

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ARTISTIC INDUSTRIES, LLC, KNIGHT
DISTRIBUTING CO., D/B/A REGENCY
COSMETICS, LONGSTEM ORGANIZERS
INC. and EZ-STEP MOBILITY, INC.,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

WALMART, INC., WAL-MART.COM USA,
LLC, and THE PARTNERSHIPS AND
UNINCORPORATED ASSOCIATIONS
IDENTIFIED ON SCHEDULE “1”,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO WALMART INC. AND WAL-
MART.COM USA, LLC'S MOTION TO DISMISS

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INTRODUCTION

Walmart, Inc. and Wal-Mart.com USA, LLC's (collectively, "Walmart") Motion to Dismiss (D.I. 20) ignores almost every well-pleaded factual allegation made in Plaintiffs' almost 300-page Complaint. Instead, Walmart glibly characterizes Plaintiffs as "spinning a tale" and predicates each of its arguments on the self-serving proposition that its conduct was innocuous. That predicate, however, is flatly contradicted by the specificity in the Complaint about Walmart's conduct as part of an ongoing pattern of deceptive, fraudulent, and anti-competitive practices and the harm it caused to Plaintiffs and Amazon Merchants ("AZ Merchants").¹ Far from innocuous, Walmart: changed its policy in 2021 to open the Marketplace to China-based sellers; and, accepted the Fraudulent Sellers' inability to demonstrate any indicia of legitimate operations, including inventory or a legal means to acquire or re-sell the thousands of unrelated products they listed with fake Brands. Under false pretenses, Walmart acquired orders from customers, conveyed the customers' contact information and payment to the Fraudulent Sellers, and the Marketplace order was fulfilled by the fraudulent conversion of the Plaintiffs' products. Walmart knew of the ORC: directly, because Walmart was told about it; and, at minimum, circumstantially, by virtue of the special exceptions Walmart afforded Fraudulent Sellers.

Consequently, Walmart's Motion, grounded on inapposite and meritless fact arguments and legal analyses, must be denied. Plaintiffs have plausibly pled claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) and (d), the Lanham Act, 15 U.S.C. § 1125(a), and applicable state laws.

¹ Capitalized terms have the same meanings as in the Complaint (D.I. 1, "Complaint" or "¶")

SUMMARY OF THE COMPLAINT’S ALLEGATIONS

A. The Motives Behind Walmart’s Misconduct

After almost 40 years of brick-and-mortar retail and grocery operations, Walmart began selling products online in 2000. ¶88. Then, in 2009, mimicking the eCommerce models of other online retailers like Amazon, Walmart introduced the Marketplace, an online platform that authorizes third-party sellers to list products alongside Walmart’s inventory. ¶89-92. As Walmart acknowledged, the “failure to successfully execute” its online eCommerce strategy could “adversely affect” its retail “market position, net sales, and financial performance.” ¶91-93. Indeed, by early 2021, Amazon was surpassing Walmart’s historically untouchable share of consumers’ retail spend. ¶83-87. In response, Walmart admittedly took an “aggressive mindset” to grow its Marketplace, and focused on increasing the number of sellers and number of products (“SKUs”) listed for sale (¶93-98), each of which drives significant monetary benefits and objectives for Walmart, including: (i) increased market share from new sellers and products; (ii) increased revenue, not just from commissions on the sales, but from advertising and increased customer traffic to the Marketplace; and (iii) evading the aforementioned adverse effects, which, among other things, impact financial performance and share price. ¶125-131.

B. Walmart’s Direction of and Involvement in the ORC and Fraudulent Scheme

Coinciding with Amazon’s removal in 2021 of thousands of China-based entities from its platform due to their fraudulent conduct, Walmart abandoned its decade-old rule that third-party sellers had to be U.S. registered, and recruited China-based sellers to the Marketplace. ¶101-104.

Beginning in 2021 Walmart put Fraudulent Sellers on the Marketplace. ¶107-124. Walmart, *inter alia*, sets up Marketplace accounts for Fraudulent Sellers who: (i) have no legal right to sell, are not authorized resellers of, and do not have inventory or even inventory

information for, the listed products (¶107(c), 108); (ii) would be misappropriating the products from another retailer, having them ship the order directly to a Walmart customer, conduct expressly prohibited for “qualified” Marketplace sellers (¶110); (iii) are not fulfilling orders by one of the two designated means: Walmart Fulfillment Services or from a business to consumer U.S. warehouse with returns capability (¶113(f))²; (iv) have no history of online or eCommerce retail operations (¶101, 111(c)); and, (v) use fake Brands (*e.g.* YhbSmt, NIKOZQ, CodYinFI, Cintbllter, Hetayc), which is prohibited for “qualified” Marketplace sellers. ¶145-149.

Further, as the Complaint details, to accomplish the substantial increase in SKU counts and drive customer traffic to the Marketplace away from the AZ Merchants’ legitimate Amazon listings, Walmart provides the Fraudulent Sellers with tools that permit them to easily bulk upload and list on the Marketplace thousands of mostly unrelated products and to wholesale copy and use the AZ Merchants’ Amazon descriptions and pictures for those products. ¶133-135, 141-144.³ In addition, Walmart gives the Fraudulent Sellers extensive exposure on the Marketplace, including a Seller StoreFront, Seller Catalog, and a Product Page for each product it uploads. ¶79(g)(h)(i), 133. And, Walmart promotes and directs traffic to the Fraudulent Sellers’ listings through advertisements on search engines like Google (¶150-151, 155-156). Walmart accomplished what it set out to do: Walmart immediately increased its seller census and SKUs, and by April 2024, thousands of new active sellers were on the Marketplace of which 73% were based in China, and

² If a Walmart customer returns the product, Walmart provides a U.S.-based return address for the Fraudulent Sellers address, and the product is returned to the Fraudulent Seller, not the AZ Merchant who supplied the product. ¶28-29, 61-68. *Notably*, both California and the Washington return addresses are residential properties, not the requisite B2C warehouses. ¶66-68, 420-423.

³ *See also* ¶30(d), (f), (g); 31(e), (f), (g); 32(d), (e); 33(e), (f), (g); 38(e), (f), (g); 40(d), (e); 41(e) (evidence of thousands of products listed by Fraudulent Sellers); Schedule 2 to Complaint, examples of Fraudulent Seller and AZ Merchant listings. Declaration of Kimberly Donaldson-Smith in Support of Plaintiffs’ Response in Opposition to the Motion at ¶2 (herein, “Decl. ¶”).

by November 2024, the Marketplace listed 700 million SKUs. ¶¶95-98, 125-130. *See* Decl. ¶3.

The Complaint details the next steps of the scheme and the ORC's operations. Once the Fraudulent Sellers and their Product Pages go live on the Marketplace, unwitting Legitimate Walmart Customers place their orders on the Product Pages under false pretenses. ¶¶154-159. Once Walmart receives the order and takes payment from the customer, it transmits the customers' personal contact information to the Fraudulent Sellers. ¶¶158-159. Walmart expressly controls the transactions and transmission of information to the Customer.⁴

Since neither Walmart nor the Fraudulent Seller have inventory to fulfill the order, or the authorization to otherwise legally secure and re-sell the fraudulently listed products, fulfillment of the order is necessarily accomplished by additional fraudulent, deceptive transactions, namely, the product is misappropriated from the AZ Merchants via a Fraudulent Amazon Order. ¶¶160-165. The AZ Merchant fulfills the order and ships the product to the Legitimate Walmart Customer. Once the product is shipped, the AZ Merchant provides the tracking information to who is, unbeknownst to the AZ Merchant, the Fraudulent Seller, who then provides the tracking information to Walmart and the Customer through the Marketplace. ¶¶163-166.

A Fraudulent Refund Request follows, whereby the Fraudulent Seller sends messages to AZ Merchant falsely claiming non-delivery of the product. ¶¶166-172. Notably, the Complaint details how the false claims of non-delivery sent to otherwise unrelated AZ Merchants were identical and substantially similar. ¶¶172-191, and Schedule 3 thereto. If a Legitimate Walmart Customer returns the product, Walmart provides the Customer with the return shipping label,

⁴ Walmart: "collect[s] all proceeds", "electronically transmit[s] to you the Order information that Walmart.com determines is necessary to fulfill each Order"; and "send[s] an automated message to each Customer confirming receipt of an Order." *See* §6 of the Retailer Agreement, link in ¶108.

which sends the product to the Fraudulent Seller, not the AZ Merchant. ¶192-199; *see* ¶546-556.⁵

Indeed, the Complaint’s factual allegations do not end with the foregoing. Section 8 of the Complaint, comprising approximately 90 pages, provides extensive details about a multitude of ORC transactions involving Plaintiffs. Those allegations provide extraordinary details of the who, what, when, where, and how of each transaction, including all material order and transactions details, as well as the details of each Fraudulent Refund Request. ¶200-346 (Artistic Industries); ¶347-423 (Regency Cosmetics); ¶424-468 (Longstem Organizers); and ¶469-542 (EZ Step).

It is rather incredulous that Walmart characterizes the ORC as involving “some small number of third-party sellers” (D.I. 20 at 4) and a “simple case” by four Amazon sellers (*id.* at 1). From just the standpoint of Walmart’s association with the 17 Fraudulent Seller Defendants, there were thousands of product listings (*supra* fn. 3) hijacked from Plaintiffs and countless AZ Merchants as part of the ORC. As alleged, because of the thousands of products offered on the Marketplace by the Fraudulent Sellers, Plaintiffs are not the only AZ Merchants victimized by the ORC. ¶5, 9, 139, 543-545. To no avail, since 2022,⁶ Plaintiffs have informed Walmart employees, including in its Organized Retail Crime division, of the details of the ORC, including the identity of Fraudulent Sellers. ¶557-561, 543-545. The ORC is no small-scale fraud, and it continues to harm Plaintiffs and AZ Merchants to this day. Decl. ¶7-8.

