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' MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS CONCERNING AMAZON'S MANIPULATION OF EVIDENCE

NOTE ON MOTION CALENDAR:
February 20, 2026

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INTRODUCTION

Amazon has engaged in a years-long effort to manipulate evidence that could be used against the company in antitrust litigation. Pursuant to its internal antitrust communications policies, Amazon lawyers, employees, and executives alter internal business documents to remove potentially incriminating language regarding Amazon's anticompetitive conduct and intent; insert Amazon's legal justifications in the guise of business judgments; and scrub discussions of sensitive topics, including competition, pricing, and Buy Box suppression. These changes to business documents to implement Amazon's communications policies are not legal advice. Yet, Amazon has withheld them as privileged. At the same time, Amazon has sought to hide candid discussions of many topics relevant to this case by training its employees to mark all communications concerning "sensitive" business issues as privileged and confidential. Collectively, these communications policies, the documents reflecting the implementation of those policies, and Amazon's related privilege marking instructions are referred to herein as Amazon's "P&C Protocol."

The Court should order Amazon to produce all withheld documents that describe and implement the P&C Protocol for two reasons:

First, the attorney-client privilege does not apply to the P&C Protocol because its primary purpose is not to provide or receive legal advice. The P&C Protocol is ultimately a corporate communications policy, and thus is not privileged. *See In re Grand Jury*, 23 F.4th 1088, 1094 (9th Cir. 2021); *Stevens v. Corelogic, Inc.*, 2016 WL 397936, at *4 (S.D. Cal. Feb. 2, 2016). The involvement of Amazon attorneys in the development and enforcement of the P&C Protocol does not mean the protocol is privileged. A company may not conduct its operations in secret simply by using in-house counsel to implement a communications policy. Amazon

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attorneys acting under the P&C Protocol are "[redacted] not legal advisors, as shown by the fact that non-attorneys also enforce the protocol. As this Court has held, "[p]rivilege does not descend like a giant fog bank over every document that is in some way connected with an effort to achieve legal compliance." *FTC v. Amazon.com, Inc.*, No. 2:23-cv-00932-JHC, Dkt. #242, at 5-6 (W.D. Wash. Mar. 3, 2025) (citation omitted). That is even more the case here, where the issue at hand is compliance with a *business* policy. Finally, allowing Amazon to assert privilege over the P&C Protocol would not serve the purpose underlying privilege: the P&C Protocol does not encourage Amazon to make full disclosures to its attorneys because it does not concern actual requests for or the provision of legal advice, and allowing Amazon to claim privilege here will undermine, not promote, the fair administration of justice.

Second, in the alternative, the crime-fraud exception to privilege applies to the P&C Protocol. Amazon cloaked business decisions behind improper privilege markings and altered and destroyed ordinary course business records to sanitize the evidentiary record. In doing so, Amazon aims to undermine the truth-finding function of the adversarial system. This constitutes litigation misconduct that should bar the extension of privilege to the P&C Protocol.

Amazon cannot carry its burden to establish privilege. Accordingly, Plaintiffs respectfully request that the Court compel Amazon to produce all P&C Protocol documents it is withholding on privilege grounds. Plaintiffs have identified some of those documents in this motion. *See infra* at Background III. However, as explained below, a re-review of Amazon's privilege log is the only way to identify and produce other P&C Protocol documents Amazon has improperly withheld. Accordingly, the Court should order Amazon to conduct a comprehensive re-review of all privilege claims it is asserting in this case and ensure that Amazon has applied the correct privilege standard.

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BACKGROUND

I. AMAZON'S ANTITRUST COMMUNICATIONS POLICIES

For years, Amazon has feared antitrust scrutiny.[1] In response, it has adopted antitrust-related communications policies designed to create a sanitized record for government enforcers and, ultimately, the courts: the P&C Protocol. The P&C Protocol has three parts: (1) rules to avoid creating a written record that could be used against Amazon in investigations or litigation; (2) revisions to documents to implement those rules and support Amazon's legal positions; and (3) a systemic practice of marking documents relating to sensitive topics as privileged so that Amazon can withhold unsanitized or unfavorable documents.

Amazon has asserted privilege over a large number of P&C Protocol documents, including the communications policies themselves; documents reflecting the implementation of the protocol, where attorneys and other employees altered business documents to remove language unfavorable to Amazon or to add material supporting Amazon's anticipated antitrust defenses; and documents concerning Amazon's widespread practice of using boilerplate requests for legal advice to shield documents from discovery. In some cases, Amazon has gone so far as to instruct employees to delete documents that violated these policies and preserve only versions that had been sanitized. Spoliation issues are addressed in a separate motion. *See* Plaintiffs' Motion For Spoliation Sanctions, filed separately ("Spoliation Mot.").

