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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARCIA BURKE, Individually and on Behalf  
of All Others Similarly Situated,

Plaintiff,

vs.

AMAZON SERVICES LLC, a Nevada limited  
liability company,

Defendant.

CASE NO.

CLASS ACTION COMPLAINT

JURY DEMAND

Plaintiff Marcia Burke (“Plaintiff”) alleges the following based upon personal knowledge as to herself and her own acts, and upon information and belief and the investigation by Plaintiff’s counsel, which included, among other things, a review of public documents, marketing materials, and announcements made by Amazon Services, LLC (“Amazon”) as to all other matters. Plaintiff believes that substantial additional evidentiary support exists for the allegations set forth herein and will be available after a reasonable opportunity for discovery.

**I. NATURE OF THE ACTION**

1. This action seeks to remedy the unfair and deceptive practices of Amazon with respect to encouraging third-party sellers to inflate prices to help cover the cost of shipping, even though consumers, who pay for an Amazon Prime Membership, are supposed to get that benefit for free.

1 2. Amazon Prime Members pay \$79 a year for Amazon Prime, which gives  
2 Members free two-day shipping on Prime-Eligible products. Defendant recognizes that  
3 consumers who purchased an Amazon Prime Membership did so to avoid or limit shipping  
4 charges.

5 3. On information and belief, Plaintiff alleges that during the Class Period,  
6 Defendant encouraged vendors who use Amazon to ship its items (referred to as Fulfillment by  
7 Amazon or FBA), to mark up the prices of these items to ultimately include shipping charges.  
8 Furthermore, Defendant provides these vendors priority by showing their items first in the  
9 Prime Member's product search results.

10 4. By concealing the shipping charges in the price of the product, Amazon is able  
11 to recoup the cost of shipping because it receives a percentage of the product's price.

12 5. Defendant's conduct was unfair, unlawful, fraudulent, is likely to deceive  
13 members of the public, and is substantially injurious to consumers. As such, Plaintiff seeks  
14 relief in this action individually and as a class action on behalf of all purchasers in the United  
15 States of Defendant's Amazon Prime Membership.

## 16 II. PARTIES

17 6. Plaintiff Marcia Burke ("Burke" or "Plaintiff") is a citizen of Alabama and an  
18 individual consumer. During the Class Period, Plaintiff became an Amazon Prime Member and  
19 utilized the Amazon Prime "free shipping" service at least eighteen times from January 11,  
20 2010 through December 14, 2010. Plaintiff, individually and on behalf of a class of persons  
21 and/or entities similarly situated, brings this action for damages and such other relief as may be  
22 available against Defendant.

23 7. Defendant Amazon Services LLC ("Amazon" or "Defendant") is a Nevada  
24 limited liability company headquartered in Seattle, Washington. According to Amazon.com's  
25 January 31, 2014 Form 10-K, Amazon Services LLC provides fulfillment in connection with  
26 certain of its sellers programs. Amazon.com and its affiliates operate as the world's largest  
online retailer.

**III. JURISDICTION AND VENUE**

1  
2 8. This Court has original jurisdiction over the claims asserted herein individually  
3 and on behalf of the class pursuant to 28 U.S.C. §1332, as amended in February 2005 by the  
4 Class Action Fairness Act. Plaintiff is a citizen and resident of Alabama. Defendant is a Nevada  
5 limited liability company headquartered in Seattle, Washington. It is wholly owned by  
6 Amazon.com, Inc. a Delaware corporation also headquartered in Seattle, Washington. Plaintiff  
7 and Defendant are citizens of different states and the matter in controversy exceeds \$75,000,  
8 exclusive of interest and costs. Personal jurisdiction is proper as Amazon is domiciled in  
9 Washington and has purposefully availed itself of the privilege of conducting business  
10 activities within the State of Washington.

11 9. Defendant (a citizen of Washington) operates its retail websites, such as  
12 amazon.com and amazon.ca, which are the subject of the present complaint, in this District.  
13 Thus, under 28 U.S.C. §§1391(c)(2) and (d), Defendant is deemed to reside in this District. As  
14 such, venue is proper in this judicial district under 28 U.S.C. §1391(b)(1) because Defendant is  
15 deemed to reside in this District and under 28 U.S.C. §1391(b)(2) because Defendant conducts  
16 business in this District and a substantial part of the events giving rise to the claims set forth  
17 herein occurred in this District.

