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16  
17 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
18 COUNTY OF SAN FRANCISCO

19  
20 **THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

21 Plaintiff,

22 v.

23 **AMAZON.COM, INC.,**

24 Defendant.

CASE NO. CGC-22-601826

**JOINT CASE MANAGEMENT  
STATEMENT**

Date: May 5, 2023

Time: 11:00 AM

Dept.: 304

Judge: Hon. Ethan P. Schulman

Case Filed: September 15, 2022

ELECTRONICALLY

**FILED**

Superior Court of California,  
County of San Francisco

**05/01/2023**

**Clerk of the Court**

BY: VERA MU

Deputy Clerk

**JOINT CASE MANAGEMENT STATEMENT**

Pursuant to the Order After Initial Case Management Conference entered by the Court on January 5, 2023, counsel for Plaintiff, The People of the State of California (“Plaintiff” or “The People”), and Defendant, Amazon.com, Inc. (“Defendant” or “Amazon”), have met and conferred and submit this Joint Case Management Statement in the above-captioned action (the “Action”).

**I. STATUS OF LITIGATION**

The Complaint was filed on September 15, 2022. On November 23, 2022, the case was granted complex designation and assigned to Department 304 for all purposes. The Court held an initial Case Management Conference on January 4, 2023.

Following the initial Case Management Conference, on January 27, 2023, the Court entered the agreed-to Stipulation and Protective Order governing the treatment of confidential information disclosed in the litigation. On March 28, 2023, the Court entered the agreed-to Stipulated Expert Protocol and Order governing expert disclosures and discovery. On April 28, 2023, the parties filed a proposed order governing the handling of electronically stored information for review and entry by the Court.

On March 30, 2023, the Court entered an order overruling Amazon’s demurrer to the Complaint. On April 10, 2023, the Court entered a Stipulation and Order extending the time for Amazon to file a Verified Answer to the Complaint to May 30, 2023. Amazon reserves its rights to file a cross-complaint, and to bring in additional parties.

Both The People and Amazon have commenced discovery, including third-party discovery. A more thorough summary of the status of discovery is set forth below in Section III. While the parties have made progress on discovery, and are continuing to confer on any issues in dispute, the parties anticipate that there will be certain issues to raise with the Court at the upcoming Case Management Conference. Those issues are addressed in Section VI below.

**II. PROPOSED PRE-TRIAL SCHEDULE**

Attached hereto as Exhibit A is the proposed pre-trial schedule agreed to by the parties. The specific dates set forth herein supersede the deadlines in the Stipulated Expert Protocol and Order entered by the Court on March 28, 2023. The parties jointly request that the Court enter this as the

1 pre-trial schedule governing the case. Each of the parties reserve the right to seek modification of  
2 this pre-trial schedule for good cause as may become necessary during litigation of this matter.

3 **III. STATUS OF DISCOVERY**

4 **A. Document Requests Served by The People.**

5 The People served their first set of requests for production of documents on Amazon on  
6 October 28, 2022. Amazon served its written responses and objections on November 29, 2022.  
7 Amazon made its first production of documents in response to The People's requests on March 10,  
8 2023 and subsequent productions on March 31, April 7, April 11, 2023, and April 24, 2023 with  
9 additional productions anticipated before May 5, 2023. Amazon's investigation, collection, and  
10 production of responsive documents is ongoing. Amazon is continuing to confer with The People  
11 on certain requests, and to investigate, scope, and collect documents responsive to other requests.  
12 Amazon otherwise anticipates substantially completing the production of documents its has agreed  
13 to produce in response to the People's first set of requests for production by the end of May, if not  
14 sooner, but Amazon has informed The People that production of documents in response to one  
15 request is likely to extend beyond May. The Parties continue to meet and confer regarding  
16 Amazon's responses to certain requests, but have reached an impasse as to certain issues, and seek  
17 guidance from the Court. The Parties' respective positions regarding such issues are set forth below  
18 in Section VI.

19 The People served their second and third sets of document requests on Amazon on March 28  
20 and March 31, 2023, respectively. These requests seek documents related to the five third parties  
21 whose depositions The People have noticed to date. Amazon's responses to these requests are due  
22 April 27 and May 1, 2023, respectively.

23 **B. Document Requests and Form Interrogatories Served by Amazon.**

24 Amazon served its first request for production of documents on The People on October 4,  
25 2022. The People served their written responses and objections on November 7, 2022. That same  
26 day, The People made their first production of documents to Amazon. Following entry of the  
27 Protective Order, on March 2, 2023, The People started rolling production of responsive documents  
28 received from third parties during the pre-suit investigation. The People made a second production

1 of such documents on March 30, 2023. The People made a final production of documents on April  
2 27, 2023 and have now completed production of those documents they have agreed to produce in  
3 response to Amazon's requests for production of documents.<sup>1</sup> The Parties continue to meet and  
4 confer regarding The People's responses to certain requests, but the Parties have reached an  
5 impasse and need the Court's guidance with respect to Amazon's request for The People's  
6 communications with third parties during its pre-suit investigation. The Parties' respective  
7 positions regarding this dispute are set forth below in Section VI.

8 Amazon served form interrogatories on The People on February 17, 2023. The People  
9 served their responses and objections on March 21, 2023. Subsequently, on April 17, 2023, after  
10 corresponding with Amazon regarding certain of The People's responses, The People served  
11 supplemental responses to Amazon's form interrogatories. The People's supplemental responses  
12 include a list identifying the name and available contact information for each third party with whom  
13 the Office of the Attorney General's Antitrust Section communicated during the pre-suit  
14 investigation (excluding other government enforcers, potential and retained experts, other potential  
15 and retained investigation/litigation/trial consultants, and their respective employees and support  
16 staff, including court reporting service providers) (hereinafter referred to as "Third Parties").  
17 Amazon anticipates the Parties will need to continue to meet and confer regarding The People's  
18 supplemental responses.

### 19 **C. Third Party Discovery**

20 The Parties could not reach agreement on a joint statement concerning the status of third-  
21 party discovery. The Parties respective positions are set forth below in Section VI.

## 22 **IV. COORDINATION**

23 The Parties believe that there are opportunities to coordinate discovery in this case with at  
24 least five other pending actions that also include antitrust claims asserted against Amazon arising  
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26 <sup>1</sup> This does not include materials received from four Third Parties that have objected to the  
27 production of their materials pursuant to the stipulated Protective Order entered in this case.  
28 Amazon is coordinating directly with those Third Parties regarding production of their documents.

1 from alleged anticompetitive agreements between Amazon and its third-party sellers and/or  
2 wholesale suppliers:

- 3 • *Frame-Wilson et al. v. Amazon.com, Inc.*, No. 2:20-cv-00424-RAJ (W.D. Wa.)<sup>2</sup>
- 4 • *De Coster et al. v. Amazon.com, Inc.*, No. 2:21-cv-00693-RSP (W.D. Wa.)
- 5 • *Brown et al. v. Amazon.com, Inc.*, No. 22-cv-00965-JHC (W.D. Wa.)
- 6 • *Mbadiwe et al. v. Amazon.com, Inc.*, No. 1:22-cv-09542 (S.D.N.Y.)
- 7 • *District of Columbia v. Amazon.com, Inc.*, No. 2021 CA 00175B (D.C. Superior Ct.)<sup>3</sup>

8 Amazon has represented to The People that it has reached informal agreements with the *Mbadiwe*  
9 plaintiffs, and an agreement-in-principle with the *Frame Wilson* and *De Coster* plaintiffs, to receive  
10 documents produced by Amazon in this litigation and to otherwise coordinate discovery efforts and  
11 scheduling the depositions of Amazon witnesses.<sup>4</sup> Amazon represented that there is no stipulation  
12 or order regarding coordination in any of these other actions.

13 The Parties agree to coordinate regarding depositions to minimize the burden on Amazon  
14 and third-party witnesses to the extent feasible without impeding the progress of this litigation. The  
15 Parties intend to meet and confer to discuss specific protocols for the scheduling of depositions,  
16 including third-party depositions.

## 17 **V. FUTURE CONFERENCES**

18 The Parties propose that the Court set a status conference every six months during fact  
19 discovery—*i.e.* in November 2023 and May 2024— as well as a conference in September 2024 to  
20 address any outstanding discovery disputes prior to the proposed close of fact discovery. The  
21

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22  
23 <sup>2</sup> The allegations in *Frame Wilson*, as well as *Mbadiwe*, involve claims related to the price of goods  
24 sold outside of Amazon’s store. *De Coster*, by contrast, involves claim related to the price of goods  
25 sold in Amazon’s store. The *Brown* action involves allegations related to Amazon’s agreements  
26 with vendors.

27 <sup>3</sup> This action involves claims concerning Amazon’s agreements with third-party sellers and  
28 wholesale suppliers under D.C. law. The court granted Amazon’s motion to dismiss on March 18,  
2022, and plaintiff appealed. Because the case is on appeal, coordination is currently not possible  
but may become so depending on the outcome of the appeal.

<sup>4</sup> Amazon understands that plaintiffs in the *Brown* action are open to coordination. Amazon expects  
to reach agreement after the pending motion-to-dismiss is resolved in that case.

1 Parties will otherwise follow the Court’s Complex Litigation Procedures and any other applicable  
2 orders and rules to the extent it is necessary to bring issues to the Court for guidance or resolution.

3 **VI. CURRENT DISCOVERY DISPUTES**

4 **A. The People’s Document Requests**

5 **1. Timing for completion of Amazon’s document productions**

6 **a. The People’s Position**

7 The People served their first request for production of documents on October 28, 2022. The  
8 vast majority of these requests call for a refresh of material previously collected and produced by  
9 Amazon during the pre-suit investigation, and thus do not require extensive scoping and collection  
10 as Amazon suggests. Amazon did not produce any documents in response to that request until  
11 March 10, 2023 (over four months after the requests were served and five days before the demurrer  
12 hearing). Amazon’s first production consisted of just 12 documents. Amazon chose to produce  
13 these documents as new documents with a new Bates-numbering sequence for the litigation, and  
14 the documents did not include any indication that Amazon had previously produced them during  
15 the pre-suit investigation. Accordingly, at the time of the demurrer hearing, The People reasonably  
16 believed that these 12 documents were new, unique documents. After further review of the  
17 documents, The People determine, and subsequently confirm with Amazon, that only 1 of the  
18 documents was actually new, and the other 11 had previously been produced to The People by  
19 Amazon during the pre-suit investigation.

20 Since that time, and through the date of this joint CMC statement, Amazon has made nine  
21 additional document productions:

- 22 • Five of the nine productions have consisted exclusively of documents Amazon  
23 previously produced to the People during the investigation with new Bates numbers.
- 24 • Two of the nine document productions have consisted exclusively of documents  
25 Amazon has previously produced to the FTC but not to the People (and among these  
26 two productions, there were upwards of 2,200 duplicates).

- The remaining two productions consist of documents that, to the People’s knowledge, Amazon has not previously collected and produced to the FTC. These two document productions—the only new documents Amazon has identified, collected, and produced in this litigation— total 7 documents.

Thus, in total, since The People served their first set of document requests on Amazon six months ago, Amazon has produced a total of 8 unique, new documents, not previously produced to either The People or the FTC.

Despite repeated requests by The People that Amazon prioritize producing those documents it previously committed to producing regarding the sixteen requests for which the parties are not presently at an impasse, Amazon has proceeded with prioritizing the re-production of documents previously produced to the People during the pre-suit investigation. The documents Amazon has agreed to but still not yet produced include information critical to the People’s prosecution of this action, including, for example, minimum margin and profitability agreements between Amazon and its wholesale suppliers and updated profit and loss documents.

The People anticipate further document requests, and the litigation cannot proceed if Amazon continues to take more than 6 months to produce a handful of new documents. Accordingly, the People seek the Court’s guidance to set a date certain by which Amazon will produce those responsive documents it has agreed to produce in response to The People’s first, second, and third requests for production of documents.

