



**COMMENTS OF ONLINE MERCHANTS GUILD  
IN RESPONSE TO FTC REQUEST FOR PUBLIC COMMENT  
REGARDING CONTRACT TERMS THAT MAY HARM FAIR COMPETITION**

The Online Merchants Guild is an association of independent ecommerce sellers committed to protecting small businesses and consumers against injurious marketplace manipulation that threatens competitive opportunities and unfairly burdens domestic small businesses.

The Guild respectfully submits the following comments for consideration by the FTC. These comments are intended to demonstrate how Amazon abuses its position as the dominate ecommerce marketplace to impose unrealistic contractual demands upon over 500K US 3<sup>rd</sup> Party Merchants, many of which are entirely dependent on Amazon's platform for their businesses to survive.

**FAIR PRICE POLICY**

Amazon's "Fair Price Policy" is injurious to both 3<sup>rd</sup> party merchants which the Guild represents as well as consumers who may experience higher pricing over time because of the policy according to economic research.<sup>1</sup>

Merchants find themselves in a situation where they unexpectedly face a price cap on products already in Amazon's warehouse. This often leads to being forced to either pay to recall the inventory or sell at a non-profitable price point as Amazon does not appear to take inventory, shipping or fulfillment costs into account when comparing external pricing. One Guild member was even told by an Amazon employee that the policy could be read to require matching even Brick & Mortar pricing.

Consumers who could take advantage a brand offering lower prices via their own website or another marketplace with lower fees do not have that option as Amazon has been known to deactivate Amazon listings for price differences of as little as one cent. This leads to a de-facto internet-wide price floor based on Amazon's fulfillment costs which is the basis for antitrust litigation against Amazon from the DC Attorney General's office.<sup>2</sup>

In an interview about the case Washington DC Attorney General Karl Racine referenced pressure that Congress put on Amazon in 2018 for a functionally equivalent "Price parity" clause and referred to the way that Amazon removed the policy in 2019, only to insert essentially the same language in a different section of its policies as a "bait and switch". We wholeheartedly agree with this assessment.

Meanwhile, a key aspect of what makes the policy unfair to both 3P Merchants AND consumers is that Amazon only appears to enforce this policy on its 3<sup>rd</sup> party merchants and not its own retail division. We have attached several examples of products where Amazon's price is higher than its competition in violation of its own policy with no apparent repercussions (See Exhibit A) and would be happy to provide further data backing up this trend if it would be helpful. We have also recently had several examples provided to us by our members where Amazon raises their price significantly, takes the "buy box" and then hits said members with a "Fair Price Violation" when they try to raise their price alongside Amazon.

In conclusion we would like to quote a question posed to Washington DC Attorney General Karl Racine on CNBC's "The Exchange" which we feel sums this up nicely.

Question: "That's exactly how the market leader tries to stay the market leader, right?"

Answer: "You're exactly right - That's exactly how the market leader uses its dominance to force the third-party seller to either access its marketplace and other marketplaces under Amazon's terms or not play on the Amazon marketplace and we think that's an incorrect use of monopoly power."<sup>3</sup>

### **Loss of Due Process Rights and Forced Arbitration**

Amazon destroys business first, asks questions later, or not at all. Amazon is quick to remove products, hold funds or suspend accounts without providing a clear reason or evidence to support their decision to do so. In addition, there is no way to address issues directly with decision makers. Sometimes it seems businesses get destroyed because Amazon overly relies on and cannot control its own AI bots.<sup>4</sup>

When suspended, 3P Merchant's only feasible option is Amazon's internal appeal process where Amazon is, as one seller put it "the judge, the jury, and the executioner" and seemingly the only way out is to admit guilt of some sort.<sup>5</sup>

As an example, let us consider the case of Washington based candy maker Chukar Cherries. On July 19<sup>th</sup> they were suspended from Amazon with no prior warning by an automated email. "Your Amazon.com selling privileges have been removed," the email read. "Your listings have been disabled. Funds will not be transferred to you but will be held in your account."

Amazon's fraud prevention bots concluded that Chukar, an established seller on Amazon of 17+ years was related to another suspended account from China that based on feedback has likely been suspended from the platform since early 2019.

Chukar's general manager Tim Oten spent over two months submitting numerous appeals to Amazon, attempting to prove that there was no connection between them and this seemingly random other seller but continually received automated responses that Amazon had "received your submission but (did) not have enough information to reactivate your account at this time,"

As they attempted to get the suspension lifted, Chukar attempted to call Amazon and ask for assistance with knowing how to resolve the issue only to be told that there was no one he could speak to who could help him understand what information he could provide to do so. To be fair to Amazon, this was incorrect. There is an “Account Health” team that you can speak to who will aid with appeals of this nature. However, this team is **extremely** limited in the information that they are allowed to provide, does not have the ability to directly impact reactivation of your account and is totally separate from the “Seller Performance” team which makes the decisions.