C. Walmart’s False Statements and Representations

Walmart represents that it operates a “trustworthy and safe marketplace” comprised of “qualified” third-party sellers, who are held out to have contractually agreed with Walmart to

⁵ Walmart also commands control over issues between the Fraudulent Sellers and customers: “Walmart will contact the seller and give them the chance to make it right. The seller has 48 hours to find a satisfactory resolution. If you’re not satisfied, **Walmart will step in** and find the right final solution” (emphasis added). *Source* link is in fn. 69 of the Complaint.

⁶ There is a typo in ¶557, the year is not 2021 but mid-2022. Decl. ¶4.

numerous seller requirements. ¶107-108, 112-115. Walmart also represents that “**only** qualified businesses can sell on Walmart Marketplace.” ¶107 (emphasis added). Building on those, Walmart states that its third-party sellers are: “qualified” and “select[ed]” pursuant to a “process [that] looks at the seller’s...Catalog...Operations...[and] Other business information,” ¶6(a), 107(c); and, prohibited from committing the conduct constituting the ORC, *i.e.* fulfill orders by purchasing “products from another retailer and hav[ing] the order shipped directly to a Walmart customer” (¶110, 121). Also, each Fraudulent Seller’s StoreFront, Seller Catalog, and the Product Pages: use fake Brands (¶145-149); misrepresent and conceal that neither Walmart nor the Fraudulent Seller had the legal right to offer to sell and sell the products; and, conceal that the Customers’ payment, name and address will be used to effectuate the ORC, including to place a Fraudulent Amazon Order *and* a false Fraudulent Refund Request. *See also* ¶723-730.

LEGAL STANDARDS

At this stage of the proceedings, in ruling on Walmart’s Rule 12(b)(6) Motion, the Court must “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the Complaint, the plaintiff may be entitled to relief.” *Black v. Montgomery Cnty.*, 835 F.3d 358, 364 (3d Cir. 2016); *Dettmering v. Vbit Techs. Corp.*, 2024 U.S. Dist. LEXIS 136939, at *7 (D. Del. Aug. 1, 2024). Indeed, there is no probability requirement imposed at the pleading stage. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). When the particularized factual allegations have put the defendants on notice of the misconduct with which they are charged,⁷ and if, when accepted

⁷ Violations of the mail and wire fraud statutes must comply with Rule 9(b), which requires that “a party must state with particularity the circumstances constituting fraud or mistake.” *Lum v. Bank of Am.*, 361 F.3d 217, 223-24 (3d Cir. 2004). Plaintiffs may satisfy this requirement by “pleading the ‘date, place or time’ of the fraud, or through ‘alternative means of injecting precision and some measure of substantiation into their allegations of fraud.’” *Id.* at 224.

as true and viewed in the light most favorable to the plaintiff, the claims are held to be facially plausible, a Rule 12(b)(6) motion must be denied. *See Phillips*, 515 F.3d at 233; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).⁸

ARGUMENT

As an initial matter, Walmart’s Motion is replete with passing references to points that are never developed or supported by case law or argument. The law is clear, arguments not properly raised in a motion are categorically waived. *Laborers Int’l Union of N. America, AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) (“a passing reference to an issue...will not suffice to bring that issue before [the] court.”); *FinancialApps, LLC v. Envestnet, Inc.*, 2020 WL 4569466, at *12 (D. Del. July 30, 2020) (refusing to dismiss counterclaim where “argument for dismissal is underdeveloped, having been raised only in a short paragraph”); *Conroy v. Leone*, 316 F. App’x 140, 144 n.5 (3d Cir. 2009) (“one conclusory sentence” constitutes an “undeveloped argument [that] has been waived”).

I. PLAINTIFFS STATE RICO CLAIMS AGAINST WALMART

Notwithstanding Walmart’s intimations otherwise, no business is immune or exempted from RICO’s reach by virtue of their size, longevity, or because they may conduct other legitimate business. Plaintiffs’ claims against Walmart are entirely consistent with RICO’s intended scope.

Plaintiffs specifically assert claims under §§ 1962(c) and 1962(d): §1962(c) prohibits a person “employed by or associated with any enterprise...to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity”; and §1962(d) prohibits a person from conspiring to violate § 1962(c). Walmart has not challenged

⁸ The Court’s determination is based on whether Plaintiffs are “entitled to offer evidence to support the claims” not on whether Plaintiffs “will ultimately prevail” on their legal claims. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (cleaned up).

that Plaintiffs pled most of the RICO elements: Person,⁹ RICO enterprise,¹⁰ pattern of racketeering activity,¹¹ and interstate commerce impact.¹² Those arguments are waived. *See supra*, pg. 7.

Herein, Plaintiffs refute with law and facts each of Walmart's primary challenges to the RICO Claim, *i.e.* whether Plaintiffs have pled that Walmart conducted or participated directly or indirectly in the conduct of the ORC's affairs, with intent and knowledge. D.I. 20 at 7-17.

A. Walmart Conducted or Participated in the Enterprise and Fraudulent Scheme

To be liable under RICO, a defendant must *conduct or participate*, directly or indirectly, in the enterprise's affairs through a pattern of racketeering activity. In *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) the Supreme Court interpreted "the word 'conduct' to require some degree of direction and the word 'participate' to require some part in that direction." *Id.* "Of course, the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but [those with] some part [not "significant control"] in directing the enterprise's affairs." *Id.*; *id.* at 179 n.4. ("[W]e disagree with the suggestion...that § 1962(c) requires 'significant control over or within an

⁹ Walmart, Inc. and Wal-Mart.com USA, LLC (¶19-22) are entities "capable of holding a legal or beneficial interest in property" and, thus, meet § 1961(3)'s definition of a "person".

¹⁰ A RICO enterprise is broadly defined, only requiring a group with a common purpose and course of conduct, and longevity sufficient to permit pursuit of the purpose. *Boyle v. United States*, 556 U.S. 938, 947 (2009). *See, supra* pgs. 2-6, summarizing the Complaint's allegations of the course of conduct by Walmart and Fraudulent Sellers since 2021; *see also* Section I.C., *infra*.

¹¹ The Complaint's allegations of a pattern of racketeering activity consisting of, under 18 U.S.C. § 1961(5), the predicate offenses of mail and wire fraud by the Fraudulent Sellers; and, the continuity and relatedness among the predicate acts, *i.e.*, that the acts share similar purposes, results, participants, victims, or methods of commission. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989). *See* ¶644 compiling wire and mail fraud allegations, and ¶639-657.

¹² The ORC involves the offers to sell, the sale of, and the shipping of products to customers nationwide, as well as fraudulent wire communications from Walmart and the Fraudulent Sellers to customers and AZ Merchants nationwide. ¶619-635.

enterprise.”). RICO also extends to associated “outsiders” who take part in the enterprise’s operation or management. *Id.* at 185.¹³

Walmart’s claims of innocence and that Plaintiffs make “bare” assertions about Walmart’s conduct and participation (D.I. 20 at 8-11) are belied by the Complaint’s well-pled, detailed allegations based on direct pre-discovery evidence and do not correspond with the law. The allegations against Walmart do not conjure up notions of ordinary contractual relationships or business practices. Walmart’s conduct is completely intertwined with and fosters the Fraudulent Sellers’ misconduct.¹⁴ It is axiomatic that the Fraudulent Sellers could not become sellers on the Marketplace, a very fundamental part of the ORC, if Walmart was a passive or unwitting actor. This started with *Walmart*, when it changed its policy about non-US third-party sellers, which coincided with China-based sellers being kicked-off Amazon’s platform, and Walmart’s recruitment of non-US sellers in 2021. ¶¶88-94, 101-104. The ORC requires affirmative conduct by Walmart to put Fraudulent Sellers on the Marketplace. ¶¶107-124. At bottom, the Fraudulent Sellers were only able to appear with their fraudulent Product Pages on the Marketplace because of Walmart’s undisclosed abandonment of its onboarding requirements for the Fraudulent Sellers,¹⁵ driven by competitive zeal and corporate greed. ¶¶88-98, 125-131.

¹³ See also *George v. Urb. Settlement Servs.*, 833 F.3d 1242, 1252 (10th Cir. 2016) (“[A] plaintiff can easily satisfy *Reves*’ operation and management test by showing that an enterprise member played some part—even a bit part—in conducting the enterprise’s affairs.”).

¹⁴ These facts render Walmart’s reliance in D.I. 20 at fn. 3 on *Zazzali* and *Van Horn* inapt, as both involve the defendant providing usual services, e.g. *Zazzali v. Hirschler Fleischer, P.C.*, 482 B.R. 495, 514–16 (D. Del. 2012) (dismissing RICO claims where the complaint alleged the firm provided routine legal services without control over the enterprise and failed to reconcile contradictory allegations about the firm’s awareness of the Ponzi scheme).

¹⁵ As discussed *supra*, pgs. 2-6, Walmart placed the Fraudulent Sellers on Marketplace despite their not having: inventory of, or legal right or authorization to sell, the thousands of unrelated products listed with fake Brands (¶¶107(c), 108, ¶¶113(f), fn. 2 *supra*, 133-135, 141-144, fn. 3 *supra*, ¶¶145-149); or, indicia of being legitimate eCommerce or retail businesses (¶¶101, 111(c)).