18 10. As an additional basis for venue, Amazon's Participation Agreement contains a  
19 forum selection clause setting venue in King County, Washington federal court. Amazon's  
20 Conditions of Use Agreement states that:

21 Any dispute . . . in which the aggregate total claim for relief  
22 sought on behalf of one or more parties exceeds \$7,500 shall be  
23 adjudicated in any state or federal court in King County,  
24 Washington . . . [That court shall have] exclusive jurisdiction and  
25 venue.

26 11. Accordingly, venue is proper under 28 U.S.C. §1391.

**IV. FACTUAL ALLEGATIONS**

**A. The Amazon Prime Program**

12. Throughout the Class Period, purchasers on Amazon.com could join the Amazon Prime Program (“Prime Program”) by paying Amazon a \$79 annual membership fee. In return, Amazon agreed that “Prime Program” Members would receive free shipping for items: (a) purchased from third-party vendors that participate in the Prime Program; and (b) designated on the relevant website as .

13. Until February 22, 2011 (the end of the Class Period), free shipping on items designated as Prime-Eligible was the exclusive benefit of Prime Program Membership.<sup>1</sup> Over the years Amazon has increased Prime’s appeal by including extras, such as movie and television streaming and Kindle e-book borrowing.

**B. Amazon’s Agreement that Shipping Charges Would Not Be Included in Items Designated as “Prime Eligible”**

14. The term “Prime-Eligible” refers to all goods for sale on the relevant website that are designated . Products eligible for Prime will be designated as such on their product pages. In return for the annual \$79 Prime Program Membership fee, Amazon agreed: (a) to provide free shipping on any and all Prime Program Member purchases of Prime Eligible items; and (b) that shipping charges would not be included in the prices of items offered for sale as Prime Eligible.

15. The Prime Program benefits include: (a) *free two-day shipping* on Prime Eligible items; and (b) *free standard shipping* on Prime Eligible items.

**C. Fulfillment by Amazon (FBA)**

16. Fulfillment by Amazon (“FBA”) is a service offered by Amazon to third-party vendors. Under FBA, the third-party vendor pays Amazon certain fees. In return, Amazon stores the products in Amazon’s fulfillment centers, and Amazon will pick, pack, ship and

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<sup>1</sup> On that date, Amazon began providing streaming movies and TV shows for free to members of its \$79/year Amazon Prime program.

1 provide customer service for these products. Third-party vendors who participate in the FBA  
2 are referred to as “FBA Vendors.”

3 17. Amazon allows and encourages FBA Vendors to list items for sale as Prime-  
4 Eligible, therefore promising that the items would be sold without charging for shipping.  
5 Amazon promotes that “Prime members love free Two-Day shipping” and that “FBA Listings  
6 on Amazon.com benefit from customer awareness of discounted shipping—and because most  
7 FBA listings are ranked without a shipping cost, [an FBA Vendor] get[s] an edge when  
8 competing!”<sup>2</sup>

9 **D. Amazon Encourages FBA Vendors to Mark Up Prices of Prime-Eligible**  
10 **Items to Include Shipping Charges**

11 18. On information and belief, Plaintiff alleges that throughout the Class Period: (a)  
12 Defendant encouraged FBA vendors to include the amount they would have charged for  
13 shipping in their item prices in order to maximize total revenue and profit margins; and (b)  
14 FBA Vendors increased their prices to Prime Program Members by the amount they charged  
15 others for shipping without revealing that a portion of those inflated prices was for shipping  
16 fees.

17 19. When an FBA Vendor prices an item on Amazon, the total price charged to the  
18 consumer includes the shipping price. Since items sold through FBA are eligible for Free Super  
19 Saver Shipping and Amazon Prime, FBA sellers actually raise their prices to match or top their  
20 competitor’s total price. For example, if the price of an item is advertised for \$10 with \$3.99  
21 shipping and the FBA Vendor wishes to match or top their price, the FBA Vendor would  
22 charge \$13.99 or higher.

