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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANGELA HOGAN, *et al.*,

Plaintiffs,

v.

AMAZON.COM, Inc.,

Defendants.

Case No. C21-996-RSM

ORDER GRANTING DEFENDANT
AMAZON.COM, INC.’S MOTION TO
DISMISS WITH LEAVE TO AMEND

I. INTRODUCTION

This matter comes before the Court on Defendant Amazon.com, Inc. (“Amazon”)’s Motion to Dismiss. Dkt. #26. Plaintiffs oppose Amazon’s Motion. Dkt. #35. The Court has determined oral argument is unnecessary. For the reasons stated below, the Court GRANTS the Motion and dismisses Plaintiffs’ claims with leave to amend.

II. BACKGROUND

For purposes of this Motion to Dismiss, the Court will accept all facts stated in the Consolidated Amended Class Action Complaint, Dkt. #23 (hereinafter, “Amended Complaint” or “Compl.”) as true.

Defendant Amazon operates an online store, Amazon.com, in which it and other third-parties sell goods directly to consumers. Compl. ¶ 1. Plaintiffs allege that Amazon controls more

1 than 50% of the U.S. retail e-commerce market by dollar amount and is projected to control
2 73.5% of that market by 2026. *Id.* ¶¶ 4, 48. Moreover, 65 to 70% of all online retail transactions
3 in the United States allegedly occur through Amazon. *Id.* ¶ 4, 185. Amazon also began
4 participating in the logistics market when it launched Fulfillment by Amazon (“FBA”) in 2006,
5 a logistics service that provides warehousing, packing, and shipping to third-party sellers
6 (referred to in the Amended Complaint as “Sellers”). *Id.* ¶ 13. Purportedly, the third-party sellers
7 account for over 50% of the items purchased through Amazon.com. *Id.* Amazon’s other
8 competitors in the logistics industry include FedEx, UPS, and the U.S. Postal Service. *Id.* ¶ 14.

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10 Third-party sellers on Amazon.com are technically not required to use FBA, however
11 Amazon conditions a third-party seller’s access to a “Prime Badge”—and with it, placement in
12 the “Buy Box”—on the seller’s purchasing FBA. *Id.* ¶ 20. The Prime Badge is associated with
13 Amazon Prime—Amazon’s first ever membership program unveiled in February 2005. *Id.* ¶ 2.
14 At Amazon Prime’s inception, an annual membership fee of \$79 provided Prime members with
15 unlimited two-day shipping at no extra cost and one-day shipping for \$3.99 per item. *Id.*
16 Plaintiffs estimate there are more than 140 million Prime members in the United States. *Id.* ¶ 4.
17 The price for Prime membership, at the time Plaintiffs filed their Amended Complaint, was
18 \$12.99 per month. *Id.* ¶ 6. The Prime Badge appears next to products on Amazon’s website that
19 are eligible for free, fast shipping to Prime members. *Id.* ¶ 6. Plaintiffs allege that products
20 offered by sellers with a Prime Badge are placed higher in Amazon’s search results and are
21 generally the only products featured in the Buy Box. *Id.* ¶ 19. The Buy Box is the section on
22 the right side of an Amazon product detail page where customers can add a product to their cart
23 or “buy now,” and purportedly is how 90% of consumer purchases on Amazon.com are made.
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27 *Id.* ¶¶ 19
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1 Plaintiffs Angela Hogan and Andrea Seberson are Amazon Prime members. *Id.* ¶¶ 42–
2 43. Ms. Hogan has had an Amazon Prime membership for most of the past seven years and in
3 that time has purchased items from Amazon and third-party sellers on Amazon.com including
4 toiletries, consumer electronics, clothing, home wares, and jewelry. *Id.* ¶ 42. Ms. Seberson has
5 had an Amazon Prime membership for a number of years and during that time has also made
6 numerous purchases through Amazon.com for items such as books, camping equipment, and
7 garden supplies among others. *Id.* ¶ 43.