The Complaint pleads Walmart's participation in the next stages of the ORC, and the ORC's dependence on Walmart's continued conduct and complicity. After Walmart gives legitimacy to the Fraudulent Sellers, to further the purpose of the ORC Walmart: solicits and receives orders through the Fraudulent Seller's Product Pages; confirms the order with the customer; takes the customer's payment and contact information; and, transmits that to the Fraudulent Seller who, posing as the customer, places the Fraudulent Amazon Order (which is the only way to fulfill the order) and, compounding the fraud, makes a Fraudulent Refund Request. *See supra* pgs. 2-6; ¶166-199, 546-556. The ORC continues back on the Marketplace, including to provide the Legitimate Walmart Customer with shipping information. ¶152-53, 164, 565.

Reyes v. Zion First Nat. Bank, 2012 WL 947139, at *3 (E.D. Pa. Mar. 21, 2012) is instructive here. In *Reyes*, Plaintiff alleged that Zions Bank and two of its subsidiaries "ND" and "MP" violated RICO §§ 1962(c) and (d) when: a telemarketer convinced Reyes to provide his bank information under the false pretense of receiving a government grant; and, the telemarketer debited Reyes's account twice using the payment processor MP (which even asserted it had Reyes' consent). *Id.* at *1. The court held that Reyes "sufficiently pleaded his § 1962(c) claims against the Zions Defendants" by alleging that each served "independent and crucial roles" in the enterprise "with the common purpose of earning fees for facilitating fraudulent telemarketing schemes." *Id.* at *6. Also, knowledge that "transactions were fraudulent," was sufficiently plead with facts "showing Zions Bank and MP/ND were aware of several blatant indications of fraud," including that: "the telemarketers' requests for payment were being returned as unauthorized at a rate that no legitimate business would ever incur;" "the telemarketers responsible for these return rates were known to have operated fraudulent schemes in the past;" and Zion Defendants "received at least one complaint about unauthorized ACH transactions originated by [telemarketer

defendant] which they processed.” *Id.*¹⁶ In *Reyes*, the defendants’ roles were more limited than Walmart’s here, yet deemed not peripheral or ancillary to the overall fraudulent scheme, and important to the telemarketer’s misconduct. *Id.* at 10.¹⁷

The cases Walmart relies on (D.I. 20 at 9) evoke circumstances where, unlike here, a defendant’s services were incidental or tangential to the operation and there was an absence of any credible allegation of knowledge of the fraud. In *Univ. of Md. v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3d Cir. 1993) the plaintiff alleged an outside auditor conducted misleading audits, attended board meetings, and provided services such as computerizing accounting functions and assisting with real estate transactions, however, all of those services were tangential to the alleged scheme, neither integral to the underlying racketeering nor playing a causal or instrumental role in the fraud’s execution. Likewise, in *Walter v. Drayson*, 538 F.3d 1244, 1245-46 (9th Cir. 2008) the outside legal counsel “was not indispensable to achievement of the enterprise’s goal.” As discussed *supra* pgs. 2-6, each of the “services” Walmart performs for the Fraudulent Sellers is required for the ORC and integral to their (undisputed) racketeering. And, as summarized *infra*, pg. 14, Walmart’s had knowledge of the Fraudulent Sellers’ conduct. ¶557-578.

Further, courts consistently recognize that even legitimate businesses can be held liable when their regular operations are utilized to facilitate racketeering activities. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 378 (3d Cir. 2010) (holding that allegations of supplying “sham bids,” which served as the mechanism to perpetuate the scheme, were sufficient to allege

¹⁶ *Liberty Bell Bank v. Rogers*, 726 Fed. Appx. 147, 152–53 (3d Cir. 2018) (summary judgment for plaintiffs affirmed; the record showed defendant acted with knowledge as there was “the absence of a legitimate purpose for the frequent transactions between the accounts...”).

¹⁷ See *U.S. v. Parise*, 159 F.3d 790, 796 (3d Cir.1998) (“RICO liability extends to those ‘plainly integral to carrying out’ the enterprise’s activities.”); *Wiatt v. Winston & Strawn LLP*, 838 F. Supp. 2d 296, 319 (D.N.J. 2012) (cites omitted) (A plaintiff satisfies the “conduct” element of a § 1962(c) claim by pleading how each defendant has “some part in directing [the enterprise] affairs.”).

participation in the enterprise's operation under *Reves*); *MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 977-79 (7th Cir. 1995) (holding that *Reves* permits recovery against defendants who “were vital to the achievement of the enterprise's primary goal,” reversing dismissal of § 1962(c) claim against “reluctant participants” of the enterprise).¹⁸

In sum, the Complaint alleges a litany of affirmative actions by Walmart done for and in concert with the Fraudulent Sellers and the ORC (including conduct that is distinct from Walmart's legitimate business operations on its Marketplace), that sufficiently pleads Walmart's direct or indirect control of, and furtherance and participation in, the alleged fraudulent scheme and ORC.

B. The Complaint Pleads Walmart Aided and Abetted Predicate Acts

To state a RICO claim against Walmart, Plaintiffs did not need to allege (but did)¹⁹ Walmart's commission of predicate acts. *Phila. Res. Supply Co. v. Norwalk & Assocs.*, 864 F.Supp. 1456, 1471 (E.D. Pa. 1994) (“[D]efendants need not have been the actual individuals who used the mails and wires, nor need to have known of the communications; it is sufficient that the use of the mails or wires by others occurred in the ordinary course of business related to the fraudulent scheme, or was foreseeable as part of the furtherance of the fraudulent scheme.”) That is why, after

¹⁸ See *George*, 833 F.3d at 1253 (Bank of America “conducted the affairs of the *enterprise* rather than simply its *own* affairs,” where plaintiffs alleged “that the relationship between BOA and Urban enhanced the enterprise's ability to thrive and avoid detection,” with “BOA publicly represent[ing] its compliance with HAMP guidelines while simultaneously” delaying and denying HAMP applications through its employees, and enlisting Urban to “serve[] as a black-hole for the documents that borrowers sent,” and “make it easier to conceal the enterprise's activities.”); *Resolution Tr. Corp. v. Stone*, 998 F.2d 1534, 1542 (10th Cir. 1993) (a corporation participated in the conduct of the enterprise's affairs through its employees' and officers' acts of signing checks, guaranteeing loans, and entering into a funding agreement enabling the enterprise to “purchase [] the automobile loans that would be” used to sustain the fraudulent scheme).

¹⁹ Plaintiffs alleged that Walmart committed mail and wire fraud by its: listing of Product Pages on Marketplace; collection and transmission of the Customers' orders, money, and personal information; and communications of such information to the Fraudulent Sellers. See ¶644 compiling the wire and mail fraud allegations in the Complaint, and ¶639-657.

a passing reference to the direct commission of predicate acts, Walmart (D.I. 20 at 11-13) focuses on whether it aided and abetted the alleged predicate acts committed by the Fraudulent Sellers.²⁰

Arguing a fact-based proposition, that is debunked by the Complaint’s allegations and addressed *supra*, Walmart says that the Complaint “merely alleges that Walmart provided the same services to [Fraudulent Sellers] that it offers to other sellers.” D.I. 20 at 11-12. For that proposition, Walmart relies on *Twitter* and *Amazon*, neither of which involves RICO or liability for mail or wire fraud. In *Twitter v. Taamneh* 598 U.S. 471, 488 (2023), the Court reaffirmed the principle that “a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission.” *Id.* at 492–93 (citing *Halberstam v. Welch*, 705 F.2d 472, 491 (D.C. Cir. 1983)). *Twitter* also confirms that systemic support can result in liability for all foreseeable wrongful acts committed by the enterprise. *Id.* at 496. Likewise, markedly different facts and procedural posture are present in *Amazon Servs. LLC v. U.S. Dept. of Agric.*, 109 F.4th 573, 582 (D.C. Cir. 2024). After an extensive administrative factual record was developed, and with “facts [that] are undisputed,” the court made a merits decision that “[n]othing in the record suggests that Amazon gave [sellers] ‘any special treatment or words of encouragement’ or ‘took any action at all’ with respect to the lawful acts,” and, “[t]here is no indication that Amazon was aware of the violations.” *Id.* at 576, 582. When Walmart’s excerpt from *Amazon* is put in the correct context it confirms that all Amazon “allegedly knew” was that sellers were shipping plants and animals and that there are import regulations.

In stark contrast to *Twitter* and *Amazon*, the Complaint does allege Walmart’s “special

²⁰ The conduct of the ORC enterprise included the predicate acts of mail and wire fraud including the Postings and Offers to Sell on the Marketplace (§643(a), 644(a)); receipt of the Customers’ order, money, and personal information (§6); each Fraudulent Amazon Order and Fraudulent Refund Request (§643(b), (d), 644(b)-(c)); and each shipment of the misappropriated products (§643(c), 644(d)-(e)). *See also* §639-657.

treatment” of the Fraudulent Sellers: Walmart changed its policy to open the Marketplace to China-based sellers; Walmart stripped away its on-boarding safeguards for the Fraudulent Sellers (at a time Amazon was removing off-shore sellers due to fraudulent conduct) making it possible for those sellers to list on the Marketplace; and Walmart accepted the absence of any indicia of legitimate operations by the Fraudulent Sellers and their inability to demonstrate they had inventory or a legal means to acquire or re-sell the thousands of unrelated products they listed with fake Brands. Also, Walmart had knowledge of the fraud: direct, including because Plaintiffs and others made Walmart aware of the ORC in mid-2022; and, circumstantial, by virtue of the litany of information known and in Walmart’s possession about the Fraudulent Sellers (*i.e.* no indicia of legitimate business operations, no inventory, no legal right to sell the thousands of listed products, fake Brands, and the consistency in the Fraudulent Sellers’ *modus operandi*. *See supra*, pgs. 2-6; and, ¶¶562-569, 573-578, 557-561. Thus, while Plaintiffs alleged Walmart’s liability is based on its direct participation and control of the ORC, Plaintiffs also plausibly allege that the Fraudulent Sellers’ unlawful activity was, at minimum, foreseeable.