Thankfully, Chukar was finally able to get it’s account back – but only after a story featuring the issue was run in the Seattle Times.<sup>6</sup> Most Amazon sellers in a similar situation would not be lucky enough to get local press involved and would be forced to rely on a network of high priced consultants, (many of whom are former Amazon employees) who specialize in helping their clients maneuver through Amazon’s “Kangaroo court”.

Meanwhile, other merchants are not quite as lucky if Amazon — the judge and juror — finds that that they have broken its often-arbitrary policies. Sellers who use the platform have reported being permanently suspended for no valid reason simply due to glitches in the system and having Amazon refuse to release funds owed. While Amazon may be legally required in some cases to withhold funds, such as if counterfeit or knockoffs are suspected, sellers have had to use arbitration or sue to get their funds released — all without any interest paid.

To get their account — often times, their entire livelihood — reinstated, sellers are often required to first admit guilt prior. The team that makes decisions on suspension matters accepts “Plan of Action” documents akin to legal briefs and rules on the future of your business with very limited ability for appeal in the form of arbitration. Sellers that do go to arbitration find themselves at a disadvantage given the fact that most of them, even if not guilty of doing so have already admitted to having violated Amazon’s terms as they know that is what Amazon wants to see.

Given the way that Amazon manipulates sellers into admitting guilt for things they may not have done we believe that the use of a forced arbitration clause is a prime example of how Amazon stacks the deck against small to mid-sized merchants on its platform. Additionally, Amazon bars sellers from participating in a group or class arbitration, combining this with the high cost of arbitration leaves it out of reach for most sellers.

Amazon’s recusal petition requesting Chairwoman Kahn’s recusal from FTC matters involving Amazon states that they request “recusal of Chair Lina Khan from any antitrust investigation, adjudication, litigation, or other proceeding in which Amazon is a subject, target or defendant”

By way of argument Amazon also states: “But due process entitles all individuals and companies to fair consideration of the merits of any investigation or adjudication by impartial Commissioners who have not—and, equally importantly, who do not appear to have—prejudged the issues against them. Courts have thus consistently held that due process requires a

Commissioner's recusal if, in a prior role, he or she appeared to have prejudged the facts and/or pronounced legal conclusions about the company's liability."<sup>7</sup>

To the 3<sup>rd</sup> party merchants we represent this is one in a long line of examples of "Rules for thee but not for me" where Amazon is demanding that they receive something which they are unwilling to give to its 3<sup>rd</sup> party merchants. When your accuser is the "the judge, the jury, and the executioner" as mentioned earlier and there is no way to request review of their decisions in court it is not in question if they have "prejudged the facts" – they have.

The combination of all these factors as well as the wide disparity in bargaining power between small merchants and the largest ecommerce company on the planet leads us to believe that this is one of the best examples of "power asymmetries that disadvantage small businesses" and bears deeper investigation by the FTC. Our members are desperate for some form of due process that would protect them from having their livelihoods arbitrarily irreparably destroyed by Amazon.

### **Arbitrary Changes and Unfair Limitations**

Amazon is notorious for making sweeping changes to its programs that can impact, or in some cases destroy entire businesses with little or no warning as well as using contractual means to redirect as much liability away from them and onto its 3<sup>rd</sup> party merchants.

The largest example of this is Amazon's repeated attempts to avoid liability for past sales taxes that Amazon owes by attempting to shift liability onto 3<sup>rd</sup> party merchants and providing state tax authorities with information on said merchants. We have covered this situation extensively in submissions to the U.S. House Committee on Small Business - Subcommittee on Economic Growth, Tax and Capital Access in March of 2020 and the House Judiciary, Subcommittee on Antitrust in August of 2020 so we will not restate those arguments here.<sup>8</sup>

In early 2020 as COVID-19 limited warehouse capacity Amazon made significant changes to how they processed inventory and prioritized items categorized as essential. Over time those restrictions were replaced by item-level limits on inbound products. Then in April Amazon announced and implemented account-level limits *on the same day*. This led to many merchants being unable to send in inventory they have already purchased after Amazon suddenly changed the rules of the game.<sup>9</sup>

The various warehouse limits would not be as critical of an issue for many sellers except for the fact that Amazon normally stacks the deck against merchants that opt to do their own fulfillment, by giving preference to merchants utilizing Amazon's fulfillment service with "Prime" shipping. Meanwhile, Amazon made several changes to its "Seller Fulfilled Prime" (SFP) program that has been closed to new participants since 2019.<sup>1011</sup> These changes mandating nationwide delivery for smaller items instead of allowing sellers to concentrate on regions near their warehouse(s) that could be reached by ground – essentially crippling the program for those that used it due to the high cost of two day delivery outside of close geographical areas.