[1] As early as 2017, Amazon [redacted] Ex. 1 at -019. All exhibit citations refer to the Declaration of Lance B. McCaskey, Dkt. # 605.

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A. Part One: Avoid Creating a Written Record Unfavorable to Amazon

1. Do Not Write Things Down

Amazon's P&C Protocol directs employees to avoid creating—or at times to destroy—written records that could be used against the company in investigations or litigation. [redacted]

As part of the P&C Protocol, Amazon also has detailed rules for writing about competition and programs subject to antitrust scrutiny.

2. Strict Censorship for Writing about Competition

[redacted]

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[redacted]

[2] Pursuant to Rule 26(b)(5)(B), Plaintiffs are submitting the clawed-back versions of Exhibits 8, 9, 10, 11, 12, 13, and 14 under seal "for a determination of [Amazon's] claim" of privilege. *See* ESI Order at ¶13, Dkt. #256. The clawed-back versions of those exhibits have an "A" suffix—e.g., Ex. 8A. Amazon's privilege log entries for the clawed-back documents are excerpted in Exhibit 15. Plaintiffs were aware of the contents of each of these clawed-back documents before they were clawed back. Notably, several were used in depositions or briefing before Amazon's clawbacks. *See* Exs. 8, 11, 13, and 14; Dkt. #421 at Ex. 3. Out of an abundance of caution, Plaintiffs are not quoting from or paraphrasing any clawed-back material, and instead are citing that material where it may aid the Court's assessment of Amazon's privilege claims. All exhibits, including clawed-back material, are marked in accordance with LCR 10(e)(10).

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[redacted]

3. Amazon's Strict Censorship for Policies and Programs Subject to Potential Investigations and Litigation

Amazon has long been aware that certain policies and programs at issue in this case would attract antitrust scrutiny, including its price parity mandate, "Buy Box" suppression, and the "Seller Fulfilled Prime" (SFP) program. Similarly, Amazon has been aware that its responses to rivals' attempts to compete, including Walmart's Pickup Discount Program, would likely attract the attention of antitrust enforcers. Amazon has prepared for this expected scrutiny with a company-wide effort to proactively scrub unfavorable evidence from its internal documents.

Amazon instructed employees [redacted]

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[redacted]

The SFP program was treated as particularly sensitive [redacted]

[redacted]

Amazon's document sanitization efforts extended to the company's responses to rivals.

[redacted]

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[redacted]

[redacted]

B. Part Two: Alter Business Documents to Support Amazon's Legal Positions

When documents were created that did not adhere to the company's antitrust communications policies, Amazon in-house attorneys and other executives have acted [redacted] to sanitize and rewrite those documents. *See* Ex. 36 at -652 [redacted]. These edits cut material unfavorable to Amazon and add material to support Amazon's anticipated defenses in any antitrust investigation or litigation.

Amazon directs employees to route business documents through attorneys with boilerplate "privileged and confidential" markings so that they can be sanitized in line with the P&C Protocol. [redacted]

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[redacted]

[redacted]

Under the P&C Protocol, Amazon lawyers make and direct changes to *internal* business documents to insert Amazon's purported justifications for its policies with an *outside* audience in mind. For example, [redacted]. Where these edits are made by attorneys, they are undetectable in the final version of the document as seen by senior executives. [redacted]

C. Part Three: Use Attorney-Client Privilege to Cloak Sensitive Discussions

The first two parts of the P&C Protocol have created a more favorable evidentiary record for Amazon. However, those parts leave two gaps. First, candid discussions are sometimes necessary to operate Amazon's business. Second, where documents violated the P&C Protocol drafting rules and required revisions, those revisions would themselves constitute incriminating evidence. Amazon's solution to both issues is to "privilege cloak" discussions of sensitive topics by covering them with outward indicia of privilege. Employees are directed [redacted]. Ex. 49 at -860; Ex. 32

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at -097 [redacted]; Ex. 3 at -763; Ex. 11A at -032. Employees routinely preface emails with generic requests of [redacted]. *See, e.g.*, Ex. 50 at -796; *see also* Ex. 39 at -723; Ex. 51 at -007; Ex. 52 at -557; Ex. 11A at -032.

Amazon employees consistently apply privilege markings based on subject matter, *not* based on whether they are seeking or conveying legal advice. Topics where employees apply privilege cloaking include, among others: [redacted] Ex. 51 at -007; Ex. 53 at -494; [redacted], Ex. 54 at -665; [redacted] Ex. 52 at -557; [redacted] Ex. 55 at -824; [redacted], Ex. 56 at -008; and [redacted], Ex. 57 at -636. Several Amazon employees have testified [redacted]; *see also FTC v. Amazon.com, Inc.*, 2:23-cv-932 (JHC), Dkt. #404, at 5 (W.D. Wash. July 10, 2025) (finding Amazon wrongfully withheld non-privileged document in which Mr. Ghani instructed employees to be "diligent" about marking documents relating to nonconsensual enrollment in Prime as "P&C").