23 20. Items are more competitively priced and typically listed higher in rank because  
24 listings are sorted by price. FBA listings on Amazon.com are sorted by product price with no  
25 shipping costs included since FBA vendor products are eligible for free shipping. For instance,  
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<sup>2</sup> <http://services.amazon.com/content/fulfillment-by-amazon.htm>

1 an FBA Vendor's product will be listed as "Eligible for FREE Super-Saver Shipping." As a  
2 Prime Member, the customer is afforded free 2-day shipping.

3 21. Amazon concealed this price increase by giving priority to FBA Vendors,  
4 showing their items first in the results of a Prime Member's product search.

5 **E. Raising Prime-Eligible Item Prices by Shipping Charges Increases  
6 Amazon's FBA Fees and Allows Amazon to Capture its Shipping Costs**

7 22. Amazon charges FBA Vendors a "referral fee," which is a percentage of the  
8 price of the Prime-Eligible item. Amazon deducts as a referral fee a percentage of the item  
9 price, excluding any taxes collected through Amazon tax collection services.

10 23. Increasing a FBA item price by an amount equal to normal shipping charges—as  
11 recommended by Amazon—results in (a) a higher referral fee paid by FBA Vendors to  
12 Amazon; and (b) the direct and immediate recovery by Amazon, in whole or in part, of its cost  
13 of "free" shipping, contrary to its contractual obligations to Prime Program Members, and  
14 contrary to FTC guidelines, which read:

15 (b) *Meaning of "Free."*

16 (1) (W)hen the purchaser is told that an article is "Free" to her if  
17 another article is purchased, the word "Free" indicates that she is  
18 paying nothing for that article and no more than the regular price  
19 for the other. ***Thus, a purchaser has a right to believe that the  
20 merchant will not directly and immediately recover, in whole or  
21 in part, the cost of the free merchandise or service by marking  
22 up the price of the article which must be purchased....***

23 16 C.F.R. §251.1(b)(1) (emphasis added).

24 **F. Plaintiff's Prime Program Membership**

25 24. From approximately January 11, 2010 through December 14, 2010, Plaintiff was  
26 an Amazon Prime Program Member and paid the annual membership fee of \$79 to Amazon. In  
return for the \$79 annual membership fee, Amazon represented to Plaintiff, like all Prime  
Program Members, that she would receive free shipping on her Prime-Eligible purchases, and

1 that the prices of Prime-Eligible items would not be increased by the inclusion of shipping  
2 charges.

3 25. Because Amazon induced FBA Vendors to include shipping charges in the  
4 prices of FBA Prime-Eligible items, Plaintiff and other Prime Program Members did not  
5 receive free shipping as represented. Instead, Amazon's FBA pricing program resulted in  
6 Prime-Eligible items being routinely offered for sale through FBA Vendors at prices inflated  
7 because the shipping charges were, in fact, included in the sales price despite Amazon's free  
8 shipping promise.

9 26. As a result, Plaintiff and other Prime Program Members were harmed and  
10 deceived by Amazon's activity because they paid the \$79 annual Prime Program Membership  
11 fee solely for the benefit of free shipping. However, the prices of FBA items offered to Prime  
12 Program Members were routinely inflated to include hidden shipping charges.

### 13 **V. CLASS ACTION ALLEGATIONS**

14 27. Plaintiff brings this action individually and as a class action pursuant to Federal  
15 Rule of Civil Procedure 23 on behalf of herself and the Class defined as follows:

16 All persons and entities in the United States who became  
17 Amazon Prime Members at any time from October 24, 2007 until  
18 February 22, 2011, and paid one or more \$79 annual Prime  
19 membership fees during that Class Period. Specifically excluded  
20 from this Class are Defendant; the officers, directors, or  
21 employees of Defendant; any entity in which a Defendant has a  
22 controlling interest; and any affiliate, legal representative, heir, or  
23 assign of Defendant. Also excluded are those who assert claims  
24 for personal injury as well as any federal, state, or local  
25 governmental entities, any judicial officer presiding over this  
26 action and the members of his/her immediate family and judicial  
staff, and any juror assigned to this action.

27 28. The Class is sufficiently numerous, as it includes millions of persons who have  
28 purchased an Amazon Prime Membership. Thus, joinder of such persons in a single action or  
29 bringing all members of the Class before the Court is impracticable for purposes of Rule  
30 23(a)(1).

1           29. The question is one of a general or common interest of many persons and it is  
2 impractical to bring them all before the Court. The disposition of the claims of the members of  
3 the Class in this class action will substantially benefit both the parties and the Court.