**b. Amazon’s Position**

Over the course of a more than 2-year investigation, and up until Plaintiff filed its Complaint, Amazon produced to Plaintiff an enormous volume of material covering a vast array of subject matter, including data, emails, and internal documents. Plaintiff complains that much of what Amazon has produced to Plaintiff in this litigation thus far are documents previously produced to the FTC and Plaintiff in the course of their respective investigations. This includes more than 700,000 documents from Plaintiff’s investigation, and an additional 15,000 documents not previously produced to Plaintiff from the FTC’s investigation. That reflects the large majority of the documents sought by Plaintiff’s first set of requests. And while Plaintiff attempts to create the

1 impression that Amazon has produced little in the way of “new” information, its statements are  
2 highly misleading. Plaintiff fails to mention that its requests call for financial or other data that is  
3 producible as a single file but in fact requires time and effort to compile and validate before  
4 production, and Amazon worked diligently to do so.

5         Regardless, there is no issue for the Court to resolve. Amazon has completed the production  
6 of documents in response to Plaintiff’s “refresh” requests, save for Plaintiff’s requests for which  
7 Amazon awaits a response from Plaintiff. And Amazon has or will have completed its production  
8 of documents responsive to all but two of the requests in Plaintiff’s first set of document requests  
9 for which the parties have reached agreement by May 5, 2023. The remaining two requests seek  
10 documents not previously collected, reviewed, or produced by Amazon. Amazon anticipates that  
11 it will have begun rolling productions in response to both of the remaining requests in the next two  
12 weeks, and is making every effort to complete its production as to one of those requests by the end  
13 of May.

14         In requesting a date certain by which Amazon will produce all documents responsive to the  
15 remainder of Plaintiff’s first set of requests, Plaintiff fails to apprise the Court that Amazon is  
16 awaiting the Plaintiff’s guidance on six of the requests which seek additional transactional data that  
17 is enormously burdensome to collect and produce. These requests seek a bespoke data set requiring  
18 Amazon to devote a significant amount of time and engineering resources to pull, validate, and  
19 produce. For reference, when Amazon produced a subset of the data sought by these requests to  
20 Plaintiff during its investigation, it took almost two months just to complete and resulted in the  
21 production of approximately 4 *terabytes* of data (the equivalent of 300 million pages). As such,  
22 Amazon has attempted to confer with Plaintiff to confirm the additional data fields Plaintiff would  
23 like included in that data. Plaintiff agreed to provide this information, but to date has not yet done  
24 so, making compliance with those data requests impossible to date. Once Plaintiff responds to the  
25 information Amazon provided about the availability of the data (and assuming its response does  
26 not result in an unreasonably burdensome volume of data), Amazon will work diligently to pull,  
27 validate, and produce those data, but anticipates that even then it will take several months to  
28 produce.



1 For the two additional sets of document requests for which Plaintiff seeks a date certain for  
2 production, Amazon’s responses and objections to those requests were due on April 27 and May 1,  
3 respectively. These requests call for “all” documents relating to certain third-party sellers. Given  
4 that the parties have yet to discuss the contours of these incredibly broad requests, it is premature  
5 to make any conclusions as to when Amazon will complete its production of responsive documents.  
6 However, Amazon intends to make every effort to complete its production of documents in advance  
7 of the depositions of the respective third-parties, which Plaintiff unilaterally scheduled prior to  
8 serving its second and third requests, and without first conferring with Amazon.

9 Finally, there is no basis for Plaintiff’s insinuation that Amazon is delaying this litigation,  
10 particularly when the Parties have agreed that fact discovery will continue into October 2024 and  
11 when Amazon has and continues to actively confer with Plaintiff about document discovery.  
12 Plaintiff also notably omits the fact that it only recently began producing third-party documents  
13 from its investigative file in response to requests that Amazon served on October 4, 2022.  
14 Plaintiff’s first production of such documents, which Amazon received on March 2, 2023,  
15 contained a total of 34 third-party documents. Plaintiff produced approximately 4,500 additional  
16 third-party documents on March 30, 2023. On the day before this submission was due, April 27,  
17 2023, Plaintiff produced over 1 million pages of documents. There was little, if any burden  
18 associated with Plaintiff’s production given that these were documents produced by third parties  
19 and maintained within Plaintiff’s investigatory file. And Plaintiff, of course, has refused to produce  
20 any documents that would require the type of scoping and collection process in which Amazon is  
21 currently engaged.

22 **2. Request for Production No. 1**

23 Request for Production No. 1 – All DOCUMENTS produced to the CA AGO in the  
24 INVESTIGATION. It shall be a sufficient response to this Request for AMAZON to  
25 provide written confirmation that all documents produced to the CA AGO in the  
INVESTIGATION are deemed produced in response to this Request.

26 **a. The People’s Position**

27 The Government Code authorizes The People to use information and evidence gathered  
28 during the pre-suit investigation to prosecute the litigation. (*See* Cal. Gov. Code § 11181(h).)

1 Consistent with this provision, The People served Request No. 1 to ensure that materials produced  
2 by Amazon during the investigation would be identified for both parties to this lawsuit while  
3 retaining the same Bates-numbering and metadata from the investigation. This Request is standard  
4 in lawsuits that follow investigations filed by enforcement agencies and is reasonably calculated to  
5 lead to the discovery of admissible evidence. Amazon cannot reasonably claim any burden, and  
6 there is no good faith basis on which Amazon can oppose this Request. Crucially, to eliminate any  
7 unnecessary burden on the Parties, and to avoid the needless costs associated with duplicative  
8 productions, Request No. 1 expressly permitted Amazon to “deem” documents produced in the  
9 litigation (a procedure that Amazon has selectively used when it fit its strategic objectives).

10 Amazon has refused to comply with Request No. 1, arguing that because the scope of the  
11 pre-suit investigation does not overlap exactly with the claims asserted in the Complaint, Amazon’s  
12 prior production includes some number of documents that are not relevant. But this argument does  
13 not establish that Request No. 1 is improper. Rather, the only issue is whether the Request is  
14 reasonably calculated to lead to the discovery of admissible evidence. (*See* Cal. Code Civ. Proc. §  
15 2017.010.) Amazon has not offered any argument, or provided any legal authority, suggesting that  
16 the Request is not reasonably calculated to lead to discovery of admissible evidence. Nor can it.  
17 Indeed, Amazon itself has taken the position that its own request for The People’s entire  
18 investigative file (Amazon Request for Production No. 1, discussed further below) is reasonably  
19 calculated to lead to discovery of admissible evidence. Of course, Amazon’s production is a part  
20 of The People’s investigative file. Further this is no dispute that the overwhelming majority of  
21 documents produced by Amazon in the pre-suit investigation are directly relevant.<sup>5</sup>

22 In an initial effort to resolve this dispute without the need for Court intervention, during a  
23 meet and confer on this issue last December, The People offered to stipulate that Amazon’s  
24 production of documents did not waive any right that Amazon may have to argue that the

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25 <sup>5</sup> Amazon’s position on Request No. 1 appears to be motivated by their desire to limit the  
26 documents Amazon produces to plaintiffs in the other litigation matters identified in Section IV  
27 above. More directly, during the meet and confer process on for this joint CMC statement, Amazon  
28 represented that it secured agreements from plaintiffs’ counsel in those other litigation matters to  
limit Amazon’s production in those cases to documents Amazon produces to The People in this  
litigation.

1 documents were not relevant or not admissible. Amazon refused, arguing without support and  
2 contrary to the Government Code that The People could not use documents obtained from Amazon  
3 during the pre-suit investigation without Amazon’s prior express approval.

4 The People rejected Amazon’s unsupported attempts to constrain use of documents  
5 obtained during the pre-suit investigation and attempted to moot the issue all together by producing  
6 (or deeming produced) all materials received from Amazon during the pre-suit investigation in  
7 response to Amazon’s request for The People’s entire investigative file.<sup>6</sup> Nonetheless, Amazon has  
8 continued to produce duplicative documents with new Bates-numbering. Amazon’s efforts have  
9 caused undue burden, as The People are forced to load and process duplicative materials. The  
10 People request that Amazon be ordered to stop all further duplicate document productions in  
11 response to this Request.

12 **b. Amazon’s Position**

13 Amazon disagrees with Plaintiff’s characterization as to the Parties’ dispute over Request  
14 No. 1. Plaintiff’s position that “the scope of the pre-suit investigation does not overlap exactly with  
15 the claims asserted in its Complaint” is a gross understatement. The FTC and Plaintiff’s  
16 investigation included business divisions not at issue in the Complaint, such as Amazon’s eBooks,  
17 Smart Devices, and Virtual Assistant Software Products, as well as Amazon’s agreement with  
18 Apple for the sale of new Apple-branded products in Amazon’s store. As Plaintiff itself has  
19 elsewhere acknowledged, “Amazon is correct that the People’s pre-suit investigation was broader  
20 than the claims at issue in the instant lawsuit.” Nonetheless, Plaintiff served a request on Amazon  
21 to produce all documents produced by Amazon in the investigation, including those relating to  
22 aspects of Amazon’s business that are not at issue in Plaintiff’s Complaint.

23 Given that the investigation was broader than Plaintiff’s claims, and because the request at  
24 issue sought documents outside the scope of those claims, Amazon objected to Plaintiff’s request  
25 on the grounds that, among other things, it was overbroad and not reasonably calculated to lead to

26 \_\_\_\_\_  
27 <sup>6</sup> To minimize the burden of managing duplicative documents The People only re-produced to  
28 Amazon those documents that Amazon had provided to The People during the investigation without  
Bates numbers. The remainder of Amazon’s pre-suit investigation productions were “deemed  
produced.”

1 the discovery of admissible evidence. In response, Plaintiff offered that Amazon could later  
2 challenge the admissibility or relevance of the documents. That offer was not acceptable to  
3 Amazon, including because Amazon has a legitimate interest in protecting confidential business  
4 documents from disclosure that are not even remotely related to the claims in the litigation.  
5 Moreover, Plaintiff’s proposal turns on its head the usual discovery process and burdens—  
6 Plaintiff’s position is that all of this material is discoverable without regard of whether or not it is  
7 related to the claims at issue in the case, and it raises the prospect that significant evidentiary  
8 motions will be needed to address the large volume of documents that will be introduced into the  
9 discovery record as a result. Nothing in the Government Code purports to supersede the Court’s  
10 discovery rules in this manner. Contrary to Plaintiff’s assertions above, Plaintiff—not Amazon—  
11 has the burden to prove that its request is reasonably calculated to lead to the discovery of  
12 admissible evidence. *See King City v. Community Bank of Cent. Cal.* (2005) 32 Cal.Rptr.3d 384,  
13 398 (“The propounder [sic] need only show that, given the known circumstances, the proposed  
14 discovery is ‘reasonably calculated to lead to the discovery of admissible evidence.’”). Plaintiff  
15 has never done so.

16 Amazon does not contend that *all* documents gathered in the investigation are irrelevant,  
17 and it has a made a good faith proposal to provide the documents that are reasonably calculated to  
18 lead to the discovery of admissible evidence on the limited issues raised in Plaintiff’s Complaint.  
19 Amazon’s proposal provided for the reproduction of approximately 700,000 documents comprised  
20 of custodial and targeted collections, as well as data from the business divisions relevant to the  
21 claims at issue. Rather than respond to this proposal, however, Plaintiff “deemed” Amazon’s  
22 confidential investigative production “as produced” in this litigation. Plaintiff simultaneously  
23 declared its request of Amazon as moot.

24 Amazon is aware of no authority that Plaintiff is entitled to introduce into litigation  
25 documents it obtained pursuant to its broad investigative authority that do not relate to claims in  
26 the litigation or that it is governed by different discovery rules than other civil litigants. Indeed,  
27 the legislative history for the code provision on which Plaintiff relies makes clear that it was added  
28 to “clarify that documents or information obtained pursuant to subpoena authorized under 11181(e)

1 can be used in any subsequent suit or action *initiated as a result of the unlawful activity.*” (Assem.  
2 Com. On Judiciary, Rep. on Sen. Bill No. 434 (2003-2004 Reg. Sess.) as amended Jun. 4, 2003,  
3 p. 5) (emphasis added). Plaintiff has brought no claims alleging any unlawful activity relating to  
4 numerous of Amazon’s business divisions covered by the investigation, including its agreement  
5 with Apple and its eBooks, Smart Devices (Echo products), Virtual Assistant Software Products  
6 (Alexa), Prime (including the components of the Prime program, such as Prime Video), or Logistics  
7 business divisions.<sup>7</sup> Plaintiff’s Complaint is about “anticompetitive agreements on price” with  
8 Amazon’s third-party sellers and vendors. Compl. ¶ 2.

