all returns will be at your expense and subject to the provisions in Paragraph 11. All provisions that reasonably may be construed as surviving the expiration or termination of this Agreement will survive.

20. Relationship of Parties

You and Amazon.com are independent contractors, and nothing in this Agreement creates any partnership, joint venture, agency, franchise, sales representative, or employment relationship, or any kind of exclusive relationship, between the parties. We reserve the right to purchase items from other sources, even if they are similar or identical to your Products, and the right to fulfill customer orders from inventory purchased outside of Advantage, whether from you or from third parties.

21. Limitation of Liability; Disclaimers

We are not liable for indirect, special, or consequential damages or any loss of revenue, profits, or data arising in connection with this Agreement or Advantage, even if we have been advised of the possibility of such damages. Further, our aggregate liability arising with respect to this Agreement and Advantage will not exceed, at any time, the total amounts paid to you under Paragraph 7 of this Agreement during the previous 12-month period.

22. Disputes

Any dispute relating to this Agreement (including any actual or alleged breach hereof), any transactions or activities under this Agreement or your relationship with us or any of our affiliates in which the aggregate total claim for relief sought on behalf of one or more parties exceeds \$7,500 will be adjudicated in any state or federal court in King County, Washington, and you consent to exclusive jurisdiction and venue in such courts.

23. International Shipping Obligations

You are responsible for all customs clearance obligations for any Products you ship to Amazon.com from an international address or we return to you at an international address. These obligations include, but are not limited to, the payment of all customs duties, taxes and other charges, and the identification of yourself as importer and exporter of record, as appropriate. Amazon must not be listed on any documentation as importer, exporter, or consignee. Amazon reserves the right to refuse to accept the shipments that do not comply with these requirements and any costs assessed against or incurred by Amazon as a result will be deducted from your bank account or amounts payable to you at Amazon's discretion.

24. Taxes

Any and all fees, expenses or reimbursements (collectively, "**Amounts**") payable by you pursuant to this Agreement are exclusive of all sales, use, inventory and other taxes, and must be paid to us without deduction or withholdings of any kind. All such taxes are your responsibility and for your account. If Amazon.com is required by law or by administration thereof to collect any such taxes

from you, you will pay such taxes to Amazon.com.
If Amazon is required to withhold any taxes on payments made by us to you, Amazon has the right to withhold such taxes and pay them to the appropriate tax authority; provided however, that Amazon will deliver a receipt for any such taxes withheld or other such documents necessary to enable you to claim a tax credit or deduction for the taxes withheld. Payment to you as reduced by such withholdings will constitute full payment and settlement to you of such amounts.
You will be responsible for all other taxes (including interest and penalties) or fees arising from transactions and the documentation of transactions under Advantage.

25. Miscellaneous

a. Choice of Law. This Agreement is governed by the laws of the State of Washington, without reference to rules governing choice of laws or the Convention on Contracts for the International Sale of Goods.

b. Assignment. You may not assign this Agreement, by operation of law or otherwise, without our prior written consent. Subject to that restriction, this Agreement will be binding on, inure to, and be enforceable against the parties and their respective successors and assigns.

c. No Waiver. Our failure to enforce your strict performance of any provision of this Agreement will not constitute a waiver of our right to enforce such provision or any other provision of this Agreement subsequently.

d. Notices. We will send all notices and other communication to you at the e-mail address you listed in your Advantage application or, where applicable, via your Account Maintenance page. You must send all notices and other communication relating to Advantage to us by using the Contact Us form, available on any page in your Advantage account, or at www.amazon.com/advantage.

e. Severability. If any provision of this Participation Agreement shall be deemed unlawful, void, or for any reason unenforceable, then that provision shall be deemed severable from these terms and conditions and shall not affect the validity and enforceability of any remaining provisions.

f. Entire Agreement. This Agreement represents the entire agreement between the parties with respect to Advantage and supersedes any previous or contemporaneous oral or written agreements and understandings.

This Agreement only governs Amazon.com orders for Products that Amazon.com will sell through Advantage. If Amazon.com orders product from you outside of Advantage (as Amazon-owned inventory), those transactions will be governed by a separate agreement.

