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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

FEDERAL TRADE COMMISSION, *et al.*,  
  
Plaintiffs,  
  
v.  
  
AMAZON.COM, INC., a corporation,  
  
Defendant.

CASE NO.: 2:23-cv-01495-JHC

**PLAINTIFFS' REPLY IN  
SUPPORT OF MOTION TO  
BIFURCATE**

NOTE ON MOTION CALENDAR:  
March 15, 2024

*ORAL ARGUMENT REQUESTED*

## INTRODUCTION

1  
2 The parties agree that the decision to bifurcate proceedings under Federal Rule of Civil  
3 Procedure 42(b) is case-specific and lies within the Court’s discretion. Plaintiffs’ motion to  
4 bifurcate detailed why complex antitrust cases, including government monopolization cases  
5 concerning online markets, are often bifurcated into separate liability and remedies proceedings to  
6 increase convenience and judicial economy. (Dkt. #167 (“Mot.”) at 3-6.) Plaintiffs further  
7 explained why bifurcation in this case would similarly benefit the Court, the parties, and non-party  
8 witnesses by allowing the parties to make focused presentations to the Court at each stage of the  
9 proceedings. *Id.* at 6-11. In opposing Plaintiffs’ motion, Amazon ignores these benefits,  
10 mischaracterizes Plaintiffs’ positions, and continues to improperly conflate the relevant liability  
11 and remedies inquiries. (Dkt. #168 (“Opp.”).)

12 First, Amazon argues that it will be prejudiced by bifurcation because it is “unfair[]” to  
13 require Amazon “to conduct discovery on undisclosed potential remedies.” *Id.* at 4-6. But there is  
14 nothing unusual or unfair about the level of detail Plaintiffs have pleaded in their requested relief,  
15 and Plaintiffs’ bifurcation proposal does not limit Amazon’s ability to explore potential remedies  
16 through normal discovery processes. Further, because the parties agree that fact discovery should  
17 encompass both liability and remedies issues, there is no connection between Amazon’s claim of  
18 prejudice and Plaintiffs’ motion to bifurcate. Amazon’s request that the Court order Plaintiffs to  
19 “disclose with reasonable particularity to Amazon all remedies they are considering proposing  
20 within 30 days” (Amazon’s Proposed Order, Dkt. #168-1)—which Amazon did not so much as  
21 discuss with Plaintiffs before filing its brief—seeks to hijack Plaintiffs’ bifurcation motion as a  
22 vehicle for a motion to compel a response to an interrogatory that Amazon has not even served.  
23 Amazon nowhere explains how its requested relief is necessitated by Plaintiffs’ motion to  
24

1 bifurcate. In fact, Amazon admits that it seeks to compel its desired remedies-specific disclosure  
2 “[r]egardless of the Court’s decision on this Motion.” (Opp. 12.)

3 Second, in arguing that bifurcation would cause inefficiency and duplication, *id.* at 6-9,  
4 Amazon ignores the key benefits to judicial economy that bifurcation would provide (*see*  
5 Mot. 6-8). And Amazon’s continued attempts to incorrectly inject the issue of determining  
6 appropriate remedies as necessarily “part of any liability determination” (Opp. 3; *id.* at 7), offered  
7 without any legal support, underscore the benefits of separating these distinct inquiries at trial.

8 Plaintiffs respectfully request that the Court reject Amazon’s attempt to bypass the normal  
9 discovery process, order that trial be bifurcated so as to economize this litigation, and allow fact  
10 discovery on both liability and remedies issues to proceed apace. If the Court is not inclined to  
11 order bifurcated proceedings at this time, Plaintiffs ask the Court to defer resolution of Plaintiffs’  
12 motion until this case is closer to trial.