9 Plaintiffs filed their Amended Complaint on February 2, 2022, suing on behalf of a
10 putative class of consumers who purchased goods on Amazon.com through the “Buy Box” that
11 were packaged and shipped using FBA. *Id.* ¶ 151. Plaintiffs bring two antitrust claims for: (1)
12 violation of Section 1 of the Sherman Act (15 U.S.C. § 1) – unlawful tying arrangement
13 (hereinafter, the “Section 1” or “tying” claim); and (2) violation of Section 2 of the Sherman Act
14 (15 U.S.C. § 2) – use of monopoly level of power to harm competition through tying scheme
15 (hereinafter, the “Section 2” or “monopolization” claim). *Id.* ¶¶ 173–194.

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18 Plaintiffs’ tying claim is based on two distinct products offered by Amazon to third-party
19 sellers: (1) the tying product – placement in the Buy Box; and (2) the tied product – FBA. *Id.* ¶
20 175. Plaintiffs allege that “Amazon’s economic power in the market for favorable placement on
21 Amazon’s website (the tying product)—and in the market for favorable product placement in e-
22 commerce more broadly—was and is sufficient to coerce Sellers to purchase Amazon’s
23 Fulfillment services (the tied product)” and through this “anticompetitive scheme” Amazon has
24 “decreased competition in the logistics market (the tied product market) and has put numerous
25 competitors in that market out of business.” *Id.* ¶¶ 177–178. As a result, Plaintiffs allege that
26 “Amazon’s unlawful tying arrangement has injured Plaintiffs and Class Members by directly
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1 leading to higher prices for items that Plaintiffs and Class Members purchased through Amazon’s
2 Buy Box.” *Id.* ¶ 182.

3 Plaintiffs’ monopolization claim relates to Amazon’s alleged monopoly level of market
4 power in two markets (the tying product markets): (1) the online retail market in the United States
5 (also referred to as the retail e-commerce market), in which Plaintiffs claim Amazon controls
6 about 65% to 70% of all marketplace sales, and (ii) the market for placement in Amazon’s Buy
7 Box, over which Amazon purportedly has complete control. *Id.* ¶ 185. Plaintiffs allege that
8 “Amazon used its power in one or both these markets to foreclose competition, to gain a
9 competitive advantage, or to destroy competitors in the United States market for logistics services
10 for retail goods (the tied-product market)—namely, the warehousing, packing, and shipping of
11 retail goods.” *Id.* ¶ 188. Specifically, Plaintiffs allege that “[b]y tying a Seller’s access to the
12 Buy Box to a Seller’s purchasing FBA, Amazon has used its monopoly level of power to force
13 many Sellers who would otherwise prefer a different logistics provider to instead pay for
14 Amazon’s Fulfillment services.” *Id.* ¶ 189. As a result, Plaintiffs claim that Amazon has “injured
15 Plaintiffs and Class Members by directly leading to higher prices for items that Plaintiffs and
16 Class Members purchased through Amazon’s Buy Box.” *Id.* ¶ 194.

20 III. DISCUSSION

21 A. Legal Standard

22 Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for
23 failure to state a claim. The court must assume the truth of the complaint's factual allegations
24 and credit all reasonable inferences arising from those allegations. *Sanders v. Brown*, 504 F.3d
25 903, 910 (9th Cir. 2007). A court “need not accept as true conclusory allegations that are
26 contradicted by documents referred to in the complaint.” *Manzarek v. St. Paul Fire & Marine*
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1 *Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Instead, the plaintiff must point to factual
2 allegations that “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
3 550 U.S. 544, 568, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The complaint avoids dismissal if
4 there is “any set of facts consistent with the allegations in the complaint” that would entitle the
5 plaintiff to relief. *Id.* at 563, 127 S.Ct. 1955; *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct.
6 1937, 173 L.Ed.2d 868 (2009).

