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AMAZON'S DIRTY LITTLE SECRET

TANYA J. MONESTIER*

ABSTRACT

You need new earbuds because one of yours just went missing. You log onto Amazon and scroll through the endless array of options. You finally select a pair “Sold by” Amazon and click “Buy Now.” Amazon promises to have the earbuds to you tomorrow. Have you ever wondered how it’s possible for Amazon to pull off this Santa-like feat? It’s because of a little-known practice called commingling. Commingling gets you your earbuds in near record time. But commingling could also result in your getting earbuds that are duds—or, worse yet, that malfunction and cause ear damage.

Commingling means that the same goods from different sellers are stored together and then sold interchangeably. The theory is great, so long as these goods are truly interchangeable. All it takes, however, is for some bad actors to co-opt the commingled supply chain and those goods are no longer interchangeable. Some goods are real. Some are fake. Some are junk. Some are dangerous. When you order something on Amazon, you don’t know what you’re going to get. You are told that goods are “Sold by” Amazon, but the actual goods you get may be from a shady third-party seller based in Shenzhen, China.

How can Amazon do this and not tell its customers? Good question. In this Article, I argue that Amazon should no longer be permitted to get away with its secret practice of commingling. Telling a buyer that they are getting goods from Seller A and then giving them goods from Seller B is deceptive—plain and simple. The law should not countenance such a practice. At the very least, Amazon should be required to disclose its practice of commingling before a buyer makes a purchase. It’s time for Amazon’s dirty little secret to be exposed and to let consumers decide for themselves whether they want to continue buying from, or on, Amazon.

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INTRODUCTION

The appeal of Amazon . . . is primarily that of affordable abundance—somewhere in there is the right thing at the right price, and you can consider endless options until you're satisfied. But what's abundant lately is undifferentiated junk. In these conditions, understanding what it is you're buying, where it came from, and what you can expect of it is a fool's errand. . . . It's basically impossible to be an informed consumer, and it always has been.¹

IMAGINE this. You go to Ulta to purchase a \$400 Dyson hair dryer.² You see that the Dyson you are interested in is not on the shelf, so you go to the cashier to ask for help. She tells you they have some in the back. She disappears for a while and comes back with the Dyson hair dryer. Unbeknownst to you, the employee shuffled over to Crazy Betty's Discount Beauty Supply down the street and got you a Dyson from there.³ You go home and use the hair dryer only to have it malfunction and fry your hair.⁴ Then you learn that Ulta has a practice whereby it substitutes goods without telling you. They sell you goods you think are from Ulta, but really, they are from Crazy Betty's—so long as they are ostensibly the “same” goods. How can they do this? How is it possible that you could go buy goods *at* Ulta and not get goods *from* Ulta? Well, it's not possible at a brick-and-mortar store. But it is possible in the wild, wild west that we call Amazon.⁵

Millions and millions of people buy from Amazon. But not many people understand what it means to buy from Amazon. Amazon is both a seller and an online marketplace that permits other sellers (i.e., third-party sellers) to sell their goods on the platform. So, when you are buying goods on Amazon, you could be buying goods from Amazon or from a third-party seller. One additional wrinkle: some third-party sellers

1. Amanda Mull, *The Death of the Smart Shopper*, THE ATLANTIC (Feb. 10, 2023), <https://www.theatlantic.com/technology/archive/2023/02/online-amazon-shopping-informed-consumer-quality-control/673017/> [https://perma.cc/RL8U-NJ2L].

2. *Dyson Supersonic Hair Dryer*, ULTA BEAUTY, <https://www.ulta.com/p/supersonic-hair-dryer-xlsImpprod14771083> [https://perma.cc/5JST-UQFU] (last visited June 2, 2024).

3. Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, 40 NW. J. INT'L L. & BUS. 157, 169 (2020) (noting that “counterfeiters . . . rely on brick-and-mortar wholesale distributors of lesser and questionable repute who [are] willing to sell counterfeits, smuggled goods, and inferior quality products”).

4. For a real-life instance where a hair dryer purchased on Amazon short-circuited and burned down a house, see Colin Lecher, *How Amazon Escapes Liability for the Riskiest Products on Its Site*, THE VERGE (Jan. 28, 2020, 8:00 AM), <https://www.theverge.com/2020/1/28/21080720/amazon-product-liability-lawsuits-marketplace-damage-third-party> [https://perma.cc/G9Z5-VAGM].

5. Many third-party sellers use the expressions “wild west” or “jungle” to refer to their experience on Amazon. MOIRA WEIGEL, DATA & SOC'Y RSCH. INST., *AMAZON'S TRICKLE-DOWN MONOPOLY: THIRD-PARTY SELLERS AND THE TRANSFORMATION OF SMALL BUSINESS* 1, 11 (Jan. 2023), https://datasociety.net/wp-content/uploads/2023/01/Weigel_Trickle-Down-Monopoly_01252023.pdf [https://perma.cc/T8WU-B46Z].

outsource inventory and logistics to Amazon through what is known as “Fulfillment by Amazon.”⁶ In these cases, the third-party seller ships inventory to Amazon for storage; when a customer places an order, Amazon handles all the logistics in terms of getting that third-party’s goods to the buyer. To recap, when you buy from Amazon, your seller is either Amazon, a third-party seller, or a third-party seller that outsources logistics to Amazon. *If only it were that simple.*

Many Fulfillment by Amazon third-party sellers participate in what is colloquially called commingling—the practice of pooling inventory of the “same” good so that they can be sold interchangeably. For instance, one hundred different third-party sellers might sell the Dyson hair dryer on Amazon. If all these sellers participate in commingling, then the thousands (or tens of thousands) of Dysons are pooled in inventory and sold interchangeably. This works, of course, if all those Dysons are truly interchangeable. But with bad actors, it is a safe bet that a number of those blow dryers will be counterfeit, unsafe, or defective in some way.⁷ Amazon itself also participates in commingling, meaning that it adds its Dyson hair dryers to the stock and when an order is placed for a Dyson “Sold by” Amazon,⁸ any old Dyson will be pulled from the pile.

So, who is the seller when you buy goods on Amazon? Who knows. If you buy goods “Sold by” Amazon, you may be getting goods from a third-party seller. If you buy goods “Sold by” one third-party seller, you may be getting goods from a different third-party seller. Because of commingling, it is impossible for a buyer to know in most cases *who* the true seller is in an Amazon transaction. No customer would tolerate a traditional brick-and-mortar store like Ulta substituting goods at its discretion without telling customers what it is doing. Yet because Amazon operates in the obscurity of cyberland and assumes myriad roles as seller, logistics provider, and platform, it has managed to escape any sort of scrutiny for commingling.

This Article calls for an end to secret commingling. Buyers have a right to know who they are *actually* buying from and not just who Amazon unilaterally declares them to be buying from. The Federal Trade Commission Act prohibits unfair and deceptive trade practices. Telling a buyer that their seller is X when, in fact, their seller is Y is the very definition of unfair and deceptive. The Federal Trade Commission (FTC)

6. *Amazon FBA: Fulfillment Services for Your Ecommerce Business*, AMAZON, <https://sell.amazon.com/fulfillment-by-amazon> [<https://perma.cc/M7JH-SP6Y>] (last visited June 7, 2024).

7. See Leslie Gaydos, *Woman Reimbursed for Counterfeit Hair Styling Tool After Calling NBC10 Boston Responds*, NBC BOSTON (Dec. 20, 2023, 6:40 PM), <https://www.nbcboston.com/investigations/consumer/woman-reimbursed-for-counterfeit-hair-styling-tool-after-calling-nbc10-boston-responds/3225234/> [<https://perma.cc/FC9T-T4F4>] (recounting the story of a woman who purchased a counterfeit Dyson Airwrap styler from a third-party seller on Amazon).

8. “Sold by” is how Amazon denotes the identity of the seller in what is commonly called its Buy Box. See *infra* Part III.

must step in to enjoin Amazon from commingling inventory or, at the very least, must mandate that Amazon disclose the practice to consumers in a way that enables them to make informed decisions about their purchases.

This Article proceeds as follows. Part I describes Amazon's business model of facilitating sales both from, and through, Amazon. Part II explores Amazon's practice of commingling, what Amazon calls by the more pleasant-sounding name "virtual tracking." Part III introduces an as of yet unexplored issue presented by commingling: that of consumer protection. It explains in detail what Amazon discloses and what a sophisticated and unsophisticated buyer is likely to understand when they buy on Amazon. Part IV outlines the legal framework for dealing with commingling as a consumer protection issue. It argues that Amazon's statement that goods are "Sold by" a certain seller when they don't actually originate from that seller constitutes an unfair and deceptive trade practice within the meaning of federal and state law. This Part suggests two separate mechanisms—an injunction or disclosure requirements—to address the issue. Part V looks at the INFORM Consumers Act, a recently enacted piece of legislation that was intended to curb fraud and counterfeits in online marketplaces such as Amazon. It argues that the legislation does not do anywhere close to enough to inform consumers about who they are buying from in online marketplace transactions. And even if the legislation were sufficient, Amazon seems to be skirting its obligations under the Act by failing to provide statutorily mandated seller information. The final section of the Article offers some concluding remarks.

I. AMAZON'S BUSINESS MODEL

Amazon has quickly become a household name.⁹ According to a recent study, Amazon is the #3 "Most Trusted Brand in America," sandwiched between UPS and Lysol.¹⁰ It is the go-to destination for convenient and quick one-stop-shopping.¹¹ The website has billions of

9. Charles Duhigg, *Is Amazon Unstoppable?*, THE NEW YORKER (Oct. 10, 2019), <https://www.newyorker.com/magazine/2019/10/21/is-amazon-unstoppable> [<https://perma.cc/S7ZX-TRLS>] ("Amazon is now America's second-largest private employer. (Walmart is the largest.) It traffics more than a third of all retail products bought or sold online in the U.S.; it owns Whole Foods and helps arrange the shipment of items purchased across the Web, including on eBay and Etsy.").

10. MOST TRUSTED BRANDS 2023, MORNING CONSULT 1, 9 (May 24, 2023), <https://pro-assets.morningconsult.com/wp-uploads/2023/05/Most-Trusted-Brands-2023.pdf> [<https://perma.cc/S287-QDY2>]. Amazon took the top spot among e-commerce and retail brands. *Id.* at 17.

11. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 985–86 (2019) ("The platform is estimated to capture 52.4% of all U.S. online retail spending Amazon's share of ecommerce is more than double the market share of its next nine competitors combined" (footnotes omitted)).

visits each month,¹² with 63% of shoppers saying that they start their online shopping searches on Amazon.¹³ By one estimate, at least 40% of online purchases in the United States take place on Amazon.¹⁴ Over 7,500 products are sold on Amazon every minute.¹⁵ This nets Amazon nearly \$1 million per minute, or \$53 million per hour.¹⁶ The company “has a greater market share than its next ten competitors combined.”¹⁷

Amazon’s business model is unique in that it sells goods directly to buyers and also provides an online platform where third parties can sell their goods to buyers. In this respect, Amazon has been described as “half-platform, half-store.”¹⁸ More accurately, one might say that Amazon is two-thirds platform and one-third store.¹⁹ This is because most goods now sold on Amazon are not sold by Amazon, but by third-party sellers using Amazon as a marketplace.²⁰ Third-party sellers account for almost 60% of the units sold on Amazon.²¹ As of 2021, over 560,000 third-party sellers operated in Amazon’s U.S. store.²²

Amazon is rewarded heavily for facilitating these sales. A recent report says that Amazon is receiving 50% of the revenue from every third-party sale that takes place on its platform.²³ The growth of third-party sales on Amazon is far outpacing first-party sales, with the former

12. Arnab Ghosh, *Amazon Seller Statistics Demystified: Unlocking Profitable Selling in 2024*, SELLERAPP BLOG (July 3, 2024), <https://www.sellerapp.com/blog/amazon-seller-statistics/> [https://perma.cc/NEE3-NC54] (noting that in May 2022 alone, there were 2.4 billion desktop and mobile visitors to the site).

13. *Id.*

14. Moira Weigel, Opinion, *What You Don’t Know About Amazon*, N.Y. TIMES (Apr. 21, 2023), <https://www.nytimes.com/2022/04/21/opinion/amazon-product-liability.html> [https://perma.cc/3TNV-QSTT].

15. Ghosh, *supra* note 12.

16. *Id.*

17. John Herrman, *Shein Found Amazon’s Weakness*, THE INTELLIGENCER (Dec. 21, 2023), <https://nymag.com/intelligencer/2023/12/shein-found-amazons-weakness.html> [https://perma.cc/4H76-DC3D].

18. Lecher, *supra* note 4 (“[Amazon] acts as a direct seller of products, while also providing a platform, called Marketplace, for third parties to sell their products.”); see also WEIGEL, *supra* note 5, at 13 (referring to this model as “Amazon . . . graft[ing] an eBay onto—or into—a Walmart”).

19. Mickey Toogood, *Amazon Selling Stats*, AMAZON: BLOG (May 10, 2024), <https://sell.amazon.com/blog/amazon-stats> [https://perma.cc/LAX7-FXV7].

20. Mull, *supra* note 1 (noting that “Amazon’s primary goal is selling the infrastructure of online shopping to other businesses—things like checkout, payment processing, and order fulfillment, which even large retailers can struggle to handle efficiently” and asking, “Why be Amazon when you can instead make everyone else be Amazon and take a cut?”).

21. Tony Owusu, *Here’s How Much Amazon Takes from Every Third-Party Sale*, THE STREET (Feb. 14, 2023, 5:15 PM), <https://www.thestreet.com/investing/heres-how-much-amazon-takes-from-every-third-party-sale> [https://perma.cc/R58M-PM3Z].

22. Motion to Dismiss by Defendant Amazon.com, Inc. at 4, Fed. Trade Comm’n v. Amazon.com, Inc. (W.D. Wash. Nov. 2, 2023) (No. 23-cv-01495) [hereinafter Amazon’s Motion to Dismiss].

23. Owusu, *supra* note 21. Amazon imposes various fees on third parties for the privilege of using its marketplace. For Fulfillment by Amazon, these fees include inventory storage fees, aged inventory surcharges, fulfillment service fees,

growing at a rate of 52% per year compared to the latter growing at a rate of 25% per year.²⁴ In 2022, Amazon made over \$117 billion in revenue from third-party sales, up approximately 14% from 2021.²⁵ It was on track to exceed this number in 2023.²⁶

There are two primary categories of third-party sales on Amazon, which are largely based on how the product will reach the consumer: “Fulfillment by Amazon” and “Fulfillment by Merchant.”²⁷ Irrespective of whether a third-party seller elects Fulfillment by Amazon or Fulfillment by Merchant, Amazon will take orders, provide all order and shipping related updates to customers, and handle payment for the transaction. Fulfillment by Amazon is what it sounds like: a third-party seller “out-source[s] order fulfillment to Amazon.”²⁸ Merchants send their goods to Amazon, which then stores the goods in its global network of fulfillment centers.²⁹ When an order is placed by a customer, Amazon will select, pack, ship, and provide customer service for the third-party goods. Fulfillment by Amazon sellers also have access to Amazon’s coveted “Prime” designation, which guarantees customers free two-day shipping.³⁰ The majority of third-party sellers on Amazon—64%—participate in Fulfillment by

unplanned services fees, removal order fees, and returns processing fees. *See Amazon FBA: Fulfillment Services for Your Ecommerce Business*, *supra* note 6.

24. Tanya J. Monestier, *Amazon as a Seller of Marketplace Goods Under Article 2*, 107 CORNELL L. REV. 705, 712 (2022).

25. Ghosh, *supra* note 12.

26. In the first quarter of 2023, third-party sales generated \$30 billion for Amazon. *See* Stephen Babcock, *60% of Amazon Sales Are Generated by Third Party Sellers*, THE CURRENT (May 25, 2023), <https://thecurrent.media/amazon-third-party-sellers> [<https://perma.cc/KJ4G-Z9BL>].

27. There is also a third option, Seller Fulfilled Prime, which was temporarily paused by Amazon in September 2020. *See* News_Amazon, Comment to *Seller Fulfilled Prime Will Reopen New Enrollment in 2023*, AMAZON: AMAZON SELLER FS. (June 2023), <https://sellercentral.amazon.com/seller-forums/discussions/t/b84ba574c99c39b-7cda6566fddfe8375> [<https://perma.cc/SE5S-P6SZ>]. Amazon lifted pause on the program in October 2023. Amazon describes the program this way: “Our goal was to allow sellers to independently handle the fulfillment of their products while also making them available to Prime customers with the same fast, free delivery they have come to expect.” *Id.* Essentially, the program is designed to allow third-party sellers to have the benefits of Prime status without outsourcing warehousing and shipping to Amazon. *See generally* Brian Connelly, *Amazon Seller-Fulfilled Prime 2024 Guide*, JUNGLE SCOUT (Jan. 5, 2024), <https://www.junglescout.com/blog/seller-fulfilled-prime/> [<https://perma.cc/ULK2-YVT2>].

28. *Amazon FBA: Fulfillment Services for Your Ecommerce Business*, *supra* note 6.

29. *Id.* Amazon claims to have “one of the most advanced fulfillment networks in the world.” *Id.*

30. *Id.*; *see also* Ryan Bullard, Note, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J.L. & TECH. ON. 181, 194 (2019) (“Perhaps most importantly, though, is that third-party vendors using FBA are able to market their products to Amazon’s ‘Prime’ members. . . . A 2018 report estimated Amazon’s Prime membership included 95 million people, and that Prime members spend, on average, approximately \$1,400 per year on merchandise bought through Amazon (compared to \$600 of yearly spending on the site for the average non-Prime customer).”).

Amazon.³¹ This option is particularly “attractive to third-party vendors because it allows them to pay Amazon to handle basic distribution services without the need to make significant capital investments in warehousing or supply-chain logistics themselves.”³² Prospective Fulfillment by Amazon sellers are offered “New Seller Incentives” to join the program like free promotional clicks on ads, free shipping to fulfillment centers, free storage, free liquidations, and free return processing.³³ Once a seller has joined Fulfillment by Amazon, it has access to Amazon’s “Seller Central” portal where it can track, among other things, its sales, inventory, and advertising.³⁴

By contrast, Fulfillment by Merchant requires sellers to handle their own logistics such as inventory storage, shipping, and customer support.³⁵ And importantly, Fulfillment by Merchant sellers do not have access to Amazon’s much-revered Prime benefits. But even under the Fulfillment by Merchant program, Amazon retains a large measure of control over the sales process. For instance, sellers with the Fulfillment by Merchant “Individual Plan” are obligated to use Amazon’s set shipping rates for all their products.³⁶ Third-party sellers are required to use Seller Central to manage their “selling account, add[] product information, mak[e] inventory updates, [and] manag[e] [orders and] payments.”³⁷ And they must use Amazon’s “Buyer-Seller Messaging” service for all customer communications.³⁸ In short, Amazon still acts as a

31. Daniela Coppola, *Fulfillment Methods Used by Third Party Sellers on Amazon in 2022*, STATISTA (Feb. 15, 2023), <https://www.statista.com/statistics/1255966/amazon-third-party-seller-fulfillment-methods/#statisticContainer> [<https://perma.cc/YAP8-ME44>] (citing 64% FBA rate). Other publications put the number much higher. See Ghosh, *supra* note 12 (73%); *Amazon Marketplace Statistics 2024*, EDESK: BLOG, AMAZON, MARKETPLACE (Feb. 6, 2024), <https://www.edesk.com/blog/amazon-statistics/> [<https://perma.cc/PQ6W-KTGC>] (73%); Brian Connolly, *14 Amazon Statistics You Should Know in 2023*, JUNGLESCOUT (Oct. 27, 2023), <https://www.junglescout.com/blog/amazon-statistics/> [<https://perma.cc/8YWP-55EK>] (86%). One publication reports that “some vendors felt as though they *had* to participate in Fulfillment by Amazon; they couldn’t otherwise attract much attention on Amazon.com, or ship products inexpensively enough to compete with rivals.” Duhigg, *supra* note 9.