Amazon significantly curtailing the Seller Fulfilled Prime program and the fact that Amazon places a significantly higher emphasis on products that they fulfill leads us to ask two questions

1. Is Amazon purposefully prioritizing FBA inventory offers above that of Merchant Fulfilled inventory in a manner which rises to the level of anticompetitive behavior?
2. Is Amazon using inbound shipping limits to attempt to induce pain points on brands in order to make them more likely to entertain selling their product directly to Amazon?

Another example of Amazon making sudden changes that could significantly impact a business is the fact that they have been known to restrict brands with as little as 24 hours' notice, leaving merchants that carry said brands scrambling to offload inventory or pay for removal fees.

### **Antitrust Legislation and Power asymmetries**

In closing, we would like to point out the massive power asymmetries that are involved between Amazon and individual 3<sup>rd</sup> party Merchants when it comes to making their voices heard in regard to antitrust legislation or enforcement.

As of the writing of this letter Amazon has:

1. Spent \$10,190,000 on 97 lobbyists to advance its various objectives.
2. Four lobbying firms and Amazon themselves have explicitly reported lobbying on Amazon's behalf in relation to Antitrust in addition to an undetermined amount of direct Amazon employees.

The average Amazon seller has:

1. Read a scaremongering email and website sent out by Amazon's director of public policy threatening to shut down the Amazon marketplace if any of the pending antitrust bills pass
2. Read a few articles about the antitrust situation
3. Concluded that they can't even think of operating at the level of influence that Amazon has leaving them to mutter under their breath

**“Man, I hope things don't get messed up worse than they already are”**

- 
- <sup>1</sup> The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry  
Andre Boik and Kenneth S. Corts <https://www.journals.uchicago.edu/doi/full/10.1086/686971>
- <sup>2</sup> <https://oag.dc.gov/release/ag-racine-files-antitrust-lawsuit-against-amazon>
- <sup>3</sup> <https://www.cnbc.com/video/2021/05/25/d-c-ag-amazon-making-third-party-sellers-set-artificially-high-prices.html>
- <sup>4</sup> <https://www.wsj.com/articles/amazons-new-ceo-can-either-help-workers-and-sellers-or-automate-them-away-11612587602#:~:text=Software%2C%20too%2C%20has,payroll%2C%20he%20adds.>
- <sup>5</sup> <https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement>
- <sup>6</sup> <https://www.seattletimes.com/business/amazon/amazon-abruptly-banned-washington-state-treat-maker-chukar-cherries-months-of-appeals-went-unheeded>
- <sup>7</sup> <https://s.wsj.net/public/resources/documents/AMZN%20petition%20re%20Khan.pdf>
- <sup>8</sup> <https://www.congress.gov/116/meeting/house/110883/documents/HHRG-116-JU05-20200729-SD014.pdf>
- <sup>9</sup> <https://www.marketplacepulse.com/articles/amazon-is-never-going-back-to-normal>
- <sup>10</sup> <https://sellercentral.amazon.com/gp/help/help.html?itemID=VB5YNDGLQG4GYGR>
- <sup>11</sup> <https://sell.amazon.com/programs/seller-fulfilled-prime>



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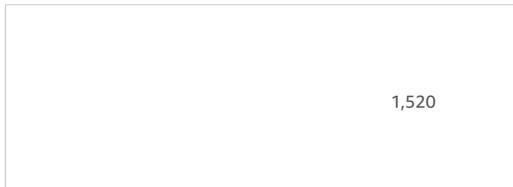
**Brand** Arrid

**Item Volume** 2.6 Fluid Ounces

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Style: 16oz - 20 Count

- 1 option from \$14.99
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- \$7.99 (\$0.40 / Count)**
- \$29.49 (\$0.37 / Count)

**Material** Paper  
**Color** Silver  
**Brand** Hefty  
**Item Weight** 1 Pounds  
**Capacity** 16 Fluid Ounces

### About this item

- PAPER COFFEE CUPS WITH LIDS: This package contains 20 Hefty hot cups 16-ounce paper coffee cups, measuring 5.4 inches tall x 3.5 inches in diameter, with lids included

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# Starburst, Skittles, & Life Savers Halloween Candy Variety Pack - 97.68oz/315ct

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# LIFE SAVERS Gummy, STARBURST Duos and Original & SKITTLES Wild Berry and Original Fun Size Chewy Bulk Halloween Candy Assortment - 97.68oz/315 pieces

Brand: Skittles  
 ★★★★★ 24 ratings  
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<b>Flavor</b>	Original
<b>Brand</b>	Skittles
<b>Ingredients</b>	Skittles Original: Sugar, Corn Syrup, Hydrogenated Palm Kernel Oil; Less than 2% of: Citric Acid, Tapioca <a href="#">See more</a>
<b>Weight</b>	97.68 Ounces
<b>Color</b>	Orange

### About this item

- Contains one (1) 97.68-ounce, 315-piece bag with an assortment of Halloween Candy
- Features a bulk Halloween candy assortment mix of LIFE SAVERS Gummy candy, STARBURST Duos & Original fruit chews and SKITTLES Wild Berry & Original Fun Size candy
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