9 Plaintiff now seeks to compel Amazon to stop producing documents responsive to this  
10 Request, but Amazon will have already completed its production of documents. What Plaintiff is  
11 actually asking the Court to do is to condone Plaintiff’s refusal to engage with Amazon on its good-  
12 faith proposals in response to this request and approve its attempt to “deem” Amazon’s entire  
13 investigative production “as produced” in circumvention of this Court’s and the California rules  
14 governing civil discovery. *See* Code Civ. Proc., § 2017.010 (“[A]ny party may obtain discovery  
15 regarding any matter, not privileged, that is relevant to the subject matter involved in the pending  
16 action . . . , if the matter either is itself admissible in evidence or appears reasonably calculated to  
17 lead to the discovery of admissible evidence.”). Amazon has been and remains willing to discuss  
18 the scope of Plaintiff’s Request, including to discuss documents that are not part of the  
19 approximately 700,000 documents and numerous data sets Amazon has produced in response to  
20 this Request.

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27 <sup>7</sup> Amazon’s Logistics business division is distinct from its fulfillment programs. Amazon has  
28 offered and produced documents and data relating to Amazon’s fulfillment program for third-party  
sellers, Fulfillment By Amazon (FBA). Amazon has also produced data pertaining to Prime’s  
profitability.

1                   **3. Request for Production No. 2**

2                   Request for Production No. 2 – All DOCUMENTS produced by AMAZON in response  
3                   to the FTC CID that have not already been produced to the CA AGO.

4                   **a. The People’s Position**

5                   The majority of documents produced by Amazon to The People during the pre-suit  
6                   investigation that gave rise to this litigation are documents Amazon had initially produced to the  
7                   FTC in response to an FTC Civil Investigative Demand (“CID”) and then subsequently produced  
8                   to The People. All of the Amazon documents cited, quoted, or referenced in the Complaint, for  
9                   example, are documents Amazon produced in response to the FTC CID. During the course of the  
10                  pre-suit investigation, Amazon made various supplemental document productions to the FTC, and  
11                  Amazon produced those supplemental productions to The People. The People’s Request for  
12                  Production No. 2 here is narrowly tailored to capture any supplemental document productions made  
13                  by Amazon to the FTC that Amazon has not produced to The People since the Complaint was filed.  
14                  This Request is reasonably calculated to lead to the discovery of admissible evidence, and because  
15                  these documents have already been collected, reviewed, and produced to the FTC, Amazon cannot  
16                  claim any burden. (*See* Civ. Proc. Code §§ 2017.010, 2017.020 [protective order not warranted  
17                  unless “the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that  
18                  the information sought will lead to the discovery of admissible evidence”].)

19                  Amazon objected to producing documents in response to Request No. 2 on the grounds that  
20                  the scope of the FTC CID is broader than the scope of the issues in this litigation. In an effort to  
21                  resolve the parties’ dispute, The People offered for Amazon to withhold documents solely  
22                  responsive to certain “Specifications” (akin to document request numbers) in the FTC CID (e.g.,  
23                  Specifications solely related to eBooks), so long as Amazon agreed to produce all other responsive  
24                  documents. The parties have made considerable progress in negotiating the Specifications,  
25                  documents solely responsive to which The People are willing for Amazon to withhold in the spirit  
26                  of compromise (and without conceding that those Specifications are not relevant or reasonably  
27                  likely to lead to the discovery of admissible evidence).

1           However, Amazon has insisted that for the Specifications that Amazon concedes are  
2 relevant and likely to lead to the discovery of admissible evidence (e.g., Specifications related to  
3 Amazon’s pricing strategies, online marketplace services, and third-party seller policies, practices,  
4 and programs), it will not produce all of the documents it has produced to the FTC that are  
5 responsive to these Specifications, but rather will withhold from its production to The People all of  
6 the documents responsive to these Specifications that it collected from 53 custodians that Amazon  
7 claims held positions unrelated to this litigation. Amazon has taken this position despite not having  
8 reviewed any of the documents it insists on withholding for relevance and despite being therefore  
9 unable to confirm that any of the documents it insists on withholding are not in fact relevant and  
10 not likely to lead to the discovery of admissible evidence. Furthermore, Amazon has taken this  
11 position despite inconsistently demanding that all of the third-party documents produced to the  
12 People during the investigation be produced to Amazon in this litigation, regardless of their  
13 relevance to the issues in this litigation (e.g., documents produced by publishers related to eBooks,  
14 documents produced by device manufacturers, etc.).

15           A cursory review of the documents responsive to the FTC’s CID that Amazon produced to  
16 the People during the investigation establishes that allowing Amazon to withhold responsive  
17 documents collected solely from one or more of the 53 custodians Amazon insists on excluding  
18 would, with virtual certainty, result in Amazon withholding highly relevant documents, and at a  
19 minimum documents likely to lead to the discovery of admissible evidence. The People conducted  
20 a preliminary search of the documents responsive to the FTC’s CID that Amazon produced to the  
21 People during the investigation, and found numerous examples of relevant documents collected  
22 solely from custodians Amazon insists on excluding from its Request No. 2 production. By way  
23 of non-exhaustive example only, the document quoted in paragraphs 8 and 207 of the complaint  
24 was collected from a single custodian, Russell Grandinetti, SVP of International Consumer, whose  
25 responsive documents Amazon is refusing to produce in response to Request No. 2. As another  
26 non-exhaustive example, in response to the FTC’s CID, Amazon produced an email in which an  
27 Amazon vendor manager instructed others on an email distribution list to encourage wholesale  
28 suppliers to engage in channel management, or withhold products from Amazon’s competitors.

1 Evidence of such concerted activity with wholesale suppliers to reduce or eliminate discounting  
2 off-Amazon lies at the heart of the Complaint’s allegations and goes to the core of this case. (*See*  
3 Compl. ¶ 7, 162-63, 174, 195-98.) This document was collected exclusively from one of the 53  
4 custodians whose documents Amazon is refusing to produce in response to Request No. 2.

5 To be clear, these examples are non-exhaustive and simply confirm what would be equally  
6 true in the absence of these examples—Amazon has done nothing to show, and cannot show, that  
7 in withholding responsive documents collected from the 53 custodians it insists on excluding, it  
8 will not withhold documents that are relevant to this case or reasonably likely to lead to the  
9 discovery of admissible evidence. The People, on the other hand, have shown that, by virtue of the  
10 fact that Amazon’s production in response to the FTC CID gave rise to this lawsuit and provided  
11 the majority of the basis for the People’s claims, the remainder of the documents Amazon produced  
12 to the FTC in response to the CID, that Amazon has not yet produced to the People, are likely to  
13 lead to the discovery of admissible evidence. Given that Amazon can show no burden whatsoever  
14 in producing to the People what it has already produced to the FTC, the Court should order Amazon  
15 that it may not withhold documents responsive to Request No. 2 on the basis that they were  
16 collected solely from one of the 53 custodians it has insisted on excluding. Once this threshold  
17 issue is resolved, the People are confident they will be able to reach an agreement with Amazon on  
18 the Specifications responsive to which Amazon will produce documents to the People in response  
19 to Request No. 2.

20 **b. Amazon’s Position**

21 As an initial matter, there is no need for the Court to engage in any purported dispute as to  
22 Request No. 2 at this time. Amazon remains willing and interested in conferring with Plaintiff on  
23 this request, and has offered to undertake extraordinary and burdensome steps to provide additional  
24 context for the topics, custodians, and specifications at issue. Plaintiff, however, insisted on  
25 bringing this unripe dispute to the Court.

26 On the merits, as Plaintiff notes, this request seeks all documents produced to the FTC since  
27 Plaintiff filed its Complaint. For all the same reasons that Amazon objects to wholesale production  
28 of documents in response to Request No. 1, Amazon also objects to this Request. Plaintiff generally



1 asserts that the request is “reasonably calculated to lead to the discovery of admissible evidence,”  
2 but also concedes that both its own investigation was, and the FTC investigation in which the  
3 subject documents were produced is, broader than the claims in Plaintiff’s Complaint. Perhaps  
4 recognizing the incompatibility of its positions, Plaintiff sets aside relevance and instead focuses  
5 on burden, arguing that Amazon is obligated to produce the documents because it has produced  
6 them before. That is not the standard for civil discovery. If it were, any party could be compelled  
7 to produce documents simply because they were readily available, and regardless of their relevance  
8 to the case.

9 Plaintiff cannot reasonably claim that all of the document categories sought by this request  
10 are reasonably calculated to lead to the discovery of admissible evidence. The AG invited Amazon  
11 to make a proposal to exclude certain documents from production in response to this Request, and  
12 over the course of several conferrals, Plaintiff and Amazon made progress by agreeing to exclude  
13 documents related to topics not at issue in the Complaint, such as Amazon’s eBooks business.  
14 Shortly before the deadline for this submission, however, Plaintiff retracted its offer and again  
15 began demanding broad categories of documents that were produced in response to aspects of the  
16 FTC’s investigation that are inapplicable to the claims in this litigation.

17 Plaintiff also claims that Amazon is excluding documents from 53 custodians that are  
18 relevant to this case or reasonably likely to lead to the discovery of admissible evidence. Not so.  
19 First, as Plaintiff well knows given the information Amazon has provided to it, the custodians from  
20 the FTC investigation from whom Amazon is presently withholding documents in this litigation is  
21 38. This is in contrast to the 58 custodians for which Amazon has agreed to produce documents.  
22 Second, as Amazon explained to Plaintiff, the FTC served requests that explicitly pertain to  
23 multiple business units within Amazon. Amazon proposed to exclude custodians who work in  
24 business units that are unrelated to the claims in the Complaint. For example, Amazon proposed  
25 to exclude the VP of Sales & Marketing for Echo Devices given that Amazon’s Alexa and Devices  
26 business is not related to the claims in the Complaint, as well as the VP of Global Transportation  
27 and the VP of Delivery Technology, given that Amazon’s Logistics business (which is distinct from  
28 the division that handles fulfillment programs offered to sellers) is also not at issue in the

1 Complaint. Plaintiff has been unwilling to consider any custodial exclusions, regardless of the  
2 custodian or their job responsibilities within Amazon.

3 Plaintiff also contends that Amazon's position is inconsistent because Amazon purportedly  
4 insisted on the production of all of Plaintiff's third-party documents, regardless of their relevance.  
5 That is not an accurate representation of the Parties' conferral. Amazon did seek Plaintiff's  
6 investigative documents, but repeatedly offered to engage with Plaintiff to identify any documents,  
7 categories of documents, custodians, or third parties that were not relevant to the investigation.  
8 Instead of engaging, Plaintiff made the decision to produce all of its third-party materials (other  
9 than correspondence) regardless of their relevance, presumably as part of a strategic effort to justify  
10 Plaintiff's overbroad position as to its discovery requests of Amazon.

11 As with Request No. 1, Amazon has offered to discuss Plaintiff's concerns with any of  
12 Amazon's proposed exclusions. Indeed, Amazon asked Plaintiff to identify documents that  
13 Plaintiff would not otherwise have if a particular custodian was excluded so that Amazon could  
14 properly evaluate Plaintiff's position. Prior to providing its submission late in the evening on April  
15 27, Plaintiff failed to do so. If Plaintiff had engaged in the meet and confer process, including as  
16 to individual custodians, Amazon is confident a resolution could be reached. For example, the  
17 document to which Plaintiff refers—from the files of the SVP of Amazon's International Consumer  
18 business—relates to a third-party seller outside the United States. Such a document is appropriately  
19 excluded, and it is also appropriate to exclude Amazon's SVP of *International* Consumer business  
20 as Plaintiff's claims relate to Amazon's conduct in the United States under California's antitrust  
21 and unfair competition laws. As for the other custodian, whose documents Plaintiff  
22 mischaracterizes, Amazon agreed to produce that custodian's documents to the extent those  
23 documents have not already been produced to Plaintiff. Regardless, these two singular examples  
24 of documents—one referring to out of scope overseas conduct, the other referring narrowly to a  
25 single vendor's sale of watches—do not establish that the inclusion of 37 other custodians whose  
26 work involves out of scope business units is reasonably calculated to lead to the discovery of  
27 admissible evidence.