32. Bullard, *supra* note 30, at 194.

33. *Amazon FBA: New Seller Incentives*, *supra* note 6.

34. *Manage Your Business in Seller Central*, AMAZON, <https://sell.amazon.com/tools/seller-central> [<https://perma.cc/Z2RU-L6FV>] (last visited June 2, 2024).

35. *Amazon Merchant Fulfilled Network*, AMAZON, <https://sell.amazon.com/learn/fulfillment-by-merchant> [<https://perma.cc/3RX4-MDWZ>] (last visited June 2, 2024).

36. *Id.* Sellers with the “Professional Plan” are permitted to set their own shipping rates. *Id.*

37. AMAZON, *THE BEGINNER’S GUIDE TO SELLING ON AMAZON 3*, <https://m.media-amazon.com/images/G/01/sell/guides/Beginners-Guide-to-Selling-on-Amazon.pdf> [<https://perma.cc/NH8B-GHZ7>].

38. *Selling Policies and Seller Code of Conduct*, AMAZON SELLER CENT., <https://sellercentral.amazon.com/gp/help/external/G1801> [<https://perma.cc/7GK4-L9NF>] (last visited June 2, 2024). Amazon makes it very clear that third-party sellers may only contact customers solely to obtain additional information required to fulfil the order and to provide customer service. *Id.* Marketing to customers is strictly prohibited. *Id.* For more information about the Buyer-Seller Messaging Permissions, see *Buyer-Seller Messaging Permissions*, AMAZON SELLER CENT., <https://sellercentral>.

central hub for customer service even though Fulfillment by Merchant sellers ship directly to the customer.

Amazon heavily steers third-party sellers³⁹ to Fulfillment by Amazon, noting on its website that “sellers see a 20–25% increase in sales after adopting FBA.”⁴⁰ Amazon touts the following benefits of Fulfillment by Amazon: Prime eligibility, Amazon’s trusted customer service and returns, the ability to “scale” a business, and cost-effectiveness.⁴¹ Amazon calls Fulfillment by Amazon the “pathway to reaching a huge audience, streamlining operations, and scaling with global infrastructure.”⁴² It features Fulfillment by Amazon “Success Stories” on its blog.⁴³ It has multiple guides,⁴⁴ webpages,⁴⁵ and blog posts⁴⁶ all extolling the virtues of Fulfillment by Amazon. To facilitate all these Fulfillment by Amazon sales (not to mention its own sales), Amazon has a robust and extensive fulfillment network. It has “over 2,000 facilities (including more than 200 fulfillment centers), [and] 120,000 trucks, vans, and [cargo] planes.”⁴⁷

Fulfillment by Amazon is big business for Amazon—and is only likely to grow. The *Intelligencer* notes that Amazon’s transition to a third-party marketplace is a “great deal for Amazon, and over the years it has become Amazon’s *main* deal.”⁴⁸ The publication quite rightly observes that Amazon has undergone an “astounding transformation in which the

amazon.com/gp/help/external/G201054220 [https://perma.cc/4EAV-NGU3] (last visited June 2, 2024).

39. According to a recent FTC Complaint filed against Amazon, the company “coerc[es]” third-party sellers into using Fulfillment by Amazon. Complaint at 80, Fed. Trade Comm’n v Amazon.com, Inc. (W.D. Wash. Sept 26, 2023) (No. 23-cv-01495), 2023 WL 6275532, ¶ 257 [hereinafter FTC Complaint]. See also *id.* at 9 (“[T]oday, virtually all sellers must use Amazon’s proprietary FBA service to fully reach Amazon’s enormous base of U.S. shoppers.”).

40. *Start Selling with Amazon*, AMAZON, https://sell.amazon.ca/marketing/brand-invite [https://perma.cc/65AM-CHT7] (last visited June 3, 2024).

41. *Amazon FBA: Fulfillment Services for Your Ecommerce Business*, *supra* note 6.

42. Daisy Quaker, *Is Amazon FBA Worth it? What to Consider*, AMAZON: GROW YOUR BUSINESS BLOG (May 25, 2023), https://sell.amazon.com/blog/is-amazon-fba-worth-it [https://perma.cc/GVL7-GCTV].

43. *Seller Stories*, AMAZON: SELLER STORIES BLOG, https://sell.amazon.com/blog/seller-stories [https://perma.cc/E36T-QUX8] (last visited June 3, 2024).

44. Sam Aronson, *Fulfillment by Amazon: A Guide for Beginners*, AMAZON: GETTING STARTED BLOG (Feb. 8, 2024), https://sell.amazon.com/blog/amazon-fba-for-beginners [https://perma.cc/4ZBP-CSDC]; *Amazon FBA: Fulfillment Services for Your Ecommerce Business*, *supra* note 6.

45. Amazon Multi-Chanel Fulfillment Team, *Using Both MCF and FBA for Order Fulfillment Increases US Sellers’ Amazon.com Sales Revenue by 38% Average*, AMAZON: MULTI-CHANNEL FULFILLMENT BLOG (July 12, 2023), https://supplychain.amazon.com/blog/mcf-fba-order-fulfillment-increases-us-sellers-amazon-sales-revenue [https://perma.cc/EXN6-TJQB].

46. Quaker, *supra* note 42; Lola Okusami & Katelynn Gonzalez, *Send to Amazon Simplifies Shipments for Fulfillment by Amazon Sellers*, AMAZON: GROW YOUR BUSINESS BLOG (Dec. 8, 2022), https://sell.amazon.com/blog/send-to-amazon-shipment-creation [https://perma.cc/5ZJ8-F3KM].

47. Amazon Multi-Chanel Fulfillment Team, *supra* note 45.

48. John Herrman, *The Junkification of Amazon. Why Does It Feel Like the Company Is Making Itself Worse?*, THE INTELLIGENCER (Jan. 30, 2023), https://nymag.com/intelli-

‘everything store’ substantially outsourced its *store*.⁴⁹ In doing so, however, it has deceived its customers by trading on the confidence and trust they have in the Amazon brand. One form of this deception—what I dub “Amazon’s dirty little secret”—is examined below.

II. AMAZON’S DIRTY LITTLE SECRET: COMMINGLING

Currently, there are over two million third-party sellers worldwide on the Amazon platform,⁵⁰ over a half a million of which operate in the United States.⁵¹ About two-thirds of these third-party sellers use Fulfillment by Amazon to sell their merchandise.⁵² In concrete terms, third-party sellers who use Fulfillment by Amazon pack up goods, ship them to Amazon warehouses, and then Amazon does the rest. One might think, on a practical level, that Amazon carves out some shelf space in one of its hundreds of warehouses for a given third-party seller’s goods. So, when a customer orders a product from Good Corp., an Amazon employee would go to the Good Corp. shelf, pull the item, and get it on its way. Indeed, that is exactly how the Federal Court of Appeals described the Fulfillment by Amazon process:

When using this service, a third-party seller sends its product to an Amazon fulfillment center, where Amazon stores the product. If a customer buys the product from the third-party seller, Amazon pulls the product off the shelf, packages it, and ships it to the customer on behalf of the seller.⁵³

Unfortunately, it is not that simple. For sellers that participate in Fulfillment by Amazon, Amazon employs what it calls “virtual tracking” for inventory management.⁵⁴ Virtual tracking means that third-party

gencer/2023/01/why-does-it-feel-like-amazon-is-making-itself-worse.html [https://perma.cc/E5BU-N3QF].

49. *Id.*

50. *Amazon Marketplace Statistics 2024*, *supra* note 31.

51. Amazon’s Motion to Dismiss, *supra* note 22, at 4.

52. Coppola, *supra* note 31.

53. *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App’x 879, 881 (Fed. Cir. 2017); *see also* *State Farm Fire & Cas. Co. v. Amazon.com Servs., Inc.*, 137 N.Y.S.3d 884, 885 (Sup. Ct. 2020) (“FBA logistics services allows third-party sellers to send their inventory to Amazon fulfillment centers for storage, and when an order is placed for the third-party seller’s goods, *they are retrieved* and shipped by Amazon employees via UPS or other-like shipping carriers.” (emphasis added)); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 138 (4th Cir. 2019) (“Under the fulfillment program, . . . [t]he seller could ship *its* inventory to an Amazon warehouse for storage and, once an order was received online for a product, Amazon would retrieve *the product* from inventory, box it, and ship it to the purchaser.” (emphasis added)); *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 197 (5th Cir. 2020) (“When a transaction takes place on Amazon.com and the third party is using FBA, Amazon will retrieve *the product* from one of its fulfillment centers and then ship it to the buyer.” (emphasis added)), *certified question answered*, 625 S.W.3d 101 (Tex. 2021).

54. *Using Manufacturer Barcodes with FBA Virtual Tracking*, AMAZON SELLER CENTRAL, <https://sellercentral.amazon.com/help/hub/reference/external/G200141480>

goods stored in Amazon facilities are tracked using a manufacturer barcode.⁵⁵ The barcode is unique to the product but is the same for all merchants selling the same product. For example, if Good Corp. is selling an Oral-B Pro 500 electric toothbrush and Not-So-Good Corp. is selling that same toothbrush, both would be labelled with the same barcode. In other words, there is only one barcode per unique good. The default account setting for Fulfillment by Amazon is virtual tracking with a manufacturer barcode; to change the default, a third-party seller would need to affirmatively opt out of virtual tracking.⁵⁶ The way the system is set up “structurally incentivise[s] the use of manufacturer codes” that qualify for virtual tracking.⁵⁷

Thus far, the significance of virtual tracking might be lost on the reader of this Article. Indeed, Amazon very likely uses the term “virtual tracking” to hide what virtual tracking really is. Virtual tracking means that every Oral-B Pro 500 electric toothbrush from every third-party seller is treated as fungible and interchangeable.⁵⁸ If one thousand different third-party sellers on Amazon sell the Oral-B Pro 500 electric toothbrush, these toothbrushes are (literally or figurately) placed into one large bin. When a customer orders an Oral-B Pro 500 from Good Corp.—a reputable American seller—he is going to get an Oral-B Pro 500 from the bin. It likely won’t be “from” Good Corp. because all of Good Corp.’s Oral-B Pro 500 toothbrushes have been put into the bin with thousands of other “identical” toothbrushes from third-party sellers who sell the same toothbrush on Amazon. There is no going to Good Corp.’s “shelf” and pulling the toothbrush that they entrusted to Amazon. Instead, a customer gets

[<https://perma.cc/8ZPL-R5FK>] (last visited June 3, 2024); *FBA Virtual Tracking FAQ*, AMAZON SELLER CENTRAL, <https://sellercentral.amazon.com/help/hub/reference/external/GEFKUGES6NSE7CBP> [<https://perma.cc/A5FS-PK8F>] (last visited June 3, 2024).

55. *Using Manufacturer Barcodes with FBA Virtual Tracking*, *supra* note 54. The alternative is for sellers to use a Fulfillment Network Stock Keeping Unit (FNSKU), which “represents a location identifier for products sitting in Amazon warehouses.” See Izabella Kaminska, Opinion, *Amazon (sub)Prime?—Part I*, FIN. TIMES (Mar. 20, 2019), <https://www.ft.com/content/f6d85b96-359e-384d-a255-f60bf152e992> [<https://perma.cc/8CPA-K3XJ>].

56. This comes at additional expense for the seller. See *Using Manufacturer Barcodes with FBA Virtual Tracking*, *supra* note 54 (“If you don’t want to use manufacturer barcode for virtual tracking any longer, you can change your preferences to use an Amazon barcode by following the instructions above. You would then be required to print Amazon barcodes from your seller account and apply them on the products yourself, or have Amazon print and apply them for a per-item fee.”). According to a Seller Central Amazon forum, it is very difficult for sellers to opt out of the commingling default. See Seller_r1mlKKLFMcINC, Comment to *Won’t Let Me Change to ‘Label by Seller’ and Has Defaulted Item to ‘Manufacturer Barcodes for Tracking’*, AMAZON SELLER FS., <https://sellercentral.amazon.com/seller-forums/discussions/t/05bcf56c60a6b5388d057038a102a5ab> [<https://perma.cc/422N-FXZW>] (last visited June 4, 2024) (one user noting: “I FINALLY FIGURED THIS OUT! I don’t know why Amazon hasn’t found an easy workaround for this . . .”).

57. Kaminska, *supra* note 55.

58. *Id.* (“Not using FNSKUs turns sellers’ products into cold, hard commodities which are treated as fungible with equivalent products sent into the system.”).

an Oral-B Pro 500 toothbrush on the theory that all these toothbrushes from all these third-party sellers are the same.⁵⁹

Although Amazon refers to this method of inventory management as “virtual tracking” or “stickerless inventory,” lay people might know it by the more common term “commingling.”⁶⁰ In its Getting Started with FBA Guide, Amazon spells out that FBA virtual tracking means “[y]our products will be sold interchangeably with the same product provided by other sellers.”⁶¹ Here is how Amazon describes virtual tracking:

Used by default for eligible products, manufacturer barcodes use virtual tracking to trace the source of the products throughout the fulfillment process. . . . Virtual tracking allows Amazon to fulfill orders using identical products from different suppliers. This enables us to process a customer order more efficiently and expedite its delivery from the fulfillment center closest to the customer.⁶²

It provides the following illustration of how virtual tracking works in concrete terms:

Suppose a customer in Florida orders a product, and only two units are available. One unit is in a fulfillment center in California and one unit is in a fulfillment center in New York. The seller who owns the California unit is the one who makes the sale.

To provide faster delivery for the buyer, we will send the unit from the closer fulfillment center in New York. We will credit the money to the seller who made the sale, and credit the unit back to the seller who did not make the sale by virtually transferring ownership of the identical unit in California.⁶³

59. Serena Ng & Greg Bensinger, *Do You Know What's Going in Your Amazon Shopping Cart?*, WALL ST. J. (May 11, 2014, 8:31 PM), <https://www.wsj.com/articles/on-amazon-pooled-merchandise-opens-door-to-knockoffs-1399852852> [<https://perma.cc/FPA9-BNXM>] (“[A] product ordered from a third-party seller may not have originated from that particular seller. If the bar code matches, any one that is on the shelf will do.”).

60. *FBA Virtual Tracking FAQ*, *supra* note 54 (“Commingling is a term that was sometimes used to refer to virtual tracking.”). Amazon also refers to the practice of using a manufacturer barcode as “stickerless inventory.” *Id.* One academic article refers to the practice as “substitution.” See Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. 259, 269 (2020).

61. GETTING STARTED WITH FULFILLMENT BY AMAZON IN THE U.S. MARKETPLACE, AMAZON 5, https://images-na.ssl-images-amazon.com/images/G/01/fba-help/QRG/FBA_Quick_Start_en-US.pdf [<https://perma.cc/WC2C-QZRQ>] (last visited June 4, 2024).

62. *Using Manufacturer Barcodes with FBA Virtual Tracking*, *supra* note 54.

63. *Id.* There are restrictions on the types of goods that qualify for virtual tracking.

For a product to qualify for [virtual tracking], it must meet all of the following requirements:

- Be in new condition

Amazon claims not to physically commingle goods from different sellers in its fulfillment centers. On its Seller Central webpage explaining virtual tracking, Amazon states that “[i]dential items from different suppliers are not physically stored together in a fulfillment center.”⁶⁴ And in its Virtual Tracking FAQs, it reiterates that “[i]dential items from different suppliers are not stored together.”⁶⁵ Yet, in its Business Services Solutions Agreement with third-party sellers, Amazon expressly reserves the right to commingle goods at its fulfillment centers:

*We will not be required to physically mark or segregate Units from other inventory units (e.g., products with the same Amazon standard identification number) owned by us, our Affiliates or third parties in the applicable fulfillment cent[er](s). If we elect to commingle Units with such other inventory units, both parties agree that our records will be the definitive basis for identifying which products are Units. We may move Units among facilities.*⁶⁶

Multiple news outlets and online sources confirm that Amazon commingles at the warehouse level.⁶⁷ So does an expert retained in recent

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- Have a single, scannable UPC, EAN, or ISBN barcode matching a single ASIN in the Amazon catalog
 - Not be an FBA restricted product or a dangerous good
 - Not be an expiration-dated product
 - Not be a consumable or topical product (such as grocery items, skin creams, cosmetics, or soaps)
 - Not be a media product (such as books, CDs, VHS tapes, or DVDs)
 - Not be a product related to children or infants (such as toys or baby clothes).

Id. It is not clear how carefully Amazon adheres to its own internal policies. For instance, Eminence, a seller of organic cosmetics products, encourages buyers not to buy from Amazon because of commingling. Cosmetics are one of the excluded categories, so they should not be eligible for commingling. See Ariana Rojas, *Should You Buy Eminence Organics from Amazon?*, EMSTORE (June 21, 2023), <https://emstore.com/blogs/skincare/should-you-buy-eminence-organics-from-amazon> [<https://perma.cc/LA3G-PHAH>].

64. *Using Manufacturer Barcodes with FBA Virtual Tracking*, *supra* note 54.

65. *FBA Virtual Tracking FAQ*, *supra* note 54.

66. AMAZON SERVICES BUSINESS SOLUTIONS AGREEMENT, AMAZON 20 (emphasis added), https://m.media-amazon.com/images/G/35/rainier/help/AU_EN_BSA_PDF.pdf [<https://perma.cc/Y4VU-SMHQ>].

67. See, e.g., Janger & Twerski, *supra* note 60, at 269 (“Therefore, when, for example, Amazon sells a food processor, the nominal seller may be Williams Sonoma, Cost Brothers, or Amazon. In reality, unless the seller opts out, all of the food processors are stored together in a common bin identified by product code, not by seller.”); Kevin Fang, *Your Amazon Products Could All Be Counterfeit. Here’s Why*, MEDIUM (Dec. 25, 2020), <https://thetriplehelix.medium.com/your-amazon-products-could-all-be-counterfeit-heres-why-ab4654d50109> [<https://perma.cc/V848-RTED>] (“As an example, if I sell Duracell C batteries on Amazon through their ‘Shipping Fulfilled by Amazon’—which I must do to receive Prime shipping designation—I need to send my batteries to an Amazon warehouse. After receiving my delivery, they will count the number of batteries, then slide the whole stock into a generic shelf labeled ‘Duracell C Batteries.’ Any purchaser receives a Duracell C battery from that box, and thus the actual seller is unknown.”); Ng & Bensinger, *supra* note 59 (noting that “[i]tems [a]re [c]ommingled at [w]arehouses” and “[i]f

litigation who worked at Amazon for eight years and currently runs a consulting agency.⁶⁸

Whether or not Amazon physically commingles inventory in any given warehouse is neither here nor there because it readily admits to virtual commingling, which is the exact same thing. If I order the Oral-B Pro 500 toothbrush from Good Corp. and Good Corp.'s toothbrushes are all sitting in a California warehouse, I won't be getting those toothbrushes. I'll be getting a toothbrush from an Amazon warehouse in New York (where I live),⁶⁹ originating from one of hundreds or thousands of other sellers.⁷⁰ But because Amazon has "virtually transferr[ed] ownership,"⁷¹ we will pretend like I got Good Corp.'s toothbrush. One publication referred to this as a "quality lottery"⁷²—you get what you get and don't get upset.