8 **B. Analysis**

9 Amazon moves to dismiss Plaintiffs’ claims, alleging various grounds for dismissal: (1)
10 Plaintiffs lack antitrust standing; (2) Plaintiffs fail to allege a Section 1 tying claim because they
11 do not identify separate, tied products; (3) Plaintiffs fail to allege a Section 1 tying claim because
12 they fail to allege market power in the tying product market or that any purchaser was “coerced”
13 into purchasing the tied product; (4) Plaintiffs fail to allege a Section 1 tying claim because they
14 fail to show sufficient anticompetitive effects in the tied product market (5); Plaintiffs fail to
15 allege a Section 2 monopolization claim because they do not allege actionable anticompetitive
16 conduct; (6) Plaintiffs fail to allege a Section 2 monopolization claim because they do not allege
17 monopoly power in the relevant market; and (7) Plaintiffs’ claims are time-barred. Dkt. # 26 at
18 6–22. The Court addresses antitrust standing first and, for the reasons explained below, finds
19 that Plaintiffs lack antitrust standing to bring their tying and monopolization claims as pled.
20 Because Plaintiffs’ claims fail without antitrust standing, the Court does not address Amazon’s
21 other arguments in this Order.
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25 Amazon claims that Plaintiffs’ Sherman Act claims must be dismissed because Plaintiffs
26 lack antitrust standing. Dkt. #26 at 14. “Antitrust standing is distinct from Article III standing.”
27 *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1256 (9th Cir. 2008) (citation omitted). A plaintiff
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1 who satisfies the constitutional requirement of injury in fact is not necessarily a proper party to
2 bring a private antitrust action. *See, e.g., City of Oakland v. Oakland Raiders*, 20 F.4th 441, 452–
3 53, 455 (9th Cir. 2021) (finding Article III standing but not antitrust standing). In *Associated*
4 *General Contractors of California v. California State Council of Carpenters* (“AGC”), 459 U.S.
5 519 (1983), the Supreme Court identified the factors a court must consider to determine whether
6 plaintiffs have standing to bring an antitrust claim: (1) whether the plaintiffs suffered “antitrust
7 injury,” i.e., the type of injury the antitrust laws were intended to prevent; (2) the directness of
8 the injury; (3) the speculative nature of the harm; (4) the risk of duplicative recovery; and (5) the
9 complexity in apportioning damages. *City of Oakland*, 20 F.4th at 455 & n.10. Further, in *Illinois*
10 *Brick Co. v. Illinois*, the Supreme Court adopted a bright-line rule that indirect purchasers may
11 not bring private antitrust damage claims. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 723–26,
12 745–47 (1977). Specifically, the *Illinois Brick* rule precludes “indirect purchasers in a chain of
13 distribution ... from suing for damages based on unlawful overcharges passed on to them by
14 intermediates in the distribution chain who purchased directly from the alleged antitrust violator.”
15 *State of Ariz. v. Shamrock Foods Co.*, 729 F.2d 1208, 1211–12 (9th Cir. 1984) (citing 431 U.S.
16 at 746, 97 S.Ct. 2061); *see also Associated Gen. Contractors of California, Inc. v. California*
17 *State Council of Carpenters*, 459 U.S. 519, 545, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (applying
18 the *Illinois Brick* rule based on “the problems of identifying damages and apportioning them
19 among directly victimized contractors and subcontractors and indirectly affected employees and
20 union entities”). Amazon asserts that Plaintiffs lack standing under both *AGC* and *Illinois Brick*.
21 Dkt. #26 at 14.