28 Plaintiff's claim that Amazon must either produce everything or re-review all documents it

1 has produced to the FTC before it can credibly argue that certain topics or custodians are not  
2 relevant or likely to lead to the discovery of admissible evidence is unfounded. As with Request  
3 No. 1, Plaintiff’s “all or nothing” approach to Amazon’s production of documents in response to  
4 this request has prevented the parties from reaching agreement. Amazon, for its part, remains  
5 willing and interested in conferring with Plaintiff on this request.

6 **B. Amazon’s Discovery Requests**

7 Request for Production No. 1: The entirety of the file developed and maintained by  
8 Plaintiff or any Representative in connection with, or in the course of, the  
Investigation.

9 Request for Production No. 13: All written Communications, correspondence, and  
10 other Documents sent to any Third Party by Plaintiff or any Representative or received  
by Plaintiff or any Representative from any Third Party regarding the Investigation.

11 **1. Amazon’s Position**

12 On October 4, 2022, Amazon served document requests concerning Plaintiff’s pre-suit  
13 investigation of Amazon, including any pre-suit correspondence between the Office of the Attorney  
14 General (“AG”) and third parties. Plaintiff contends, subject to limited exceptions, that it has  
15 completed its production of responsive documents.<sup>8</sup> But Plaintiff refuses to produce any of its  
16 correspondence with the more than 125 of the third parties that Plaintiff communicated with during  
17 the investigation.<sup>9</sup> And Plaintiff refuses to search for responsive correspondence beyond the AG’s  
18 Antitrust Section. Plaintiff does not dispute the relevance of such communications, nor could it:  
19 such communications are likely to bear on the relevant market, interpretation of data, and potential  
20 motivations of third-party witnesses, and they will help Amazon conduct more targeted discovery  
21 from third parties. It is untenable for an agency of the California state government to pursue an  
22 investigation, claim that its investigation revealed evidence of anti-competitive activity, initiate a  
23 public lawsuit in the courts of this State, and then seek to hide information that may bear on the

24 <sup>8</sup> Plaintiff waited until March 2, 2023 to begin that production. Amazon understands that Plaintiff  
25 has now produced subpoenas, objections and responses, testimony, sworn statements, written  
26 discovery, and third-party productions, to the extent they exist, for most of the 25 third parties that  
27 provided such information during the investigation. Plaintiff has identified additional third-party  
materials that will be produced upon the resolution of objections lodged with Amazon by third  
parties pursuant to the Protective Order.

28 <sup>9</sup> Amazon does not raise here any issue as to correspondence with (i) entities with whom Plaintiff  
has asserted common-interest, or (ii) Plaintiff’s retained expert witness or consultants.

1 case and that is important to Amazon’s ability to defend itself against the allegations. The Court  
2 should order Plaintiff to produce all third-party correspondence from the pre-suit investigation.

3 **a. Plaintiff’s third-party correspondence is not protected from disclosure.**

4 Plaintiff initially asserted an array of privileges with respect to all third-party information  
5 in its investigative file and refused to produce any documents at all. Although Plaintiff has retreated  
6 from its opening position in virtually all other respects—including, for example, the claim that  
7 documents produced to Plaintiff by third-party witnesses are protected work product—Plaintiff will  
8 not produce its pre-suit correspondence with third parties. In counsel’s experience, such  
9 correspondence is routinely produced in civil antitrust litigation that follows from a government  
10 investigation. Plaintiff, for example, initially objected but later agreed produce its pre-suit third-  
11 party correspondence in *State of California v. Vitol, Inc.*, No. CGC-20-584456 (S.F. Super.),  
12 another civil antitrust action pending in the Complex Litigation division. And third-party  
13 correspondence is routinely produced in antitrust enforcement litigation in federal court. *E.g.*,  
14 *United States of America, et al. v. Google LLC*, 1:20-cv-3010-APM, Dkt. 111 at 2 (D.D.C., Feb.  
15 23, 2023) (reflecting production of third-party correspondence from government’s pre-suit  
16 investigation). Plaintiff does not dispute this fact, but instead seeks to walk away from its conduct  
17 in prior cases to avoid engaging in discovery in this case. Plaintiff also offers strained privilege  
18 arguments—that Plaintiff’s third-party correspondence is protected from disclosure by the official  
19 information privilege, and that any substantive communications constitute attorney work product—  
20 citing fact-specific and non-citable, non-precedential orders, including on issues inapposite to  
21 Plaintiff’s current arguments.<sup>10</sup> When examined, it is clear that Plaintiff’s privilege claims are

22 <sup>10</sup> See *State of California v. Vitol*, No. CGC-20-584456 (S.F. Super. Aug. 12, 2022) (third-party  
23 correspondence from a separate investigation under confidential informant privilege, which  
24 Plaintiff does not advance here, and no work-product claim); *State of California v. Ashford*  
25 *University, LLC*, No. RG17883963 (Alameda Cty. Super., May 31, 2018) (finding AG’s conduct  
26 waived some work-product protections, considering types of documents Plaintiff has agreed to  
27 produce in this case, recognizing AG’s refusal to produce might foreclose AG’s ability to present  
28 evidence, and noting defendant could conduct independent discovery to determine third-party  
communications with AG); *UFCW & Employers Benefit Trust et al., v. Sutter Health, et al.* No.  
CGC-14-538451 (S.F. Super. June 8, Aug. 2, and Aug. 17, 2018) (conducting *in camera* review of  
correspondence and other investigative materials, ordering the production of some materials, and  
recognizing witness statement contrary to a plaintiff’s position may favor disclosure); *State of*  
*California v. U.S. Loan Auditors Inc., et al.* No. 34-2010-88873 (Sacramento Cty. Super., May 16,

1 without legal support, diverge from settled practice, are inconsistent with Plaintiff’s production of  
2 other third-party materials, and create untenable practical implications.

3 **i. The official information privilege does not apply.**

4 Plaintiff first invokes California’s “official information” evidentiary privilege to justify  
5 withholding pre-suit correspondence with third parties. To do so, Plaintiff must show:

6 Disclosure of the information is against the public interest because there is a necessity for  
7 preserving the confidentiality of the information that outweighs the necessity for disclosure  
in the interest of justice.

8 Evid. Code. § 1040; *see Marylander v. Superior Ct.* (2000) 81 Cal.App.4th 1119, 1125-1126. In  
9 making determinations concerning the public interest, “the interest of the public entity as a party in  
10 the outcome of the proceeding may not be considered.” Evid. Code, § 1040(b).

11 As an initial matter, Plaintiff offers no authority to suggest this privilege is properly invoked  
12 as to documents and information from the underlying pre-suit civil enforcement investigation of  
13 the same defendant. This case is markedly different from the authority Plaintiff cites. *See Bd. of*  
14 *Registered Nursing v. Superior Court* (2021) 59 Cal.App.5th 1011, 1021-1022 (subpoenas to  
15 nonparty state agencies for disciplinary records of healthcare providers that “had little or no  
16 relevance to the claims and defenses at issue in this proceeding”); *People v. Superior Ct.* (1977) 70  
17 Cal.App.3d 341 (request for discovery as to whether others were or were not investigated); *Williams*  
18 *v. Superior Ct.* (1993) 5 Cal.4th 337, 341 (newspaper request for sheriff’s records pursuant to  
19 California Public Records Act). Here, Amazon is seeking information from a party to this Action  
20 obtained during the investigation that led to the Action, where the documents at issue are  
21 undeniably relevant to Plaintiff’s claims and Amazon’s potential defenses, and where Plaintiff has  
22 yet to identify any confidentiality or privacy interests akin to those present in the authority it cites.

23 Plaintiff also cannot sustain its position on the merits with respect to its third-party  
24 correspondence.<sup>11</sup> Plaintiff’s only purported interest in preserving the confidentiality of this

25 \_\_\_\_\_  
26 2011) (discovery of witnesses’ prior statements in connection with pleadings filed during active  
litigation not necessary for impeachment purposes).

27 <sup>11</sup> At the very least, Plaintiff is not entitled to a blanket invocation of the privilege, particularly  
28 when Plaintiff has failed to provide a privilege log. *See Michael P. v. Superior Court* (2011)92  
Cal.App.4th 1036, 1043.

1 correspondence is its own “institutional interest” as to its “ability to obtain open and truthful  
2 information from witnesses.”<sup>12</sup> But that is not enough in a case like this where Plaintiff used  
3 compulsory process to collect evidence against Amazon, initiated litigation as a result of that  
4 investigation, and then publicly disclosed what this evidence supposedly showed.<sup>13</sup> Furthermore,  
5 Plaintiff is proceeding under its “parens patriae” authority to step into the shoes of California  
6 natural persons and assert their claims under the Cartwright Act. Bus. & Prof. Code, § 16760.  
7 What that means is that its claims are no different than the claims those natural persons would have  
8 if they sued on their own behalf. Under those circumstances, claims of “official information” ring  
9 hollow—California natural persons would have no ability to hide communications with third parties  
10 if they brought suit themselves, and it follows *a fortiori* that Plaintiff cannot do so when it is  
11 asserting their claims.

12 Plaintiff also offers vague and unsupported claims that “many potential witnesses” have  
13 expressed “grave concern” that Amazon will retaliate if “it perceives the witnesses  
14 contacted . . . were overly cooperative or forthcoming.” Any notion that Amazon would engage in  
15 such conduct is offensive and baseless. But even if legitimate, it would not justify limiting the  
16 scope of discovery. And Plaintiff cannot otherwise dispute that it has already disclosed much about  
17 the identity and participation of witnesses in this case. There is no reason that otherwise relevant  
18 correspondence would change the balance in a way that could justify Plaintiff’s privilege claim.

19 Plaintiff further contends that Amazon can “contact, seek discovery from, and depose” any  
20 of the witnesses who communicated with Plaintiff in the course of its investigation. Plaintiff fails  
21 to mention that it is actively seeking to prevent Amazon from seeking such discovery from third  
22 parties by lodging objections to Amazon’s subpoenas under the same claim of privilege it asserts

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23 <sup>12</sup> As discussed, this case is entirely different from *Board of Registered Nursing*, where the Court  
24 expressed concern about the “[i]ndiscriminate production of investigatory files.” 59 Cal.App.5th  
25 at 1042. Requiring Plaintiff to produce third-party correspondence from an investigation of  
Amazon does not come close to triggering such a concern.

26 <sup>13</sup> *E.g.*, State of California, Department of Justice, *Attorney General Bonta Secures Court Decision*  
27 *Denying Amazon’s Attempt to Evade Responsibility in California’s Antitrust Lawsuit* (Mar. 30,  
28 2023) (“There is no shortage of evidence showing that the ‘Everything store’ is costing consumers  
more....”); B. Koenig, *Amazon Says Calif. AG Price Floor Suit Lacks “Coordination,”* Law360  
(Dec 8, 2022) (quoting AG’s office as stating “We have uncovered extensive evidence showing  
that Amazon’s anticompetitive contracting practices have raised prices....”).

1 here, and also by objecting on other grounds (relevance, overbreadth, etc.) to third-party document  
2 requests that impose no obligations on Plaintiff directly.