Become an Advantage member today!

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ATTACHMENT B



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Associates

Advantage

Web Services

Paid Placements

On-Demand Publishing



Browse Amazon.com Advantage > Rules & Instructions

Advantage Instructions and Rules

Updated February 29, 2008

1. Amazon.com Advantage Application

To enroll in Amazon.com Advantage, you must have an e-mail account and Web access, and you must have North American distribution rights to the Title you want to enroll. Items and/or shipments that do not comply with the instructions and rules may be assessed handling fees and/or returned to you at your expense.

1.1. As part of the enrollment process, you must identify one or more Titles that you would like to include in the Program. You may identify additional Titles at any time during your membership in the Program. We will evaluate each Title and will notify you of its acceptance or rejection. We may reject any Title at our sole discretion, including on the basis that it does not meet any requirements contained in the Instructions and Rules.

1.2. Each Title added to your account must have a valid ISBN (in the case of book Titles), UPC (in the case of CD, DVD, software, video game or video titles) or EAN printed on the back of each Copy as well as a bar code that scans to this same ISBN/UPC/EAN. The scannable bar code's ISBN/UPC/EAN on the title must match the ISBN/UPC/EAN entered on your Advantage application. If the item is shrink-wrapped or in a protective case, the bar code must be scannable without removing that material. Items without a scannable bar code may incur a handling fee and/or may be returned to you at your cost.

1.3. Orders received at our facilities that do not meet our required item and carton level packaging requirements may be assessed a handling fee and/or returned to your and your expense.

1.4. You are responsible to prepay and bear all costs incurred to ship orders to our fulfillment center (including, for example, costs of freight and transit insurance). Freight charges must be marked prepaid as we will not accept shipments sent Cash On Delivery (COD).

2. Item-Level Packaging and Labeling Requirements

2.1. Each shippable unit must have a product identification number (UPC, ISBN, EAN) that is barcoded as well as printed numerically on an easily visible and scannable part of the exterior of the item or its point of sale packaging.

2.2. Any separate items that together comprise one SKU (i.e. Sets) must be packaged as a single unit.

2.3. Items must be free of all unauthorized marketing materials including pamphlets, price tags, display materials or other non-Amazon stickers.

2.4. Vendors shipping items that may require unusual handling or care must notify the vendor services team prior to shipping

2.4.1. Books, Calendars, Card Sets: Each title must have an ISBN or EAN that is printed on the book and a scannable bar code printed on the back of the book. The bar code must scan to match the ISBN or EAN on the book, and the ISBN or EAN on the book must match the ISBN or EAN on the application. **Learn more about ISBNs and EANs.**

Allowable binding or product types listed with ISBNs or EANs include: Books, Maps, Audio CDs, Calendars, Pamphlets, Sheet Music, CD-ROMs, Diaries (or Journals), and Single Issue Magazines. Single sheets of paper are **NOT** eligible for enrollment in Advantage.

2.4.2. CDs:

2.4.2.1. The title and artist name must be printed on and readable from the spine (the thin side of the CD).

2.4.2.2. A scannable barcoded UPC must be on the outside of the package with the UPC bar code clearly visible through the wrapping. **Learn more about UPCs.**

2.4.2.3. The CD must be shrink-wrapped in a protective case, such as a plastic jewel case. CDs in paper or plastic sleeves are not accepted.

2.4.2.4. The bar code must scan to match the UPC on the CD, and the UPC on the CD must match the UPC on the application.

2.4.2.5. The product must be packaged sufficiently to protect the contents during shipment to the customer.

2.4.3. VHS videos, Software, Video Games or DVDs:

2.4.3.1. The title must be printed on and readable from the spine.

2.4.3.2. VHS, Software, Video Games and DVD items must be shrink-wrapped with a scannable barcoded UPC on the outside of the package with the UPC bar code clearly visible through the wrapping. **Learn more about UPCs.**

2.4.4. The bar code must scan to match the UPC on the VHS/DVD, and the UPC on the VHS/DVD must match the UPC on the application.