### 13 **ARGUMENT**

#### 14 **I. BIFURCATION WILL NOT PREJUDICE AMAZON.**

15 Amazon claims the “key prejudice of [Plaintiffs’] bifurcation proposal” is that it would  
16 require Amazon to “conduct remedies discovery and proceed to trial before Plaintiffs have even  
17 disclosed the remedies they potentially might seek.” (Opp. 4.) Amazon argues it “should be  
18 advised of Plaintiffs’ remedy proposals now,” *id.* at 6, and requests an order requiring Plaintiffs to  
19 “disclose with reasonable particularity to Amazon all remedies they are considering proposing  
20 within 30 days” (Amazon’s Proposed Order, Dkt. #168-1). Amazon’s prejudice concerns are  
21 unfounded and its request to compel disclosure on remedies is premature and procedurally  
22 improper.

23 Amazon’s statements claiming “silence” and a “lack of disclosure” from Plaintiffs  
24 regarding remedies (Opp. 2, 6), as well as its suggestion that Plaintiffs have provided Amazon

1 with “no information about remedies,” *id.* at 5, are false and misleading. In both the Complaint  
2 and subsequent submissions to the Court, Plaintiffs have outlined the remedies that they seek,  
3 including an order that “Amazon is permanently enjoined from engaging in its unlawful conduct”  
4 and “similar or related conduct, or any conduct with the same or similar purpose and effect”; any  
5 “equitable relief, including but not limited to structural relief,” as necessary to “redress and prevent  
6 recurrence of Amazon’s violations of the law” and “restore fair competition and remedy the harm  
7 to competition caused by Amazon’s violations of the law”; “equitable monetary relief” and “costs  
8 of suit” for certain Plaintiff States; and “any additional relief the Court finds just and proper.”  
9 (Complaint, Dkt. #114 at 147-49; Amended Complaint, Dkt. #171 at 152-54; *id.* ¶¶ 483, 485, 488,  
10 491, 495, 498, 503, 509, 517, 523, 525, 528, 541-42, 553-54, 558, 561, 563, 566; *see also* Joint  
11 Status Report, Dkt. #135 (“JSR”) at 44-45 (Plaintiffs seek relief as “necessary to stop Amazon’s  
12 unlawful activities, restore fair competition, and remedy the harm to competition caused by  
13 Amazon’s conduct”).)<sup>1</sup>

14 These allegations satisfy the Federal Rules of Civil Procedure, *see, e.g., FTC v. Cephalon,*  
15 *Inc.*, 100 F. Supp. 3d 433, 439 (E.D. Pa. 2015) (Rule 8(a)(3) “does not require” that a demand for  
16 relief be made with “great specificity” (quoting *Sheet Metal Workers Loc. 19 v. Keystone Heating*  
17 *& Air Conditioning*, 934 F.2d 35, 40 (3d Cir. 1991) (Alito, J.))), and match similar requests for  
18 relief in other complex monopolization cases seeking equitable relief, *see, e.g., United States v.*  
19 *Google LLC*, No. 1:20-cv-03010 (D.D.C. Jan. 15, 2021), Dkt. #94 at 57-58 (complaint requesting,  
20 among other relief, to “[e]njoin Google from continuing to engage in the anticompetitive practices  
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22 <sup>1</sup> Amazon asserts that Plaintiffs “offer no explanation of how the remedies sought by the States  
23 and the FTC will differ” (Opp. 12), but this ignores the statement in Plaintiffs’ motion that  
24 certain Plaintiff States’s claims “will require independent analysis of applicable remedies”  
because—unlike the FTC’s claims—they concern “state law claims for equitable monetary relief,  
including disgorgement” (Mot. 8).

1 described herein”; “[e]nter structural relief as needed to cure any anticompetitive harm”; and  
2 “[e]nter any other preliminary or permanent relief necessary and appropriate to restore competitive  
3 conditions”).