3 By comparison, Amazon has competing and substantial interests in disclosure. In  
4 particular, Plaintiff spent years deploying its uniquely powerful investigative and compulsory  
5 processes to engage with witnesses pursuant to its investigatory authority. These are discovery  
6 tools above and beyond those available to Amazon through non-party subpoena practice. Without  
7 access to third-party correspondence from the investigation, there is a significant risk that Amazon  
8 will be left with an incomplete and/or misleading picture as to Plaintiff's pre-suit investigation and  
9 the availability of critical evidence. And that risk is particularly acute with respect to witnesses  
10 from the investigation that Plaintiff intends to call in connection with this case. Plaintiff's  
11 production, for example, reflects unexplained gaps in investigative discovery—*e.g.*, witnesses  
12 providing testimony without first receiving a testimonial subpoena—that presumably are explained  
13 in the correspondence being withheld. Such documents also likely reflect effective amendments to  
14 the materials Plaintiff has produced, including any additional limits, qualifications, or concessions  
15 agreed to by Plaintiff and the third parties in response to Plaintiff's pre-suit discovery demands.  
16 Plaintiff's position also risks excluding from discovery, among other things: (i) statements by third  
17 parties as to documents they identified but did not produce, the disclosure of which would  
18 streamline third-party discovery; (ii) offers of assistance from third parties that would reflect bias;  
19 and/or (iii) statements by third parties that tend to support Amazon's defenses. For all of these  
20 reasons, the necessity of the disclosure to Amazon of the Plaintiff's third-party correspondence  
21 outweighs Plaintiff's asserted confidentiality interests.

22 **ii. Plaintiff's third-party correspondence is not work product.**

23 Plaintiff's pre-suit correspondence with third parties is not work product. California  
24 provides absolute protection to "an attorney's impressions, conclusions, opinions, or legal research  
25 or theories," and qualified protection for other "work product of an attorney" where such protection  
26 would not "unfairly prejudice the party seeking discovery in preparing that party's claim or defense  
27 or . . . result in an injustice." Code Civ. Proc., § 2018.030. Communications with third parties do  
28 not fall into any of these categories. The case Plaintiff cites—*Coito v. Superior Court* (2012) 54

1 Cal.4th 480, 486<sup>14</sup>—cannot bear the weight Plaintiff places upon it. *Coito* involved the  
2 government’s recorded statements made by four juvenile witnesses to state investigators in a  
3 wrongful death suit filed against the state. As Plaintiff concedes, the statements at issue were not  
4 made during a pre-suit investigation, but instead **during civil discovery** (and after depositions were  
5 noticed), at a stage in the case where the defendant had equal tools and access to witnesses. *Coito*  
6 did not consider a situation, as here, where one party enjoyed unique access to compulsory process  
7 in a pre-suit investigation. *Id.* at 486-487. And *Coito* addressed only the types of information that  
8 Plaintiff has already conceded is discoverable (and has disclosed) in this Action: witness identities  
9 and recorded witness statements. There is no basis to distinguish the correspondence Plaintiff is  
10 withholding from the other categories of documents—*e.g.*, subpoenas, written discovery, and  
11 testimony—that Plaintiff has produced. And Plaintiff cannot strategically invoke a work-product  
12 claim under *Coito* to shield the production third-party correspondence, when it is foregoing the  
13 same argument with respect to other similarly situated investigative materials.

14 Moreover, Plaintiff’s proposal to stretch California’s work-product protections to include  
15 documents exchanged with third parties—and beyond the internal government records at issue in  
16 *Coito*—is flatly inconsistent with well-established principles regarding the waiver of work-product  
17 protections. *See Roush v. Seagate Tech., LLC* (2007) 15 Cal.App.4th 210, 225 (“We cannot divine  
18 the necessity for sharing . . . attorney work product information with a percipient witness[.]”);  
19 *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1239 (“Waiver of work  
20 product protection . . . is generally found under the same set of circumstances as waiver of the  
21 attorney-client privilege—by failing to assert the protection, by tendering certain issues, and by  
22 conduct inconsistent with claiming the protection. Waiver also occurs by an attorney’s voluntary  
23 disclosure or consent to disclosure of the writing to a person other than the client who has no interest  
24 in maintaining the confidentiality of the contents of the writing.”) (citations omitted). Here,  
25

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26 <sup>14</sup> Plaintiff’s other cited authority provides only general statements about work-product protections.  
27 It is factually inapplicable to this case. *See Curtis v. Superior Ct.* (2021) 62 Cal.App.5th 453  
28 (identity of non-testifying expert); *Bank of Am., N.A. v. Superior Ct.* (2013) 212 Cal.App.4th 1076  
(otherwise privileged communications involving insurer and insurer-retained counsel); *Lasky,*  
*Haas, Cohler & Minter v. Superior Ct.* (1985) 172 Cal.App. 264 (undisclosed attorney materials).



1 Plaintiff has disclosed *dozens* of independent third-parties who are themselves also regulated by  
2 Plaintiff, and who independently possess the material that Plaintiff is claiming as its work product.  
3 That alone waives any work product protection that theoretically might have been claimed. *See*  
4 *McKesson HBOC*, 115 Cal.App.4th at 1240 (work product protection waived because disclosing  
5 party “and the government are not aligned in any litigation, and they do not share the same stake  
6 or have the same goal”).

7 Even if correspondence with third parties could, in limited cases, be subject to such  
8 protections, there is still no support for the categorical protection Plaintiff asserts. Work-product  
9 claims are evaluated on a case-by-case basis. *Coito*, 54 Cal.4th at 495-497, 500; *see League of Cal.*  
10 *Cities v. Superior Ct.* (2015) 241 Cal.App.4th 976, 993. Any work-product claim—whether  
11 absolute or qualified—fails because Plaintiff has not articulated a claim as to any particular  
12 documents, including because Plaintiff has failed to provide a privilege log. And any qualified  
13 claim fails because of the prejudice to Amazon’s ability to prepare its defense, as discussed above.

14 **b. Plaintiff cannot limit discovery to the AG’s Antitrust Section.**

15 Plaintiff seeks to limit discovery to only the individuals assigned to work within the AG’s  
16 Antitrust Section, and thus to exclude, among others, the AG’s front-office staff, the AG’s public  
17 affairs personnel, or anyone else within the Department of Justice involved in the investigation.  
18 This is an arbitrary limitation. Plaintiff does not dispute that material within the AG’s office but  
19 beyond the Antitrust Section would be both relevant and within its possession, custody, or control.  
20 And although Plaintiff asserts that the pre-suit investigation was conducted by the Antitrust Section,  
21 and that any correspondence concerning the investigation should have been shared with the  
22 Antitrust Section, Plaintiff cannot represent (and has not represented) that only the Antitrust Section  
23 interacted with third parties concerning the investigation, or that all such correspondence between  
24 third parties and employees outside the Antitrust Section concerning the investigation is presently  
25 within the Antitrust Section’s possession. Plaintiff cannot even represent that it has conducted a  
26 reasonable search outside of the Antitrust Section, nor has it attempted to substantiate that any such  
27 search would be unduly burdensome. Absent clear representations along these lines, Plaintiff is  
28

1 obligated to search for and produce responsive documents from any individual within the AG's  
2 office identified as having interacted with third parties concerning the investigation.

3 **2. The People's Position**

4 As set forth above, The People commenced their production of documents with their written  
5 responses and objections to Amazon's first request for production of documents on November 7,  
6 2022, and expect to complete production of documents they have agreed to produce by April 30,  
7 2023. The People's production includes the following materials: all investigative hearing  
8 transcripts and exhibits, all investigative subpoenas and responses, all declarations obtained from  
9 Third Parties, and all documents received from Third Parties during the pre-suit investigation. In  
10 addition, as outlined above, in response to Amazon's form interrogatories, The People have  
11 disclosed the names and available contact information for each of the Third Parties with whom  
12 The People communicated during the pre-suit investigation.

13 Notwithstanding The People's fulsome production of materials developed during the  
14 pre-suit investigation, Amazon continues to press for production of communications between The  
15 People and Third Parties.<sup>15</sup> However, The People's communications with Third Parties during the  
16 pre-suit investigation are protected from disclosure by the official information privilege. In  
17 addition, any substantive communications, which reflect attorneys' mental impressions, are also  
18 separately protected from production by the attorney work-product doctrine.

19 The People are not bound by compromises reached in other cases, Amazon counsel's  
20 anecdotal experience, or federal law or practice. Privileges under California law apply here to  
21 protect these third-party communications and should be upheld. As in all cases involving the  
22 official information privilege and qualified work product doctrine, a balancing of the interests of  
23 justice governs the need to disclose. Trial courts have repeatedly upheld the official information  
24  
25

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26 <sup>15</sup> In addition to pressing for production of these communications from The People, Amazon has  
27 also separately issued subpoenas to third parties noticed for deposition seeking production of the  
28 same communications directly from those third parties.

1 privilege and work product protection over communications with third parties during investigations  
2 in civil cases brought by The People.<sup>16</sup>

3 *Official Information Privilege* — California Evidence Code Section 1040 defines “official  
4 information” as “information acquired in confidence by a public employee in the course of his or  
5 her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege  
6 is made.” (Evid. Code, § 1040(a).) The Third-Party communications at issue constitute  
7 information acquired in confidence during the pre-suit investigation, that have not been publicly  
8 disclosed, and are therefore official information.

9 Official information is protected from disclosure when the consequences to the public of  
10 disclosure outweigh the consequences to the litigant of nondisclosure. (*Marylander v. Superior*  
11 *Court* (2000) 81 Cal.App.4th 1119, 1129 (hereafter *Marylander*)). “Consideration of the  
12 consequences to the public involves matters relating to the effect of disclosure on public processes  
13 and procedures.” *Ibid.* As in every investigation, The People have a strong institutional interest in  
14 maintaining the confidentiality of the information collected to protect their ability to obtain open  
15 and truthful information from witnesses. This is a weighty interest. Antitrust cases such as this  
16 one involve companies with tremendous market power over market participants and potential  
17 witnesses. As California courts have recognized in the context of applying the official information  
18 privilege to prevent disclosure of investigatory files:

19 Agencies rely on the confidentiality of complaints, witnesses, deliberations, and the  
20 proceedings in general to protect vulnerable . . . witnesses . . . and maximize the truth-  
seeking function of their efforts. Indiscriminate production of investigatory files and

21 <sup>16</sup> See, e.g., Order Denying Defs. Mot. to Compel, *People v. Vitol Inc.* (Super Ct. San Francisco  
22 County, Aug. 12, 2022, No. CGC-20-584456) at pp. 9-10 (holding that communications with other  
23 enforcers and with confidential informants were “official information” and that the need to protect  
24 this information outweighed defendant’s need for the documents); Orders on Mots. to Compel,  
25 *UFCW & Employers Benefit Trust v. Sutter Health*, (Super. Ct. San Francisco County, June 8, Aug.  
26 2, and Aug. 17, 2018, No. CGC-14-53845) (holding protected by official information privilege: (1)  
27 communications between the People and outside counsel for witnesses; (2)  
28 communications/statements made by witnesses not under oath; and (3) statements made under oath  
that were of no use to defendants); *People v. Ashford University LLC* (Super. Ct. Alameda County,  
May 31, 2018, No. RG17883963), at pp. 3-4 (holding that substantive communications with  
witnesses and other enforcers were work product); Order Granting People’s Motion For Protective  
Order, *People v. US Loan Auditors Inc.* (Super. Ct. Sacramento County, May 16, 2011) 2011 Cal.  
Super. LEXIS 35 (granting protective order to bar defendant from obtaining communications  
between the People and third-party witnesses that were work product or constituted official  
information).

1 administrative records would discourage cooperation by persons outside the agencies and  
2 candid discussion by persons inside the agencies.

3 (*Bd. of Registered Nursing v. Superior Court* (2021) 59 Cal.App.5th 1011, 1041-42; *see also*  
4 *UFCW & Employers Benefit Trust, et al., v. Sutter Health, et al., supra*, at pp. 1-3 (noting AG’s  
5 “intuitional interest in maintaining confidentiality in order to allow the AG to conduct these sorts  
6 of investigations, i.e., to be able to provide credible assurances to witnesses, in general, that their  
7 information will be held in confidence”); *People v. US Loan Auditors Inc., supra*, at pp. \*17-20.)  
8 This is especially true in a matter such as the case at bar, where many potential witnesses have  
9 expressed grave concern regarding retaliatory actions Amazon may take if it perceives the  
10 witnesses contacted by The People were overly cooperative or forthcoming. (*See* Complaint, ¶ 68.)  
11 Third Parties engaged in these communications with The People on the understanding that The  
12 People would protect the confidentiality of these communications. The ability to communicate  
13 openly with witnesses is integral to The People’s conduct of investigations and an order requiring  
14 production would seriously impede The People’s ability to secure necessary information in future  
15 investigations.