2.4.5. The product must be packaged sufficiently to protect the contents during shipment to the customer.

2.4.6. When you enroll a title, you set the suggested retail price or "List Price". Titles with a List Price below \$2.99 or above \$999.99 are excluded from the program and will be rejected if enrolled.

2.4.7. Each Title, whether book, CD, video, or DVD, must also satisfy Amazon.com's suitability standards. These standards currently relate to quality, value, subject matter, production standards, and compliance with intellectual property laws. In no event will we accept any Title that we decide in our discretion to be pornographic.

2.4.8. Please note that vinyl albums, 45s, cassettes, eight-track tapes, non-NTSC-formatted videos, and non-region 1 or 0 DVDs are not eligible for the Program.

2.5. Used or damaged products may not be sold via Amazon.com Advantage. If you have used products to sell, please visit Amazon Marketplace.

2.5.1. If your application is successfully received, we will send you a thank-you e-mail within 24 hours. If you don't receive this e-mail, we did not receive your application, and we ask that you try again.

3. Application Approval and Ordering of Titles

3.1. Your Advantage account is not considered fully active until you have successfully enrolled at least one item.

3.2. Once you have successfully enrolled at least one title, we will send you an initial order e-mail. This e-mail contains instructions on how to log in as a member and access the "Orders" tab of the Vendor account website to confirm your order.

3.3. Confirm your order, get shipping instructions, and send copies of your Title to the designated fulfillment center.

3.4. To confirm your order, log in as a member and click on the "Orders" tab. Click on the Order ID to confirm your order and get your shipping instructions. Confirm your Order and then print out the Shipping Label and Packing Slip. Send copies to the address on the Shipping Label. Include the Packing Slip in the box with the items you are shipping.

3.5. Orders received at our facilities that do not meet our required item and carton level packaging requirements may be assessed a handling fee and/or returned to your and your expense.

4. Carton Packaging Requirements

4.1. Each carton must contain items associated with no more than five (5) Order IDs.

4.2. Cartons must sufficiently protect contents, including the protection of point of sale packaging, during transit and receipt. (For example: RSC, B flute, ECT-32, 200BH)

4.3. Cartons may not exceed 50 lbs. unless one single shippable unit exceeds 50 lbs itself. Cartons containing a single item over 50 lbs must be clearly labeled "Heavy Weight" on the top and sides.

4.4. Unacceptable forms of dunnage include crinkle wrap, shredded paper and peanuts of any kind.

4.5. Acceptable forms of dunnage include foam, air pillows and full sheets of paper.

4.6. No "gaylords" (pallet sized cartons) or point of sale packaging may be used as cartons.

4.7. Carton Labeling:

4.7.1. Required: Each carton must arrive with a shipping label either printed on it or affixed to it, in a location and condition that is easily visible and scannable.

4.7.2. You must use the Printable Shipping Label available for printing after you confirm each order OR if you are unable to use the printable shipping label mark each carton clearly with the following information:

4.7.2.1. Order ID (list of all Order IDs with which contents are associated)

4.7.2.2. To: Amazon.com

4.7.2.3. Attn: (customer name if other than Amazon.com)

4.7.2.4. Address of the Fulfillment Center. Example:

Amazon.com.kydc, Inc.

INVENTORY

1850 Mercer Drive

Lexington, KY 40511

4.7.2.5. From: (Your Company's Name)

4.7.2.6. Carton# (# _____ of total # _____)

4.7.2.7. For cartons that contain only one item ID (UPC/EAN/ISBN) also include:

4.7.2.8. Product ID# (UPC/EAN/ISBN, or another)

4.7.2.9. Quantity (number of units contained)

4.8. If it is impossible to put all the Order IDs (up to 5 per carton is acceptable) on the carton label, the label should indicate "Multiple Order IDs" (with no Order IDs listed) and a carton level packing slip that has all Order ID information for the container must be included.

4.9. Cartons that contain mixed SKUs or partial cartons must be clearly labeled as such.

4.10. Separate items packaged together, that are intended to be sold together as a single set, must be clearly labeled with "Sold as Set" to prevent pieces of the set from being separated. The set must also have a single, unmistakable bar code that identifies the entire set. Bar codes on individual component pieces of the sets must not be visible.