C. The Complaint Plausibly Pleads the Requisite “Intent” by Walmart

Walmart’s “intent” argument is misleading and off base. D.I. 20 at 13-17. As an initial point, the RICO statute itself does not include an “intent” element. Rather, an underlying predicate offense may (as discussed *supra*). To allege a predicate offense “a plaintiff need not offer direct evidence of intent. Instead, the fact finder may infer a defendant’s knowledge and intent from circumstantial evidence.” *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc.*, 46 F.3d 258, 270 (3d Cir. 1995). Indeed, in *U.S. v. Sturm*, 671 F.2d 749, 751 (3d Cir. 1982), cited at D.I. 20 at 15, the Third Circuit upheld a criminal RICO conviction holding “[t]he causation element of the offense is established by a showing that ‘an individual does an act with knowledge that use of the

mails will follow in the ordinary course of business or where such use can reasonably be foreseen even though not actually intended.’” *Sturm*, 671 F.2d at 751.

Walmart argues that Plaintiffs’ allegations of its involvement in the ORC “def[y] common sense.” D.I. 20 at 14. What defies common sense is why Walmart did not shut down the Fraudulent Sellers when confronted with the facts of the ORC and prevent the Fraudulent Sellers from listing on the Marketplace. When it is established that a person learns of a fraud, knows that its continued provision of services is essential in carrying out that fraud, and nonetheless continues its participation, *the plaintiff has shown that the defendant* “knew about [racketeering activity] and agreed to facilitate the scheme.” *Salinas v. United States*, 522 U.S. 52, 66 (1997) (a defendant is liable for joining a RICO conspiracy under such circumstances).

As detailed *supra*, pgs. 2-6, Walmart was told about the ORC, and Walmart knew it had changed its policy to open the Marketplace to China-based sellers, accommodated the absence of any indicia of legitimate operations by the Fraudulent Sellers and their ability to lawfully fulfill Marketplace orders. Walmart did not use the information in its possession to identify, shut down, and prevent new listings by Fraudulent Sellers. ¶¶562-569, 573-578, 557-561.²¹ Walmart’s knowledge of and agreement to facilitate the scheme is amply pled. *See Jaguar*, 46 F.3d 258 at 270-71 (upholding verdict that circumstantial evidence, including that “an experienced dealer...would have grown suspicious of the excessive amount of service income attributable to warranty work,” with “the pervasive[ness] [of the] warranty fraud,” established that “[defendant] was aware of and facilitated the” scheme.).

²¹ Walmart’s self-serving characterizations, attempting to explain away the communications from Plaintiffs and others, Walmart’s responses, and the Complaint’s allegations identifying the bevy of information in Walmart’s possession that identified the Fraudulent Sellers (D.I. 15-16), are unfounded, fact disputes, not properly considered at this time.

Furthermore, Walmart is incorrect about the import of Plaintiffs' allegations of its financial motives behind the ORC and scheme alleged.²² *Lester v. Percudani*, 2008 U.S. Dist. LEXIS 91202, *23-30 (M.D. Pa. Oct. 24, 2008) (allegations that defendant underwrote and approved loans outside of normal business practices supported knowledge of scheme to defraud borrowers). Also, post-*Reves*, "financial motive" analogous to Walmart's financial motive alleged here, can demonstrate the requisite nexus of a defendants' conduct to furthering and participating in a RICO enterprise. *See Ins. Brokerage*, 618 F.3d at 377 (alleged reciprocal bid-rigging and sham bids plausibly demonstrated that the insurers worked together in pursuit of a shared purpose—achieving greater business and profits); *In re Aetna UCR Litig.*, 2015 U.S. Dist. LEXIS 84600, *83 (D.N.J. June 30, 2015) (the enterprise served "(1) 'to create a mechanism through which Aetna, UHG and the Insurer Conspirators could under-reimburse subscribers...and (2) to increase insurer profits by deceptively underpaying ONET benefits" sufficiently pled a purpose).²³

D. The Complaint Also States a §1962(d) Conspiracy Claim Against Walmart

Plaintiffs also state a § 1962(d) conspiracy claim against Walmart in Count II (§¶661-669) for conspiring to violate § 1962(c), which claim builds on the properly pled § 1962(c).²⁴ Importantly, Walmart's argument and reliance on *Ferguson v. Moeller*, 2016 WL 1106609 (W.D.

²² D.I. 20 at fn. 4 cites to two securities fraud cases addressing the element of scienter under the federal securities laws, an issue with a wholly separate body of case law inapposite to RICO.

²³ *Burrell v. Staff*, 60 F.4th 25, 40 (3d Cir. 2023), *cert. denied*, 143 S. Ct. 2662 (2023) (leveraging plaintiffs' labor for profit constituted participation in the enterprise's affairs); *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 379-80 (6th Cir. 1993) (life insurance company could be liable for employee's fraudulent sales of policies because it benefited from a resultant increase in its corporate income); *Schuster v. Anderson*, 378 F. Supp. 2d 1070, 1105 (N.D. Iowa 2005) (allegation sufficient that bank benefited by receiving nearly half a million in interest from fraudulent loans)

²⁴ Except as to its own participation and intent (addressed *supra*), Walmart does not challenge allegations of Plaintiffs' experiences (§¶200-542), or the plausibility of the Complaint's allegations about the Fraudulent Sellers and their conduct, the litany of predicate acts over time, and key facts about the ORC ("organized crime syndicate" as Walmart terms it). *See* D.I. 20 at 1-2, 4-6.

Pa. Mar. 22, 2016), at D.I. 20 at 17 and 11, are wrong as applied to the §1962(d) analysis. *Salinas* is clear that the commission of a predicate act by a conspirator is not required.²⁵

Recognizing the futility of such argument at this stage, Walmart offers limited argument directed to 1962(d)'s "knowing agreement" element. D.I. 20 at 17-18. The Third Circuit held in *Smith v. Berg*, 247 F.3d 532, 537 n.11, 538 (3d Cir. 2001) that where a RICO defendant's liability turns on its knowledge, the facts developed in discovery and at trial are dispositive, *not* a pleading-stage assertion that the defendant was an "innocent service provider", "merely providing services" to the primary wrongdoers. Moreover, the § 1962(d) "agreement" need not be express as long as its existence can be inferred from Walmart's words, actions, or the interdependence of the activities and persons involved, or other circumstantial evidence. *U.S. v. Boria*, 592 F.3d 476, 481 (3d Cir. 2010); *U.S. v. Schramm*, 75 F.3d 156, 159 (3d Cir. 1996).²⁶

Walmart's self-serving portrayals of its conduct are contradicted by the Complaint's factual allegations. *See* discussion *supra* at pgs. 2-6, 15. It is this conduct and Walmart's knowledge that transformed Walmart's relationships with the Fraudulent Sellers (whose conduct the Complaint undisputedly alleges constitutes schemes to defraud) into RICO conspiracies. At minimum, Walmart joined the conspiracy, and as the Supreme Court has held, they have "adopt[ed] the goal of furthering or facilitating the criminal endeavor." *Salinas*, 522 U.S. at 66. As with the underlying

²⁵ 522 U.S. at 65 (holding that the reach of § 1962(d) is to an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying [§ 1962(c)] offense").

²⁶ Plaintiffs plead direct contact between Walmart and the Fraudulent Sellers, but proof is not required of contact by conspirators with all other members, nor that all be aware of all the details of the conspiracy in order to be found to have agreed to participate in it. *U.S. v. De Peri*, 778 F.2d 963, 975 (3d Cir. 1985) ("As we said in *Riccobene*, '[i]t is well established that one conspirator need not know the identities of all his coconspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it.'" (quoting *U.S. v. Riccobene*, 709 F.2d 214, 225 (3d Cir. 1983))); *U.S. v. Bergrin*, 650 F.3d 257, 271 (3d Cir. 2011) (Knowledge of one's co-conspirators is not required).

predicate acts, the knowledge requirement for the conspiracy itself can be made with a showing of willful blindness. *U.S. v. Wert-Ruiz*, 228 F.3d 250, 255 n.3 (3d. Cir. 2000). At bottom, Walmart’s arguments and the issue of “knowing agreement” are of a fact-specific nature not resolvable on a 12(b)(6) Motion. *See Smith, supra*.²⁷

II. PLAINTIFFS ADEQUATELY PLEAD LANHAM ACT CLAIMS (COUNT VI)

The Lanham Act was intended “to protect persons engaged in . . . commerce against unfair competition,” including false advertising, that causes reputational harm or lost sales. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131 (2014) (quoting 15 U.S.C. § 1127). The Lanham Act provides that: “Any person who... [uses any]... false or misleading description of fact, or false or misleading representation of fact, which (B)...misrepresents **the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services, or commercial activities**, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.” 15 U.S.C. § 1125(a)(1)(B)(Emphasis added). Walmart’s attempt to recast Plaintiffs’ claim and ignore the full scope of § 1125(a)(1)(B) applicable here must fail. Plaintiffs have alleged unfair, anticompetitive conduct by Walmart, resulting in reputational harm, lost sales and lost profits by Plaintiffs and AZ Merchants, and thus adequately pled a false advertising claim under the Lanham Act. ¶720-723.²⁸

A. The Complaint Plausibly Alleges Actionable Representations by Walmart

Walmart’s Motion argues that the Complaint does not allege: (1) actionable false

²⁷ *See also, Lester*, 2008 U.S. Dist. LEXIS 91202, *38 n. 21 (Summary judgment denied for defendant on RICO conspiracy claims based on evidence that the bank had violated industry banking standards and disregarded its own internal procedures, even though the bank offered innocuous explanations for the alleged misconduct; the court reasoned that a reasonable jury could conclude that the bank knowingly facilitated the fraudulent scheme).