4 Amazon cites no authority for its argument that the Court should order Plaintiffs to disclose  
5 more detailed remedy proposals outside of the normal discovery process. Amazon  
6 mischaracterizes Plaintiffs as “tak[ing] the position that they can defer disclosing proposed  
7 remedies until after the Court rules on liability” (Opp. 4), but nothing in the cited portions of the  
8 Joint Status Report or Plaintiffs’ motion supports that statement. And nothing in Plaintiffs’  
9 bifurcation proposal would limit Amazon’s ability to seek discovery related to remedies through  
10 proper processes; indeed, Plaintiffs’ proposed order expressly states that it does not “limit the  
11 scope of fact discovery” in any way. (Plaintiffs’ Proposed Order, Dkt. #167-1; *see also* JSR at 44  
12 (“[Plaintiffs’] proposal would not limit the ability of any party to take discovery regarding  
13 remedies during the time for fact discovery.”).) Although Amazon’s demand here for detail on “all  
14 remedies [Plaintiffs] are considering proposing” would not be a proper interrogatory—among  
15 other issues, it would call for attorney work product—Amazon is free to issue discovery requests  
16 regarding remedies. Plaintiffs will respond to those discovery requests, and if Amazon believes it  
17 is entitled to more detail regarding Plaintiffs’ “potential menu of remedies” (Opp. 6), it can meet  
18 and confer with Plaintiffs and then move to compel pursuant to the applicable discovery rules.  
19 Amazon should not be permitted to circumvent standard discovery procedures simply because it  
20 would be advantageous for Amazon.

21 Contrary to Amazon’s mischaracterizations, Plaintiffs do not “seek to leave their proposed  
22 ‘broad’ relief unspecified,” *id.* at 1; instead, Plaintiffs propose bifurcation to allow the parties to  
23 make focused presentations to the Court at the liability stage and, as needed, at a separate remedy  
24 proceeding tailored to specific findings on liability. The precise contours of the requested remedies

1 presented at that remedy stage will necessarily be informed by the Court’s liability findings.  
2 Despite Amazon’s claim that it will be “handicapped” in its ability to obtain information on  
3 specific requested remedies, *id.* at 6, nothing in Plaintiffs’ proposal would limit the parties’ ability  
4 to seek to supplement the trial record as needed following a liability determination.

## 5 **II. BIFURCATION WILL PROMOTE EFFICIENCY AND JUDICIAL ECONOMY.**

6 Amazon argues that “Plaintiffs’ proposed bifurcation would be less efficient than a single  
7 trial” because the Court “would need to hold two separate proceedings and witnesses would need  
8 to be called twice.” (Opp. 2; *id.* at 6-9.) This overly simplistic analysis ignores several of the  
9 benefits of bifurcation that Plaintiffs detailed in their motion, including (i) avoiding an  
10 unnecessarily long trial due to witnesses having to testify about a range of potential remedies  
11 covering all possible liability outcomes, including remedies that may ultimately be foreclosed by  
12 the Court’s liability determinations, and (ii) potentially obviating the need for a remedies  
13 proceeding altogether. (Mot. 5 (citing *Kraft Foods Glob., Inc. v. United Egg Producers, Inc.*, 2023  
14 WL 5177501, at \*10 (N.D. Ill. Aug. 11, 2023)); *see Kraft Foods*, 2023 WL 5177501, at \*10 (“It  
15 is not quite right to say that one trial is more efficient than two. . . . [T]he choice is between one  
16 longer trial (liability + damages) or one shorter trial (liability) plus the possibility of a second trial  
17 (damages).”). Amazon’s failure to address the potential benefits of tailoring a bifurcated remedy  
18 proceeding to the scope and specifics of the Court’s liability determination is revealing,  
19 particularly given Amazon’s recognition that assessing any particular proposed remedies in this  
20 case will likely “turn on fact-intensive and disputed issues.” (Opp. 6 n.2.)<sup>2</sup>

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22 <sup>2</sup> Amazon contends Plaintiffs’ reliance on *Microsoft* is “misplaced” because “[t]he D.C. Circuit  
23 did not mandate a bifurcated proceeding.” (Opp. 8.) As Plaintiffs’ motion makes clear, however,  
24 the relevant proposition from *Microsoft* is that the scope and specifics of a court’s remedy  
necessarily depend on the scope and specifics of the court’s liability determination. (Mot. 5  
(citing *United States v. Microsoft Corp.*, 253 F.3d 34, 103-05 (D.C. Cir. 2001)).)