To be clear, commingling is not limited to third-party sellers who participate in Fulfillment by Amazon. Goods sold by Amazon itself are commingled, physically or virtually, with goods from third-party sellers.⁷³ Recall the provision from the Amazon Business Solutions Services

the bar code matches, any one [item] that is on the shelf will do"); Arishekar N., *Factors to Consider Before Selling on Amazon*, GOOD MEN PROJECT (Sept. 28, 2022), <https://goodmenproject.com/business-ethics-2/factors-to-consider-before-selling-on-amazon/> [https://perma.cc/2R3H-9S8Y] ("Amazon stores goods from various sellers in one place. If you haven't labeled your item properly, it could get mixed up with goods from other brands."); *Pros and Cons of Amazon Commingling FBA Inventory of Third-Party Sellers*, AMAZON: AMAZON SELLERS ATT'Y (Apr. 3, 2023), <https://www.amazon-sellers.attorney/blog/pros-and-cons-of-amazon-commingling-fba-inventory-of-third-party-sellers> [https://perma.cc/MK52-MNMA] ("Commingling inventory refers to the practice of mixing identical products from different sellers in Amazon's warehouses. For example, if two different sellers are selling the same brand of headphones, Amazon may store both sellers' inventory together in the same bin. When an order is placed for that product, Amazon will choose which seller's product to fulfill the order from based on a variety of factors, such as proximity to the customer and inventory levels.").

68. Rebuttal Expert Report of Rachel Johnson Greer at 17, *Zagg Inc. v. Ichilevici* (S.D. Fla. July 17, 2023) (No. 23-CV-20304), 2023 WL 5984541, at ¶ 58 ("If commingling is permitted and selected, the products are sorted in the fulfillment centers by Amazon using the manufacturer's UPC printed on the packaging and chain of custody is not preserved if there is more than one seller." (emphasis added)).

69. Ng & Bensinger, *supra* note 59 (noting that Amazon will typically take products from the warehouse nearest the customer).

70. Fang, *supra* note 67 ("If you purchase from Amazon, any seller could have sent that product in. It doesn't matter the star review, the number of products sold, even the reputability of the seller—they can all be categorized under the same listing.").

71. *Using Manufacturer Barcodes with FBA Virtual Tracking*, *supra* note 54.

72. Kaminska, *supra* note 55.

73. Ng & Bensinger, *supra* note 59 (noting that Amazon "commingl[es] products from third-party merchants with those supplied directly to Amazon by the brands themselves"); Izabella Kaminska, Opinion, *Amazon (sub)Prime?—Part II*, FIN. TIMES (Apr. 3, 2019), <https://www.ft.com/content/b1d88fcb-df94-38aa-840c-3d8480e7c0c9> [https://perma.cc/5Q2G-U6A6] ("But the statement [from the Amazon representative] did address a previously unanswered question of ours regarding whether 'sold by Amazon' products were commingled too. Seemingly, according to the statement, they are."); see also Response Brief of Defendant-

agreement replicated above: “We will not be required to physically mark or segregate [third-party seller] Units from other inventory units . . . owned by us, our Affiliates or third parties in the applicable fulfillment cent[er] (s).”⁷⁴ This provision states that Amazon is not required to segregate its goods from third-party seller goods. Thus, both Amazon and third-party seller goods are commingled. A customer, therefore, who orders a product “Sold by” Amazon is just as likely to get a commingled good as a customer who orders a product from a third-party seller that is “Fulfilled by” Amazon.⁷⁵ The only way⁷⁶ to guarantee the actual source of the good is to purchase from a Fulfillment by Merchant third-party seller.⁷⁷

Commingling is central to Amazon’s business model.⁷⁸ Indeed, Amazon Prime’s delivery guarantee could not exist were it not for

Appellee Amazon at 36 n.4, *Milo & Gabby LLC v. Amazon.com, Inc.* (Fed. Cir. Apr. 24, 2016) (No. 13-cv-01932), 2016 WL 2348398, at *36 n.4 (Amazon brief implicitly admitting that it commingles its own products with those of third-party sellers; the company notes that “Amazon did not commingle the pillowcases at issue in this case because only one third-party seller used Fulfillment by Amazon and Amazon itself did not offer to sell any of the pillowcases”).

74. AMAZON SERVICES BUSINESS SOLUTIONS AGREEMENT, *supra* note 66, at 20 (emphasis added).

75. Ganda Suthivarakom, *7 Myths About Counterfeit Products, Debunked*, N.Y. TIMES: WIRECUTTER (Feb. 11, 2020), <https://www.nytimes.com/wirecutter/blog/myths-about-counterfeit-products-debunked/> [<https://perma.cc/V8RX-KVG2>] (“In a recent lawsuit, Fuse Chicken, a company that manufactures tech accessories, claims that it purchased a counterfeit version of its own product that was shipped and sold by Amazon—not from a third-party seller.”).

76. Or, presumably, to buy from a category of goods that is not eligible for commingling. Amazon, however, sets and defines these categories unilaterally. Based on a retrospective look at my purchases, it seems like Amazon does commingle goods in certain prohibited categories. For instance, I purchased a variety pack of popcorn from a company called Love Corn, and the order was “Supplied by” “Other.”

77. Fulfillment by Merchant sellers, however, are downgraded in search results. Fang, *supra* note 67 (“The problem is exacerbated through the ‘Buy Now’ button, which automatically chooses the cheapest price+shipping cost. The sellers who choose to use non-commingled inventory (X00 sticker) lose out, as no one will buy from them when they believe an identical product is cheaper from a different seller.”); Duhigg, *supra* note 9 (“Companies enrolled in Fulfillment by Amazon often appeared in the Buy Box, the top search listing on Amazon.com. To participate, many vendors had to pay about two dollars per item. They also had to let Bezos collect valuable data on which products were becoming popular and which companies were having trouble satisfying demand. Soon, some vendors felt as though they *had* to participate in Fulfillment by Amazon; they couldn’t otherwise attract much attention on Amazon.com, or ship products inexpensively enough to compete with rivals.”).

78. See generally Julie Coleman, *Amazon CEO Explains How Company Carries Out Same-Day Delivery*, CNBC (Dec. 6, 2023, 7:48 PM), <https://www.cnbc.com/2023/12/06/amazon-ceo-explains-how-company-carries-out-same-day-delivery.html> [<https://perma.cc/V979-QV3Q>] (noting that “delivery speed meaningfully changes customers’ conversion rates and the rate at which they’re willing to buy”).

commingling.⁷⁹ The Financial Times writes, “If you have ever wondered how it is possible for Amazon Prime to guarantee 24, or 48, hour delivery for a hugely diverse range of products, the answer is commingling.”⁸⁰ It notes that “[t]he larger the geographic area, the more effective commingling becomes.”⁸¹

Commingling presents several major legal issues, including those related to counterfeiting and to products liability. The link between commingling and counterfeiting is apparent and well-known, at least in the Amazon seller community.⁸² Commingling creates the ideal environment for counterfeit goods to enter the stream of goods being sold interchangeably.⁸³ This, in turn, has serious spillover effects for the manufacturer or brand holder, who has their brand diluted because of counterfeit goods being sold on Amazon.⁸⁴ The counterfeit problem cannot be overstated.⁸⁵ In 2018, the Government Accountability

79. Amazon is looking to offer more same-day or next-day delivery options. See Annie Palmer, *Amazon Says Its Delivering More Products Than Ever in One Day or Less*, CNBC (July 31, 2023, 7:30 AM), <https://www.cnbc.com/2023/07/31/amazon-says-its-delivering-more-products-than-ever-in-one-day-or-less.html> [<https://perma.cc/2PUP-5SM2>]. Commingling will be central to Amazon’s push for faster delivery.

80. See Kaminska, *supra* note 55.

81. *Id.*

82. Chow, *supra* note 3, at 185 (“As China is the world’s largest source of counterfeits, the result was predictable: beginning in 2015, counterfeits soon began to proliferate on Amazon’s e-commerce sites, much to the chagrin and exasperation of brand owners.”).

83. Ryan Williams, *Amazon Inventory Management Causes Authentic Vendors to Sell Fakes*, RED POINTS, <https://www.redpoints.com/blog/amazon-commingled-inventory-management/> [<https://perma.cc/6M65-DZAV>] (June 8, 2022). The blog notes:

You have a legitimate product, either from your own brand or one you are permitted to sell. One day, you start to receive complaints from your customers that you are selling counterfeits. You don’t sell fakes, and you only sell through channels you believe to be secure, i.e. Amazon. Yet the claims of counterfeits continue, and not only are you forced to pay these customers back, but you’re left with a slew of highly critical, one-star reviews, crushing your seller account.

So, what exactly went wrong?

For many sellers, the answer to their seemingly cursed account lies in the commingled bins within Amazon’s inventory management system.

Id.

84. See, e.g., Jeff Bercovici, *Small Businesses Say Amazon Has a Huge Counterfeiting Problem. This ‘Shark Tank’ Company Is Fighting Back*, INC. (Apr. 2019), <https://www.inc.com/magazine/201904/jeff-bercovici/amazon-fake-copypat-knockoff-products-small-business.html> [<https://perma.cc/2KYL-BQ9V>]; Fang, *supra* note 67 (“Worse, because fraudulent products cut corners to save price, they can undercut all the other legitimate sellers and be the majority provider of the product to consumers, stealing all business and causing a flood of poor reviews, permanently ruining the product listing even if the seller in question is eventually removed.”).

85. One publication refers to Amazon’s counterfeit problem as “rampant.” Brittney Myers, *Some Shoppers Are Fleeing Amazon Because of Counterfeit Goods*, THE ASCENT, A MOTLEY FOOL SERVICE (Jan. 17, 2023), <https://www.fool.com/the-ascent/personal-finance/articles/some-shoppers-are-fleeing-amazon-because-of-counterfeit-goods/> [<https://perma.cc/24D5-FUU9>]. A recent survey by Michigan State University found that nearly seven in ten people said they had received counterfeit goods from an online purchase at least once last year. Ash-Har Quaraishi, Amy

Office investigated several third-party marketplaces, including Amazon, Walmart, and eBay.⁸⁶ Nearly 43% of the goods ordered from these marketplaces were counterfeit.⁸⁷ In 2023, Amazon claims to have identified and removed over six million counterfeit products on its website.⁸⁸

Counterfeits on Amazon are a real problem and Amazon knows it.⁸⁹ It has created what it refers to as “Amazon Project Zero,” a program designed to drive the number of counterfeits on Amazon to zero.⁹⁰ And it has even developed an in-house division—the Counterfeit Crimes Unit—whose goal it is to “[b]ring bad actors to justice.”⁹¹ But some say that “[n]ot only has [Amazon] avoided any serious backlash for allowing the sale of fake goods, it’s actually thrived from it.”⁹²

Because of the counterfeiting problem, several large brands have opted out of selling on Amazon, either directly or through third parties. For instance, Birkenstock has boycotted the Amazon platform owing to

Corral & Ryan Beard, *\$2 Trillion Worth of Counterfeit Products Are Sold Each Year: Can AI Help Put a Stop to It?*, CBS NEWS, <https://www.cbsnews.com/news/ai-counterfeit-detection-amazon/> [<https://perma.cc/CR8C-T8ML>] (Dec. 12, 2023, 11:02 AM).

86. Ben Unglesbee, *Can Amazon and Its Marketplace Rivals Fix Their Counterfeits Problem?*, RETAIL DIVE (Apr. 9, 2018), <https://www.retaildive.com/news/can-amazon-and-its-marketplace-rivals-fix-their-counterfeits-problem/520301/> [<https://perma.cc/FRW5-6TYW>].

87. *Id.*

88. *Amazon Announces Its Latest Advances in Counterfeit Prevention for Customers, Brands, and Selling Partners*, AMAZON PRESS CENTER (Apr. 4, 2023), <https://press.aboutamazon.com/2023/4/amazon-announces-its-latest-advances-in-counterfeit-prevention-for-customers-brands-and-selling-partners> [<https://perma.cc/ZR92-Z6G8>]. Amazon “spent \$1.2 billion and employed 15,000 people to fight fraud on the marketplace in 2022.” Mary Meisenzahl, *Amazon Is Cracking Down on Counterfeiters, and a Legal Expert Says Consumers Should be ‘Cautiously Optimistic’*, DIGIT. COM. 360 (Apr. 26, 2023), <https://www.digitalcommerce360.com/2023/04/26/amazon-counterfeit-report/> [<https://perma.cc/662D-7PV6>].

89. Vidhi Choudhary, *A Timeline of Amazon’s Efforts to Curb Counterfeit Selling*, MOD. RETAIL (May 23, 2023), <https://www.modernretail.co/technology/a-timeline-of-amazons-efforts-to-curb-counterfeit-selling/> [<https://perma.cc/33TQ-BKH5>].

90. Dharmesh M. Mehta, *Amazon Project Zero*, AMAZON (Feb. 28, 2019), <https://www.aboutamazon.com/news/company-news/amazon-project-zero> [<https://perma.cc/W5BR-SU6G>]. Amazon’s model relies largely on third-party sellers policing themselves. Louise Matsakis, *Amazon Wants Brands to Fight Fake Products Themselves*, WIRED (March 1, 2019, 7:17 PM), <https://www.wired.com/story/amazon-fake-products-project-zero/> [<https://perma.cc/G7KR-A4LN>].

91. *Amazon Counterfeit Crimes Unit: Bringing Bad Actors to Justice*, AMAZON, <https://brandservices.amazon.com/counterfeitcrimesunit> [<https://perma.cc/9DXR-M2HV>] (last visited June 4, 2024).

92. David Pierson, *Extra Inventory. More Sales. Lower Prices. How Counterfeits Benefit Amazon*, L.A. TIMES (Sept. 28, 2018, 3:00 AM), <https://www.latimes.com/business/technology/la-fi-tn-amazon-counterfeits-20180928-story.html> [<https://perma.cc/HJ42-DH6T>]; see also Chow, *supra* note 3, at 185 (“[A]ccording to one brand owner representative, ‘Amazon is making money hand over fist from counterfeiters, and they’ve done about as little as possible for as long as possible to address the issue.’” (quoting Ari Levy, *Amazon’s Chinese Counterfeit Problem Is Getting Worse*, CNBC (July 8, 2016, 9:34 AM), <https://www.cnbc.com/2016/07/08/amazon-chinese-counterfeit-problem-is-getting-worse.html> [<https://perma.cc/K5XW-H4U7>])).

the counterfeit problem.⁹³ Nike does not permit third parties to sell on Amazon but has signed an agreement to sell wholesale to Amazon itself.⁹⁴ Numerous small businesses have exited the Amazon space after their brand and reputation were tarnished by counterfeits sold on Amazon.⁹⁵ Amazon has been—and continues to be—embroiled in a number of lawsuits over counterfeits.⁹⁶

A separate but related problem concerns the sale of defective and dangerous goods on Amazon. A Wall Street Journal investigation in 2019 found over four thousand items for sale on Amazon that had “been declared unsafe by federal agencies, [were] deceptively labeled[,] or [were] banned by federal regulators.”⁹⁷ Of these thousands of goods, 46% were shipped from Amazon warehouses, meaning that either Amazon was the seller or that a third-party seller had elected Fulfillment by Amazon.⁹⁸ Amazon has faced a number of lawsuits in recent years from buyers alleging that they suffered serious personal injury from third-party goods purchased on Amazon.⁹⁹ Amazon has largely avoided liability for goods sold by third-party sellers on its platform, convincing courts that because Amazon does not have title to the goods in question, it is not the

93. Fang, *supra* note 67. Swatch, whose brands include Longines, Omega, and Kate Spade, have also moved away from selling on Amazon. See Matthew Dalton & Laura Stevens, *Amazon Has a Luxury Problem*, WALL ST. J., <https://www.wsj.com/articles/amazon-has-a-luxury-problem-1507460401> [<https://perma.cc/K2PW-958J>] (Oct. 11, 2017).

94. Khan, *supra* note 11, at 991.

95. Wade Shepard, *How Amazon's Wooing of Chinese Sellers Is Killing Small American Businesses*, FORBES (Feb. 14, 2017, 11:36 AM), <https://www.forbes.com/sites/wadeshepard/2017/02/14/how-amazons-wooing-of-chinese-sellers-is-killing-small-american-businesses/> [<https://perma.cc/3X4C-7BU9>] (chronicling various stories of small businesses having their goods counterfeited on Amazon). Specifically, the article notes that “[a]n interesting trend is that many of the companies who are having their products counterfeited on Amazon are not just the big brands . . . but also smaller ‘mom and pop’ brands.”

96. Pierson, *supra* note 92; see, e.g., *Kinsley Tech. Co. v. Ya Ya Creations, Inc.*, No. 20-cv-04310, 2021 WL 2227394, at *1–2 (C.D. Cal. May 3, 2021); *Fuse Chicken, LLC v. Amazon.com, Inc.*, No. 17-cv-1538, 2019 WL 5420210, at *2 (N.D. Ohio Jan. 15, 2019).

97. Alexandra Berzon, Shane Shifflett & Justin Scheck, *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned Unsafe or Mislabeled Products*, WALL ST. J. (Aug. 23, 2019, 8:56 AM), <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990> [<https://perma.cc/EL4F-LTC9>].

98. *Id.*

99. See, e.g., *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 142 (3d Cir. 2019) (defective goods caused permanent blindness in plaintiff's left eye), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 818 F. App'x 138 (3d Cir. 2020) (en banc); *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 620 (Cal. Ct. App. 2020) (defective goods exploded and severely burned plaintiff); *State Farm Fire & Cas. Co. v. Amazon.com, Servs. Inc.*, 407 F. Supp. 3d 848, 849 (D. Ariz. 2019) (defective hoverboard ignited and caused severe home damage), *aff'd*, 835 F. App'x 213 (9th Cir. 2020); *Erie Ins. v. Amazon.com, Inc.*, 925 F.3d 135, 138 (4th Cir. 2019) (defective headlamp caught fire and damaged insured's home); *Pickard v. Amazon.com, Inc.*, No. 20-CV-01448, 2023 WL 8191903, at *1 (W.D. La. Nov. 27, 2023) (battery charger caused deadly fire which killed plaintiff).

“seller” of those goods and therefore can’t be liable in either tort or contract.¹⁰⁰ But courts have not yet considered what impact commingling has on Amazon’s title argument. Amazon claims it is not liable for goods it does not own (i.e., have title to), but because of commingling, no one knows “which goods Amazon owns and which goods it doesn’t own.”¹⁰¹ It may only be a matter of time before courts realize that Amazon’s practice of commingling inventory renders its title argument more than a little thin.¹⁰²

As is apparent, commingling presents several thorny legal problems related to counterfeiting and products liability.¹⁰³ But there is another issue presented by commingling that has yet to be identified and explored; buyers have a right to know exactly what they are buying and who they are buying from. Commingling prevents this from happening. As a matter of pure consumer protection, Amazon’s practice of commingling must either be eliminated or seriously regulated. In the next Part, I discuss the intricacies of purchasing on Amazon, which in turn sets the

100. Monestier, *supra* note 24, at 717–18. The article notes that:

By and large, U.S. courts have held that Amazon is not strictly liable for the goods sold by third parties on Amazon’s website. In the words of one court, there is “an emerging consensus against construing Amazon as a ‘seller’ or ‘distributor’—and, therefore, against holding Amazon strictly liable for defective products sold on its website.” . . .

. . . The reasoning is usually twofold. First, because Amazon does not have title to the goods in question, it cannot be a seller under relevant state law. And second, under the Fulfillment by Merchant program, Amazon does not exercise sufficient control over the goods to qualify as a seller.

Id. (footnotes omitted) (quoting *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 400 (S.D.N.Y. 2018)).

101. *Id.* at 758. The article highlights:

The commingling provision truly illustrates the lunacy of Amazon’s title argument, and relatedly, its disclosure argument. Amazon claims it is not liable for goods it does not own (i.e., have title to), but no one actually knows which goods Amazon owns and which goods it doesn’t own. And Amazon claims that it discloses the identity of the true seller—but it doesn’t actually know who the true seller is. The commingling provision reveals Amazon’s title argument for what it is: a disingenuous attempt to use a legal technicality to avoid responsibility for injuries caused by its sale of goods.

Id.

102. See Plaintiff’s Original Brief on the Merits, *Pickard v. Amazon.com, Inc.* (W.D. La. Mar. 15, 2024) (No. 20-01448), 2024 WL 2242657.