²⁸ Contrary to Walmart’s argument (D.I. 20 at 19, 24-26), the Lanham Act claim asserted does not include a “false association trademark claim” (*id.* at 25). The argument is a red herring.

statements (D.I. 20 at 22-24); and (2) that Walmart “made” those statements (*id.* at 19-21).

1. The Actionable False Statements

Walmart affirmatively represents that it operates a “trustworthy and safe marketplace” comprised of “qualified” third-party sellers, who are held out to have contractually agreed with Walmart to numerous seller requirements. ¶¶107-108, 112-115. To be sure of their materiality, Walmart puts the same statements front and center in its Motion. D.I. 20 at 3. Walmart publicly represents its third-party sellers are: “qualified” and “select[ed]” pursuant to a “process [that] looks at the seller’s...Catalog...Operations...[and] Other business information,” and “**only** qualified businesses can sell on Walmart Marketplace.” ¶6(a), 107(c) (emphasis added). Walmart also says Marketplace sellers cannot “purchase products from another retailer and have the order shipped directly to a Walmart customer.” ¶¶110, 121.

In addition, as part of the ORC, there are numerous false and misleading statements made in, and material omissions from, the Fraudulent Sellers’ StoreFronts, Seller Catalogs, and the Product Pages (“Listings”)²⁹ because: they identify the products under a fake Brand name; misrepresent and conceal that neither Walmart nor the Fraudulent Seller had the legal right to offer to sell and sell the products; conceal that the Customers’ payment and personal information would be used to effectuate the ORC, including to place a Fraudulent Amazon Order *and* make a Fraudulent Refund Request; and, misrepresent the affiliation and association of the products as those of the Fraudulent Seller. *See supra* pgs. 2-6, *see also* ¶¶723-730.

Nevertheless, Walmart argues that Plaintiffs do not identify actionable statements.³⁰ *First,*

²⁹ Walmart uses the terms “re-listings” or “Defendant Listings” or “Listings” which equate to the “Fraudulent, Deceptive, and Anticompetitive Postings and Offers to Sell” defined in ¶5.

³⁰ The foregoing statements are “specific, measurable and capable of being proved false” and “could reasonably be interpreted as a statement of objective fact.” *Newborn Bros. Co. v. Albio Eng’g Co.*, 481 F.Supp. 3d 312, 347 (2020 D.N.J.).

Walmart does not address its statements about a “trustworthy and safe marketplace” comprised of “qualified” third-party sellers, which Plaintiffs’ allegations demonstrate are false and material. ¶107-124.³¹ These statements of advertising and promotion go directly to the nature and characteristics of the Marketplace that are designed to divert sales from Plaintiffs. *See Incarcerated Entm’t, LLC v. CNBC LLC*, 331 F. Supp. 3d 352, 358 (D. Del. 2018) (speech that is made “for the purpose of influencing consumers to buy the defendants’ goods or services...” is actionable).

Second, Walmart mischaracterizes Plaintiffs’ allegations and claim as just challenging advertising about the “goods” being sold. D.I. 20 at 22-23.³² Walmart’s focus on the **goods** and their “geographic origin” or “qualities” is wrong, making its reliance on *Tiger Supplies* inapposite, as Plaintiffs are not challenging characteristics of the goods sold, such as defendants’ use of the “same SKUs, product descriptions and labels.” 2022 U.S. Dist. LEXIS 99435, at *31 (D.N.J. Jun. 3, 2021). Walmart has ignored Plaintiffs’ detailed allegations regarding the Listings and how they comprise fundamentally

false information of Sold By, Fulfilled By, View Seller Information, Brand, Business Name, Business Address, Business Phone, and Shop All Seller Items Pages, thereby deceptively passing off these goods as those belonging to Fraudulent Seller Defendants, and ... misrepresenting the affiliation, connection and association of these goods in not

³¹ *See e.g.* ¶111 (“Customers do not want to be placing orders on the Marketplace [with] third-party sellers who: [] engag[e] in fraud;...are not authorized to sell the listed products;...[and] stealing sales and customers from legitimate e-Commerce merchants, and unfairly, competitively disadvantaging and harming them, by fraudulent third-party sellers ... on [the] Marketplace.”)

³² Walmart (D.I. 20 at 24) also argues that the Fraudulent Amazon Orders or Refund Requests are not commercial advertisement or promotion made to a purchaser. Walmart too narrowly construes these communications, which are manifestations of a successful duping of the public as intended and accomplished by the Listings. The Lanham Act “covers more than a classic advertising campaign” and includes communications “disseminated sufficiently to the relevant purchasing public to constitute advertising or promotion within that industry.” *Innovasystems, Inc. v. Proveris Sci. Corp.*, 2014 U.S. Dist. LEXIS 109228, at *19 (D.N.J. Aug. 6, 2014) (collecting cases). These Fraudulent Orders and Refund Requests, with the Listings, are part of the overall fraudulent scheme. Whether false representations were sufficiently disseminated to the purchasing public is “ordinarily a question of fact inappropriate for resolution on a motion to dismiss.” *Wakefern Food Corp. v. Marchese*, 2021 U.S. Dist. LEXIS 161661, at * 12 (D.N.J. Aug. 26, 2021).

attributing these goods to Plaintiffs and Class Members.

¶726. The Listings – inclusive of each Product Page and Seller StoreFront - are comprised of false information going to the heart of the “nature” and “characteristics” of the commercial activity (or service) being conducted by Walmart and the Fraudulent Sellers, *i.e.* the offering of goods for sale and the fulfillment of orders. The Listings contain fake Brands and conceal that the Fraudulent Sellers do not have inventory of the goods nor are authorized resellers. Instead, the Listings falsely state that the goods are “**Sold and shipped by**” the Fraudulent Seller (*see* image in ¶79, 135), when, in fact, the goods are “sold and shipped” by and from the Plaintiffs and AZ Merchants. ¶9, 205, 216, 225, 239, 250, 262, 275, 288, 302, 318, 333, 392-393, 408, 439, 449, 461, 545, 563.³³

Indeed, after Plaintiffs filed the Complaint, Walmart added this new language to the Seller Page: a “seller may use a different seller to supply a consumer product to consumer upon purchase.”³⁴ Discovery will explain the sudden emergence of this ambiguous and buried statement.³⁵ Suffice to say, however, this serves as a blatant acknowledgement by Walmart that its representations about how and from whom the products would be fulfilled have been inherently false.

³³ Clicking on that Seller name takes the customer to that Seller StoreFront page, which lists the business name, contact information, and “About the Store” information. *See* images, ¶31-33, 38, 40-41, 45-46. Then, clicking on “View More,” the customer sees an “About” the seller page, with the full business address of the Fraudulent Seller identifying the place of geographic origin of the product. *See* images, ¶32.

³⁴ *See* Decl. ¶6. The Court may take judicial notice of this information. *See Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (a court evaluating a Rule 12(b)(6) motion may consider documents “attached to or submitted with the complaint, and any matters incorporated by reference or *integral to the claim*, items subject to judicial notice, matters of public record, orders, and items appearing in the record of the case”) (internal quotation marks and citations omitted).

³⁵ *Bracco Diagnostics, Inc. v. Amerhsam Health, Inc.*, 627 F. Supp. 2d at 478, 464 (D.N.J. Mar. 25, 2009) (“Under the Lanham Act, false claims are not excused or remedied by the use of footnotes because a footnote or disclaimer that purports to change the apparent meaning of the claims and render them literally truthful, but which is so inconspicuously located or in such fine print that readers tend to overlook it, will not remedy the misleading nature of the claims.”)

2. *Walmart is Directly Responsible for The False Statements*

Walmart erroneously argues (D.I. 20 at 19-21) that Plaintiffs do not allege that Walmart “made” the foregoing statements. As an initial matter, there is no question that Walmart made the statements about the “trustworthy and safe marketplace” and its “qualified” third-party sellers.

Next, the Complaint alleges Walmart’s affirmative role and conduct in creating, sponsoring, presenting and controlling the information on its Marketplace. *First*, Walmart created, operates and controls the Walmart Marketplace, which is a *commercial digital platform* operated for the sole purpose of making a profit by the onboarding of merchants and for extracting a share of revenue generated on every transaction conducted by its merchants on the Marketplace. ¶107, 124, 592. *Second*, Walmart advertises and promotes the Listings by directing customers to its Marketplace through extensive internet advertising and promotion of Walmart Marketplace and the products listed for sale. ¶156-157. *Third*, Walmart: controls *who* is permitted to sell on its Marketplace (only “qualified businesses” and “professional sellers” that are accepted after a “selection process” and is required to collect, verify and disclose certain information pursuant to the INFORM Act); *how* they are permitted to sell (with a “selection process”); *what* they are permitted to sell pursuant to Retailer Agreements (“high quality” offerings with a “legal right to sell” and “accurate product information” and “accurate tracking numbers”); and *how* they are permitted to offer returns (approving shipping methods and return centers). ¶6, 11, 107-109, 115, 566. It monitors sellers’ postings and can remove sellers and their content. ¶592.

Fourth, Walmart holds out the Listings on Walmart Marketplace *as its own* by prominently displaying the Walmart logo at the top of each webpage. *See, e.g.*, images at ¶30, 31, 40(f), 41, 45, 46(d) (items pages); ¶32-33, 38, 40, 46 (business/review pages); ¶135, 347, 425, 470 (listings pages). *Fifth*, Walmart controls and shares in the customers’ payments for purchases from the

Fraudulent Sellers on its Marketplace, ¶6, 115. *Sixth*, the Marketplace operates, controls and presents a “Buy Box” for every product listing, authorizing the seller with the lowest price for a product to be the one that has their listing displayed. ¶150-151. Plainly, Walmart is not a mere bystander with no involvement or control over the Listings on its Marketplace.