1 Amazon further asserts that “the Court, the parties, and witnesses will need to participate  
2 in two separate proceedings that Plaintiffs concede will cover overlapping issues.” *Id.* at 7. This  
3 misstates Plaintiffs’ point, which is that bifurcation would allow the Court to impose limits on the  
4 scope of any testimony required at the remedies phase to avoid repetition and promote efficiency.  
5 (Mot. 11.) For example, in *Kraft Foods*, after a bifurcated trial resulted in findings of liability for  
6 antitrust violations, the court set ground rules to avoid duplication of evidence in the remedy phase.  
7 *See id.*; *Kraft Foods*, No. 1:11-cv-8808 (N.D. Ill. Nov. 27, 2023), Dkt. #587 (“[T]he Court  
8 encourages brevity. The parties must avoid undue repetition, and the Court may impose reasonable  
9 limits if the evidence becomes cumulative.”). The Court has broad discretion to determine the  
10 scope and format of the remedies phase. (Mot. 6, 10-11); *see, e.g., In re Google Play Store*  
11 *Antitrust Litig.*, No. 3:21-md-02981 (N.D. Cal. Jan. 18, 2024), Dkt. #917 (instructing plaintiff,  
12 following bifurcated trial resulting in liability, to file a “proposed injunction, together with brief  
13 statements in support drafted by the experts [plaintiff] intends to call” at “an evidentiary hearing  
14 on the issue of an appropriate conduct remedy,” with defendant to respond “one week after that  
15 (and one week before [the hearing])”).

16 Plaintiffs’ motion explained why fashioning an appropriate remedy is a distinct legal  
17 inquiry from determining liability (Mot. 4-5) and how Amazon’s improper conflation of these  
18 issues further demonstrates why bifurcation is warranted, *id.* at 8-10. In opposition, Amazon  
19 doubles down on arguing that the Court cannot determine liability without first “considering the  
20 real-world consequences of . . . remedies on competition,” and asserts, without any legal support,  
21 that “any potential injunctive relief” is “unquestionably relevant to fundamental issues to be  
22 decided on liability.” (Opp. 2; *id.* at 7.) Amazon contends that “evidence of how Plaintiffs say  
23 Amazon’s conduct must be altered to comply with antitrust law is relevant to assessing whether  
24 Amazon’s conduct today promotes competition when compared to the ‘but-for world’ under

1 Plaintiffs’ proposed remedies.” *Id.* at 7. This is not how the Sherman Act works. To establish  
2 liability under Section 2 of the Sherman Act, a plaintiff must show that the defendant’s conduct  
3 “reasonably appears capable of making a significant contribution to maintaining monopoly  
4 power.” *Microsoft*, 253 F.3d at 79 (cleaned up). The plaintiff need not “reconstruct the hypothetical  
5 marketplace absent” the defendant’s conduct, *id.*, let alone a hypothetical marketplace absent the  
6 defendant’s conduct but with a potential remedy in place. *See* 6C Phillip E. Areeda & Herbert  
7 Hovenkamp, *Antitrust Law* ¶ 657a2 (5th ed. 2020). Amazon’s continued efforts to incorrectly  
8 inject remedies-specific issues into the liability inquiry underscore why bifurcation will better  
9 allow for efficient presentation of evidence on fundamental questions of liability.

10 **CONCLUSION**

11 Plaintiffs respectfully submit that the Court should bifurcate the proceedings into liability  
12 and remedies phases in accordance with Plaintiffs’ proposed order.

13  
14 Dated: March 15, 2024

*I certify that this memorandum contains 2,094 words, in compliance with the Local Civil Rules.*

15  
16 Respectfully submitted,

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