4           30. Class certification is appropriate under Rule 23(b)(3) because common  
5 questions of law and fact substantially predominate over any questions that may affect only  
6 individual members of Class. Among these common questions of law and fact are:

7           a) Whether shipping charges were routinely included in the prices of FBA  
8 Prime-Eligible items;

9           b) whether the routine inclusion of shipping charges in the prices of FBA  
10 Prime-Eligible items constitutes a breach of Amazon's promise to Prime Program Members  
11 that shipping charges would not be included in the prices of items offered for sale as FBA  
12 Prime-Eligible;

13           c) whether Washington law applies to the claims of all Class members; and

14           d) whether Amazon's activity was unfair and deceptive in trade or  
15 commerce, adversely impacting the public interest.

16           31. The members of the Class were similarly affected by having purchased an  
17 Amazon Prime Membership for its intended purpose as promoted by Defendant as set forth in  
18 detail herein, and the relief sought herein is for the benefit of Plaintiff and other members of the  
19 Class. Thus, there is a well-defined community of interest in the questions of law and fact  
20 involved in this action and affecting the parties.

21           32. Plaintiff asserts claims that are typical of the claims of the Class for purposes of  
22 Rule 23(a)(3). For the following non-inclusive reasons, Plaintiff's claims are typical of those of  
23 the Class members.

24           a) Plaintiff, like all Class members, became an Amazon Prime Program  
25 Member during the period that the Terms and Conditions governing her Amazon Prime  
26 Program membership provided that:

- 1 i. disputes involving an “aggregate total claim for relief sought on  
2 behalf of one or more parties exceeds \$7,500 shall be adjudicated in  
3 any state or federal court in King County, Washington...”; and  
4 ii. “the laws of the state of Washington will govern any dispute of any  
5 sort that might arise between you and Amazon...”

6 b) Amazon continually breached its promise to Plaintiff and Prime Program  
7 Members that shipping charges would not be included in the prices of items offered for sale as  
8 FBA Prime-Eligible. Shipping charges were, throughout the Class period, routinely included in  
9 the prices of FBA Prime-Eligible items.

10 33. Plaintiff will fairly and adequately represent and protect the interests of the  
11 members of the Class for purposes of Rule 23(a)(4). Plaintiff has no interests antagonistic to  
12 those of other members of each respective Class. Plaintiff is committed to the vigorous  
13 prosecution of this action and has retained counsel experienced in litigation of this nature to  
14 represent her. Plaintiff anticipates no difficulty in the management of this litigation as a class  
15 action.

16 34. Defendant engaged in a common course of conduct giving rise to the legal rights  
17 sought to be enforced by the members of the Class. Similar or identical statutory and common  
18 law violations and deceptive business practices are involved. Individual questions, if any, pale  
19 by comparison to the numerous common questions that predominate.

20 35. Proceeding as a class action provides substantial benefits to both the parties and  
21 the Court because this is the most efficient method for the fair and efficient adjudication of the  
22 controversy. Because of the nature of the individual claims of the members of Class, few, if  
23 any, could or would otherwise afford to seek legal redress against Defendant for the wrongs  
24 complained of herein, and a representative class action is therefore the appropriate, superior  
25 method of proceeding and essential to the interests of justice insofar as the resolution of claims  
26 of the members of the Class is concerned. Absent a representative class action, members of the  
Class would continue to suffer losses for which they would have no remedy, and Defendant

1 would unjustly retain the proceeds of their ill-gotten gains. Even if separate actions could be  
2 brought by individual members of the Class, the resulting multiplicity of lawsuits would cause  
3 undue hardship, burden, and expense for the Court and the litigants, as well as create a risk of  
4 inconsistent rulings, which might be dispositive of the interests of the other members of the  
5 Class who are not parties to the adjudications and/or may substantially impede their ability to  
6 protect their interests.

7 36. Given the similar nature of Class members' claims and the contractual provision  
8 designating the laws of the State of Washington as governing, a nationwide class can be  
9 managed by this court. Thus, a significant economy of scale exists in concentrating the  
10 litigation in this forum.