Walmart (D.I. 20 at 19) relies on *CoStar Group, Inc. v. LoopNet, Inc.*, an out of circuit case, which holding is based on traditional copyright law. 373 F.3d 544 (4th Cir. 2004). In *CoStar*, copyright owners sued defendant internet service provider (ISP) alleging that the ISP directly infringed the owners’ copyrights to photographs of commercial real estate by allowing subscribers to post the photographs on the provider’s website. *Id.* at 546-548. The owners appealed the district court’s order granting summary judgment to the ISP, and the Fourth Circuit affirmed stating the *Copyright Act*, does not provide for direct liability of those that did not engage in volitional conduct. *Id.* at 555. Unlike Walmart, the ISP is a “cyberspace” defendant, whose only role is to store and be a conduit of others’ data. *Id.* at 551. At this stage, Walmart cannot be held to be just a “passive owner[] and manage[r] of an electronic Internet facility.” *Id.* at 550, 557-561 (dissent).

Likewise misplaced is Walmart’s reliance (D.I. 20 at 20) on *Parker v. Google*, 422 F. Supp. 2d 492 (E.D. Pa. 2006), *aff’d* 242 F. App’x. 833 (3d Cir. 2007). In *Parker*, the *pro se* plaintiff internet writer/publisher sued defendant Google, an ISP, for reposting plaintiff’s copyrighted material without permission. In granting defendant’s motion to dismiss Lanham Act claims based on trademark infringement, the court held that the plaintiff alleged *only* that defendant *republished* his work and did not allege that the defendant “*in any way* participated in the creation of the website’s content or use of his mark” and provided “*no additional detail* about the meaning of ‘republishing’ in this context and certainly has *not alleged active participation* on the part of Google.” *Id.* at 502-503 (emphasis added). That is in stark contrast to, as detailed *supra*, Walmart

as the maker of and “a moving force” in causing the false and misleading statements to be made. *Id.*; *Vans, Inc. v. Walmart, Inc.*, 2023 U.S. Dist. LEXIS 189943, at *10-11 (C.D. Cal. Oct. 11, 2023) (summary judgment denied; holding that Walmart could be held directly liable for “offering to sell” infringing goods and was not a passive facilitator, even if it does not have the legal right to sell the infringing item) (quotation omitted).³⁶

3. *Walmart is Liable for Statements Made by a Third Party*

Plaintiffs amply plead that Walmart directly made the actionable statements that form the basis of the Lanham Act claims. Alternatively, Plaintiffs also demonstrate Walmart’s liability for these statements if they are determined to have been made by a third party. As expressly held by the court in *Newborn*, (selectively quoted by Walmart at D.I. 20 at 19), statements made by a defendant are actionable and there is §1125(a) “liability for statements made by third parties.” 481 F.Supp. 3d at 344-45. “[S]peech by a third party that was created, sponsored, and presented by the defendant [is] actionable under the Lanham Act.” *Id.*

Furthermore, as Walmart concedes, the Third Circuit has recognized vicarious liability under the Lanham Act. D.I. 20 at 20. “A person who knowingly and significantly participates in another’s act of trademark infringement is himself guilty of infringement.” *Katiroll Co. v. Kati Roll & Platters, Inc.*, 2012 U.S. Dist. LEXIS 104104, *10-11 (D.N.J. Jul. 26, 2012) (cleaned up). And secondary liability is not limited to a manufacturer-distributor relationship, as it has been expanded it beyond that particular origin. *Id.* at *13. Additionally, courts in the Third Circuit recognize contributory liability for false statements. *See Interlink Prods. Int’l, Inc. v. F&W*

³⁶ *See, e.g., Live Face on Web, LLC v. Emerson Cleaners, Inc.*, 66 F. Supp. 3d 551, 556 (D.N.J. Dec. 11, 2014) (holding that a non-ISP defendant “operating its own website, is more than just a conduit of information” was “sufficient to satisfy the volitional conduct or causation element of a direct infringement claim” the specifics of which “may be explored during discovery.”)

Trading LLC, 2016 U.S. Dist. LEXIS 44256, at * 24-25 (D.N.J. Mar. 31, 2016) (denying motion to dismiss Lanham Act false statement claims under direct or contributory liability theories).

Walmart cites *AT&T v. Winback & Conserve Program, Inc.*, in which the Third Circuit held that the phone company's sales representatives were independent contractors and that remand was required to determine whether they acted with apparent authority of the phone company to commit Lanham Act violations. 42 F.3d 1421 (3d Cir. 1994). Here, similarly, Walmart cannot avoid liability at the motion to dismiss stage by self-servingly characterizing their lack of involvement with the Listings or the Fraudulent Orders and Refund Requests.

Walmart's suggestion that Plaintiffs have not pled Walmart's "participation" in the false and misleading statements fails and is unpersuasive for all of the reasons detailed *supra* Section II.A.1-2, and pgs. 2-6, and in the Complaint. Walmart is alleged to be part of the fraudulent scheme in which the Listings are essential to the ORC, and, critically, Walmart's conduct consists of its creating, sponsoring, controlling and presenting the Listings, which have hijacked Plaintiffs' products' information and pictures, are directed to consumers of Plaintiffs' products, and are intended to and result in a purchase of the product on the Marketplace instead of from Plaintiffs. The Fraudulent Orders and Refund Requests are an integral part of the scheme and reflect the intended outcome and success of the Listings, *i.e.* Plaintiffs' receipt of an order, that they will fulfill, and for which a Fraudulent Refund Request will follow.

B. Plaintiffs Plausibly Allege the Requisite Proximate Injury

The Lanham Act § 1125(a) protects any person "who believes that he or she is or is likely to be damaged" by the defendant's false advertising. Walmart's proximate causation arguments (D.I. 20 at 21-22) mischaracterize and ignore the asserted false statements and Plaintiffs' injuries.

Proximate causation is shown by an "economic or reputational injury flowing directly from

the deception wrought by the defendant's advertising; and that occurs when deception of consumers causes them to withhold trade from the plaintiff." *Lexmark*, 572 U.S. at 133. Walmart's statements about its "safe", "trustworthy" Marketplace of "qualified" sellers and the Listings, deceive customers into placing orders for Plaintiffs' products on the Marketplace (instead of with the Plaintiffs). The products are being deceptively passed off as supplied by the Fraudulent Sellers and "causes the Amazon Merchants to not get the sale from the legitimate customers." ¶5, 12, 118-119, 133-137, 723-727. A direct and obvious link between Walmart's false and misleading statements and Plaintiffs' lost revenue and profits occur on the Marketplace. Further, by virtue of the scheme's use of a Fraudulent Amazon Order and Refund Request, Plaintiffs have their products wrongfully converted, without compensation. ¶4, 5, 11, 117, 120, 202. At bottom, proximate causation is typically a question of fact. *See, e.g., Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 716 (3d Cir. 2018). Taken as true, the Plaintiffs plead injury and proximate causation, and they are entitled to an opportunity to prove them. *Id.* at 134.³⁷

III. PLAINTIFFS ADEQUATELY PLEAD STATE LAW CLAIMS

A. The California Consumer Protection Statutes Apply Extraterritorially

Extraterritorial application of California law is dictated by the fact that the Marketplace is California-centric and unlawful conduct integral to the Complaint is focused entirely on the Marketplace. *In Re Tobacco II Cases*, 207 P.3d 20, 30 (Cal. 2009) (The focus is "on the defendant's conduct, rather than the plaintiff's damages[.]"); *see also Thunder Studios, Inc. v. Kazal*, 13 F. 4th 736, 743 (9th Cir. 2021) ("[T]he determinative factor ... is the location of the conduct.").

³⁷ Pleading an eventual financial loss suffices to state a claim at this stage. *See e.g. Spanish Sports Network, LLC v. Spanish Football Prods., LLC*, 2021 WL 2284260, at *8 (D.N.J. June 4, 2021) (finding that the plaintiff was "likely to be damaged by [d]efendants[]" misleading statement that it was the only source of coverage for Phillies and Eagles games because it will harm his business reputation and eventually lead to a decrease in revenue or profits").

The law is clear that, on the facts alleged here, California law applies extraterritorially. *See Ehret v. Uber Techs., Inc.*, 68 F. Supp. 3d 1121, 1132 (N.D. Cal. 2014) (California law applied to a nationwide class where the alleged unlawful conduct was developed, maintained, and hosted on California-based websites and apps, with billing and payment processed through California).³⁸ Like Uber in *Ehret*, Marketplace operations are centered in and occurring from California: Defendant Wal-Mart.com USA, LLC (a California LLC) is headquartered in northern California, and the entity through which Marketplace operations are conducted by Walmart, Inc. (which is registered to do business in California). ¶¶19-21, 28, 33, 37-41, 66, 68, 620, 623-624, 672, 706-709. Walmart makes no factual arguments to the contrary. *See also* Decl. ¶5.

Walmart's reliance on *Daramola v. Oracle Am., Inc.*, 92 F.4th 833 (9th Cir. 2024), which does not address the extraterritorial application of California's consumer protection statutes, is misplaced and inapposite. In *Daramola*, the court held that the anti-retaliation provisions of Sarbanes-Oxley and Dodd-Frank do not apply extraterritorially to "a Canadian [employee] working out of Canada for a Canadian subsidiary of a U.S. parent company." *Id.* at 837. That the employee may have used CA-located web servers during the course of his employment was a peripheral fact and did not, unremarkably, equate to "sufficient relevant conduct" occurring in California. *Id.* at 843–44. Applying California law here is straightforward and not controversial: "[California] has a clear and substantial interest in preventing fraudulent practices in this state which may have an effect both in California and throughout the country." *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P.2d 539, 556 (Cal. 1999).