103. There is also the issue of unscrupulous third-party sellers gaming the system by sending counterfeit goods to Amazon, and then requesting a return of “their” inventory, which will presumably include authentic products. See Kaminska, *supra* note 55. The article notes that:

Meanwhile, because Amazon is still obliged to return unsold inventory to suppliers on request, sellers say this creates an incentive for opportunists to send in fake, or low quality, goods into commingled inventory just to receive higher quality goods in return. What proportion of quality goods they receive back depends on how contaminated the particular product pool is, but for many the arbitrage opportunity is worth a punt.

Id.

stage for my argument that Amazon's current practices run afoul of federal and state consumer protection legislation.

III. COMMINGLING AND CONSUMER PROTECTION

It is fair to say that the vast majority of consumers have no idea that Amazon commingles its inventory.¹⁰⁴ Indeed, everyone I have spoken to about the issue is shocked that this practice occurs and that it is completely hidden from buyers. Were Amazon's practice of commingling transparent and communicated to buyers, it would undoubtedly influence purchasing decisions¹⁰⁵ and Amazon's bottom line. As such, Amazon has every incentive to keep the questionable inventory management practice under wraps. I argue that Amazon should no longer be permitted to commingle inventory. And, if it is permitted to do so, it should be required to meaningfully inform buyers of this practice.

To understand this argument, we need to look in more detail at what Amazon discloses and what buyers understand about their Amazon purchases. This, in turn, sets the stage for the argument that substituting goods without a buyer's knowledge or consent is unfair and deceptive within the meaning of federal and state law.

104. Based on a Westlaw search, I was only able to identify six law review articles, aside from mine, that have referenced Amazon's practice of commingling. See Kyle A. Batson, Comment, *The "Catch-22" of Amazon's Argument to Function as an Auctioneer: The Implied Warranty of Merchantability*, 54 ST. MARY'S L.J. 545, 550 (2023) (student comment mentioning commingling in passing); Gina Boone, Note, *Designing Dupes: A Legislative Proposal for Holding Online Marketplaces Contributorily Liable for Counterfeit Goods*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1302, 1324 (2021) (student note mentioning commingling in passing); Janger & Twerski, *supra* note 60, at 269 (devoting a few sentences to commingling and why the practice is problematic); Chow, *supra* note 3, at 185 (explaining link between commingling and counterfeiting); Shih-wei Chao, Note, *The Secret Life of Platform Intellectual Property Adjudication*, B.C. INTELL. PROP. & TECH. F., March 2023, at 10–11 (discussing commingling in relation to intellectual property); Brooke Carroll, Note, *1-Click to Counterfeit: How the Federal Circuit Should Analyze E-Commerce Providers for Cases of Direct Patent Infringement*, 30 FED. CIR. B.J. 163, 186–89 (2020) (student note in federal bar journal discussing commingling and counterfeiting).

105. See, e.g., OutspokenPerson, Comment to *To Avoid Counterfeits and Get Real BIFL Products, Don't Shop Amazon*, REDDIT, https://www.reddit.com/r/BuyItForLife/comments/135aetc/to_avoid_counterfeits_and_get_real_bifl_products/?sort=confidence [<https://perma.cc/9HXV-LEA2a>] (last visited June 4, 2024) [hereinafter *Don't Shop Amazon Reddit Thread*] ("I did not know this. I have bought at least 50 pairs of DT in the last decade. This explains why some are fabulous and others are shit. I'll buy direct now."); jezarnold, Comment to *Don't Shop Amazon Reddit Thread*, *supra* note 105 ("I learn[ed] of this problem a few years ago, and deliberately go out of my way to not buy from Amazon anymore."); iainfharper, Comment to *Don't Shop Amazon Reddit Thread*, *supra* note 105 ("Tbh when I found out about this[,] I stopped buying any brands on Amazon. I'm surprised it's not more widely known."); agent_flounder, Comment to *Don't Shop Amazon Reddit Thread*, *supra* note 105 ("I am done ordering anything critical, important, expensive, name brand, etc from [Amazon].").

A. *What Amazon Discloses*

When a prospective buyer searches for goods on Amazon, hundreds or thousands of search results usually appear. Some will be “Sponsored.”¹⁰⁶ Others will have Amazon designations on them, such as “Amazon’s Pick” or “Best Seller.” Some will boast the Amazon Prime logo. A number will be from a designated “Small Business.” Certain products will have coupon options. Some goods display a count of how many customers purchased the product that month. The product options and Amazon-affixed labels¹⁰⁷ are overwhelming. As one publication bluntly put it, “The interface itself is full of junk.”¹⁰⁸

Notably missing from all this junk is the identity of the seller.¹⁰⁹ To see who is selling the product, a buyer must click on an individual item and be brought to a new page, referred to as the “Detail Page.”¹¹⁰ At that point, Amazon’s “Buy Box” appears on the right-hand side of the screen.¹¹¹ The top of the Buy Box contains, among other things, the price of the item, the expected delivery date, and whether it is Prime-eligible. Below this information, a buyer will find a yellow button to “Buy Now” and an orange button to “Add to Cart.” Underneath all this, in smaller font than everything else in the Buy Box, a buyer will see the following:

106. According to the FTC Complaint filed against Amazon, the company “litters its storefront with pay-to-play advertisements.” Many of these are “irrelevant junk ads, internally called ‘defects,’” which result in billions of dollars in revenue for Amazon. FTC Complaint, *supra* note 39, at 2.

107. Rory Van Loo & Nikita Aggarwal, *Amazon’s Pricing Paradox*, 37 HARV. J.L. & TECH. 1, 19 (2023) (noting “these labels could augment misperception by customers,” and that “[a]t a minimum, these labels risk contributing to . . . cognitive overload”).

108. Herrman, *supra* note 48; *see also* Mull, *supra* note 1. The article posits:

Amazon is getting worse, but you probably already knew that, because you probably shop at Amazon. The online retail behemoth’s search results are full of ads and sponsored results that can push actually relevant, well-reviewed options far down the page. The proportion of its inventory that comes from brands with names like Fkprorjv and BIDLOTCUE seems to be constantly expanding. Many simple queries yield results that appear to be the exact same product over and over again—sometimes with the exact same photos—but all with different names, sellers, prices, ratings, and customer reviews. If you squint, you can distinguish between some of the products, which feels like playing a decidedly less whimsical version of “spot the difference” picture games.

Id.

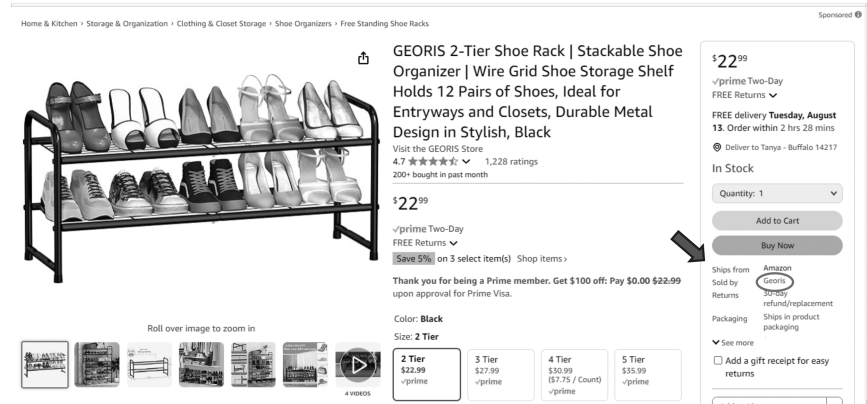
109. Berzon, Shifflett & Scheck, *supra* note 97 (“Amazon doesn’t make it easy for customers to see that many products aren’t sold by the company. Many third-party items the Journal examined were listed as Amazon Prime eligible and sold through the Fulfillment by Amazon program, which generally ships items from Amazon warehouses in Amazon-branded boxes. The actual seller’s name appeared only in small print on the listing page.”).

110. FTC Complaint, *supra* note 39, at 23.

111. Janger & Twerski, *supra* note 60, at 268 (“If one looks at the image in Figure 1 below, the page banner says boldly ‘Amazon Prime.’ The words ‘Amazon’, or ‘Prime’ appear a total of thirteen times on the page. The name of the seller, ‘Cost Brothers,’ appears once. It is hard to find.”).

Ships from [Amazon or third-party seller]
 Sold by [Amazon or third-party seller]
 Returns [Information about returns]
 Payment Secure Transaction

Here is a screenshot of where the name of the “seller” is located within the Buy Box:¹¹²



The identity of the seller is buried deep in the Buy Box, sandwiched among a lot of other information.¹¹³ It occupies a miniscule amount of space in comparison to all the other information on the page.¹¹⁴

112. *GEORIS Stackable 2-Tier Shoe Rack Screenshot*, AMAZON, <https://www.amazon.com/GEORIS-Stackable-Storage-Organizer-Bedroom/dp/B09NC7NTQF> [permalink unavailable] (last visited Aug. 11, 2024). Arrow and circle added by author for ease of reference.

113. Margaret E. Dillaway, *The New “Web-Stream” of Commerce: Amazon and the Necessity of Strict Products Liability for Online Marketplaces*, 74 VAND. L. REV. 187, 206–07 (2021) (“Amazon, by comparison, only displays the designations ‘Sold by Seller’ and ‘Fulfilled by Amazon’ in small type under the so-called ‘buy-box,’ an information-dense area of the product page where users click to add a product to their shopping cart for purchase. Through manipulation of this ‘buy-box,’ Amazon decides which vendor will appear, chooses whose inventory will be sold, and maximizes confusion for consumers as to the actual identity of the vendor.” (footnote omitted)).

114. Janger & Twerski, *supra* note 60, at 267–68. The article explains that:

For a buyer, the identity of the nominal seller is often unclear. Indeed, through its manipulation of the so-called “Buy Box,” Amazon does everything it can to maximize that confusion. . . . When the buyer clicks on the product, Amazon takes them to a screen which includes additional product details, and in the top right-hand corner, two buttons: “buy now” and “add to cart.” This location on the screen is referred to in Amazon parlance as the “Buy Box.” Near these buttons, there is additional information. It is likely to say one of three things: (1) sold by XXX and shipped by XXX; (2) Sold by XXX and fulfilled by Amazon; or (3) sold and shipped by Amazon. This is the only indication the buyer gets of who is nominally selling the product. The buyer may never even notice it.

Id.

Neither the words “Ships from” nor “Sold by” are hyperlinked to provide a customer with an explanation of their meaning. If the goods are “Sold by” a third-party seller, then the name of that seller will be hyperlinked, and a buyer can click-through to see more information about that seller, including their storefront, registered address, and buyer feedback.¹¹⁵

Once the item gets placed in the buyer’s cart, the identity of the seller completely disappears. So, an item purchased from Amazon will look identical in a customer’s cart to the exact same item purchased from ABC Corp. The seller’s name is nowhere to be found. Instead, the product boasts the Amazon Prime logo and “FREE Returns.” There is no ability at this point in the transaction to see who is selling the items in the cart.¹¹⁶

When a customer receives a product sold by a third-party seller and fulfilled by Amazon, it will usually come in an Amazon box held together by Amazon tape.¹¹⁷ It will probably be delivered by an Amazon employee driving an Amazon van.¹¹⁸ Amazon will process returns, handle payment processing, deal with complaints, and the like. The buyer has absolutely no interaction with the so-called “seller” of the goods.

In short, everything about the Amazon experience—from the initial search for products to the post-sale receipt of the goods—screams “Amazon” and not “third-party seller.”

B. *The Unsophisticated Buyer*

A number of buyers on Amazon might be classified as “unsophisticated.” The term is not intended to be pejorative in any way.¹¹⁹ Instead,

115. If a buyer wishes to purchase the goods from a different seller (i.e., not the one whose name appears in the Buy Box), he must scroll down and choose a different seller. Since buyers will rarely consider other potential sellers, it is very important for sellers to “win” the Buy Box. 98% of sales go to the seller designated in the Buy Box. See FTC Complaint, *supra* note 39, at 5.

116. Most customers, however, don’t put their items in a cart and instead simply use the Buy Now feature without paying attention to the identity of the seller. See WEIGEL, *supra* note 5, at 12 (“The vast majority simply click on the ‘Buy Now’ button that displays as the default option in the ‘Buy Box’ on the upper right-hand corner of the page without taking note of whether the seller Amazon has chosen is a third-party or Amazon itself.”).

117. The court in *State Farm Fire & Cas. Co. v. Amazon.com Servs. Inc.* astutely observed, “[w]hile Amazon claims the fine print shows the third-party sells the product, in this instance HoneyMony, the packaging the consumer receives is emblazoned with Amazon’s logo.” 137 N.Y.S.3d 884, 888 (Sup. Ct. 2020) (citation omitted).

118. Dana Mattioli & Esther Fung, *The Biggest Delivery Business in the U.S. Is No Longer UPS or FedEx*, WALL ST. J., <https://www.wsj.com/business/amazon-vans-outnumber-ups-fedex-750f3c04> [<https://perma.cc/ZU3M-D5HW>] (Nov. 27, 2023, 10:36 AM) (“Before Thanksgiving this year, Amazon had already delivered more than 4.8 billion packages in the U.S., and its internal projections predict that it will deliver around 5.9 billion by the end of the year . . .”).

119. Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 493–94 (2010) (“An ever growing body of case law and

it is intended to denote a buyer who is not necessarily knowledgeable about online shopping, computer technology, or Amazon's business model. The unsophisticated buyer does not appreciate that Amazon is both a store and a marketplace.¹²⁰ Consequently, when they make purchases on Amazon, they believe they are buying goods from Amazon.¹²¹ Several plaintiffs in recent products liability actions fall into this category; they believed that when they placed an order on Amazon, Amazon was the seller of those goods.¹²² Why is it that these buyers don't know that Amazon functions in a dual capacity—as seller and as logistics provider?¹²³

First, it is likely that unsophisticated buyers draw an analogy to the physical world. When I go into Lowe's and purchase goods, I am purchasing those goods *from* Lowe's. Thus, it does not occur to them that the model would be any different when purchasing online.¹²⁴

Second, even though Amazon's website does technically identify who the goods are "Sold by," an unsophisticated buyer is likely to miss this altogether.¹²⁵ Recall that the "Sold by" notation appears in the Buy

scholarship has fashioned a rigid dichotomy between sophisticated and unsophisticated parties in a wide array of contract inquiries." (footnotes omitted)).

120. WEIGEL, *supra* note 5, at 3 ("The case of Amazon can be confusing because customers buy both first- and third-party goods there—shopping both *from* and *through* the platform. . . . Amazon's interface does not make it easy to tell whether you are buying from Amazon or from a 3P seller.").

121. Carroll, *supra* note 104, at 165 ("[M]any consumers may not even realize they are actually purchasing goods from third-party sellers instead of directly from Amazon."); Joan Verdon, *Retailers Join Fight to Get Amazon and Other Marketplaces to Identify Third Party Sellers*, FORBES (Sept. 1, 2020, 8:16 AM), <https://www.forbes.com/sites/joanverdon/2020/09/01/retailers-join-fight-to-get-amazon-and-other-marketplaces-to-identify-third-party-sellers/> [<https://perma.cc/Y7AV-ZVMZ>] ("Consumers often do not realize they are buying from a third party seller, rather than Amazon, when they place an order . . .").

122. See *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 609 (Cal. Ct. App. 2020) ("[Bolger] received the battery . . . in Amazon packaging, including an Amazon-branded box with Amazon-branded shipping tape. Throughout the process, Bolger had no contact with Lenoge [the third-party seller] or anyone other than Amazon. *She believed Amazon sold her the battery*. Amazon's total fee for the transaction was \$4.87, or approximately 40 percent of the purchase price." (emphasis added)); *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 418 (6th Cir. 2019) ("On November 3, 2015, Plaintiff Megan Fox accessed the webpage and purchased a FITURBO F1 hoverboard. At that time, *Plaintiff believed that Defendant owned the hoverboard, and that she purchased the hoverboard from Defendant*." (emphasis added)).

123. Amazon.com, Inc., 86 Fed. Reg. 38450, 38454 (Consumer Product Safety Comm'n July 21, 2021) (Complaint) ("Consumers who purchase FBA consumer products on amazon.com may reasonably believe they are purchasing the products from Amazon. While the ASIN includes 'Sold by [merchant]' in small print underneath the 'Buy Now' link, Amazon only explicitly identifies the role of third parties in its FBA program at paragraph 16 of its 'Conditions of Use' for its website." (alteration in original)).

124. Berzon, Shifflett & Scheck, *supra* note 97 (observing that "[m]any of the millions of people who shop on Amazon.com see it as if it were an American big-box store, a retailer with goods deemed safe enough for customers").

125. Herrman, *supra* note 48 ("There's a good chance, however, that it won't actually be sold *by* Amazon but rather by a third-party seller that has spent

Box, a very information-dense area of the webpage.¹²⁶ It is located *after* the yellow “Add to Cart” and the orange “Buy Now” button. And notably, what follows immediately after the prominent yellow and orange buttons is not the name of the seller, but instead the name of the shipper—which is usually Amazon.¹²⁷ The strange and inverted placement of “shipper” and then “seller” is, no doubt, deliberate.¹²⁸ It puts the Amazon name front and center, even if Amazon is not the actual seller of the goods.¹²⁹

Third, to the extent that an unsophisticated buyer does see “Shipped by Amazon” and “Sold by Third Party,” he is unlikely to appreciate what this means. Again, his reference point is the traditional retail model. If he sees a coffee maker “Shipped by Amazon” and “Sold by Coffee Pros,” he will likely assume that he is buying a product sold by Amazon and manufactured by Coffee Pros.¹³⁰ In other words, buyers may simply assume that the third party is the name of the manufacturer of the item, while Amazon remains the seller of the item. In short, there is a swath of the buying public that has no idea that buying from third parties on Amazon is not much different than buying from sellers on eBay, Craigslist, Facebook Marketplace, or Etsy.¹³¹

Amazon’s very business model is deceptive as it creates the impression that Amazon is the seller of all products on its website. Amazon directly benefits from buyers’ ignorance about its dual function as both

months or years and many thousands of dollars hustling for search placement on the platform—its ‘store,’ to use Amazon’s term, is where you will have technically bought this spatula. There’s an even better chance you won’t notice this before you order it.”).

126. The only other way of understanding that Amazon is both a seller and a conduit for third-party sales is to read the company’s Conditions of Use, which are hyperlinked at the bottom of Amazon’s home page. Buried deep in these provisions is the following statement: “Parties other than Amazon operate stores, provide services or software, or sell product lines through the Amazon Services. . . . If you purchase any of the products or services offered by these businesses or individuals, you are purchasing directly from those third parties, not from Amazon.” *Conditions of Use*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM> [<https://perma.cc/X63W-S4KE>] (Sep. 14, 2022).

127. Recall that over 60% of third-party sellers use Fulfillment by Amazon. See sources cited *supra* note 31 and accompanying text.

128. It is hard to imagine any scenario where the identity of the shipper is more important than the identity of the seller.

129. Pierson, *supra* note 92 (“When a product is labeled ‘Shipped from and sold by Amazon’ it’s supposed to lend an air of authenticity.”).

130. Of course, this doesn’t apply to all products. If such a buyer sees a Keurig-branded coffee machine sold by Coffee Pros, they are not likely to think Coffee Pros is the manufacturer. But I venture to guess that these buyers don’t give much, if any, thought to Coffee Pros’ role in the transaction. The buyer in this circumstance may think that Amazon purchased the goods from Coffee Pros and is now selling to the public.

131. Pierson, *supra* note 92 (observing that Amazon’s marketplace has been described as “a messy free-for-all—a flea market run amok where up to 5 million vendors from across the world ferociously compete to sell the cheapest toothbrush or beach towel”).

a retailer and a marketplace for third-party goods.¹³² It would not be difficult for Amazon to operate two separate websites or to clearly delineate Amazon purchases from marketplace purchases. For instance, Amazon-sold¹³³ goods could appear with a different color backdrop than third-party goods. Or individual tabs could delineate between Amazon-sold goods and third-party goods.