16 The People’s strong interest in maintaining the confidentiality of official information must  
17 be balanced against Amazon’s need for information to defend against the claims asserted against  
18 it. For that reason, as described above, The People have already made a fulsome disclosure of  
19 responsive materials from the investigative file, including all documents received from Third-Party  
20 witnesses and the names and available contact information of all such Third Parties. Amazon can  
21 contact, seek discovery from, and depose any of the individuals known to The People who may  
22 have knowledge of the issues in this lawsuit. Amazon can ask these individuals to identify relevant  
23 documents, they can directly probe any potential bias, and they can elicit statements that tend to  
24 support Amazon’s defenses. Amazon therefore has no need for the requested communications that  
25 would outweigh the public interest in maintaining the confidentiality of Third-Party  
26 communications. (*See Marylander, supra*, 81 Cal.App.4th at p. 1129 (finding that “the availability  
27 of the material to the litigant by other means” should be considered when weighing the needs of a  
28 litigant against the public interest in nondisclosure); *see also, Coito v. Superior Court* (2012) 54

1 Cal.4th 480, 496 (hereafter *Coito*) (a party is not prejudiced by nondisclosure of witness statements  
2 obtained by opponent where the party is free to interview the witness to find out what information  
3 the witness has that is relevant to the litigation)).

4 Amazon has not established, and cannot establish, any need for the requested  
5 communications that would outweigh the public interest in protecting the ability of the government  
6 to obtain fulsome and truthful information from willing witnesses in future investigations. (*See,*  
7 *e.g., People v. Super. Ct.* (1977) 70 Cal.App.3d 341, 344 (trial court erred in ordering the Attorney  
8 General to answer interrogatories that required disclosure of investigative materials as there was no  
9 substantial evidence to show that disclosure would not be against the public interest); *see also*  
10 *Williams v. Super. Ct.* (1993) 5 Cal.4th 337, 354-355 (holding that the Public Records Act’s  
11 “exemption for law enforcement investigatory files does not end when the investigation ends”).<sup>17</sup>

12 *Attorney Work Product* — As codified under California law, a writing that reflects “an  
13 attorney’s impressions, conclusions, opinions, or legal research or theories is not discoverable  
14 under any circumstances.” (Code Civ. Proc. § 2018.030(a).) Witness statements, including in  
15 communications with a party’s attorney, are protected by this absolute work product protection, to  
16 the extent they reveal “an attorney’s analysis and legal assessment.” (*See Bank of Am., N.A. v.*  
17 *Superior Ct.*, (2013) 212 Cal. App. 4th 1076.) In *Coito*, the California Supreme Court held that  
18 third party witness statements obtained through an attorney-directed interview are entitled to  
19 absolute work product protection:

20 [Absolute protection applies] not only when a witness’s statements are  
21 “inextricably intertwined” with explicit comments or notes by the attorney stating  
22 his or her impressions of the witness, the witness’s statements, or other issues in  
23 the case. It also may occur when the questions that the attorney has chosen to ask  
(or not ask) provide a window into the attorney’s theory of the case or the attorney’s  
evaluation of what issues are most important.

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24 <sup>17</sup> Citing no authority, Amazon claims that the official information privilege does not apply if The  
25 People bring suit under its “*parens patriae*” authority. There is no such restriction on application  
26 of the official information privilege. All that is necessary for it to apply is that the information was  
27 acquired in confidence by a public employee in the course of his or her duty and not open, or  
28 officially disclosed, to the public prior to the time the claim of privilege is made. (Evid. Code, §  
1040(a). That is the case here. And, in any event, the suit at bar has also been brought in the  
Attorney General’s law enforcement capacity.

1 (Coito, *supra*, 54 Cal.4th at p. 495 (internal citations omitted).)

2 Further, attorney work product other than writings that are absolutely protected enjoy  
3 qualified protection, and such materials are not subject to discovery “unless the Court determines  
4 that denial of discovery will unfairly prejudice the party seeking discovery in preparing the party’s  
5 claim or defense.” (Code Civ. Proc. § 2018.030(b).) This qualified privilege is designed to prevent  
6 an attorney “from free riding on the industry or efforts of opposing counsel” where their opponent  
7 has “expended time and effort in identifying locating each witness, securing the witness’s  
8 willingness to talk, listening to what the witness said, and preserving the witness’s statement for  
9 possible future use.” (Coito, *supra*, 54 Cal.4th at p. 496.) The qualified privilege applies to “all  
10 written materials and oral information not reflecting the attorney’s legal thoughts.” (Curtis v.  
11 Superior Ct. (2021) 62 Cal.App.5th 453, 468 (hereafter *Curtis*) (quoting *Lasky, Haas, Cohler &*  
12 *Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 271).) Where a document is covered by the  
13 qualified privilege, the “party seeking disclosure has the burden of establishing that denial of  
14 disclosure will unfairly prejudice the party in preparing its claim or defense or will result in  
15 injustice.” (Curtis, at p. 469.)

16 The People’s efforts to investigate Amazon, and its communications with Third Parties  
17 pursuant to that investigation, are clearly entitled to absolute or, at least, qualified work product  
18 protection. (See Coito, *supra*, 54 Cal.4th 480, 496 (holding that as a matter of law witness  
19 statements are entitled to at least qualified work product protection).) Protecting a party’s ability  
20 to communicate with witnesses in confidence fulfills the purpose of the qualified privilege, which  
21 grants attorneys “the degree of privacy necessary to encourage them to prepare their cases  
22 thoroughly” and prevents attorneys from “taking undue advantage of their adversary’s industry and  
23 efforts.” (*Id.* at pp. 493, 496.) Accordingly, Amazon can only obtain production of such materials  
24 if it can demonstrate that it will be unfairly prejudiced if the communications are not produced.  
25 Amazon has not met, and cannot meet, this standard where, as here, it already has the names and  
26 available contact information for all Third Parties with whom The People communicated during  
27 the pre-suit investigation, as well as all documents produced by those Third Parties to The People  
28 in connection with the pre-suit investigation. That is, Amazon can seek documents from, interview,

1 and/or depose any of these Third Parties to obtain any knowledge they have that supports Amazon’s  
2 defenses or is otherwise relevant to the litigation and, thus, can show no prejudice. (*Id.* at p. 496).<sup>18</sup>

3 Amazon also seems to argue that because the communications at issue are with Third  
4 Parties, The People have necessarily waived any work product protection over these  
5 communications. This argument is unsupportable in light of *Coito* and other binding California  
6 precedent, which clearly hold that interviews with third-party witnesses are protected from  
7 disclosure as either absolute or qualified work product. (*Coito, supra*, 54 Cal.4th at p. 496  
8 (“[W]itness statements procured by an attorney are entitled as a matter of law to at least qualified  
9 work product protection.”).)<sup>19</sup> That these interviews may have taken place partly through email  
10 exchanges that Third Parties may have copies of does not transform them into non-work product  
11 or constitute a waiver. Trial courts have on multiple occasions denied discovery of communications  
12 with third-party witnesses that would reveal the attorney’s tactics, impressions, or evaluation of the  
13 case, or would result in opposing counsel taking undue advantage of the attorney’s industry or  
14 efforts, including where the party seeking discovery sought production of such emails from the  
15 third party itself. (*See People v. Ashford Univ., LLC, supra*, at 3 (“[T]he AG is not required to  
16 produce emails and other communications that are in the nature of interviews with persons with  
17 knowledge of the case. Those are in the nature of witness interviews and are work product.”));

18  
19 <sup>18</sup> While *Coito* involved post-filing interviews conducted by a defendant, nothing in the decision  
20 suggests that absolute or qualified work product protection is inapplicable to witness statements  
21 obtained by attorneys during pre-filing investigations. Indeed, Amazon’s interpretation of the case  
22 is inconsistent with *Coito*’s emphasis on conducting an accurate and thorough investigation, and  
23 with the general policy of encouraging litigants to carefully investigate claims before filing suit.  
(*See id.* at p. 496 (“[A] default rule authorizing discovery of witness statements procured by an  
attorney would impede the Legislature’s intent to encourage [attorneys] to prepare their cases  
thoroughly.”).) *Coito* clearly contemplates that an attorney’s thoughts and impressions, and  
industry and efforts expended to gather evidence for a lawsuit should be protected from disclosure.

24 <sup>19</sup> *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1238 does nothing to  
25 alter this. Rather, it held that where a third party independently conducted an audit on its own  
26 initiative, and provided an independently prepared report of that audit to the government  
27 voluntarily, the third-party waived its work product protection over the report. (*Id.* at pp. 1233,  
28 1237-1238.) Notably, The People have produced every single document that a Third Party provided  
to it during the investigation, whether in response to compulsory process or otherwise. Thus, if a  
document similar to the one described in *McKesson* had been provided to the People, it would have  
been produced. Rather, the People seek to protect substantive communications elicited by Deputy  
Attorneys General, which multiple trial courts have found to be work product under *Coito*.

1 *People v. US Loan Auditors Inc., supra*, 2011 Cal. Super. LEXIS 35, at pp. 24-26 (rejecting  
2 defendant’s assertion that the People “waived any [work product] privilege by sharing the  
3 information with the witnesses.”).<sup>20</sup>

4 Finally, the People’s production of its witness list, as well as hearing transcripts, subpoenaed  
5 documents, and other materials described above, does not undermine the People’s right to protect  
6 its work product communications with Third Parties. Under California law, there is no broad  
7 subject matter waiver of privileges or protections; rather, as Amazon acknowledges, each  
8 communication must be evaluated independently. (*See* Evid. Code § 912(a) (privilege assessed for  
9 each communication); *People v. Ashford Univ., LLC, supra*, at 3-4 (AG communications with third  
10 parties protected work product even where interview transcripts produced).) Accordingly, The  
11 People have met their obligation to produce documents responsive to Request No. 1, and Amazon  
12 is not entitled to production of communications between The People and Third Parties.

13 **C. Third Party Discovery**

14 **1. Amazon’s Position**

15 **a. Preliminary Statement**

16 Notwithstanding an extensive process during which the Parties exchanged draft positions  
17 and conferred on issues for this Joint CMC Statement, Amazon first received Plaintiff’s substantive  
18 position on third-party discovery as set forth below on Friday, April 28, 2023 at 3:03 P.M. Pacific,  
19 which was the day this statement was due to be filed. In light of Plaintiff’s late disclosure, Amazon  
20 has no choice but to reserve its rights to address Plaintiff’s arguments at the upcoming conference.

21 **b. Plaintiff’s Third-Party Disclosures.**

22 Plaintiff did not begin producing documents and information received from third parties in  
23 the course of Plaintiff’s pre-suit investigation until March 2, 2023—five months after Amazon

24 \_\_\_\_\_  
25 <sup>20</sup> Amazon attempts to evade the clear holdings in cases such as *Coito* and *Marylander* that  
26 upholding the attorney work product and official information privileges cannot result in prejudice  
27 to Amazon because Amazon may seek relevant information from the Third Parties by noting that  
28 The People have lodged objections on the basis of these privileges in response to Amazon’s efforts  
to obtain the protected communications from the Third Parties themselves. The People’s objections  
merely seek to ensure that Amazon may not effect an end run around the privileges. If Amazon’s  
discovery requests are otherwise proper, they will be able to obtain any relevant information from  
these witnesses.



1 served its requests for these documents. Plaintiff has since disclosed 25 third parties that produced  
2 documents, testimony, sworn statements, and/or written discovery in the course of Plaintiff's pre-  
3 suit investigation. On April 17, 2023, Plaintiff identified more than 100 additional third parties that  
4 Plaintiff's Antitrust Section contacted or interacted with during the course of the investigation.  
5 Plaintiff refuses to produce any of its correspondence with either group of third parties on the basis  
6 of various asserted privileges. As a result, Amazon has no insight into whether or to what extent  
7 any of these individuals and entities provided information informally to Plaintiff in connection with  
8 the pre-suit investigation. Although Amazon's investigation and review of the information recently  
9 provided by Plaintiff is ongoing, Amazon expects that a significant number of the third parties that  
10 participated in or were contacted in connection with Plaintiff's pre-suit investigation will need to  
11 be the subject of third-party discovery in this case.

