THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO BIFURCATE

NOTE ON MOTION CALENDAR: March 15, 2024

ORAL ARGUMENT REQUESTED

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INTRODUCTION

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

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

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

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

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

ARGUMENT

I. BIFURCATION WILL NOT PREJUDICE AMAZON.

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

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

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

These allegations satisfy the Federal Rules of Civil Procedure, *see, e.g.*, *FTC v. Cephalon, Inc.*, 100 F. Supp. 3d 433, 439 (E.D. Pa. 2015) (Rule 8(a)(3) "does not require" that a demand for relief be made with "great specificity" (quoting *Sheet Metal Workers Loc. 19 v. Keystone Heating & Air Conditioning*, 934 F.2d 35, 40 (3d Cir. 1991) (Alito, J.))), and match similar requests for relief in other complex monopolization cases seeking equitable relief, *see, e.g.*, *United States v. Google LLC*, No. 1:20-cv-03010 (D.D.C. Jan. 15, 2021), Dkt. #94 at 57-58 (complaint requesting, among other relief, to "[e]njoin Google from continuing to engage in the anticompetitive practices

[1] Amazon asserts that Plaintiffs "offer no explanation of how the remedies sought by the States and the FTC will differ" (Opp. 12), but this ignores the statement in Plaintiffs' motion that certain Plaintiff States's claims "will require independent analysis of applicable remedies" because—unlike the FTC's claims—they concern "state law claims for equitable monetary relief, including disgorgement" (Mot. 8).

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

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

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

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

II. BIFURCATION WILL PROMOTE EFFICIENCY AND JUDICIAL ECONOMY.

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

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

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

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

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

CONCLUSION

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

Dated: March 15, 2024

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

Respectfully submitted,

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