22 As to the first *AGC* factor, a “showing of antitrust injury is necessary, but not always
23 sufficient, to establish standing.” *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5
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1 (1986). Antitrust injury requires “(1) unlawful conduct, (2) causing an injury to the plaintiff, (3)
2 that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust
3 laws were intended to prevent.” *City of Oakland*, 20 F.4th at 456. Furthermore, in assessing
4 alleged antitrust injuries, courts must focus on anticompetitive effects “in the market where
5 competition is [allegedly] being restrained.” *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974,
6 992 (9th Cir. 2020) (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1057 (9th
7 Cir. 1999)). “Parties whose injuries, though flowing from that which makes the defendant’s
8 conduct unlawful, are experienced in another market do not suffer antitrust injury.” *Id.*

9
10 Amazon argues that Plaintiffs’ Sherman Act claims both fail because they are not
11 purchasers in the market in which competition was allegedly restrained. For Plaintiffs’ tying
12 claim, Amazon argues that Plaintiffs assert anticompetitive harm in the market for fulfillment or
13 logistics services pointing out that the Amended Complaint describes the tying product as
14 “placement in the Buy Box” (Featured Offer), the tied product as “Fulfillment by Amazon,” and
15 the alleged market in which the tied product competes as the “market for logistics for retail goods
16 in the United States—namely, the warehousing, packing, and shipping of retail goods.” Dkt. #26
17 at 15 (citing Compl. ¶ 175). As pled, Amazon argues that Plaintiffs do not purchase the tied
18 product as they “are not retailers who purchase logistics services for the warehousing, packing,
19 and shipping of their goods. Rather, Plaintiffs allege they purchased ‘items’ ([Compl.] ¶ 182)
20 such as ‘skin care products, shampoo, consumer electronics, clothing, children’s toys, child-proof
21 cabinet locks, stroller accessories, bedding, kitchen supplies, eating utensils, drinkware,
22 skateboarding equipment, and jewelry’ ([Compl.] ¶ 42).” Amazon argues this is fatal because
23 “[t]he key question in an illegal tying claim is whether the plaintiff purchased the tied product
24 from the antitrust defendant.” Dkt. #26 at 16 (emphasis removed) (quoting *Warren Gen. Hosp.*

1 v. *Amgen Inc.*, 643 F.3d 77, 88 (3d Cir. 2011); accord *Lakeland Reg'l Med. Ctr., Inc. v. Astellas*
2 *US, LLC*, 763 F.3d 1280, 1289 (11th Cir. 2014)). Amazon argues that because Plaintiffs do not
3 allege that they purchased the allegedly tied product—FBA—they cannot possibly have suffered
4 antitrust injury. Amazon asserts Plaintiffs' monopolization claim fails for the same reason,
5 because their monopolization claim is also based on harm in the allegedly tied product market:
6 “logistical services for retail goods.” Dkt. #26 at 16 (quoting Compl. ¶ 188). And, as with the
7 tying claim, the harm alleged in a monopolization claim must occur in the allegedly monopolized
8 market. *Id.* (citing *Qualcomm*, 969 F.3d at 992). But, again, the Amended Complaint does not
9 allege that end consumers such as Plaintiffs purchase fulfillment/logistics services—instead, they
10 purchase retail goods—thereby failing to allege antitrust injury. *Id.* (citing Compl. ¶¶ 20, 22, 24–
11 25).

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14 In response, Plaintiffs assert that they are participants in the fulfillment/logistics market
15 because Plaintiffs themselves purchase FBA. In support, Plaintiffs cite to the Amazon Services
16 Business Solutions Agreement (Dkt. #36, Ex. 1).¹ Plaintiffs point to Section S-4 and S-5 of the
17 Amazon Services Business Solutions Agreement. Dkt. #35 at 7–8. Section S-5 states in relevant
18 part: “[Amazon] will remit to you [,the third-party seller,] your available balance...[f]or each
19 remittance, your available balance is equal to any Sales Proceeds not previously remitted to you
20[.]” while Section S-4 clarifies that: “Sales Proceeds will not include any shipping charges
21 set by us in the case of Your Transactions that consist solely of products fulfilled using
22 Fulfillment by Amazon.” Dkt. #36-1 at 23–24. In response, Amazon points to Section F-9.1 of
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26 ¹ Plaintiffs argue that the Amazon Services Business Solutions Agreement is both incorporated by reference into the
27 Amended Complaint and is the proper subject of judicial notice. Dkt. #35 at 5 n.5, 7–8. Plaintiffs cite to Paragraphs
28 49–50 of their Amended Complaint as support for their incorporation by reference argument. The Court finds it
entirely unclear how the paragraphs Plaintiffs reference as support for incorporation by reference have anything to
do with the Amazon Services Business Solutions Agreement. However, the Court will consider the Amazon
Services Business Solutions Agreement because it meets the standards for judicial notice set forth in Fed. R. Evid.
201(b).