12 **c. Plaintiff's Third-Party Deposition Notices.**

13 On February 24, 2023, prior to producing any third-party documents to Amazon or  
14 identifying any third parties that participated in its investigation, Plaintiff sought to domesticate a  
15 California subpoena in the State of New York for a third-party witness who founded a company  
16 that offers products for sale in Amazon's store.<sup>21</sup> Plaintiff noticed this deposition for May 10, 2023.  
17 Plaintiff did not seek to coordinate with Amazon as to the scheduling of this deposition (or any  
18 other third-party discovery) prior to issuing the subpoena, and only informed Amazon of the  
19 subpoena on March 8, 2023 after it had been served.

20 Plaintiff followed a similar pattern by serving additional deposition subpoenas for dates in  
21 May, June, and July on four additional third-party witnesses who own or are employed by  
22 companies that offer products for sale in Amazon's store and/or sell products at wholesale to  
23 Amazon. Although Plaintiff has agreed to reschedule depositions at the request of third parties,  
24 Plaintiff has refused Amazon's requests to continue these depositions in order for Amazon to  
25 review the investigative materials for these witnesses produced by the AG, and then seek any

26 \_\_\_\_\_  
27 <sup>21</sup> As discussed below, Plaintiff and certain third parties have taken the untenable position that the  
28 very identity of these witnesses, together with the deposition notices, subpoenas, and other judicial  
processes necessary to schedule their depositions, are designated "Highly Confidential – Attorneys  
Eyes Only."

1 additional documents from the witnesses and their companies through third-party subpoena  
2 practice. There is thus a significant likelihood that third-parties will be required to sit for multiple  
3 depositions as a result of Plaintiff's refusal to coordinate with Amazon.

4 Notwithstanding Plaintiff's lack of coordination, Amazon has or will serve document  
5 subpoenas for each of these third parties and their respective companies. For each third-party  
6 document subpoena Amazon has served, Plaintiff subsequently served "Objections" to the  
7 subpoena on, among other things, relevance, privilege, and burden grounds. To date, Plaintiff has  
8 offered no authority to serve such objections, nor any explanation as to why such objections are  
9 necessary or appropriate, nor why the third party cannot respond and object on its own as is typical.  
10 Here, again, Plaintiff's conduct is counterproductive and serves only to further complicate third-  
11 party discovery in this case.

12 Amazon has or will also serve cross-notices for deposition testimony on the third-party  
13 witnesses. Amazon will need sufficient time to examine these witnesses and will coordinate  
14 schedules with the witnesses in order to identify convenient dates and minimize burden.

15 To avoid these issues going forward, Amazon has proposed to Plaintiff that coordination is  
16 necessary in order to minimize the burden on potential witnesses, including the possibility that any  
17 third party is required to sit for multiple depositions. Amazon further proposed that the Parties  
18 inform the Court that they planned to negotiate an agreement as to a protocol governing the notice  
19 and scheduling of depositions as to Party and third-party witnesses, to ensure there is sufficient  
20 notice and a mutually agreeable date for all interested parties. Plaintiff was unwilling to make that  
21 representation.

22 Separately, Amazon notes Plaintiff's refusal—in connection with filing this statement—to  
23 allow Amazon to identify these individuals by even their initials—*e.g.*, witness "A.B." as a  
24 fictitious example—even though Plaintiff has routinely done so in its own non-confidential  
25 correspondence. Plaintiff first raised a concern with the use of initials on April 28, 2023, at 1:35  
26 P.M., Pacific, which was the day this filing was due, and suggested that it would require that the  
27 draft be filed under seal. Amazon thus deleted the use of any initials (and names for those  
28 individuals who are not asserting a confidentiality objection) to avoid any dispute. As discussed

1 below, Amazon believes that the designation of witness identities is unnecessary, but in the interim  
2 believes that the use of initials, at a minimum is an efficient mechanism for the Parties to update  
3 the Court on routine discovery matters without violating the Court's Protective Order. That  
4 Plaintiffs believe that cannot be safely done even in light of anonymizing steps perfectly captures  
5 how disruptive Plaintiff's improper use of confidentiality designations is proving to be in this case.

6 **2. The People's Position**

7 **a. Preliminary Statement**

8 The People first received Amazon's position regarding third-party discovery, or any  
9 indication that Amazon intended to raise these issues, three days ago, on Tuesday, April 25, 2023.  
10 The Parties had a lengthy meet and confer yesterday afternoon, Thursday, April 27, 2023, at which  
11 time Amazon made clear that it intended it would be raising the issues it had outlined during the  
12 upcoming case management conference. Accordingly, The People prepared and forwarded their  
13 substantive insert to Amazon. None of this was a surprise to Amazon, as The People had conveyed  
14 their substantive positions during the earlier meet and confer.

15 **b. Timely Production of Documents from Third Parties**

16 Contrary to Amazon's mischaracterizations, The People promptly commenced rolling  
17 production of documents received from Third Parties after entry of the Protective Order and have  
18 now completed that production. Because the Protective Order details the protocols for third parties  
19 to designate, and The People to produce, documents received from third parties, The People could  
20 not have commenced production before the Protective Order was entered at the end of January. As  
21 contemplated in the Protective Order, immediately after it was entered by the Court, The People  
22 provided a copy of the Protective Order to the various third parties from whom documents had been  
23 received and notified them of their right to consent or object to the production of their materials to  
24 Amazon within the specified 21-day period. Eight business days after that 21-day period had run,  
25 on March 2, 2023, The People commenced their rolling production of documents received from  
26 third parties. At that time, Amazon had still not produced any documents at all. The People have  
27 now completed the production of all documents received from Third Parties. In sum, Amazon's  
28 allegations of delay on the part of The People are inaccurate and unproductive.

1 Amazon’s next complaint in its position statement on third-party discovery simply rehashes  
2 the issue discussed at length directly above—namely, the propriety of The People’s withholding  
3 their privileged and work-product-protected communications with third parties during the  
4 investigation. As is clear from The People’s position statement on this issue directly above,  
5 Amazon’s attempt to free-ride off The People’s industry and efforts in investigating Amazon’s  
6 agreements and conduct and invade well-established privileges relied on by The People to conduct  
7 fulsome investigations is wholly improper. Amazon claims that it “has no insight into whether or  
8 to what extent any of these individuals and entities provided information informally to Plaintiff in  
9 connection with the pre-suit investigation.” But Amazon has just as much ability (if not more) to  
10 contact these individuals and entities—“informally” or through compulsory process—as The  
11 People did during the investigation. That such outreach requires effort on the part of Amazon is  
12 not a reason to allow Amazon to free-ride off The People’s pre-suit investigation work. Amazon  
13 now has every piece of information available from The People to which it is entitled—and more—  
14 to fully defend itself against The People’s claims in this lawsuit, and Amazon has not made any  
15 showing to the contrary.

16 **c. The People’s Third-Party Deposition Notices**

17 As an initial matter, there is no issue here ripe to present to the Court. The Parties have  
18 worked cooperatively regarding the scheduling of third-party depositions, and The People intend  
19 to continue to do so. Just this week, Amazon for the first time suggested that the Parties agree to  
20 establish certain protocols when noticing depositions, and The People agreed to meet and confer  
21 on the issue, but the Parties have not yet done so. As set forth below, The People have given ample  
22 notice of the scheduled third-party depositions, revealing that Amazon’s true purpose in raising this  
23 issue appears to be to try to further slow or impede progress of fact discovery.

24 The People gave Amazon more than two months’ notice in connection with the third-party  
25 depositions scheduled to date, and The People completed production of the few documents received  
26 from those third-party witnesses (including the investigative hearing transcripts and exhibits) more  
27 than a month before the depositions were initially noticed to proceed. In short, Amazon had more  
28 than ample notice of these depositions. Moreover, The People have coordinated with both the

1 third-party witnesses, and Amazon, to set dates to proceed that will allow the third-party witnesses  
2 time to respond to the document subpoenas served by Amazon and account for everyone's  
3 schedules. Further, The People have made clear that they are open to meet and confer with Amazon  
4 regarding a process for scheduling depositions more generally (something Amazon only first raised  
5 in their draft of this joint CMC statement two days ago).

6 While this should resolve any issues regarding the scheduling of third-party depositions,  
7 given Amazon's gross mischaracterization regarding The People's conduct, The People have set  
8 forth here a more complete and accurate recitation of the chronology of events:

- 9 • **New York Third-Party Seller.** On March 8, 2023—nearly six months after  
10 commencement of this Action—The People served a notice of deposition of a third-  
11 party seller in New York for a deposition date of May 10, 2023—more than two  
12 months later. The New York court had issued the subpoena on February 4, 2023,  
13 and The People received the issued subpoena on March 2, 2023. The People served  
14 Amazon with the deposition notice the same day they confirmed effective service  
15 on the witness. The Parties have since agreed to reschedule the deposition for July  
16 12, and the witness has agreed to Amazon's request to sit for a second consecutive  
17 day on July 13. The People completed their production of materials related to this  
18 witness in response to Amazon's requests for production on March 2, 2023. On  
19 March 21, 2023, Amazon served broad document subpoenas on this witness and  
20 their business for essentially all of their business files and communications with  
21 Amazon (which Amazon already has) from January 2010—over 13 years ago—to  
22 the present. This is despite recently (and inexplicably) refusing to produce to The  
23 People in response to The People's second set of requests for production to Amazon,  
24 any of Amazon's communications with or other materials concerning this witness  
25 post-dating the filing of the Complaint. Amazon also included in its document  
26 subpoena to this witness a demand for the witness's communications with the Office  
27 of the Attorney General during the pre-suit investigation—an improper attempt to  
28 make an end run around The People's assertions of privilege and work-product

1 protection over those materials, which were already the subject of a request for  
2 production from Amazon to The People. The People served timely and proper  
3 objections to these requests.

- 4 • **New York Wholesale Supplier.** On March 9, 2023, The People served a notice of  
5 deposition of a wholesale supplier in New York for a deposition date of May 2,  
6 2023—nearly two months later. The New York court had issued the subpoena on  
7 March 6, 2023, and The People received the issued subpoena on March 8, 2023.  
8 The People served Amazon with the deposition notice the same day they served the  
9 witness. The Parties have since agreed to reschedule the deposition for July 27, and  
10 the witness has agreed to Amazon’s request to sit for a second consecutive day on  
11 July 28. The People completed their production of materials related to this witness  
12 in response to Amazon’s requests for production on March 30, 2023. On March 21,  
13 2023, Amazon served substantially the same broad subpoenas on this witness and  
14 their business, including for the same temporal scope (January 2010 to the present)  
15 while simultaneously refusing to produce to The People in response to The People’s  
16 second set of requests for production to Amazon, any of Amazon’s communications  
17 with or other materials concerning this witness post-dating the filing of the  
18 Complaint. The People served timely and proper objections to Amazon’s document  
19 subpoenas to this witness.

- 20 • **Texas Third-Party Seller.** On March 23, 2023, The People served a notice of  
21 deposition of a third-party seller in Texas for a deposition date of May 24, 2023—  
22 over two months later. The Texas court had issued the subpoena, and it was received  
23 by The People, on March 16, 2023. The People served Amazon with the deposition  
24 notice the same day they served the witness. Amazon is in talks with the witness to  
25 sit for a second consecutive day on May 25. The People completed their production  
26 of materials related to this witness in response to Amazon’s requests for production  
27 on March 2, 2023. On April 6, 2023, Amazon commenced the process of serving  
28

1 (substantially the same broad) document subpoenas on this witness and their  
2 business. The People served timely and proper objections.

- 3 • **Washington Third-Party Seller.** On March 31, 2023, The People served a notice  
4 of deposition of a third-party seller in Washington for a deposition date of June 6,  
5 2023—over two months later. The Washington court had issued the subpoena on  
6 March 24, 2023, and The People received the issued subpoena on March 30, 2023.  
7 The People served Amazon with the deposition notice the same day they served the  
8 witness. The parties have since agreed to reschedule the deposition for July 11, and  
9 Amazon is in talks with the witness to sit for a second consecutive day on July 12.  
10 The People completed their production of materials related to this witness in  
11 response to Amazon’s requests for production on March 2, 2023. Amazon has  
12 indicated its intent to serve a document subpoena on this witness and their business.  
13 However, while the deposition notice was served on Amazon almost a month ago,  
14 Amazon still has not served any document subpoenas.