³⁸ The *Ehret* court rejected the very cases cited by Walmart. (*compare id. with* (D.I. 20 at 28)). *See also AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1110 (9th Cir. 2013); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1238 (9th Cir. 2000).

B. Walmart is Liable Under State Statutes

Plaintiffs have asserted claims under California, Florida, New York, North Carolina, and Utah statutes, *see* ¶¶670-886, which provide affected businesses like Plaintiffs and AZ Merchants with a cause of action against Walmart on the facts alleged here, *see* pgs. 2-6, *supra*.

1. Plaintiffs Can Assert State Statutory Claims Against Walmart

Walmart's argument (D.I. 20 at 30, 32-33) that *businesses* do not have standing to pursue state statutory claims is incorrect. Each state statute provides affected businesses like Plaintiffs and the AZ Merchants with a cause of action based on unfair and deceptive practices.³⁹

2. Plaintiffs Allege Walmart's Direct Violation of the UCL, CLRA and FAL

Walmart's conduct, discussed *supra* pgs. 2-6, plausibly plead claims under California's UCL which prohibits “any unlawful, unfair or fraudulent business act or practice.” *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539 (Cal. 1999) *Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101, 1117 (N.D. Cal. 2016). Each of the three prongs of the UCL provides a separate and distinct theory of liability and an independent basis for relief. *Id.* at 540. Indeed, the “unlawful” prong of the UCL “borrows violations of other laws and treats them as unlawful practices, that the [UCL] makes independently actionable.” *Id.*⁴⁰

Likewise, the plain language of the CLRA makes clear it applies to Plaintiffs' claims

³⁹ *See Kasky v. Nike, Inc.*, 45 P.3d 243, 249 (Cal. 2002); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006) (FDUTPA protects “the consuming public and legitimate business[es].”); *City of New York v. Smokes-Spirits.Com, Inc.*, 911 N.E.2d 834, 837 (N.Y. 2009) (standing under GBL § 349 extends to competitors); *Dalton v. Camp*, 548 S.E.2d 704, 710 (N.C. 2001); *Westgate Resorts, Ltd. v. Adel*, 285 P.3d 1219, 1228 (Utah 2012) (reversing trial court's conclusion that a third party lacked standing under the UCSPA for not being a consumer).

⁴⁰ Plaintiffs pled a predicate violation, *i.e.*, “anything that can properly be called a business practice and that at the same time is forbidden by law.” *Id.* North Carolina and Florida statutes operate similarly. *See Bhatti v. Buckland*, 400 S.E.2d 440, 443 (N.C. 1991) (“Because the presence of fraud is undisputed, defendant's acts were ‘unfair or deceptive.’”); Fla. Stat. Ann. § 501.203(3) (listing “*per se*” violations).

against Walmart. Cal. Civ. Code § 1770(a) enumerates various “unfair or deceptive acts or practices” “**undertaken by any person in a transaction** intended to result or *that results in the sale* or lease of goods or services *to any* consumer are unlawful” (emphasis added), and subdivision (14) plainly prohibits unfair methods of competition and unfair or deceptive acts or practices “that are prohibited by law.” *Id.* at (a)(14). *See Barrett v. Apple Inc.*, 2022 WL 2119131, at *5 (N.D. Cal. June 13, 2022) (CLRA violation predicated on common law conversion and Cal. Penal Code § 496). Also, to bring a CLRA claim, Plaintiffs do not need to be consumers or have direct relationships with Walmart. *See, e.g., NJOY*, 2024 WL 5324737, at *15-16 (CLRA claim stated against competitor); *McAdams v. Monier, Inc.*, 182 Cal. App. 4th 174, 186 (2010) (CLRA claim “may be established independent of any contractual relationship between the parties”).

As for the FAL, its procedures largely mirror those of the UCL but require knowledge of falsity, making statements about the disposition of property unlawful if they are (1) knowingly untrue or misleading or (2) reasonably should have been known to be untrue or misleading. *See Nationwide Biweekly Administration, Inc. v. Super. Ct. of Alameda Cnty.*, 462 P.3d 461, 473 (Cal. 2020). In *People v. Forest E. Olson, Inc.*, the court noted that the FAL’s reasonable care language is not satisfied by blind reliance on representations made by others; it imposes a duty to investigate, particularly when a business doing the advertising has access to relevant information and means of verification. 137 Cal. App. 3d 137, 139-40 (1982).

C. Plaintiffs Plausibly Pled State Statutory and Common Law Claims

Walmart states, without developed argument, that Plaintiffs have not alleged reliance or injury, as it pertains to the statutory and common law fraud claims. D.I. 20 at bottom of pg. 32 - top of pg. 33 (using a misleading heading), pg. 34. Those arguments must be rejected outright, and any attempt by Walmart to respond or address them in the reply brief stricken. *See supra* pg. 7.

Next, Walmart is wrong regarding reliance: it is not required or can be presumed. With respect to the state statutory claims, see *Tobacco II* 207 P.3d at 39 n.17 (recognizes that “many types of unfair business practices” under the UCL fraudulent prong do not require the same “concept of reliance.”); *Stutman v. Chem. Bank*, 731 N.E.2d 608, 612 (N.Y. 2000) (intent to defraud and justifiable reliance not required for GBL 349-50); *Bechor v. Simcenter, Inc.*, 394 So. 3d 666, 669 (Fla. Dist. Ct. App. 2024) (“[A] party asserting a [FDUTPA] deceptive trade practice claim need not show actual reliance on the representation or omission...”); *Stetser v. TAP Pharm. Products, Inc.*, 598 S.E.2d 570, 584 (N.C. App. 2004) (N.C.G.S. § 75–1.1 “does not require scienter on the part of the defendant [or] reliance by the plaintiff”); *Utah Div. of Cons. Prot. v. GAF Corp.*, 760 P.2d 310, 315 (Utah 1988) (“Actual reliance on the statement need not be shown”). With respect to the state common law fraud claims, see *Metrocity Holdings, LLC v. Bank of Am., N.A.*, 2023 U.S. Dist. LEXIS 165582, at *21 (S.D. Fla. Sept. 18, 2023) (“[FL] law does not require that the false statement be made directly to the injured party”); *Secor v. Knight*, 716 P.2d 790, 795 n.1 (Utah 1986) (“Failure to communicate accurate or complete information has been grounds for relief based on fraud.”); *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 122 (S.D.N.Y. 2009) (“Contrary to defendants' contentions, plaintiff's allegation of reasonable reliance on a material, false representation is sufficient to survive this stage of motion practice.”).

Likewise, Walmart's (undeveloped) causation assertion is wrong. A “fraudulent” business act is actionable by business competitors upon showing that the public, rather than the plaintiff, is likely to be deceived. See *Watson Lab'ys, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1121 (C.D. Cal. 2001) (The UCL Fraudulent prong covers “deception to some members of the public, or harm to the public interest”). Additionally, while causation must be shown, a plaintiff need not “allege that [the] misrepresentations were the sole or even the decisive cause of the injury-

producing conduct.” *Tobacco II*, 207 P.3d at 40.⁴¹ Harm to consumers is not limited to direct financial loss—restricting choice, lowering quality, reducing innovation—are all cognizable public harms that are not tied to an immediate and direct financial loss. Thus, whether Marketplace customers lost money or property due to statements or omissions on Marketplace is irrelevant to this analysis. D.I. 20 at 41, 44. Furthermore, Walmart’s argument ignores the harm to Plaintiffs was the direct and inevitable consequence of the fraudulent scheme and conduct by Walmart and the Fraudulent Sellers, including the false statements to consumers about the “safe” “trustworthy” Marketplace with “qualified” sellers. Those statements, and independently the Fraudulent Seller Pages and Product Pages, were affirmative statements and deceptions that redirected customers from the legitimate sellers (Plaintiffs and AZ Merchants) to Walmart and the Fraudulent Seller pages, wherein a sale resulted in, *inter alia*, Walmart receiving a commission. *See NJOY*, 2024 WL 5324737, at *19 (Plaintiff-competitor stated a UCL claim, alleging that defendants’ websites, packaging, and advertisements deceived consumers by implying their products were lawful).⁴²

Moreover, Walmart glosses over the fact that each state law prohibits unfair or deceptive ***methods of competition*** arising from a defendant’s anticompetitive conduct; *i.e.*, gaining an advantage not through merit but by enabling exploitative, predatory, or abusive practices that

⁴¹ *Stutman*, 731 N.E.2d at 612-13 (GBL § 349 requires nothing more than that the “defendant’s ‘material deceptive act’ caused the injury.”); *In re Opioid Litigation*, 2018 WL 3115102, *18-19 (N.Y. Sup.) (NY counties adequately alleged (GBL § 349) direct injuries resulting from opioid manufacturer defendants’ materially deceptive acts and practices, which targeted and misled the public about the safety and efficacy of opioids); *Roxane Labs., Inc. v. Smithkline Beecham Corp.*, 798 F. Supp. 2d 619, 628 n.9 (E.D. Pa. 2011) (“[T]he causation requirement under [the FDUTPA] is satisfied if the defendants’ conduct was simply likely to cause harm.”); *Dalton*, 548 S.E.2d at 711 (N.C. 75-1.1 requires that “the act proximately caused injury to the plaintiff.”).