The choice not to distinguish Amazon from third parties is intentional. Amazon deliberately blurs the lines¹³⁴ between where Amazon ends and third parties begin so that customers view *all* sales consummated on Amazon as being the same.¹³⁵ According to one author, “[O]ne of Amazon’s primary marketing functions has been to put a trustworthy American veneer on products without a recognizable brand name that have been conceptualized, designed, and produced wholly overseas.”¹³⁶ The trust that Amazon has deliberately cultivated inures to the benefit of third-party sellers. One third-party seller was quoted as saying, “But the biggest thing is that people trust Amazon . . . And so they trust us.”¹³⁷ In

132. Austin Martin, Note, *A Gatekeeper Approach to Product Liability for Amazon*, 89 GEO. WASH. L. REV. 768, 782 (2021) (“Consumers may easily be unaware if the items they purchase through Amazon are sold by third-party vendors or by Amazon itself, suggesting just how much consumers trust Amazon when purchasing goods through its platform.”).

133. I am using the term “Amazon-sold” goods to denote non-Amazon branded goods that are sold by the platform. The proliferation of Amazon’s private label goods raises a myriad of other (predominantly antitrust) concerns. See, e.g., Khan, *supra* note 11, at 993 (“In some cases, Amazon has responded to popular items introduced by third-party merchants by sourcing those same products directly from the manufacturer and demoting the third-party merchants in search results.”); Reiley Pankratz, Comment, *Duty to Disclose: Amazon’s E-Commerce Platform, Private-Label, and the Need for Disclosure*, 30 KAN. J.L. & PUB. POL’Y 162, 168 (2020) (“The FTC should enact a regulation requiring Amazon . . . to clearly disclose which products are its own private-label products and which products are supplied from outside vendors to avoid anticompetitive practices and consumer deception.”).

134. Amazon offers an A-to-Z Guarantee for *all goods* sold on its platform, further fueling the perception that Amazon is the seller of all goods on its platform. *A-Z Guarantee*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTIFYQV> [<https://perma.cc/8LNV-7C74>] (last visited June 5, 2024).

135. See FTC Complaint, *supra* note 39, at 21 (“Amazon’s online superstore unites its Retail and Marketplace arms, with products intermixed and presented to the public simultaneously and side-by-side. To a shopper browsing on Amazon, there are no obvious differences between the types of listings, nor is there a way to regularly shop for products sold only by Amazon Retail or Amazon Marketplace.”); Amazon’s Motion to Dismiss, *supra* note 22, at 5. (“[S]hopper[s] browsing on Amazon’ observe ‘no obvious differences’ between Amazon Retail listings (where Amazon sets the price and controls the delivery experience) and third-party seller listings (where third-party sellers set the price and control the delivery experience).” (alterations in original) (quoting FTC Complaint, *supra* note 39, at 21)).

136. Amanda Mull, *Is This How Amazon Ends?*, THE ATLANTIC (Dec. 13, 2023), <https://www.theatlantic.com/technology/archive/2023/12/american-amazon-consumers-shein-temu/676339/> [<https://perma.cc/4JWL-HFDK>] (observing that “Amazon made the unknown seem sufficiently reliable, or at least sufficiently American”).

137. Duhigg, *supra* note 9.

turn, Amazon brings more and more third-party sellers into the circle of trust, resulting in billions of dollars in fees and commissions for Amazon.

Thus far, there have not been calls for Amazon to separate its seller role more clearly from its marketplace role—at least not as a consumer protection matter.¹³⁸ This is peculiar especially because so many recent personal injury plaintiffs have claimed that they believed they were buying goods “from” Amazon.¹³⁹ Not only is there no effort to get Amazon to be more transparent about its unorthodox business model, but more and more retailers are following suit in adopting a dual seller/platform interface.¹⁴⁰ However, even if Amazon were more transparent about its dual role—sometimes seller, sometimes platform—this would still leave intact Amazon’s completely under-the-radar practice of commingling.

C. *The Sophisticated Buyer*

The sophisticated buyer understands that Amazon wears two hats simultaneously: a seller hat and a service provider hat. He generally appreciates that if a product is “Sold by” and “Shipped by” a third party, then Amazon is not the seller of those goods. Consequently, he may steer clear of those goods, thinking that those goods may be inferior, defective, dangerous, or the like. Instead, he may gravitate toward goods that seem to have Amazon’s stamp of approval: they are either “Sold by” Amazon or “Shipped by” Amazon. In other words, a sophisticated buyer is more inclined to pay attention to Amazon’s role in the transaction, assuming the goods that are sold or shipped by Amazon have, in some way, been vetted by Amazon.¹⁴¹

138. Arguments have been made that such a separation is necessary from an antitrust perspective. See Khan, *supra* note 11, at 976–77 (“One feature dominant digital platforms share is that they have integrated across business lines such that they both operate a platform and market their own goods and services on it. This structure places dominant platforms in direct competition with some of the businesses that depend on them, creating a conflict of interest that platforms can exploit to further entrench their dominance, thwart competition, and stifle innovation.”).

139. See sources cited *supra* note 122 and accompanying text; see also Catherine M. Sharkey, *Holding Amazon Liable as a Seller of Defective Goods: A Convergence of Cultural and Economic Perspectives*, 115 NW. U. L. REV. ONLINE 339, 348 (2020) (“And even when consumers may understand that third-party sellers are the source of a product, they likely expect that Amazon is selecting and vetting the goods sold on its marketplace.”).

140. For example, companies like Target, Walmart, Best Buy, and Newegg have adopted this model. Mull, *supra* note 1 (“Amazon’s dominance has bent competitors such as Walmart and Target to ape the same tactics that can make the site so unwieldy: Other companies’ search results are now similarly dotted with strange offerings from largely unrecognizable third parties, devolving after a page or two into a heap of listings with indeterminate origins and quality.”). Mull predicts that Amazon’s business model contains the seeds of its own demise. See Mull, *supra* note 136.

141. Weigel, *supra* note 14. The author makes the following observations about buyers:

You feel comfortable buying [goods] from a brand called something like PHZWLA—or, more likely, without looking up the brand at all—because

A small percentage of these sophisticated buyers may be classified as “hyper-sophisticated” and understand the difference between “Sold by Amazon; Fulfilled by Amazon” and “Sold by [Third Party]; Fulfilled by Amazon.” These buyers know that Amazon is the seller in the former scenario, but not the latter.

Sophisticated buyers make decisions about what to buy, and from who, based on information Amazon provides to them. In particular, the identity of the seller is probably one of the most important factors to a sophisticated buyer. In an Amazon Prime sub-reddit thread, Amazon buyers make it clear that they gravitate toward “Sold by” Amazon goods to avoid counterfeit or dangerous products.

- “I also usually go for ‘sold and shipped by Amazon’ with the thought process of avoiding unauthentic products.”¹⁴²
- “They always say who it’s sold by in blue text. I usually check that because I want to avoid scam brands”¹⁴³
- “I try to stick with ships from and sold by Amazon, if only for accountability.”¹⁴⁴

These comments reflect a common theme: sophisticated buyers trust Amazon and do not necessarily trust third-party merchants that sell on Amazon. To protect themselves, these buyers ensure that they only buy goods “Sold by” Amazon. But because of Amazon’s practice of commingling inventory, these buyers are not actually able to protect themselves. They are not able to make informed decisions about what they are buying.¹⁴⁵ They are told they are buying goods “Sold by” Amazon, but they may instead be getting goods sourced from a fly-by-night outfit in China.¹⁴⁶ And they proceed with their purchases in complete oblivion. In other words, they don’t know what they don’t know.

you trust that Amazon has vetted it. You assume that if the headphones sounded tinny or smelled funny, at least a few of the thousands of reviews on the page would have said so. And if these things were really dangerous, if they were going to spark a fire in your ears or come apart and choke your infant in her sleep, that would have happened to someone already and Amazon would have removed them.

Id.

142. cnuttin, Comment to *Someone Please Clear This Up: Does Amazon Com[m]ingle Their Own Inventory*, REDDIT [hereinafter *Does Amazon Commingled Reddit Thread*], https://www.reddit.com/r/amazonprime/comments/xqnhzq/someone_please_clear_this_up_does_amazon_comingle/ [https://perma.cc/Y35G-M67Y] (last visited June 4, 2024).

143. Alastair_Grimes, Comment to *Does Amazon Commingled Reddit Thread*, *supra* note 142.

144. abductee92, Comment to *How to Avoid Commingled, Counterfeit Products*, REDDIT, https://www.reddit.com/r/amazonprime/comments/rh2tax/how_to_avoid_commingled_counterfeit_products/ [https://perma.cc/9G99-E5UV] (last visited June 4, 2024).

145. *See generally* Mull, *supra* note 1.

146. Mary Serene Carino, *How Did Amazon Reach Its Prime?*, 21 J. INT’L BUS. & L. 193, 208 (2022) (“49% of the top 10,000 largest sellers on Amazon [are] based in China.”); *see also* Herrman, *supra* note 48 (noting Amazon “aggressive[ly] recruit[s]

* * *

In this Part, I have laid out what Amazon discloses to buyers and what different types of buyers are likely to understand about Amazon and their purchases on the website. The most that a typical buyer could understand is that goods are sold on Amazon by third-parties other than Amazon. But even this buyer—the sophisticated or hyper-sophisticated buyer—doesn't know Amazon's dirty little secret: that he may be getting goods from a seller other than the one he agreed to buy from. We can call this “virtual tracking,” “commingling,” “stickerless inventory,” or “substitution.” Or we can call what it is: lying.¹⁴⁷ Amazon is lying to buyers about who they are buying goods from. Put in more legal terms, Amazon's failure to disclose its practice of commingling inventory constitutes unfair and deceptive trade practices within the meaning of the Federal Trade Commission Act (FTC Act or the Act) and its state law counterparts.¹⁴⁸ It is to that argument that I now turn.

IV. WHEN “SOLD BY” IS NOT “SOLD BY”: A CASE FOR LIABILITY UNDER DECEPTIVE TRADE PRACTICES STATUTES

Amazon would say that it does disclose the seller of the goods to the buyer. In the Buy Box, Amazon includes a notation, before a purchase is made, that the item is “Sold by” a certain seller. Most prospective buyers will miss this notation altogether, but nonetheless, it is there. However, because of commingled inventory, it is quite possible that the item is not actually “Sold by” that seller; it is sold by another seller. And a buyer is none the wiser.¹⁴⁹ Telling a buyer that the goods they are purchasing are

... sellers based in China, who, according to some estimates, accounted for nearly half of all businesses on the platform in 2020”); Jon Emont, *Amazon's Heavy Recruitment of Chinese Sellers Puts Consumers at Risk*, WALL ST. J. (Nov. 11, 2019, 11:17 AM), <https://www.wsj.com/articles/amazons-heavy-recruitment-of-chinese-sellers-puts-consumers-at-risk-11573489075> [<https://perma.cc/E86A-VV5E>] (noting “[a] new product listing is uploaded to Amazon from China every 1/50th of a second”).

147. Mull, *supra* note 1 (“Products have to meet certain safety standards and sellers cannot falsely advertise their wares, but even when they violate the country's consumer-protection laws, the burden of proof is usually on the consumer, and pursuing even a strong case can be prohibitively expensive and drawn-out. Beyond that, marketers, salespeople, and retailers are free to foster a casual relationship with the truth in ways that those without the benefit of rarefied legal training might describe as *lying*.”).

148. Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 WAYNE L. REV. 1869, 1895–96 (2000) (“In the late 1960's and 1970's, almost every state enacted a statute aimed at protecting consumers from unfair or deceptive conduct by merchants. In almost half the states these statutes track the broad, vague language of section 5 of the FTC Act, proscribing ‘unfair or deceptive acts or practices . . .’” (footnote omitted) (quoting Unlawful Acts and Practices, ALASKA STAT. tit. 45, ch. 50, § 471(a))).

149. Khadeeja Safdar, Shane Shifflett & Denise Blostein, *You Might Be Buying Trash on Amazon—Literally*, WALL ST. J., <https://www.wsj.com/articles/you-might-be-buying-trash-on-amazonliterally-11576599910> [<https://perma.cc/L9FS-NYQW>] (Dec. 18, 2019, 3:38 AM) (“Amazon customers don't always have total control over whom they buy from. A default setting in an Amazon account known as

“Sold by” Seller A and instead providing a buyer with goods from Seller B is illegal. Just because it is done by a beloved brand, takes place completely out of sight, and is couched as an inventory management practice does not make it any less illegal. The practice falls squarely within the meaning of deceptive and unfair trade practices under both federal and state law.

The FTC Act is the primary statute of the Federal Trade Commission,¹⁵⁰ whose motto is “Protecting America’s Consumers.”¹⁵¹ The Act is primarily designed to address anti-competitive behavior and unfair or deceptive trade practices.¹⁵² Specifically, Section 5 of the Act gives the agency authority over “unfair and deceptive acts and practices.”¹⁵³ Rather than specifically enumerating what these unfair and deceptive acts and practices might be,¹⁵⁴ the FTC has instead issued policy guidance

‘commingling’ can mean customers think they are buying from one merchant but end up getting the product from another . . .”).

150. 15 U.S.C. §§ 41–58 (2024); *see also Fed. Trade Comm’n Act*, FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/browse/statutes/federal-trade-commission-act> [<https://perma.cc/R22H-EHNM>] (last visited June 5, 2024). Under the Act, the Commission has the power to:

(a) [P]revent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; (d) gather and compile information and conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress and the public.

Id.

151. FED. TRADE COMM’N, <https://www.ftc.gov/> [<https://perma.cc/K9J2-MVBT>] (last visited June 5, 2024).

152. Originally, the Act only dealt with unfair competition, but was eventually amended to cover unfair and deceptive trade practices as well. *See Greenfield, supra* note 148, at 1869–70 (noting that the original 1914 Act was amended in 1938 to include unfair trade practices). The need for a federal statute to regulate consumer law was grounded in “perceived failings” of existing law. *See Joshua D. Wright, The Antitrust Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2226–27 (2012). Wright explains:

Redress for common consumer grievances—such as the inaccurate description of a product or the dishonoring of a warranty—lay in suits for breach of contract, fraud, or fraudulent misrepresentation. Both tort and contract remedies presented problems, however. Tort theories of recovery imposed “intent to deceive” and causation requirements, while contract theories required privity between buyer and seller, which became more uncommon in the increasingly mobile 1960s American economy. Judicial remedies often could prove economically futile as the cost of a suit typically could overwhelm whatever damages the consumer could demonstrate.

Id. (footnotes omitted).

153. 15 U.S.C. § 45(a)(1) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

154. FED. TRADE COMM’N, STATEMENT OF CHAIR LINA M. KHAN JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER AND COMMISSIONER ALVARO M. BEDOYA ON THE ADOPTION OF THE STATEMENT OF ENFORCEMENT POLICY REGARDING UNFAIR METHODS OF COMPETITION UNDER

on the meaning of “deceptive” as used in Section 5.¹⁵⁵ In that guidance, the then-Chairman of the FTC noted that certain elements “undergird all deception cases”: 1) “[T]here must be a representation, omission or practice that is likely to mislead the consumer”; 2) the practice must be examined “from the perspective of a consumer acting reasonably in the circumstances”; and 3) “[t]he representation, omission, or practice must be a ‘material’ one.”¹⁵⁶ In assessing materiality, “the basic question is whether the act or practice is likely to affect the consumer’s conduct or decision with respect to a product or service.”¹⁵⁷ States have enacted corresponding state-based legislation to protect consumers from unfair and deceptive trade practices.¹⁵⁸ These statutes, sometimes referred to as “little FTC acts,”¹⁵⁹ vary in scope but are all fundamentally designed to provide redress to consumers who have been wronged by deceptive business practices.¹⁶⁰ Thus, both federal and state law track similar territory:

SECTION 5 OF THE FTC ACT. 5 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmtKhanSlaughterBedoyaStmt.pdf [<https://perma.cc/G29G-QGX6>] (“Inasmuch as the policy statement does not neatly set out a bounded list of prohibited practices, this follows Congress’s design. Lawmakers opted against a pre-specified list of proscribed tactics because they knew that such a list would quickly become outdated. Congress instead tasked the FTC with concretizing the meaning of ‘unfair methods of competition’ through litigation and rulemaking, informed by the agency’s expertise and ability to do rigorous research into real-world markets and evolving business practices.”).

155. FED. TRADE COMM’N, FTC POLICY STATEMENT ON DECEPTION, (Oct. 14, 1983) [hereinafter FTC POLICY STATEMENT ON DECEPTION], https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [<https://perma.cc/72AS-8576>].

156. *Id.*

157. *Id.*

158. Elise M. Nelson & Joshua D. Wright, *Judicial Cost-Benefit Analysis Meets Economics: Evidence from State Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 997, 1002–03 (2017) (“State UDAPs [unfair or deceptive acts and practices statutes] were generally based upon either an existing federal or state law or a uniform model statute. The FTC developed a model statute upon which most state UDAPs were based: the Model Unfair Trade Practices and Consumer Protection Law (UTP-CPL).” (footnote omitted)).

159. Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 912 (2017) (“State consumer protection statutes [are] known as state UDAP laws or state ‘little FTC acts’ . . .”). They are also sometimes referred to as “state consumer protection laws” or “state consumer protection acts.” *Id.* at 912 n.2. For an argument that the expression “little FTC Act” is a misnomer, see Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 163 (2011) (noting “[t]here is growing concern that enforcement under these acts is not only qualitatively different than FTC enforcement but may also be counter-productive for consumers”).

160. Pridgen, *supra* note 159, at 912 (noting that the goals of the state statutes “were to extend the reach of the FTC’s consumer protection mission into the states and to provide a more productive legal tool for consumers to obtain compensation for injustices committed by unscrupulous merchants”). For a macro critique of state statutes or state practice, see James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 ANTITRUST L.J. 947, 947–48 (2017) (arguing that many of these laws have drifted from their original purpose).

they are designed to ensure that consumers are protected from false, misleading, or otherwise deceptive business practices.¹⁶¹

Amazon's misrepresentation as to the identity of the seller of goods on its platform is actionable under the FTC Act or any of its state law counterparts. Indeed, a misrepresentation of this nature (i.e., one going to the very identity of the seller) is at the core of the protections afforded by such legislation.¹⁶² For the sake of simplicity, this Article will focus on federal legislation, the FTC Act,¹⁶³ and its accompanying guidance to argue that Amazon's practice of commingling runs afoul of consumer protection law.

A. *There Is a Representation or Omission Likely to Mislead*

Put simply, is a statement that goods are "Sold by X" when they are not, in fact, sold by X, a representation or omission that is likely to mislead? The answer is yes.

One might argue that Amazon is making an affirmative misrepresentation.¹⁶⁴ Amazon is telling a buyer that the goods he is purchasing are "Sold by" a certain seller, but they are not actually sold by that seller.¹⁶⁵ In the words of Professors Janger and Twerski, "[B]y allowing substitution of products from different third-party sellers who have placed their

161. Robert M. Langer & Alundai J. Benjamin, *The FTC's 2022 Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 and Its Potential Impact upon Little FTC Acts*, 37 ANTITRUST 49, 51 (2023) (noting "most Little FTC Acts contain a provision that state courts construing the Act should be 'guided by,' or 'give due consideration and great weight' to the interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act").

162. Although the FTC Act does not enumerate specific prohibited acts, commentary from some eighty-four years ago identifies the sorts of practices that fall squarely within the statute: "[F]alse and misleading advertising; misbranding, mislabeling and misrepresenting products as to composition, origin, quality or source; passing off one's goods as those of another." FED. TRADE COMM'N, STATEMENT OF THE HON. GARLAND S. FERGUSON ON THE ADMINISTRATION OF THE FEDERAL LAWS RELATING TO FALSE AND MISLEADING ADVERTISING (Apr. 30, 1940), https://www.ftc.gov/system/files/documents/public_statements/685231/19400430_ferguson_the_administration_of_the_federal_laws_relating_to_false_and_misleading.pdf [<https://perma.cc/R9HH-2JR2>].