5. Replenishment

When inventory of your Title gets low, Amazon.com will send you an e-mail requesting more Copies. Please check that the ISBN or UPC on the items you are shipping matches the ISBN or UPC listed in the order, and that the scannable bar code still matches the ISBN or UPC on your Title. If a new edition is available for your Title, the new edition cannot be substituted for the previous edition. If for any reason you cannot fill this or future orders for an ISBN or UPC (i.e. out of stock, temporarily or permanently out of print, etc.), you must suspend the title in your Advantage account. To change an item Status, click the "Update Item Status" link in the Items tab. Failure to notify us of a change in status may result in suspension of your Amazon.com Advantage Title(s) and/or your account.

6. Proof of Delivery

Amazon.com will not issue compensation for packages or items lost in transit to our fulfillment center. Compensation for lost packages or items can only be issued if Proof of Delivery is available to indicate the item was in fact accepted by our fulfillment center. Proof of Delivery to our fulfillment center must include all of the following information: (1) shipper's tracking ID number, (2) date and time of delivery, (3) location of delivery, (4) weight of the package upon shipment, (5) name of Amazon.com receiver. Compensation for partially received shipments requires proof of the item's weight at the time of arrival at our fulfillment center. We strongly recommend choosing a shipping method that is traceable and/or insuring your parcel with your shipper.

7. Payment

7.1. Under Advantage, Amazon.com pays the vendor for copies shipped to use for sale only after we have sold the item to an Amazon.com customer.

7.2. The standard purchase discount is 55% - you keep 45% of the List Price. The standard

55% purchase discount means that Amazon.com is entitled to a 55% discount on the List Price for each unit that sells. You, the vendor, receive 45% of the List Price. You set the List Price, also known as Suggested Retail Price, of your products, and all payments made to you are calculated based on the List Price. If Amazon.com decides to further reduce the sales price to the customer below the List Price, the customer discount comes out of Amazon.com's percentage.

7.2.1. Non-standard terms under Advantage Professional and non-profit organizations (501c3) will receive confirmation of terms in writing via email.

7.3. Payment is issued at the end of each month for copies sold in the previous month. All payments are made in U.S. dollars. For example, if a Copy sells any time during the month of January, Amazon.com will issue payment by the last day of February.

7.4. Payment is made via Electronic Funds Transfer (EFT) to the U.S. bank account you provide upon account set up. If you are unable to accept Electronic Funds Transfer (EFT) payments, we will pay you by check. We charge a processing fee of \$15.00 per check and will issue checks only if the amount payable is at least \$100; if you need to be paid by check we will accrue and withhold payments until the total amount due is at least \$100. Since EFT is not yet available for non-U.S. bank accounts, we do not apply the \$15.00 check processing fee for international vendors that do not have a U.S. bank account. We will still hold payment until payment exceeds \$100.

7.5. Do not send us invoices for Copies shipped to us since payment is made automatically and is based on customer sales. Sending invoices for Advantage orders may result in delayed payment.

8. International Shipments

8.1. You are responsible for costs and other obligations associated with shipments that Amazon.com receives from, or ships to you at, an international address, including but not limited to all customs duties, taxes and other charges, as well as the identification of yourself as importer and exporter of record, as appropriate. Amazon must not be listed on any documentation as importer, exporter, or consignee.

8.2. The delivery term when shipping items internationally must be D.D.P (Delivery Duty Paid) - Destination, which will be the Amazon fulfillment center to which you are required to send your Products.

9. Member Help

9.1. Additional help and information for members can be found on the Advantage vendor website.

9.1.1. Log into your account and click on "HELP" in the upper right hand corner to access the Advantage Help & Information Center. Read the New Vendor FAQ to learn about adding new titles, how to confirm an Order, uploading cover art, etc.

9.2. You may contact the Advantage Vendor Services Team at any time with questions regarding your account.

9.2.1. The best way to contact the Vendor Services team is to log into your Advantage account, click on "Contact Us" at the bottom of any page and follow the instructions. We strive to answer all inquiries within 24 hours.