1 the Amazon Services Business Solutions Agreement titled Handling and Storage Fees, which
2 states: “You [, the third-party seller,] will pay [Amazon] the applicable fees described in the
3 applicable Fulfillment by Amazon Fee schedule.” Dkt. #36-1 at 34. In reading these sections of
4 the Amazon Services Business Solutions Agreement, the Court finds that the Amazon Services
5 Business Solutions Agreement does not establish Plaintiffs pay Amazon for FBA. The Court
6 agrees with Amazon that Plaintiffs’ Amended Complaint is, instead, replete with allegations that
7 third-party sellers, and not Plaintiffs, purchase FBA. Dkt. #38 at 2 (citing *e.g.*, Compl. ¶¶ 24–
8 26, 42–43, 129–136, 151, 182, 194)).

10 Plaintiffs also argue that regardless of the Amazon Services Business Solutions
11 Agreement, Plaintiffs must purchase FBA when they purchase Amazon products on
12 Amazon.com, i.e., transactions that do not involve a third-party seller. Dkt. #35 at 6–8. In
13 response, Amazon points out that Plaintiffs’ Amended Complaint alleges that Plaintiffs do not
14 pay for shipping. The Amended Complaint states that both Plaintiffs are Amazon Prime
15 members (Compl. ¶¶ 42–43), and therefore receive “free, fast shipping” of any product with a
16 Prime Badge (*Id.* ¶ 6). And according to the Amended Complaint, all products shipped through
17 FBA receive the Prime Badge. *Id.* ¶ 80(iii); *see also* ¶¶ 19–20. Further, Plaintiffs’ claims pertain
18 only to items purchased through the Featured Offer (¶¶ 151, 182, 194), and, at least according to
19 the Amended Complaint, “only products with the Prime Badge are offered through the [Featured
20 Offer].” *Id.* ¶ 24. Amazon argues that this must mean, for every relevant sale regardless of the
21 seller, Plaintiffs allege they purchased a Prime-badged product and received free shipping.
22 Indeed, every example the Amended Complaint provides of the consumer-side shipping cost for
23 items in the Featured Offer shows that the consumer received “FREE delivery.” Dkt. #38 at 3
24 (citing Compl. ¶¶ 120–122). Amazon argues that despite Plaintiffs’ assertions that FBA shipping
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1 charges are paid directly by the consumer, the Amended Complaint reveals that Plaintiffs paid
2 no such charges. The Court agrees that taking Plaintiffs' Amended Complaint as true, it does
3 not see room for argument that Plaintiffs somehow directly paid for FBA shipping charges
4 themselves.

5 Plaintiffs also argue that the Supreme Court's decision in *Apple v. Pepper*, 139 S. Ct.
6 1514 (2019) salvages their claims because the charges for FBA shipping are akin to markups
7 which are ultimately borne by Plaintiffs. In *Pepper*, consumers brought an antitrust class action
8 against Apple, Inc. ("Apple") alleging that Apple attempted to monopolize the market for
9 smartphone apps. 139 S. Ct. at 1520. The sole question before the Supreme Court was whether
10 the consumers were proper plaintiffs for that particular antitrust suit—in particular whether the
11 consumers were "direct purchasers" of the monopolized product (the iPhone apps) from Apple
12 such that under *Illinois Brick* they had antitrust standing for alleged monopolization. The
13 Supreme Court found:
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16 In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom
17 of a vertical distribution chain who are attempting to sue manufacturers at the top of the
18 chain. There is no intermediary in the distribution chain between Apple and the
19 consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the
20 alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to
21 Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the iPhone
owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust
suit.