- 15 • **California Wholesale Supplier.** On March 31, 2023, The People served a notice  
16 of deposition of a wholesale supplier witness in Washington for a deposition date of  
17 June 29, 2023—nearly three months later. The People served Amazon with the  
18 deposition notice the same day they served the witness. The People completed their  
19 production of materials related to this witness in response to Amazon’s requests for  
20 production on March 30, 2023. Amazon has indicated its intent to serve a document  
21 subpoena on this witness and their business. However, while the deposition notice  
22 was served on Amazon almost a month ago, Amazon still has not served any  
23 document subpoenas.

24 As the foregoing makes clear, Amazon received abundant notice of these five depositions  
25 scheduled to occur more than six months after the filing of the Complaint, and Amazon does not  
26 and cannot cite any authority for the proposition that it was entitled to anything more. (*See* Cal.  
27 Code Civ. Proc., § 2025.210(b) [“The plaintiff may serve a deposition notice without leave of court  
28 on any date that is 20 days after the service of the summons on, or appearance by, any defendant.”]);

1 *id.* § 2025.270(a) [“An oral deposition shall be scheduled for a date at least 10 days after service of  
2 the deposition notice.”]. For example, Amazon cites no authority for its suggestion that The People  
3 were required to notify Amazon at the time The People requested the issuance of these subpoenas  
4 from the foreign states. And The People and the third-party witnesses have already worked with  
5 one another and Amazon to reschedule the depositions for mutually agreeable dates as necessary.  
6 Moreover, The People completed their production of materials to Amazon related to this witness  
7 in response to Amazon’s requests for production months in advance of the noticed deposition dates.  
8 As such, Amazon’s assertion that The People have “refused Amazon’s requests to continue these  
9 depositions in order for Amazon to review the investigative materials for these witnesses produced  
10 by the AG” is misleading at best. There is at present no possibility—let alone a “significant  
11 likelihood”—that these witnesses will be required to sit for multiple depositions because of  
12 Amazon’s need to review The People’s pre-suit investigation materials related to these witnesses.  
13 In contrast to The People’s prompt production of documents to Amazon related to these witnesses,  
14 Amazon’s production of documents related to the New York third-party seller, New York  
15 wholesale supplier, and Texas third-party seller was due on April 27, and on that date Amazon  
16 produced nothing and instead served objections in which it stated its intent to withhold all  
17 responsive materials post-dating the filing of the Complaint.

18 Amazon asserts that the objections The People served to Amazon’s document subpoenas to  
19 these third parties—in which Amazon has improperly attempted to make an end-run around (and  
20 disregard) The People’s valid claims of privilege and work-product protection over their  
21 communications with third-party witnesses during the pre-suit investigation—are not “necessary  
22 or appropriate.” Amazon cites no authority for this proposition—because there is none. And  
23 nothing about The People’s service of objections with respect to Amazon’s requests that implicate  
24 The People’s privileged and work-product materials suggests that these third parties themselves  
25 “cannot respond and object on [their] own.” The People fully expect the third parties to do so at  
26 the time their responses are due.



1           **D. Confidentiality Designations**

2           **1. Amazon’s Position**

3           As Plaintiff began to produce and disclose third-party discovery in recent weeks, it  
4 designated all of this information (including the identity of any third party) as “Highly  
5 Confidential–Attorneys’ Eyes Only” (“HC-AEO”) pursuant to the January 27, 2023 Stipulated  
6 Protective Order. Pursuant to Paragraph 4(i) of the Protective Order, that designation is limited to  
7 “extremely sensitive” information “such that the disclosure of such to another Party or Non-Party  
8 would create a substantial risk of serious harm that cannot be avoided by less restrictive means.”

9           Plaintiff’s categorical and overbroad designations complicate and burden Amazon’s  
10 discovery efforts. The disclosure, for example, of HC-AEO information within Amazon is limited  
11 to four of Amazon’s in-house litigation attorneys focused on competition issues, impairing  
12 Amazon’s ability to internally coordinate in response to Plaintiff’s discovery efforts and  
13 complicating Amazon’s efforts to quickly and efficiently serve similar discovery on the third parties  
14 that Plaintiff has identified.<sup>22</sup> Plaintiff’s overbroad designations also unnecessarily shield this case  
15 from the public beyond what is contemplated by the Protective Order. Amazon thus seeks the  
16 Court’s input as to the following two issues at the CMC<sup>23</sup>:

17           *First*, when Plaintiff began issuing deposition notices and the associated subpoenas to third  
18 parties in recent weeks, it initially designated such documents HC-AEO under the Protective Order.  
19 When challenged by Amazon, Plaintiff initially maintained, and then later withdrew its  
20 designations but stated it intended to ask these third-party witnesses whether they separately wished  
21 to designate their deposition notices and/or subpoenas for protection. On April 20, 2023, Plaintiff  
22 informed Amazon that following its *ex parte* discussions with these witnesses, four of the five  
23 served with a deposition subpoena have asserted an independent HC-AEO designation as to the

24           <sup>22</sup> To the extent there is an ambiguity in the Protective Order about what is and is not a permissible  
25 disclosure of HC-AEO information, for example, Amazon is effectively required to seek Plaintiff’s  
guidance and/or consent as it works to defend the case.

26           <sup>23</sup> Amazon alerts the Court to these issues because it has been a significant cause of unnecessary  
27 and collateral burden on Amazon in litigating this case. Amazon is not seeking any order or other  
28 relief from the Court that would be inconsistent with the dispute-resolution processes contemplated  
by the Protective Order as to particular confidentiality designations.

1 subpoena and their identity as a witness in this case. There is no conceivable basis for treating the  
2 *names* of people and companies to be deposed in this matter as highly confidential information. As  
3 of the date of this filing, one of the four third-party witnesses to assert an HC-AEO designation as  
4 to the subpoena has withdrawn its designation. The remaining three have either not responded or  
5 continue to seek protected status for their deposition notices.<sup>24</sup> And although Amazon will continue  
6 to confer with these third parties as contemplated by the Protective Order, guidance from the Court  
7 as to the propriety of applying the HC-AEO designation in this context would streamline discovery  
8 and future disputes given the large number of potential third-party witnesses in this case.

9 *Second*, when Plaintiff began producing third-party documents on March 2, 2023, Plaintiff  
10 again marked nearly the entirety of its productions HC-AEO under the Protective Order. Plaintiff  
11 offered only the following explanation for its confidentiality designations:

12 The designations stamped on each document reflect the highest confidentiality  
13 designation applied by all interested parties, including the People, the third party  
14 who originally provided the materials to the People, and other enforcement  
15 agencies whose investigations into Amazon are ongoing. For the avoidance of  
16 doubt, where a document has been assigned a confidentiality designation, not only  
17 the document's contents, but also the identity of the third party that provided the  
document to the People, and the fact that that third party provided that document to  
the People, are also designated as and should be treated with that level of  
confidentiality.

18 Plaintiff's vague disclosure made it difficult, for Amazon to assess and understand the nature and  
19 propriety of the confidentiality designations with respect to documents produced from Plaintiff's  
20 investigative file. Because of the impact of Plaintiff's position on Amazon's ability to prepare its  
21 defense, Amazon promptly raised this issue with Plaintiff on March 13, 2023.

22 On April 20, 2023, after multiple requests, Plaintiff provided Amazon with the specific  
23 confidentiality designations asserted by Plaintiff, third-party witnesses, and, in some cases, the U.S.  
24 Federal Trade Commission, with respect to the third-party documents Plaintiff has produced.  
25 Plaintiff continues to assert that *the identity of witnesses* that participated in its investigation must  
26 be maintained as HC-AEO. And in many instances, *Plaintiff is seeking a higher level of*

27 <sup>24</sup> Although out of place for a civil antitrust case, and notwithstanding Amazon's objection to this  
28 untenable position, Plaintiff objects to Amazon's identifying these third parties by even their initials  
in this public pleading.

1 *confidential treatment for third-parties' documents than the applicable third-party seeks itself.*

2 There is no conceivable ground for Plaintiff to assert that there is a “risk of serious harm” from  
3 disclosure that is not even being asserted by the source of the information. Amazon has challenged  
4 Plaintiff’s attempt to independently designate third-party documents and information as HC-AEO,  
5 and may require the Court’s guidance to the extent this issue has not been resolved prior to the  
6 CMC.

7 **2. The People’s Position**

8 In contravention of the procedures set forth in Paragraphs 15-17 of the Protective Order,  
9 Amazon has attempted to front several issues on confidentiality that are not ripe for the Court’s  
10 intervention. Amazon also conflates designations made by The People and designations made by  
11 interested third parties. Beyond failing to follow the procedure outlined for addressing such  
12 disputes in the Protective Order, Amazon’s efforts in this regard are an especially egregious attempt  
13 to seek “the Court’s guidance” on an *ex parte* basis without notice to the interested third parties or  
14 the opportunity for them to be heard.

15 There is presently no dispute ripe for review by the Court with respect to *The People’s*  
16 confidentiality designations under the Protective Order. Amazon first gave notice of its challenge  
17 to certain designations by The People this past Monday April 24. The Parties are scheduled to meet  
18 and confer regarding those issues as set forth in the Protective Order but have not yet done so.  
19 Should the Parties be unable to resolve the issues raised by Amazon, the Parties will proceed to  
20 raise the issues with the Court pursuant to the procedures set forth in Paragraph 17 of the Protective  
21 Order. Until such time, these issues are not ripe for the Court’s consideration and Amazon’s  
22 attempts to circumvent the procedures set forth in the Protective Order are wholly inappropriate.

23 Amazon’s unilateral inclusion of substantive arguments regarding the designations made  
24 by third parties in this filing is an *ex parte* effort to sway the Court in the absence of all interested  
25 parties. While The People completely disagree that any third party has acted inappropriately in  
26 designating their own materials, those third parties deserve the opportunity to be present and heard  
27 regarding any substantive arguments consistent with the protocol outlined in the Protective Order  
28 entered by this Court. And, to prevent this type of conduct in the future, Amazon should be

1 admonished from future attempts to make such *ex parte* arguments in the absence of all interested  
2 parties.

3  
4 DATED: April 28, 2023

Respectfully Submitted,

5 By: /s/ Anik Banerjee

By: /s/ Jeffrey M. Davidson

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**EXHIBIT A – THE PARTIES’ PROPOSED PRETRIAL SCHEDULE**

<b>Event</b>	<b>Date</b>
Deadline for Amazon to file Verified Answer	May 30, 2023
Deadline to serve written discovery requests or subpoenas for deposition of fact witnesses	(July 12, 2024 – Fri.)
Deadline to file discovery motions.	(September 6, 2024 – Fri.)
Close of fact discovery.	(October 11, 2024 – Fri.)
Deadline for Parties to issue demand for testifying expert witness information pursuant to CCP § 2034.210.	(October 18, 2024 – Fri.)
Deadline for Parties to exchange information pursuant to Paragraph 21 of the Expert Protocol Order.	(November 15, 2024 – Fri.)
Deadline for Parties to exchange information pursuant to Paragraph 22 of the Expert Protocol Order.	(December 20, 2024 – Fri.)
Deadline for Parties to serve Opening Expert Reports pursuant to Paragraphs 23 and 24 of the Expert Protocol Order	(January 31, 2025 – Fri.)
Deadline for Parties to serve Rebuttal Expert Reports pursuant to Paragraphs 25 and 26 of the Expert Protocol Order	(May 2, 2025 – Fri.)
Deadline for Parties to serve Reply Expert Reports pursuant to Paragraphs 27 and 28 of the Expert Protocol Order	(July 25, 2025 – Fri.)
Close of expert discovery.	(October 24, 2025 – Fri.)
Deadline to move for summary judgement or summary adjudication or any other dispositive motions	(January 23, 2026 – Fri.)
Deadline for opposition to any dispositive motions	(April 24, 2026 – Fri.)
Deadline for reply in support of any dispositive motions	(May 29, 2026 – Fri.)
Final pretrial conference.	(July 17, 2026)
Trial begins.	(August 10, 2026)