Still have questions?

Click here to read Advantage Frequently Asked Questions.

Click here to Contact Us!

Where's My Stuff?

- Track your recent orders.
- View or change your orders in Your Account.

Shipping & Returns

- See our shipping rates & policies.
- Return an item (here's our Returns Policy).

Need Help?

- Forgot your password? Click here.
- Redeem or buy a gift certificate.
- Visit our Help department.

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ATTACHMENT C

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Bargain Books

Textbooks



March 31, 2008

Open letter to interested parties:

We wanted to make sure those who are interested have an opportunity to understand what we're changing with print on demand and why we're doing so.

One question that we've seen is a simple one. Is Amazon requiring that print-on-demand books be printed inside Amazon's own fulfillment centers, and if so why?

Yes. Modern POD printing machines can print and bind a book in less than two hours. If the POD printing machines reside inside our own fulfillment centers, we can more quickly ship the POD book to customers -- including in those cases where the POD book needs to be married together with another item. If a customer orders a POD item together with an item that we're holding in inventory -- a common case -- we can quickly print and bind the POD item, pick the inventoried item, and ship the two together in one box, and we can do so quickly. If the POD item were to be printed at a third party, we'd have to wait for it to be transhipped to our fulfillment center before it could be married together with the inventoried item.

Speed of shipping is a key customer experience focus for us and it has been for many years. Amazon Prime is an example of a successful and growing program that is driving up our speed of shipment with customers. POD items printed inside our own fulfillment centers can make our Amazon Prime cutoff times. POD items printed outside cannot.

Simply put, we can provide a better, more timely customer experience if the POD titles are printed inside our own fulfillment centers. In addition, printing these titles in our own fulfillment centers saves transportation costs and transportation fuel.

Another question we've seen: Do I need to switch completely to having my POD titles printed at Amazon?

No, there is no request for exclusivity. Any publisher can use Amazon's POD service just for those units that ship from Amazon and continue to use a different POD service provider for distribution through other channels.

Alternatively, you can use a different POD service provider for all your units. In that case, we ask that you pre-produce a small number of

copies of each title (typically five copies), and send those to us in advance (Amazon Advantage Program—successfully used by thousands of big and small publishers). We will inventory those copies. That small cache of inventory allows us 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. Unlike POD, this alternative is not completely "inventoryless." However, as a practical matter, five copies is a small enough quantity that it is economically close to an inventoryless model.

Might Amazon reconsider this new policy?

Only if we can find an even better way to serve our customers faster. Over the years we've made many improvements to our service level for consumers. Some of these changes have caused consternation at times, but we have always stuck with the change when we believe it's good for customers. An early example: many years ago we started offering customer reviews on our website. This was a pioneering thing to do at the time. The fact that we allowed *negative* customer reviews confounded many publishers -- some were downright angry. One publisher wrote to us asking if we understood our business: "You make money when you sell things! Take down these negative reviews!" Our point of view was that our job was to help customers make purchase decisions. It made sense to us to stick with the customer-centric position of embracing customer reviews, even negative ones.

Another example: a few years ago, we made the decision to offer used books, and to make those used copies available directly alongside the new editions. This caused significant consternation, but we stood by the decision because we were convinced it was right for customers. Sometimes a used book will do and it can sometimes be had at a significant cost savings relative to a new book. We stuck with the customer-friendly decision.

Our decision with POD is the same. Once a book is in digital format, it can be quickly printed on modern POD printing equipment. It isn't logical or efficient to print a POD book in a third place, and then physically ship the book to our fulfillment centers. It makes more sense to produce the books on site, saving transportation costs and transportation fuel, and significantly speeding the shipment to our customers and Amazon Prime members.

We hope this helps those who are interested understand what we're working to do and why. We believe our customer-focused approach helps the entire industry in the long term by selling more books.

Sincerely,

The Amazon.com Books Team

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- View or change your orders in [Your Account](#).

Shipping & Returns

- See our [shipping rates & policies](#).
- [Return](#) an item (here's our [Returns Policy](#)).

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