163. "Unfair" trade practices have been distinguished from "deceptive" trade practices, with the FTC issuing separate guidance for each. While it is certainly unfair for Amazon to commingle goods and not disclose the practice to customers, the unfairness arises *from the deceptive nature of the practice*. Accordingly, the guidance and case law dealing with deception is a more apt reference point.

164. FTC POLICY STATEMENT ON DECEPTION, *supra* note 155, at 1 n.4 ("A misrepresentation is an express or implied statement contrary to fact.").

165. Simone T. Peinkofer & Yao Henry Jin, *The Impact of Order Fulfillment Information Disclosure on Consequences of Deceptive Counterfeits*, 32 PROD. & OPERATIONS MGMT. 237, 238 (2022) ("To address this information asymmetry, online retailers have increasingly enhanced their service designs by disclosing which parties are responsible for selling and shipping products. Surprisingly, these disclosures do not always match actual service processes, as retailers may commingle their own inventory with those of third-party sellers to harness inventory-pooling benefits." (citation omitted)).

products in Amazon's inventory, [Amazon] effectively makes a sale that differs from the one described in the 'Buy Box.'"¹⁶⁶

Alternatively, one might argue that Amazon is not misrepresenting the identity of the seller. It is simply not fully disclosing its inventory management practices which—in some (but not all) cases—might result in buyers getting goods from a seller other than the one whose name appeared in the Buy Box. Thus, most charitably, we have an omission.¹⁶⁷ Amazon does not tell buyers that the goods they are buying could originate from a seller other than the one displayed on the screen. Whether couched as an affirmative representation or as an omission is of no moment. In either circumstance, the statement or non-statement is likely to mislead; it causes a buyer to believe that goods are from a certain seller when they are not, in fact, from that seller.

Amazon might respond that this is neither an omission nor a misrepresentation. Amazon does disclose who goods are “Sold by”—meaning who is legally responsible for the goods. If goods are “Sold by” Amazon and they turn out to be defective or dangerous because they are taken from commingled inventory, Amazon will stand behind those goods as the “seller.” If goods are “Sold by” third-party seller X, then third-party seller X will be legally liable for any issues with the goods. In other words, Amazon would say that terms like “seller” and “Sold by” are legal terms,¹⁶⁸ and don't necessarily denote, as a factual matter, who the goods are “from.” Thus, Amazon would claim that the moniker “Sold by” is not a misrepresentation; it accurately captures the legal seller in the transaction and who will ultimately bear responsibility for the goods.¹⁶⁹

Any such argument, however, misses the mark. When a layperson sees the term “Sold by,” he will view the expression as describing who the goods are coming *from*—i.e., who selected, sourced, and put the stamp of approval on the goods that are now being sold. People buy goods, or refrain from buying goods, based on who sells them.¹⁷⁰ Consumers

166. Janger & Twerski, *supra* note 60, at 272.

167. FTC POLICY STATEMENT ON DECEPTION, *supra* note 155, at 1 n.4 (“A misleading omission occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed. . . . In determining whether an omission is deceptive, the Commission will examine the overall impression created by a practice, claim, or representation.”).

168. This argument would be reminiscent of the “title” arguments Amazon makes in products liability actions involving goods sold on its platform.

169. This argument may be problematic considering the position Amazon has taken in products liability actions. For instance, in *Bolger v. Amazon.com, LLC*, Amazon described the third-party seller at issue as performing the following functions: “It sourced the product, held title, set the price, and transferred title directly to the buyer.” Memorandum of Points and Authorities in Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication by Defendant Amazon.com, LLC at 5, *Bolger v. Herocell, Inc.* (Cal. Super. Ct. Dec. 14, 2018) (No. 37-2017-00003009), 2018 WL 11208952, at *5 (emphasis added). This is an explicit acknowledgement that the “seller” is the one who “sources the product.”

170. *Majority of Consumers Buying from Companies That Take a Stand on Issues They Care About and Ditching Those That Don't, Accenture Study Finds*, BUS. WIRE (Dec. 5, 2018, 8:05 AM), <https://www.businesswire.com/news/home/20181205005061/>

trust certain sellers, such as Target, Walgreens, and The Home Depot, to source quality products.¹⁷¹ If I see baby wipes on a store shelf at Target, I assume that they have gone through some sort of vetting process.¹⁷² I assume that Target has internal quality control standards to ensure that these baby wipes do not contain harmful chemicals or dyes. If I see baby wipes at Dollar Tree, I may not have the same assumptions. I may wonder where Dollar Tree got those baby wipes from—a vendor in China that has questionable quality control practices?¹⁷³ Obviously, I have no way of knowing whether either the baby wipes at Target or Dollar Tree will prove to be problematic. But *who* is selling them (Target vs. Dollar Tree) matters to me.¹⁷⁴ Not because of who I can sue at the end of the day when those wipes prove to be dangerous. But because I trust Target to seek out and source quality products more than I trust Dollar Tree to do the same.¹⁷⁵

en/Majority-of-Consumers-Buying-From-Companies-That-Take-A-Stand-on-Issues-They-Care-About-and-Ditching-Those-That-Don't-Accenture-Study-Finds [https://perma.cc/WW92-4NAC] (“Today, 62 percent of consumers say their purchasing consideration is driven by a company’s ethical values and authenticity. Furthermore, nearly three-quarters (74 percent) crave greater transparency in how companies source their products, ensure safe working conditions and their stance on important issues such as animal testing.”).

171. Chow, *supra* note 3, at 170 (“In the United States, counterfeits are also unable to penetrate into legitimate distribution channels to reach large department stores or other large retailers. Counterfeits are almost never found in large chain stores such as Costco, Target, or Walmart. These companies either use qualified distributors or have vertically integrated business models that allow them to control distribution themselves.” (footnote omitted)).

172. *Product Safety & Quality Assurance*, TARGET, <https://corporate.target.com/sustainability-governance/operating-ethically/product-safety-quality-assurance> [https://perma.cc/L5XR-LCJP] (last visited June 5, 2024).

173. Daniel Villarreal, *41% of Americans Say They Won't Buy Products Made in China, While 35% of Chinese Say They Won't Buy American-Made Goods*, NEWSWEEK (May 15, 2020, 6:45 PM), <https://www.newsweek.com/41-americans-say-they-wont-buy-products-made-china-while-35-chinese-say-they-wont-buy-1504503> [https://perma.cc/ET7H-7Y6V] (“A new Deutsche Bank survey shows that 41 percent of Americans say they won’t buy products made in China . . .”).

174. Jonathan Crowl, *Study Finds Brand Reputation More Important to Consumers Than Price*, SKYWORD (May 15, 2015), <https://www.skyword.com/contentstandard/study-finds-brand-reputation-more-important-to-consumers-than-price/> [https://perma.cc/3CEK-C4HA] (“Everyone knows price matters to consumers, but a new study suggests the lowest price doesn’t always win. Even more important to consumers is the reputation of retailers—and how prices correlate to that brand reputation.”).

175. Kali Coleman, *Don't Buy These Products at Dollar Tree or Dollar General, New Report Warns*, BESTLIFE (May 5, 2022), <https://www.bestlifeonline.com/dollar-tree-chemicals-news> [https://perma.cc/WJX5-VT4Q] (“Researchers purchased more than 200 products being sold from a number of dollar store retailers in the U.S. and Canada and tested a total of 635 unique components or materials from these products for certain toxic chemicals. According to the report, more than one half (53 percent) of all the products tested contained at least one chemical of concern.”).

Enter Amazon and commingling. I trust Amazon to source quality products. So do millions of Americans.¹⁷⁶ When I buy goods from Amazon, I fully expect to get goods *from* Amazon (i.e., that Amazon sourced). What I do not expect is a bait and switch. I do not expect that if I buy goods from Amazon, I will instead get goods that are from a third-party vendor in China. And yet this is exactly what Amazon does. It represents that goods are “Sold by” Amazon, but instead delivers goods to buyers that are from a seller other than Amazon. It is little consolation that if something goes wrong with the goods, a buyer can look for legal recourse to Amazon. This is not how buyers approach sales transactions. When they look at who sells goods, they don’t look at the seller as the entity that will bear legal liability months or years down the line if goods are defective. Instead, they look at the seller as the party that sourced and vetted the goods that they are purchasing.¹⁷⁷

Through commingling, Amazon has created a practice where it simply deems a certain entity to be the seller, even though that entity has no relation to the actual physical goods being sold.¹⁷⁸ There is no such thing as a “deemed” or “legal” seller. Either you are the seller of the goods or not. A company like Amazon cannot unilaterally control and manipulate the meaning of commonly understood terms like “seller” and “Sold by.”

B. *The Practice Must Be Examined from the Perspective of the Reasonable Consumer*

The second part of the FTC’s guidance on deception indicates that the practice must be examined from the perspective of a buyer acting reasonably in the circumstances.¹⁷⁹ In other words, context matters. There are a host of factors to consider in assessing the reasonableness of a consumer’s claim for misrepresentation, including: “[H]ow clear is the representation? [H]ow conspicuous is any qualifying information? [H]ow important is the omitted information? [D]o other sources for the omitted information exist? [H]ow familiar is the public with the product or service?”¹⁸⁰

This contextual exercise is important in certain cases but has limited applicability to Amazon’s misrepresentation (or non-disclosure) as

176. Amazon Staff, *Amazon Named Among the Most Innovative, Trusted Brands by Axios Harris Poll and 3 Other Recent Polls*, AMAZON (May 25, 2023), <https://www.aboutamazon.com/news/company-news/amazon-named-among-the-most-innovative-trusted-brands-in-4-recent-polls> [<https://perma.cc/T3GN-DLA5>].

177. See, e.g., Kocjb11, Comment to Herrman, *supra* note 48 (“The difference between Amazon and a REAL STORE, is that the store is doing a level of vetting for you. If I walk into a Target or a Walmart or my local supermarket, somebody is making decisions about what to put on the shelves.”).

178. AMAZON SERVICES BUSINESS SOLUTIONS AGREEMENT, *supra* note 66, at 24 (“[Y]ou . . . agree to indemnify, defend, and hold [us] harmless . . . against any Claim that arises from or relates to . . . any Unit that we identify as yours pursuant to Section F-4 . . .”).

179. FTC POLICY STATEMENT ON DECEPTION, *supra* note 155, at 1 n.4.

180. *Id.* at 5.

to commingling. This is because even the most conscientious consumer would be unable to get to the ground truth about who is selling what on Amazon. Amazon does not disclose in any way, shape, or form to consumers that it occasionally (or maybe more than occasionally) substitutes Seller A's goods for Amazon's goods, and Seller B's goods for Seller C's goods. Commingling as a practice is kept a tightly guarded secret. Third-party sellers know that commingling is happening because they are required to opt out of it. But buyers have no clue that this behind-the-scenes substitution is taking place—and would have no means by which to discover the very existence of the practice.¹⁸¹ Thus, this prong of the test is a gimme: examined from the perspective of a reasonable consumer, Amazon's statements about the identity of the seller certain of its transactions are false and misleading. The question becomes, simply, is such a representation or omission material?

C. *The Representation or Omission Must Be Material*

Whether characterized as a misrepresentation or omission, Amazon's failure to disclose that it commingles inventory misleads a consumer about a critical aspect of the transaction: who the consumer is ultimately buying from. FTC Guidance specifies that a "material" misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers.¹⁸² It notes that "[i]njury exists if consumers would have chosen differently but for the deception."¹⁸³ Arguably, there is no information more material to a buyer than who is selling a given item. This is because the identity of the seller provides a universally recognized surrogate for the quality and safety of the goods purchased.¹⁸⁴

181. One online publication describes how buyers can protect themselves from dangerous goods on Amazon: "[P]urchase items critical to personal safety, such as bike helmets and child seats, from traditional brick-and-mortar retailers who are far less likely to stock counterfeits." Fang, *supra* note 67. This presupposes, however, that a buyer knows that commingling exists. If a buyer has no clue that Amazon swaps out one seller's goods for another, why would it be concerned when it purchases goods "Sold by" Amazon? After all, Amazon is one of the most trusted brands in America.

182. FTC POLICY STATEMENT ON DECEPTION, *supra* note 155, at 5 (footnote omitted).

183. *Id.* at 6.

184. Consider, for example, a purchase of a carbon monoxide detector. I am a lot more likely to purchase a carbon monoxide detector at The Home Depot than I am at Odds-and-Ends Discount Hardware based *solely* on the identity of the seller. I trust that the carbon monoxide detector at The Home Depot will be authentic and safe. I have no idea where Odds-and-Ends Discount Hardware gets their carbon monoxide detectors from. I have no idea whether they are real or counterfeit. I have no idea if they are close to their expiration date. I have no idea if they've been sitting in a hot warehouse for years. And since I am not about to take my chances with a carbon monoxide detector, I'll get the one from The Home Depot—who most likely sourced the carbon monoxide detector from a reputable vendor—and be on my way. See, e.g., Kirsty Major, *Looking for an Online Bargain? Beware of Exploding Batteries, Dangerous Toys, Even Socks That Can Burn You . . .*, THE GUARDIAN

The materiality of who sources a product is reflected in the products liability case law. In *Skaggs v. Amazon.com, Inc.*,¹⁸⁵ for instance, the court explained the difference between goods sold by Amazon and goods sold by third parties:

When Amazon is the seller of a product, it *sources the product*, sets the price, and holds title to the product. . . .

Where a third party is the seller, it is identified in the “sold by” line The third-party seller decides what to sell, *sources the product*, sets the price, and ensures that it is the seller of the product. Additionally, the third-party seller *is responsible for ensuring that the product complies with all applicable laws*.¹⁸⁶

As the court recognizes, the seller “sources the product.”¹⁸⁷ In doing so, the seller is the one that ensures that the “product complies with all applicable laws”¹⁸⁸—i.e., that it is safe. The identity of the actual seller matters and is much more than a label that is affixed to a transaction.¹⁸⁹

A representation or omission is material if it would likely affect the consumer’s decision with respect to a good.¹⁹⁰ As discussed above, the identity of the seller is a paramount concern and one that is very likely to shape decisions about whether to buy a given product. The focus above was on issues of product safety; of course, the identity of the seller matters when it concerns things like hair dryers, electric toothbrushes, and baby wipes. But what about items that don’t raise acute safety concerns? Does the identity of the seller really matter if you’re buying goods that have a low risk of presenting a safety problem? According to Professors Janger and Twerski, “Whether or not [commingling] is problematic may vary with the type of product. Sometimes the seller matters.”¹⁹¹

I would submit that the identity of the seller always matters. First, even seemingly innocuous purchases can present safety concerns.¹⁹²

(Dec. 13, 2023, 5:00 PM), <https://www.theguardian.com/money/2023/dec/13/looking-for-an-online-bargain-beware-of-exploding-batteries-dangerous-toys-even-socks-that-can-burn-you-> [https://perma.cc/HHQ2-RQNJ] (recounting the story of a retired doctor who purchased brand name smoke alarms from a third-party seller on Amazon’s UK site). When the alarms kept beeping, he contacted technical support only to discover that the smoke detectors were already 10 years old; the seller had stickered over the expiration label with a false new expiration date. *Id.*

185. 334 So.3d 780 (La. Ct. App. 2021).

186. *Id.* at 784 (emphasis added). Note that *Skaggs* was a Fulfillment by Merchant case.

187. *Id.*

188. *Id.*

189. Janger & Twerski, *supra* note 60, at 269 (“Amazon decides who will appear in the ‘Buy Box’ and whose inventory will be sold. All of this is largely out of the control of third-party sellers or the awareness of the consumer.”).

190. FTC POLICY STATEMENT ON DECEPTION, *supra* note 155, at 1.

191. Janger & Twerski, *supra* note 60, at 270 n.54.

192. *MSU Survey: 7 in 10 Consumers Deceived into Buying Counterfeit Products Online*, MSUToday (Oct. 19, 2023), <https://msutoday.msu.edu/news/2023/msu-survey-7-in-10-consumers-deceived-into-buying-counterfeit-products-online> [https://perma.

When Heather Oberdorf purchased a dog leash on Amazon, she probably didn't think it could potentially pose any safety hazards.¹⁹³ And yet, the leash retracted unexpectedly and caused permanent blindness in her left eye.¹⁹⁴ The leash was purchased on Amazon from a third-party seller that had since disappeared.¹⁹⁵ Second, the identity of the seller always matters in relation to the price paid. Buyers are willing to pay a premium to buy from a reputable seller. They are not willing to pay a premium to buy from a third-party seller in China. When buyers think they are buying "from" Amazon and get commingled goods from a third-party instead, they have overpaid. They might nonetheless have purchased those third-party goods, but probably not at the price they paid thinking it was Amazon itself supplying the goods.¹⁹⁶

D. *Supreme Court Precedent Supports Liability Under the FTC Act*

The Supreme Court has repeatedly opined that forms of misrepresentation similar to commingling are deceptive or unfair within the meaning of Section 5 of the FTC Act. In *Federal Trade Commission v. Royal Milling Co.*,¹⁹⁷ the FTC sued the petitioners for using the term "Milling Company" to sell their products.¹⁹⁸ The petitioners were not, in fact, engaged in the business of milling (i.e., grinding wheat into flour); instead, they were in the business of selling already-milled flour.¹⁹⁹ The Court summarily concluded that "clearly the methods used were unfair and were methods of competition."²⁰⁰ It then focused on whether preventing the use of these methods was in the best interest of the public.²⁰¹ On this point, the Court stated:

If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by

cc/H27G-JPXM] ("Clothes and shoes—the most commonly purchased counterfeit items, according to the survey—might pose minimal threats, but even these products may contain harmful chemicals such as lead.").

193. *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 818 F. App'x 138 (3d Cir. 2020).

194. *Id.* at 140.

195. *Id.* at 142.

196. Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1320 (2015) (noting the problem of overcharge when buyers "pay[] more for goods than they would have had the market been governed by more informed and rational consumers").

197. 288 U.S. 212 (1933).

198. *Id.* at 214–16 ("All are engaged in preparing for the market self-rising flour and plain flour and selling the same in interstate commerce. None of them grind from the wheat the flour which they thus prepare and sell, but only mix and blend different kinds of flour purchased from others engaged in grinding.").

199. *Id.* at 214.

200. *Id.* at 216.

201. *Id.*

imposing upon them an exactly similar article, or one equally as good, but having a different origin.²⁰²

The Court continued:

[Buyers] believe that the price or quality or both are affected to their advantage by the fact that the article is prepared by the original grinder of the grain. The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of [the] opinion that the purchasing public is entitled to be protected against that species of deception²⁰³

As the Court makes clear in *Royal Milling*, a buyer is entitled to purchase a good because it comes from a certain seller—it is not enough to supply the buyer with “an exactly similar” item or “one equally as good, but having a different origin.”²⁰⁴ So too, an Amazon buyer is entitled to purchase a good because it originates from a particular seller. Supplying the “same” good from a different seller does not suffice under *Royal Milling*. The Court also noted that the purchasers in the case were deceived into buying something that they did not intend to buy and may not have purchased but for the misrepresentation. Again, the words are apt in the Amazon commingling context. Certainly, buyers are being deceived into purchasing something they did not want—goods from a seller other than the one they agreed to buy from.

A case decided one year later, *Federal Trade Commission v. Algoma Lumber Co.*,²⁰⁵ provides further support for the proposition that a seller is not entitled to substitute goods.²⁰⁶ In that case, the respondents were engaged in the manufacture and sale of lumber and timber products that they sold under the name of “California white pine” or “white pine.”²⁰⁷ The lumber was not, in fact, white pine according to either “botanical science” or under “commercial practice and understanding.”²⁰⁸ The Court discussed at length whether the lumber supplied by the respondents, *pinus ponderosa*, was substantially equivalent to white pine; it concluded it was not.²⁰⁹ It emphasized, however, “the substitution would be unfair

202. *Id.*

203. *Id.* at 216–17. Ultimately, the Court held that the companies could keep their trade names because they constituted valuable business assets in the form of goodwill, but that they were required “proper qualifying words” to make it clear they were not the millers of the grain. *Id.* at 217.