⁴² *See FTC v. LeadClick Media, LLC*, 838 F.3d 158, 170 (2d Cir. 2016) (“A defendant may be held liable for its own acts of deception[], whether by directly participating in deception or by allowing deceptive acts or practices to occur that are within its control. This direct liability is distinguishable from liability for merely aiding and abetting the deceptive conduct of another.”).

distort market conditions. *In re Namenda Indirect Purchaser Antitrust Litig.*, 338 F.R.D. 527, 575 (S.D.N.Y. 2021) (harmonizing unfair competition under the consumer protection statutes of California, Florida, North Carolina, and Utah, and rejecting the argument that “unfair” is not necessarily equivalent to “unconscionable” or “deceptive”).⁴³ Walmart’s arguments (D.I. 20 at 33) directed to the Utah UCSPA and UTIAA claims are likewise contrary to the statutes’ plain language. The UTIAA proscribes a series of deceptive trade practices (§875), and states that “a complainant need not prove competition between the parties or actual confusion or misunderstanding.” §13-11a-3(6). The UTIAA statute contains no inducement requirement.⁴⁴

Walmart knowingly facilitated illicit transactions on Walmart.com that steal sales (the original sale) from Plaintiffs and AZ Merchants which results in a loss of the profit from that sale, and absent such conduct, no transaction on Amazon (either the Fraudulent Order or Refund Request) would occur (but does, also resulting in the illegal conversion by Walmart and the Fraudulent Sellers of the Plaintiffs and AZ Merchants’ injury are stealing inventory). Beyond

⁴³ *Himmelstein v. Matthew Bender & Co., Inc.*, 171 N.E.3d 1192, 1197-98 (N.Y. 2021) (“GBL § 349 is focused on the seller's deception and its subsequent impact on consumer decision-making...a broader impact on consumers at large.”). Thus, a misrepresentation need not be involved at all. *See California Med. Assn. v. Aetna Health of California Inc.*, 532 P.3d 250, 256 (Cal. 2023) (“[A] practice may be deemed unfair even if not specifically proscribed by some other law.”); *Dillon v. BMO Harris Bank, N.A.*, 16 F. Supp. 3d 605, 621 (M.D.N.C. 2014) (“[N.C.] Unfair trade practices claims can be based on a violation of public policy ‘even when fewer than all of the elements of the triggering statute are satisfied.’”).

⁴⁴ Walmart instead selectively quotes from *Barker v. Wal-Mart Stores, Inc.*, D.I. 20 at 33, which addressed causation and injury at class certification for a UTIAA claim but (respectfully) used “induced” imprecisely (*id.* at 20-21), a term otherwise absent from the opinion. As to the UCSPA, it provides a cause of action for a “consumer” but does not define the term. *Compare* § 13-11-19(4)(a) *with* § 13-11-3. However, it broadly prohibits both deceptive and unconscionable practices “*in connection with* a consumer transaction,” and its list of deceptive practices is explicitly nonexclusive. §§ 13-11-4(1)-(2); -5(1). Indeed, “anticompetitive conduct claims can be brought under the UCSPA’s unconscionability prong”; “[a] claim of unconscionable conduct ‘does not require a showing of fraud or deception.’” *In re HIV Antitrust Litig.*, 2023 WL 3006572, at *5 (N.D. Cal. Apr. 18, 2023). The Utah Acts are applicable. *See* § 13-11-2; § 13-11a-1.

private business interests, Walmart’s conduct undermines fair commerce and informed consumer choice, and strikes at the heart of competition itself.

D. Plaintiffs Have Plausibly Alleged Secondary Liability Under State Laws

Walmart’s arguments that Plaintiffs have not plausibly alleged “secondary” or “aiding and abetting” liability under California, Florida, New York, North Carolina, and Utah law are based on two primary arguments: (i) state laws do not allow claims for vicarious liability (D.I. 20 at 28-29, 31); and (ii) Walmart did not plead “personal assistance”, or “substantial assistance” or “encouragement.” *Id.* at 29-30, 32. *First*, Plaintiffs’ allegations support finding that Walmart can be held secondarily liable under the laws of California, Florida, New York, North Carolina, and Utah. Utah appears to recognize vicarious and aiding and abetting theory for both common-law and statutory fraud; *see GAF Corp.*, 760 P.2d at 314 (recognizing there is UCSPA vicarious liability and that a third party’s statements can be imputed to a defendant who “knew of or acquiesced in [the third party’s] statements.”). North Carolina is unsettled on the issue of aiding and abetting fraud, but does recognize a similar cause of action; *see TaiDoc Tech. Corp. v. OK Biotech Co., Ltd.*, No. 12 CVS 20909, 2016 WL 1221425, at *11 (N.C. Super. Mar. 28, 2016) (“facilitation of fraud”); *Dillon*, 16 F. Supp. 3d at 619 (aiding and abetting N.C. Consumer Finance Act). The states also recognize vicarious or aiding and abetting liability theory for statutory fraud.⁴⁵

Second, Walmart has “knowingly participated” in and provided “substantial assistance” to the scheme and the fraudulent conduct alleged through the Walmart Marketplace which it created, operates and controls. *See* Sections I and II, *supra*, discussing RICO and Lanham Act claims.

⁴⁵ *See People v. Toomey*, 203 Cal. Rptr. 642, 651 (Cal. App. 1st Dist. 1984) (aiding and abetting under UCL and FAL); *St. Francis Holdings, LLC v. MMP Capital, Inc.*, 2022 WL 991980, *9 (E.D.N.Y. Mar. 31, 2022) (vicarious liability for fraudulent inducement under FL law); *Meisel*, 651 F. Supp. 2d at 121 (co-defendant vicariously liable for fraud under NY law).

Walmart’s citation to California cases regarding secondary liability are unhelpful and far from “directly on point.” D.I. 20 at 40. *Perfect 10* and *Emery* are inapposite because, in both cases, the defendants merely provided generic services—payment processing in *Perfect 10* and logo licensing in *Emery*—without exercising control over or participating in the underlying unlawful conduct. Walmart’s reliance on *Barrett v. Apple Inc.*, 523 F. Supp. 3d 1132, (N.D. Cal. 2021), is similarly flawed (for reasons independent of the fact that plaintiffs’ claim had merit).⁴⁶ *Barrett* involved a gift card scam in which Apple had no active role, unlike Walmart is alleged to have here. Importantly, plaintiffs in *Barrett* did not allege facts connecting their victimization to the fraudsters’ use of Apple’s app store. The scheme was perpetrated without any alleged nexus to the App Store. By contrast, Plaintiffs here allege that Walmart’s conduct is integral to the scheme, actively facilitating every stage. This direct and multifaceted involvement distinguishes Walmart’s role from the peripheral connection alleged in *Barrett*.

E. Plaintiffs State Unjust Enrichment Claims Against Walmart (Counts X, XIV, XVII, XXI)

Walmart’s argument about Plaintiffs’ unjust enrichment claims is untenable. D.I. 20 at 35. In stark contrast to the Complaint’s allegations, discussed *supra*, Walmart deems its conduct “neutral” and the Fraudulent Refund Request as the sole source of any benefit or harm from the ORC. To the contrary, Walmart profits from each commission it gets from each sale by the Fraudulent Sellers on the Marketplace. ¶4(d)), 6-7, 13, 125-131. Also, the profitability of Fraudulent Sellers (and the ORC itself) at the expense of Plaintiffs depends entirely on Walmart’s conduct and the Marketplace. Plaintiffs amply allege that they conferred a direct or indirect benefit

⁴⁶ It is worth noting that *Barrett* amended and stated claims for Cal. Penal Code § 496, Conversion, Unlawful Conduct (CLRA & UCL), and Unconscionability (CLRA & UCL). *Barrett*, 2022 WL 2119131. And then settled as a nationwide class of an estimated 500,000 members. *See Barrett, et al., v. Apple Inc, et al.*, 2024 WL 5339480, at *4 (N.D. Cal. Dec. 19, 2024).

on Walmart.⁴⁷ ¶¶770-779, 813-825, 849-858, 897-906.

IV. LEAVE TO AMEND

The law is well settled that, “if a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile.” *Phillips*, 515 F.3d at 245. Likewise, F.R.C.P 15 embodies a liberal approach to amendment and directs that “leave shall be freely given when justice so requires...” *Dole v. Arco Chem. Co.*, 921 F.2d 484, 486-87 (3d Cir. 1990). To the extent the Court determines that the Complaint has not yet plausibly pled one of the asserted claims against Walmart, Plaintiffs respectfully request that such claim be dismissed without prejudice and with leave to amend the Complaint. No prior amendments have been requested or previously allowed. Under these circumstances, granting leave to file an amended Complaint is warranted. *See In re PMTS Liquidating Corp.*, 490 B.R. 174 (D. Del. 2013) (granting leave to file **third** amended complaint); *Clarity Sports Int’l LLC v. Redland Sports*, 400 F. Supp. 3d 161 (M.D. Pa. 2019) (granting leave to “file a second amended complaint that clarifies” the claims and “includes additional factual allegations[.]”)

CONCLUSION

Walmart’s Motion must be denied in its entirety based on the foregoing and the allegations detailed in the Complaint.

⁴⁷ *See In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp. 2d 867, 913, 928-35 (E.D. Pa. 2012) (Illustrating that unjust enrichment claims under CA, FL, NY, NC and UT law may arise from indirectly conferring a benefit); *Russell v. Walmart, Inc.*, 680 F. Supp. 3d 1130, 1132 (N.D. Cal. 2023) (CA unjust enrichment elements); *Shands Teaching Hosp. and Clinics, Inc. v. Beech St. Corp.*, 899 So. 2d 1222, 1227 (Fla. Dist. Ct. App. 2005) (FL); *Greene v. Clean Rite Centers, LLC*, 714 F. Supp. 3d 134, 149 (E.D.N.Y. 2024) (NY); *Booe v. Shadrick*, 369 S.E.2d 554, 556 (N.C. 1988) (NC); *Rawlings v. Rawlings*, 240 P.3d 754, 763 (Utah 2010) (Utah).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2025, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record listed on the ECF notification.

/s/
Scott M. Tucker