## 11 VI. CAUSES OF ACTION

### 12 FIRST CLAIM FOR RELIEF

#### 13 (Breach of Contract on Behalf of Plaintiff and the Class)

14 37. Plaintiff re-alleges each and every allegation contained above as if fully set forth  
15 herein.

16 38. Plaintiff and members of the Class entered into a written agreement with  
17 Defendant to pay Amazon a \$79 annual membership fee to become a Prime Program member.  
18 As a Prime Program member, Plaintiff and members of the Class were told that they would  
19 receive free shipping for items: (a) purchased from third-party vendors that participate in the  
20 Prime Program; and (b) designated on the relevant website as FBA Prime-Eligible.

21 39. The routine inclusion and encouragement of shipping charges in the prices of  
22 FBA Prime-Eligible items constitutes a breach of Amazon's promise to Prime Program  
23 Members that shipping charges would not be included in the prices of items offered for sale as  
24 FBA Prime-Eligible, and violates Amazon's agreement that shipping would be "free."

25 40. As a direct result of Amazon's breach, Plaintiff and members of the Class were  
26 damaged by Amazon's breach of the contract in that they paid the \$79 Prime membership fee

1 and were not afforded the benefits of the Prime Program. Amazon was unjustly benefited at the  
2 expense and to the detriment of Plaintiff and the Class members.

3 **SECOND CLAIM FOR RELIEF**

4 **(Washington Consumer Protection Act Wash Rev. Code Ann §§ 19.86.020 et seq.**  
5 **Violations on Behalf of Plaintiff and Class)**

6 41. Plaintiff re-alleges each and every allegation contained above as if fully set forth  
7 herein and, to the extent necessary, pleads this cause of action in the alternative.

8 42. The Defendant's acts and representations described above constitute unfair and  
9 deceptive acts or practices in the conduct of trade or commerce which affect the public interest  
10 within the meaning of the Washington Consumer Protection Act, Wash. Rev. Code Ann.  
11 §19.86, *et seq.*

12 43. Amazon had a statutory and contractual duty to refrain from unfair or deceptive  
13 acts or practices in trade and commerce.

14 44. Amazon's conduct, described above, was unfair and deceptive in trade and  
15 commerce.

16 45. Amazon engaged in a per se unfair trade practice with regard to advertising  
17 "free" shipping to Prime Members. Amazon's unfair and deceptive conduct in trade and  
18 commerce, described above, impacted the public interest, and injured Plaintiff and the Class  
19 she seeks to represent.

20 46. Plaintiff seeks compensatory damages, punitive and special damages including  
21 but not limited to treble damages, as well as reasonable attorneys' fees and costs resulting from  
22 Defendant's conduct.

23 **VII. PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff prays for judgment and relief against Defendant as follows:

25 A. That the Court certify the Class under Rule 23 of the Federal Rules of Civil  
26

1 Procedure and appoint Plaintiff as Class Representative and her attorneys as Class Counsel to  
2 represent the members of the Class;

3 B. That the Court declare that Defendant's conduct constitutes a breach of contract  
4 as well as violation of The Washington Consumer Protection Act;

5 C. That the Court order Defendant to implement whatever measures are necessary  
6 to remedy the unlawful, unfair, or fraudulent business acts or practices, untrue and misleading  
7 advertising, and other violations of law described in this Complaint;

8 D. That the Court order Defendant to notify each and every individual and/or  
9 business who purchased an Amazon Prime Membership during the Class Period of the  
10 pendency of the claims in this action in order to give such individuals and businesses an  
11 opportunity to obtain restitution from Defendant;

12 E. That the Court award actual/compensatory damages in an amount to be proven,  
13 and consisting of, among other things, a refund of all annual Prime Program membership fees  
14 paid and all shipping fees paid during the Class period;

15 F. That the Court award treble damages as provided under the Washington  
16 Consumer Protection Act;

17 G. That the Court order Defendant to pay restitution to restore to all affected  
18 persons all funds acquired by means of any act or practice declared by this Court to be an  
19 unlawful, unfair, or a fraudulent business act or practice, plus pre- and post-judgment interest  
20 thereon;

21 H. That the Court grant such other and further relief as may be just and proper.

## 22 **VIII. JURY DEMAND**

23 Plaintiff demands a trial by jury on all causes of action so triable.  
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Respectfully submitted,  
TOUSLEY BRAIN STEPHENS PLLC

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