204. *Id.* at 216.

205. 291 U.S. 67 (1934).

206. *Id.* at 77.

207. *Id.* at 70.

208. *Id.*

209. *Id.* at 77.

though equivalence were shown.”²¹⁰ This is true even if a buyer received an equivalent product and saved money in the process. The Court stated:

But saving to the consumer, though it be made out, does not obliterate the prejudice. Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. . . . The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.²¹¹

Algoma Lumber reinforces *Royal Milling* in holding that sellers are not permitted to substitute “equivalent” goods. Instead, a buyer is deceived if he orders one thing and gets something else. The Amazon parallel is once again apparent. A buyer who orders an Oral-B 500 electric toothbrush sold by Amazon is entitled to an Oral-B 500 electric toothbrush sold by Amazon—not the “equivalent” sold by a third-party seller.

Thirty years later, the Supreme Court affirmed its holdings in *Algoma Lumber* and *Royal Milling*. In *Federal Trade Commission v. Colgate-Palmolive Co.*,²¹² the Court was called upon to determine what facts constitute a material factor in a purchaser’s decision to buy under Section 5 of the FTC Act.²¹³ The respondents argued that material facts are those which deal with the substantive qualities of a product.²¹⁴ By contrast, the FTC argued that any fact can be material, so long as it materially induces a purchaser’s decision to buy.²¹⁵ The Court sided with the FTC’s interpretation as being “more in line” with the decided cases.²¹⁶ It repeated the language from *Algoma Lumber* that “[t]he public is entitled to get what it chooses,” and the language from *Royal Milling* that purchasers have a “right” to purchase from their chosen seller and “imposing upon [a buyer] an exactly similar article, or one equally as good, but having a different origin” is not countenanced under Section 5.²¹⁷

Supreme Court case law makes clear that substituting one seller’s goods for another violates the FTC Act. Just because Amazon does so in the shadows and with the buy-in of third-party sellers does not make the practice any less problematic. The bottom line is that Amazon misrepresents to buyers who the seller of their goods is. It tells them who it designates as the legal seller of their goods; but it does not tell them who the actual seller of their goods is.

210. *Id.*

211. *Id.* at 78 (citation omitted).

212. 380 U.S. 374 (1965).

213. *Id.* at 386–87.

214. *Id.*

215. *Id.* at 387.

216. *Id.*

217. *Id.* at 387–88 (first quoting *Fed. Trade Comm’n v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934); and then quoting *Fed. Trade Comm’n v. Royal Miller Co.*, 288 U.S. 212, 216 (1933)).

E. *What the FTC Should Do About Commingling*

The FTC has expressed serious concerns about a number of Amazon's business practices.²¹⁸ In September 2023, the FTC, along with 17 state attorneys general, filed a massive antitrust lawsuit²¹⁹ against the retail giant alleging that it used a set of "interlocking anticompetitive and unfair strategies to illegally maintain its monopoly power."²²⁰ The lawsuit alleges that Amazon's actions "stop rivals and sellers from lowering prices, degrade quality for shoppers, overcharge sellers, stifle innovation, and prevent rivals from fairly competing against Amazon."²²¹ Separately, the FTC is pursuing Amazon for deceptive and unfair practices concerning its signature Prime program; it claims that Amazon enrolls customers into its Prime program without their consent and makes it very difficult for customers to cancel their subscriptions.²²² The FTC also recently brought actions against Amazon concerning its Ring doorbell cameras and Alexa virtual assistant devices.²²³ Both of these actions were settled.²²⁴ Clearly, the FTC is on top of most things Amazon.²²⁵

218. *Prepared Statement of the Federal Trade Commission: Hearing on Fiscal Year 2024 Federal Trade Commission Budget Before the Comm. on Energy and Com., S. Comm. on Innovation, Data, & Com.*, 117th Cong. 26 (2023) ("Our consumer reports data show that online platforms have become fertile ground for fraud and abuse, and we are taking on this problem using all of our tools.").

219. The Associated Press notes that this is "the agency's most aggressive move yet to tame the market power of Amazon." Haleluya Hadero, *The Amazon Antitrust Lawsuit Is Likely to Be a Long and Arduous Journey for the FTC*, AP, <https://apnews.com/article/amazon-ftc-lina-khan-antitrust-lawsuit-da0b124e24183a3acd60367f05181f49> [<https://perma.cc/R9FE-SL3H>] (Oct. 10, 2023, 11:16 AM).

220. *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, FED. TRADE COMM'N (Sept. 26, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power> [<https://perma.cc/BQ8D-JAQP>].

221. *Id.*

222. Amended Complaint for Permanent Injunction, Civil Penalties, Monetary Relief, and Other Equitable Relief, Fed. Trade Comm'n v. Amazon.com, Inc. (W.D. Wash. Sept. 20, 2023) (No. 23-cv-0932); *see also* *Amazon.com, Inc. (ROSCA), FTC v.*, FED. TRADE COMM'N (Nov. 17, 2023), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2123050-amazoncom-inc-rosca-ftc-v> [<https://perma.cc/ZRR6-P2FU>].

223. Kevin Collier, *What Are the Four Cases the FTC Has Recently Brought Against Amazon?*, NBC NEWS (Sept. 27, 2023, 6:00 AM), <https://www.nbcnews.com/tech/tech-news/are-four-cases-ftc-recently-brought-amazon-rcna117426> [<https://perma.cc/4SAJ-P7WA>]; Office of Public Affairs, *Amazon Agrees to Injunctive Relief and \$25 Million Civil Penalty for Alleged Violations of Children's Privacy Law Relating to Alexa*, U.S. DEP'T OF JUST. (July 19, 2023), <https://www.justice.gov/opa/pr/amazon-agrees-injunctive-relief-and-25-million-civil-penalty-alleged-violations-childrens> [<https://perma.cc/LA2H-BHSJ>]; Jim Kreidler, *FTC Says: Amazon Didn't Protect Alexa's Users' or Children's Privacy*, FED. TRADE COMM'N (May 31, 2023), <https://consumer.ftc.gov/consumer-alerts/2023/05/ftc-says-amazon-didnt-protect-alexa-users-or-childrens-privacy> [<https://perma.cc/SE4T-VPBW>].

224. *See* Collier, *supra* note 223.

225. For other recent FTC actions against or involving Amazon, *see* *FTC Returns Nearly \$60 Million to Drivers Whose Tips Were Illegally Withheld by Amazon*, FED. TRADE COMM'N (Nov. 21, 2021), <https://www.ftc.gov/news-events/news/press>

But commingling seems to be a glaring hole. In its 172-page anti-trust lawsuit against Amazon, the FTC chronicles a litany of deceptive and anticompetitive behavior by Amazon. Never once, however, does it mention Amazon's practice of commingling.²²⁶ Likewise, I could find no reference to "virtual tracking" or "commingling" on the FTC's webpage. Given that many of the problems associated with counterfeit, dangerous, and defective goods can be addressed via regulating the practice of commingling, this omission is patent.

What options could the FTC pursue to address the commingling issue?²²⁷ First, the FTC could seek to enjoin Amazon from commingling goods of unknown origin from different sellers. Section 13(b) of the FTC Act²²⁸ authorizes the Commission to seek preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission," including Section 5 which prohibits unfair and deceptive trade practices.²²⁹ Obviously, Amazon would vigorously resist such an injunction, as it would deal a major blow to its business model. But a permanent injunction from commingling is the only way to meaningfully deal with the rampant and widespread counterfeit problem on Amazon. And an injunction is the only remedy that would be consistent with FTC Supreme Court case law. The Court has made it abundantly clear that a customer is entitled to the exact item he ordered from the exact seller he ordered it from. Substituting so-called equivalent products without the buyer's knowledge is not permitted.

Alternatively, the FTC could require Amazon to disclose to a consumer that he will be (or may be) receiving goods from commingled

releases/2021/11/ftc-returns-nearly-60-million-drivers-whose-tips-were-illegally-withheld-amazon [https://perma.cc/CA5W-JF83] (action to refund Amazon driver tips); *FTC, Amazon to Withdraw Appeals, Paving Way for Consumer Refunds Related to Children's Unauthorized In-App Charges*, FED. TRADE COMM'N (Apr. 4, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/04/ftc-amazon-withdraw-appeals-paving-way-consumer-refunds-related-childrens-unauthorized-app-charges [https://perma.cc/WK6V-9GKH] (refunds for customers of children's unauthorized in-app purchases); *FTC Approves Final Order Against the Bountiful Company in First Case Alleging Hijacking of Online Product Reviews*, FED. TRADE COMM'N (Apr. 10, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-approves-final-order-against-bountiful-company-first-case-alleging-hijacking-online-product [https://perma.cc/TUC9-MA8J] (hijacking reviews on Amazon); *Cure Encapsulations, Inc.*, FED. TRADE COMM'N (June 4, 2019), https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3113-cure-encapsulations-inc [https://perma.cc/8DFX-NUX6] (fake reviews of weight loss supplement sold on Amazon).

226. Recall that Amazon funnels Fulfillment by Amazon third-party sellers into commingling by default, making it difficult and expensive to opt out.

227. On the mechanics of pursuing a remedy, see *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 593 U.S. 67, 71–72 (2021) (noting "[t]he Act permits the Commission to use both its own administrative proceedings (set forth in § 5 of the Act) and court actions in exercising this authority").

228. 15 U.S.C. § 53(b) (2024).

229. 15 U.S.C. § 13(b) (2024); see also *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/34UV-S45J].

inventory. This disclosure would need to be conspicuous and provided to a customer before they make a purchase on Amazon. Even in an ideal world, however, this may not be a particularly effective solution.²³⁰ First, having any sort of commingling disclosure presupposes that a buyer understands Amazon's business model—that sometimes it sells its own goods, sometimes it sells third-party goods, and sometimes it sells and ships third-party goods. Very few consumers appreciate these distinctions. One would need a PhD in Amazonomics to understand this unique and unintuitive business model. Second, since the Amazon interface is so cluttered and confusing, it is difficult to see where this disclosure would go or how it could be made in a clear and conspicuous manner. If Amazon currently fails to delineate the identity of the nominal seller conspicuously, it is hard to believe it could be trusted to conspicuously identify the actual seller. Third, how could Amazon meaningfully explain commingling and its implications to a hapless buyer who is just looking to buy a desk lamp or an electric razor online? The explanation of commingling—and its attendant risks—is not exactly a one-sentence “FYI.”²³¹ Fourth, it is not clear that Amazon is able to determine at the point of sale (or, more accurately, prior to the point of sale) which goods will be drawn from commingled inventory.²³² As such, any disclosure would likely take the form of a qualified statement such as: “Your goods may be from a seller that uses virtual tracking.” Of course, no customer would understand what this means or why it is significant, completely defeating the reason for disclosure in the first place.

Nonetheless, if an injunction is not a feasible option,²³³ disclosure is the next-best option. Indeed, Congress has recognized the need for additional disclosures for parties who participate in online marketplaces. However, its solution—the Integrity, Notification, and Fairness in Online

230. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011) (“Although mandated disclosure addresses a real problem and rests on a plausible assumption, it chronically fails to accomplish its purpose.”); Douglas J. Plume, *Finding a Better Disinfectant: Shortcomings of Modern Public-Disclosure Regulations as a Tool for Directing Corporate Behavior and Protecting Consumers*, 40 REV. BANKING & FIN. L. 865, 902 (2021) (“[A] great deal of research in social psychology and behavioral economics has shown that people ‘distort information and ignore and misuse it in making decisions.’ Mandated disclosure—making more information available to people—‘does not solve this problem.’” (quoting Ben-Shahar & Schneider, *supra* note 230, at 720)).

231. For instance, on the Reddit threat mentioned earlier that explained commingling in very simple terms, many users still not seem to appreciate the consequences of commingling. See, e.g., TheRedSe7en, Comment to *Don't Shop Amazon Reddit Thread*, *supra* note 105.

232. Presumably, the buyer would need to enter their shipping address first so that Amazon could determine which warehouse the goods will be shipped from.

233. Some consumers may value the benefits that commingled inventory provides (in the form of faster shipping) over the harms it produces.

Retail Marketplaces for Consumers Act (the INFORM Consumers Act)—leaves much to be desired.²³⁴

V. THE INFORM CONSUMERS ACT DOES NOT INFORM CONSUMERS

Congress has recognized that online marketplaces like Amazon present unique challenges in terms of counterfeiting and consumer protection.²³⁵ In 2023, Congress passed the INFORM Consumers Act, which went into force on June 27, 2023.²³⁶ The INFORM Consumers Act mandates that online marketplaces, such as Amazon, collect, verify, and disclose certain information to consumers about “high-volume third-party sellers.”²³⁷ According to the FTC, “The goal of the INFORM Consumers Act is to add more transparency to online transactions and to deter criminals from acquiring stolen, counterfeit, or unsafe items and selling them through those marketplaces.”²³⁸ In particular, the Act aims to ensure that the identity of the seller is clear to the consumer.²³⁹ To that end, online marketplaces must now disclose to the consumer the following information for high-volume sellers with aggregate annual sales of over \$20,000 on the platform: ²⁴⁰ (i) “the full name of the seller”;

234. 15 U.S.C. § 45f (2024).

235. See generally John H. Zacharia & Kari Kammel, *Congress’s Proposed E-Commerce Legislation for Regulation of Third-Party Sellers: Why It’s Needed and How Congress Should Make It Better*, 21 U.C. DAVIS BUS. L.J. 91, 118–19 (2020).

236. *Informing Businesses About the INFORM Consumers Act*, FED. TRADE COMM’N (June 2023), <https://www.ftc.gov/business-guidance/resources/INFORMAct> [<https://perma.cc/7TKB-S79H>].

237. 15 U.S.C. § 45f (2024); *Informing Businesses About the INFORM Consumers Act*, *supra* note 236; see also *id.* (noting online marketplaces may be fined for failure to collect and verify the required disclosures); Michael Purcell, *What Is the INFORM Consumers Act?*, THOMPSON REUTERS (June 8, 2023), <https://legal.thomsonreuters.com/blog/what-is-the-inform-consumers-act/> [<https://perma.cc/R3YA-PHFF>]. The article explains:

The [Act] requires online marketplaces to implement due diligence measures to ensure their sellers are legitimate businesses and that the products they sell are authentic. Online marketplaces must verify the identity of their sellers by collecting and verifying their tax ID numbers, government-issued IDs, and bank account information. They must also implement protocols to identify and remove counterfeit products from their platforms and provide information to consumers about the products they purchase. In addition, information such as the identity of the seller, their name, business address, contact information, and country of origin (for products they purchase) must be made readily available to consumers.

Id.

238. *Informing Businesses About the INFORM Consumers Act*, *supra* note 236.

239. *Id.* (noting that “[w]hen consumers buy products from online marketplaces, the identity of the seller is often unclear”).

240. A high-volume third-party seller:

[M]eans a participant on an online marketplace’s platform who is a third party seller and, in any continuous 12-month period during the previous 24 months, has entered into 200 or more discrete sales or transactions of new or unused consumer products and an aggregate total of \$5,000 or more in gross revenues.

15 U.S.C. § 45f(f)(3)(A).

(ii) “the physical address of the seller”; and (iii) “contact information for the seller to allow for direct communication between the buyer and seller” (including a phone number, email address, and other methods of direct messaging).²⁴¹ The online marketplace is required to disclose this information to consumers in a “clear and conspicuous manner” either on the product listing page, including via hyperlink, or in the order confirmation or other document or communication sent after the purchase is finalized.²⁴²

Additionally, and relevant to the issue of commingling, an online marketplace must disclose the following:

Whether the high-volume third party seller used a different seller to supply the consumer product to the consumer upon purchase, and, upon the request of an authenticated purchaser, the information described in clause (i) relating to any such seller that supplied the consumer product to the purchaser, if such seller is different than the high-volume third party seller listed on the product listing prior to purchase.²⁴³

The disclosure, once again, can be on the product listing page or on an after-the-fact confirmation document, so long as it is “clear and conspicuous.”

At first glance, it appears that platforms like Amazon must disclose to consumers whether they are using commingled inventory to fulfil orders. For instance, Adams and Reese LLP, an international and multidisciplinary law firm,²⁴⁴ states in a recent newsletter that the INFORM Consumers Act mandates that “[o]nline marketplaces must also inform consumers when ‘commingling’ occurs (i.e., when a different seller supplies the product purchased).”²⁴⁵ Careful examination of the INFORM Customers Act, however, suggests otherwise.

Consider the wording of the provision. An online marketplace, such as Amazon, must disclose “[w]hether the high-volume third party

241. 15 U.S.C. § 45f(b)(1)(B). Much of this information is already being disclosed through the Amazon interface, so it’s not clear that the INFORM Consumers Act adds much on the disclosure front. See Micah_Amazon, Comment to *Address Verification Privacy??*, AMAZON SELLER CENT., <https://sellercentral.amazon.de/seller-forums/discussions/t/4d3be234-2edb-468d-820d-b1ea8236fb23> [<https://perma.cc/3WQM-ALDE>] (last visited June 5, 2024) (“To ensure that customers have the best information at their disposal when making shopping decisions, Amazon already maintains a seller profile page on Amazon.com for each seller, including their name, address, optional customer-service phone number, and a link to our Buyer-Seller Messaging chat service. Because this page satisfies some of the new requirements under the INFORM Consumers Act, we are not making any changes.”).

242. 15 U.S.C. § 45f(b)(1)(A)(ii).

243. 15 U.S.C. § 45f(b)(1)(B)(ii).

244. *About Adams and Reese LLP*, VAULT, <https://legacy.vault.com/company-profiles/law/adams-and-reese-llp> [<https://perma.cc/2MLD-LCKT>] (last visited June 8, 2024).

245. *What’s Next Following the INFORM Consumer Act?*, ADAMS & REESE LLP (Feb. 3, 2023), [<https://perma.cc/8JQ6-K9V5>].

seller used a different seller to supply the consumer product to the consumer.”²⁴⁶ A high-volume seller that has opted into commingling—or more accurately, failed to opt out of commingling—has not “used” a different seller to supply the goods to the buyer. The decision of whether to substitute one seller’s goods for another rests with Amazon itself. A third-party seller has no control over the decision and only learns about it (if at all) after-the-fact.²⁴⁷ In other words, participating in commingling means that your inventory may be used fungibly. But Amazon decides whether and when to do so. Thus, the statutory precondition in the INFORM Consumers Act is simply not met: a high-volume seller who agrees to commingle inventory never uses a different seller to supply the product. Instead, Amazon uses a seller other than the one listed to supply goods to customers. Amazon, however, is exempt from any disclosure requirements. The disclosure provisions apply only to high-volume third-party sellers. The INFORM Consumers Act specifically states that “[t]he term ‘third party seller’ does not include . . . a seller who operates the online marketplace’s platform.”²⁴⁸

Interestingly, however, it seems like Amazon has not interpreted the INFORM Consumers Act provision narrowly. On its webpage, “About the INFORM Consumers Act,” Amazon writes:

246. 15 U.S.C. § 45f(b)(1)(B)(ii).

247. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 607 (2020) (“[I]n most cases[,] there are no communications between FBA supplier and buyer; the FBA supplier simply discovers in a report or some other form of notification that a product has been sold to the buyer.” Amazon does not contact the seller for approval of the purchase; Amazon itself decides whether to allow the transaction to go through.”); Brief of Flipper LLC, An Amazon Third Party Merchant with Product sold in All 50 States and Over 20 Countries, as Amicus Curiae in Support of Respondents at 7–8, *State v. Wayfair, Inc.*, 901 N.W.2d 754 (S.D. 2017) (No. 17-494) (“Amazon has full control over where it sends the inventory; the individual merchant has no control or knowledge of where Amazon places the inventory. Amazon merchants only find out about a sale after it occurs, and even then, only if they download specified reports.”), *vacated and remanded by* 138 S.Ct. 2080 (2018).