22 *Id.* at 1521. The Court does not find that *Pepper* saves Plaintiffs' claims—they still have not
23 established antitrust standing. Unlike in *Pepper*, where plaintiffs purchased the allegedly
24 monopolized product (iPhone apps), here Plaintiffs did not pay for the allegedly monopolized
25 product (logistic services, specifically FBA).
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27 Finally, Plaintiffs argue that they have antitrust injury because the Supreme established
28 in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) that "the market participant

1 requirement can also be satisfied by showing that plaintiffs’ injuries were ‘inextricably
2 intertwined’ with the injuries of the actual market participants.” Dkt. #35 at 9–10 (quoting *In re*
3 *WellPoint, Inc. Out-of-Network “UCR” Rates Litig.*, No. MDL 09-2074 PSG (FFMx), 2013 U.S.
4 Dist. LEXIS 208787, at *27 (C.D. Cal. July 19, 2013) (citations omitted). Here, Plaintiffs argue,
5 “Plaintiffs’ injuries (paying supracompetitive prices for items shipped using FBA) are
6 inextricably intertwined with the injuries inflicted by Amazon on third-party Sellers (being
7 forced to use the more expensive and inferior Amazon Fulfillment services to gain access to the
8 Buy Box).” *Id.* at 10. In *McCready*, the plaintiff purchased the product (a restrictive health-
9 insurance policy) that formed the basis of the alleged conspiracy. *McCready*, 457 U.S. at 468.
10 The plaintiff had a health plan that paid for psychotherapy services rendered by psychiatrists but
11 not psychologists, and alleged that the health insurer had engaged in a conspiracy with a
12 psychiatrists’ organization to prevent psychologists’ entry into the market. *Id.* at 467–70. The
13 Court held the plaintiff could bring suit under Section 4 of the Clayton Act despite not herself
14 being one of the affected competitors, i.e., a psychologist. *Id.* at 478–79. Because denying
15 coverage to consumers was the “very means” through which the conspirators allegedly effected
16 the scheme, plaintiff’s injuries were “inextricably intertwined” with the anticompetitive harm.
17 *Id.* at 479, 484. Amazon argues that Plaintiffs’ allegations are not analogous to those held
18 sufficient in *McCready*, as it would be third-party sellers—not consumers—that sit in the position
19 analogous to the *McCready* plaintiff: Sellers are the entities that allegedly would be purchasing
20 from logistics competitors absent the conduct. The Court agrees. Plaintiffs once again fail to
21 recognize that the tied product at issue is the FBA charges—Plaintiffs do not dispute this or
22 attempt to argue otherwise in their response.
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1 For these reasons, the Court finds that Plaintiffs lack antitrust injury as pled. Because
2 antitrust injury is a necessary finding for antitrust standing, Plaintiffs' Sherman Act claims must
3 fail, and the Court need not analyze the remaining *AGC* factors. As Amazon argues, Plaintiffs
4 are at best indirect purchasers and would be precluded from bringing antitrust claims by the
5 bright-line rule established in *Illinois Brick* that authorizes suits by *direct* purchasers but bars
6 suits by *indirect* purchasers. *See Illinois Brick*, 431 U.S. at 746.
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8 **IV. CONCLUSION**

9 Having reviewed the relevant pleading and the remainder of the record, the Court hereby
10 finds and ORDERS:

- 11 1) Defendant's Motion to Dismiss (Dkt. #26) is GRANTED.
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13 2) Plaintiffs' Amended Complaint is DISMISSED WITHOUT PREJUDICE with leave
14 to amend.
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16 3) Plaintiffs shall have thirty (30) days to file a second amended complaint. If Plaintiffs
17 fail to do so, this case will be closed.

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19 DATED this 20th day of April, 2023.
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22 RICARDO S. MARTINEZ
23 UNITED STATES DISTRICT JUDGE
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