248. 15 U.S.C. § 45f(f)(6)(B). Is this provision superfluous? Not entirely. It could capture the practice of dropshipping. Dropshipping is an order fulfillment practice that essentially does away with the need for inventory. The dropshipper takes orders without the inventory on hand; after the orders are received, the dropshipper seeks to fulfill the order with a third-party. The dropshipper functionally serves as a middleman, but the actual goods will come to the buyer from a third-party supplier. In the Amazon context, if a third-party seller elects Fulfillment by Merchant, it could conceivably participate in dropshipping if it “outsources” the sale once the order is received. Amazon has a stringent policy on dropshipping, which, ironically, seeks to prevent the customer from learning the true identity of the seller. The policy provides that dropshipping “is not acceptable unless it is clear to the customer that you are the seller of record.” *Drop Shipping Policy*, AMAZON SELLER CENT., <https://sellercentral.amazon.com/help/hub/reference/external/201808410?ref=https://perma.cc/Z5QV-QMCQ> (last visited June 5, 2024). It mandates that the actual seller’s identity must not “appear[] on packing slips, invoices, or external packaging[]; it is strictly prohibited without exception.” *Id.* Amazon claims that “[a]ny time a customer sees packaging, invoices, or receipts identifying a seller that is not you[,] it creates confusion for the customer about how their order is being fulfilled and whom they should contact with any problems or questions.” *Id.*

To comply with the new law, we will begin notifying customers in shipping confirmation emails when an item in their order was supplied by a different seller than the seller they ordered from, and provide a link to the supplying seller's profile page in the customer's order-history invoices. This will mainly occur for sellers who have not opted out of FBA's virtual tracking program.²⁴⁹

Amazon states that it will provide the name of the true seller in sales where the high-volume seller participates in commingling (i.e., has not opted out of virtual tracking). It says it will do so in "shipping confirmation emails"—in other words, after a purchase is made.²⁵⁰

I have recently received one of these shipping confirmation emails from Amazon. The information about the substitute seller is provided at the very bottom²⁵¹ of the shipping confirmation email in miniscule font, buried among information no consumer will ever read. It states, in light-colored, 8.5 point Arial font:

Unless otherwise noted, items sold by Amazon.com are subject to sales tax in select states in accordance with the applicable laws of that state. If your order contains one or more items from a seller other than Amazon.com, it may be subject to state and local sales tax, depending upon the [seller's] business policies and the location of their operations. Learn more about tax and seller information.

Your invoice can be accessed here.

One or more items in your shipment was supplied by a different seller than the seller you purchased the item from. Visit Your Orders from a web browser to see the suppliers of these items on your invoices.

This email was sent from a notification-only address that cannot accept incoming email. Do not reply to this message.²⁵²

It can safely be said that only a handful of Amazon's hundreds of millions of customers will ever see this disclosure—which is statutorily required to be "clear and conspicuous"—or know that their goods came from a seller other than the one nominally designated by Amazon.

249. Micah_Amazon, *supra* note 241.

250. *Id.*

251. In what would be considered the "footer"—i.e., not part of the email itself.

252. Shipping confirmation on file with author. Note that Amazon's own words in its Motion to Dismiss the FTC's Amended Complaint involving Prime sign-ups suggest that the buried, small, gray disclaimer regarding the alternate supplier is not conspicuous. *See* Amazon's Motion to Dismiss Amended Complaint at 10, Fed. Trade Comm'n v. Amazon, Inc. (W.D. Wash. Dec. 8, 2023) (No. 23-cv-0932) ("Prime's price and auto-renewal terms are disclosed 'in regular sized, bold font' against a white backdrop, making them easily viewable to the 'reasonable user.' Again, this is exactly what the FTC recommends. ('A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, should stand out from any accompanying text.')" (first quoting *Capp v. JPMorgan Chase Bank, N.A.*, 2023 WL 3030990, at *4 (E.D. Cal. Apr. 21, 2023); and then quoting Declaration of Joseph A. Reiter in Support of Defendants' Request for Judicial Notice, ex. 3 at 60825, Fed. Trade Comm'n v. Amazon, Inc. (W.D. Wash. Dec. 8, 2023) (No. 23-cv-0932))).

A similar “disclosure” practice was held not to pass legal muster in *Singer Manufacturing Co. v. Golden*.²⁵³ In that case, defendants advertised that they were selling “genuine Singer parts,” but then sometimes substituted non-Singer parts in orders to consumers. At the bottom of every customer invoice, the following notation appeared:

Where a substitution is made, you will please understand that we are doing it to help you out—that the number you wanted wasn’t available anywhere.

Also note this: We do not depend on one source of supply. We go anywhere and everywhere to give our customers the best possible service.

You are under no obligation to keep any items that are not entirely satisfactory.²⁵⁴

The Seventh Circuit Court of Appeals observed that the note was “in such small type that it was very difficult to read without a reading glass.”²⁵⁵ The court then stated, “When one orders parts by name of manufacturer, number, and description, he has a right to have his order filled as given, and if substitutions are made in circumstances calculated to lead the purchaser to believe he is getting what he orders when he is not, it is . . . a fraud upon the purchaser”²⁵⁶

It is safe to say that Amazon is not “clearly and conspicuously” disclosing to consumers that their goods are being supplied by a seller other than the one they agreed to buy from. But for the 0.01% of buyers who do see the notation in the footer of their shipping confirmation email, is Amazon providing the statutorily required information about the true seller? The answer, unfortunately, is no.

I have made several purchases on Amazon over the past year. In writing this Article, I pulled up invoices for all these purchases.²⁵⁷ Each invoice contains the name of the goods ordered and then the following

253. 171 F.2d 266 (7th Cir. 1948).

254. *Id.* at 268 (internal citations omitted).

255. *Id.*

256. *Id.* The *Singer* case involved the tort of palming off or passing off. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 25:3, Westlaw (database updated Mar. 2024) (“The kind of conduct properly designated as ‘palming off’ in modern law is a seller knowingly substituting brand X in response to a request or order for brand A.”). Passing off is prohibited under state and federal law. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 (AM. L. INST. 1995) (“Section 2(a) of the Uniform Deceptive Trade Practices Act imposes liability upon any person or commercial entity that ‘passes off goods or services as those of another,’ or ‘causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services.’ Passing off is also prohibited under the various Unfair Trade Practices and Consumer Protection Acts.” (quoting *Revised Uniform Deceptive Trade Practices Act*, in NATIONAL INSTITUTE FOR EDUCATION IN LAW AND POVERTY, HANDBOOK ON CONSUMER LAW §2 (2d ed. 1968))).

257. Invoices are available in a customer’s order history and appear below the order number and next to the order details.

notation: “Sold by” and “Supplied by.” For goods sold by Amazon, the “Sold by” line said “Amazon.com Services, Inc.” And the “Supplied by” line for all my Amazon.com Services, Inc. purchases said “Other.” I do not know whether this means Amazon used commingled inventory to supply every single one of my purchases, or if there is some alternative explanation.²⁵⁸ For goods sold by Fulfillment by Amazon third-party sellers, about half were “Supplied by” a seller other than the seller I purchased from. Specifically, a total of thirteen items I purchased from a third-party seller were “Supplied by” a different seller. In each of these instances, Amazon said the goods were “Supplied by” “Other.” No actual seller name was provided. Alarming, two of these purchases would be considered cosmetics products, which should not have been eligible for commingling.²⁵⁹ Several were electronic devices, including a Blink alarm system, a laptop computer, and an outdoor lamp post.²⁶⁰ The remainder of the items were clothing, shoes, and household goods.

Contrary to Amazon’s claim,²⁶¹ it does not “provide a link to the supplying seller’s profile page in the customer’s order-history invoices.”²⁶² And, to add to the confusion, it does provide a link to the “Sold by” seller’s profile page (i.e., the “seller” who did not actually supply the product). It is unlikely that a consumer would be able to track down the name of, and information for, the actual seller. For instance, I reached out to “Organixx,” a pseudonym for one of the cosmetics companies where inventory was “Supplied by” “Other.”²⁶³ Amazon did not provide a direct means of communicating with Organixx, nor did it provide an email address for the company as required by the INFORM Consumers Act. Instead, I used the interface provided by Amazon to communicate with Organixx. I asked what “Supplied by” “Other” meant on my invoice. The response was the following sentence: “Hi there, this is produced by Organixx.”²⁶⁴ I tried to send two follow-up emails requesting further information and the seller did not respond. There was no readily apparent way to contact Amazon about this purchase to request the information about the true seller. I used the chat function to explain the issue to a customer service representative and he had no idea what any of this meant.²⁶⁵

258. Another possible explanation is that Amazon uses dropshipping for some of these purchases.

259. *Using Manufacturer Barcodes with FBA Virtual Tracking*, *supra* note 54 (stating that cosmetics are not eligible for commingling).

260. Quaraishi, Corral & Beard, *supra* note 85 (noting “[c]ounterfeit electronics . . . contribute to over 70 deaths and 350,000 serious injuries in the United States annually”).

261. And to the INFORM Consumers Act.

262. Micah_Amazon, *supra* note 241.

263. The company is based in Los Angeles, California.

264. Communication on file with author.

265. After consulting with someone else, and in response to the author’s concern that she might get a counterfeit product, this is what he wrote: “When it says ‘Supplied by others,’ the [third-party seller] only obtains it [from] the other fulfillment [sic] center if the store . . . run[s] out of stock[.] [B]ut no worries[.]”

This information (“Sold by” and “Supplied by”) appears on Amazon invoices dating back years, so it is not clear that it is being provided as part of the INFORM Consumers Act. To the extent that “Supplied by” means that the goods come from commingled inventory and not the inventory of the seller, no customer will understand its meaning. Frankly, I am not even sure what “Supplied by” means, and I have spent innumerable hours in this commingled Amazon universe. As I mentioned above, every single item I purchased that was “Sold by” Amazon directly says on its invoice that it was “Supplied by” “Other.” If “Supplied by” “Other” means that the goods are drawn from commingled inventory, then it would seem that goods “Sold by” Amazon are never actually sold by Amazon. Much like the confusion in the Buy Box about “Shipped by” and “Sold by,” the distinction between “Sold by” and “Supplied by” on an invoice that no reasonable customer will look at is meaningless.

The bottom line is the INFORM Consumers Act does nothing to address the commingling problem. Buyers have a right to know who is selling them goods before a purchase is made. Congress apparently recognized the need for such up-front disclosure in a bill that was introduced into the Senate in 2019, but has since faltered.²⁶⁶ The “Stopping All Nefarious Toys in America Act,” or “SANTA Act,” aimed to require online marketplaces to “disclose certain verified information regarding sellers of children’s products to inform consumers.”²⁶⁷ The SANTA Act would have required online marketplaces to disclose “in a conspicuous manner” or “through a link on a product listing” the name of the seller and their relationship to the goods (e.g., manufacturer, importer, retailer, etc.).²⁶⁸ Additionally, an online marketplace, such as Amazon, would have to disclose prior to purchase the name of the seller supplying the children’s product if it is different from the seller listed on the product listing page. This reflects a clear acknowledgement that the identity of the true seller matters to consumers—and that they have a right to know this information before they proceed with a transaction.²⁶⁹

the store obtains same items. No counterfeits.” (alterations in grammar added to enhance readability). Communication on file with author.

266. An additional piece of legislation has also been in the works for a while. See *MSU Survey: 7 in 10 Consumers Deceived into Buying Counterfeit Products Online*, *supra* note 192 (“The Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce, or SHOP SAFE Act, was reintroduced to Congress in September 2023 after it did not go to a vote in 2020 and 2021. The SHOP SAFE Act incentivizes e-commerce platforms to vet sellers and proposes holding these platforms accountable for counterfeit products sold through third parties.”). For the full text version of the current bill, see SHOP SAFE Act of 2023, S. 2934, 118th Cong. (2023).

267. SANTA Act, S. 3073, 116th Cong. (2019).

268. *Id.*

269. For many buyers, it is impractical to return a purchase after it has already been delivered, particularly for those purchasers who live in remote areas or do not have access to transportation. Moreover, if a customer returns too many items, they may be banned from using the site. See Amanda Mull, *The Nasty Logistics of Returning Your Too-Small Pants*, *THE ATLANTIC* (Oct. 7, 2021), <https://www.theatlantic.com/>

The INFORM Consumers Act creates the illusion of transparency without mandating that Amazon provide the information that is necessary for transparency. The original sponsors of the INFORM Consumers Act²⁷⁰ proclaimed that people “deserve” to know basic information like who is selling them goods online and that consumers should have “confidence” that they are getting the exact goods they purchased.²⁷¹ Amazon’s in-the-shadows practice of commingling prevents both these things from being true. A customer will never know who is selling them goods on Amazon; all they will know is who Amazon deems to be the legal seller of the goods. The true provenance of the goods will remain a mystery.

CONCLUSION

Amazon has gone from the “Everything Store”²⁷² to the “everything goes store.” As one author put it:

It was as though . . . Target or Walmart had invited anyone in the world to come and set up a flea market in their aisles to hawk the same goods that the store was selling, and potentially for lower prices. But, to extend this metaphor, Amazon was also renting out all the tables in the flea market, taking all the bids, and deciding who got to make the sale in each case, without telling either its tenants or its customers how it had arrived at the decision.²⁷³

To extend the metaphor even further, commingling means that Target and Walmart have now mixed all their goods with the flea market goods and mixed all the flea market goods with one another. Anyone who enters this space will have no idea what he is purchasing.

magazine/archive/2021/11/free-returns-online-shopping/620169/ [https://perma.cc/9EM2-UWFB] (noting that “Amazon, Sephora, Best Buy, Ulta, and Walmart, among many others, close shoppers’ accounts or bar them from stores if their returns seem atypical or potentially fraudulent”).

270. Durbin, Cassidy, Grassley, Hirono, Coons, Tillis Introduce Bill to Ensure Greater Transparency for Third-Party Sellers of Consumer Products Online, U.S. SENATE COMM. ON THE JUDICIARY (Mar. 23, 2021), <https://www.judiciary.senate.gov/press/dem/releases/durbin-cassidy-grassley-hirono-coons-tillis-introduce-bill-to-ensure-greater-transparency-for-third-party-sellers-of-consumer-products-online> [https://perma.cc/5URV-UQ8G]. The Senate version of the bill was later superseded by a House version. Amazon initially vigorously contested the INFORM Consumers Act; only after the Act was “watered down” did the company throw its support behind it. See Brian Huseman, *INFORM Act Punishes Small Businesses and Favors One Particular Business Model*, AMAZON (Apr. 28, 2021), <https://www.aboutamazon.com/news/policy-news-views/inform-act-punishes-small-businesses-and-favors-one-particular-business-model> [https://perma.cc/25XZ-BCWV]; Cristiano Lima, *A ‘Watered Down’ Counterfeit Crackdown Wins the Support of Amazon, Other Sites*, WASH. POST (Nov. 3, 2021, 9:16 AM), <https://www.washingtonpost.com/politics/2021/11/03/watered-down-counterfeit-crackdown-won-support-amazon-other-sites/> [https://perma.cc/65SE-HQN6].

271. Durbin, Cassidy, Grassley, Hirono, Coons, Tillis Introduce Bill to Ensure Greater Transparency for Third-Party Sellers of Consumer Products Online, *supra* note 270.

272. Connolly, *supra* note 31.

273. WEIGEL, *supra* note 5, at 13.

It does not take a law degree to know that falsely representing the seller of goods is unfair and deceptive. Buyers have a right to know what they are getting and who they are getting it from. Amazon should no longer be permitted to engage in secret commingling and take the untenable and indefensible position that “all these goods are the same, so it’s ok.” The FTC should enjoin Amazon from commingling inventory and swapping out one seller’s goods for another. While this may result in inventory inefficiencies on Amazon’s end, it is the only way to ensure that customers get the actual goods they ordered and paid for. At the very least, Amazon should be required to clearly and conspicuously disclose to customers that the goods they are getting come from someone other than the nominal seller. This means putting the disclosure up front and in a way that the consumer understands what is happening. Burying the information at the bottom of shipping confirmation emails in cagey language such as “Supplied by” simply does not cut it.

The FTC has been very aggressive recently in policing Amazon. Its massive antitrust lawsuit against the company is only in its preliminary stages, but experts do not believe that this will mark the unravelling of Amazon.²⁷⁴ If this is true, then Amazon will be a force to be reckoned with for the foreseeable future. It is already extending into health care,²⁷⁵ car sales²⁷⁶ and banking.²⁷⁷ So perhaps instead of trying to slay

274. Camilla Hodgson, *What Lina Khan’s Antitrust Case Could Mean for Amazon*, FIN. TIMES (Sept. 29, 2023), <https://www.ft.com/content/70985afa-65e0-45fa-9c7c-ab898eeac55e> [<https://perma.cc/93FF-FKNH>] (“‘I think [the case] is a bit of an uphill climb’ for the FTC, says Michael Carrier, co-director at the Rutgers Institute for Information Policy and Law. ‘One of the real challenges here is that consumers seem to be happy with Amazon.’” (alteration in original)); Sara Morrison, *The Government’s Case to Break Up Amazon, Explained*, VOX (Oct. 4, 2023, 5:59 PM), <https://www.vox.com/technology/2023/9/26/23835959/ftc-amazon-antitrust-law-suit-prime-lina-khan> [<https://perma.cc/9HGT-4JM2>] (“Adam Kovacevich, who heads up the Chamber of Progress, a tech industry group that is largely funded by Big Tech companies, including Amazon, believes the FTC will struggle to make the case to the courts and consumers that Amazon is doing anything wrong when its many customers are largely very happy with its services.”); Mike Scarcella, *FTC’s Amazon Antitrust Lawsuit Faces High Bar in US Court—Experts*, REUTERS (Sept. 27, 2023, 7:10 AM), <https://www.reuters.com/legal/ftcs-amazon-antitrust-lawsuit-faces-high-bar-us-court-experts-2023-09-27/> [<https://perma.cc/VS3A-VWDM>] (“Several legal experts told Reuters that the FTC faces a high bar in trying to show that U.S. consumers would be better off in a world without Amazon’s policies in place.”).

275. *Amazon Pharmacy*, AMAZON, <https://pharmacy.amazon.com/> [<https://perma.cc/U75X-NQ95>] (last visited June 10, 2024).

276. Andrew J. Hawkins, *Amazon Announces Online Car Sales for the First Time, Starting with Hyundai*, THE VERGE (Nov. 16, 2023, 1:49 PM), <https://www.theverge.com/2023/11/16/23964233/amazon-car-online-sale-hyundai-dealer-alexa> [<https://perma.cc/W8B3-83ZT>].

277. Melody Brue, *Is Amazon Building the Next Generation Bank?*, FORBES (Apr. 30, 2021, 12:04 PM), <https://www.forbes.com/sites/moorinsights/2021/04/30/is-amazon-building-the-next-generation-bank/> [<https://perma.cc/F8F9-SGCR>].

Goliath, the FTC should pursue incremental measures—like the ones I am suggesting in this Article²⁷⁸—to keep Goliath in check.

278. Nikita Aggarwal & Rory Van Loo, Opinion, *Prime Day Buyers, Beware. Amazon Makes It Hard to Find the Best Deals*, CHI. TRIBUNE (Oct. 10, 2023, 2:15 PM), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-amazon-law-suit-ftc-price-customer-manipulation-20231011-f4nhcqm6zanzc6idrqqxncbju-story.html> [<https://perma.cc/H554-QZUX>] (noting “consumer protection lawsuits may offer lower-hanging legal fruit because they do not require overcoming the always-difficult challenge of proving that a company has monopoly power”).