In some cases, Amazon employees expressly stated an intent to [redacted]. *See, e.g.*, Ex. 61 at -279 [redacted]"); Ex. 62

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at -847 [redacted]

[redacted]

[redacted]"); Ex. 63 at -031 ("[redacted]

[redacted]"); *see also* Ex. 32 at -097. The breadth of this practice has reached the point that some employees joke about *actual* requests for legal advice: for example, [redacted]

[redacted]

[redacted] Ex. 64 at -564.

II. AMAZON'S SYSTEMIC PATTERN OF PRIVILEGE ABUSE

This case is just one of *four* instances to date—three before this Court—in which Amazon has abused privilege protections to shield non-privileged documents from discovery by systematically adding indicia of privilege, such as "privileged and confidential" labels or by addressing emails to in-house counsel. These repeated instances of widespread privilege over-designation reflect a deliberate and strategic choice on the part of the company. *See FTC v. Amazon.com, Inc.*, 2:23-cv-932-JHC, Dkt. #404, at 5-6, 8 (W.D. Wash., July 10, 2025) (sanctioning Amazon for improperly withholding almost 70,000 documents, including documents where employees were instructed to apply a version of the P&C Protocol); *De Coster v. Amazon.com, Inc.*, No. 2:21-cv-00693-JHC ("*De Coster*"), Dkt. #302, at 11, 14-15 (W.D. Wash. Jan. 31, 2025) (ordering Amazon to produce over 60% of documents submitted for *in camera* privilege review, and finding that Amazon "improperly designated operational, business, and strategic documents as attorney-client communications or attorney-work product"); *Garner v. Amazon.com, Inc.*, Dkt. #291 (W.D. Wash., Sept. 23, 2024) (ordering Amazon to produce "almost 80%" of documents submitted for *in camera* privilege review and finding that "Amazon

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improperly attempted to cloak operational, business, and strategic documents . . . with the attorney client privilege").

III. AMAZON IS WITHHOLDING P&C PROTOCOL DOCUMENTS

Although Amazon has produced some P&C Protocol documents despite their improper privilege markings, Amazon continues to withhold (or redact) many more. The clawed-back versions of Exhibits 8A through 14A illustrate this. It is not clear from Amazon's privilege log what other P&C Protocol materials Amazon is continuing to redact or withhold in their entirety. Although Plaintiffs have attempted to identify privilege log entries that appear to be part of the P&C Protocol, *see* Ex. 16, Plaintiffs' ability to do so based on Amazon's privilege log is limited. Amazon's log entries, including for the documents that Amazon has clawed-back, do not describe the basis for withholding those documents with sufficient specificity to determine whether the privilege claim relates to the P&C Protocol. *See* Ex. 15, *infra* Argument III. But Amazon's privilege log and the evidence detailed above suggests that Amazon continues to withhold and redact P&C Protocol documents on a widespread basis.

LEGAL STANDARD

In the Ninth Circuit, "[t]he party asserting the attorney-client privilege has the burden of proving that the privilege applies to a given set of documents or communications." *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992). The attorney-client privilege must be "narrowly and strictly construed." *United States v. Gray*, 876 F.2d 1411, 1415 (9th Cir. 1989); *see United States v. Christensen*, 828 F.3d 763, 803 (9th Cir. 2015) ("privilege should be 'strictly confined within the narrowest possible limits'"). Because attorney-client privilege "has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose," which is to "encourage clients to make full disclosure to their attorneys."

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Fisher v. United States, 425 U.S. 391, 403 (1976). Thus, it applies only where the underlying client disclosures "might not have been made absent the privilege." *Id*.

The free flow of information between attorneys and clients is protected "because it promotes compliance with law and aids administration of the judicial system." *In re Teleglobe Commn's Corp.*, 493 F.3d 345, 360-61 (3d Cir. 2007) (emphasis omitted); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that privilege is meant to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"). Privilege is not applied "mechanically . . . anytime it might increase the flow of information"; it requires a "nuanced inquiry into whether according a type of communication protection is likely to encourage *compliance-enhancing* communication that makes our system for resolving disputes more operable." *Teleglobe*, 493 F.3d at 361 (emphasis in original).

Unlike outside counsel, in-house attorneys "frequently serve as integral players in business decisions or activities," and there is "no presumption" that their communications "are protected by attorney-client privilege." *Dolby Labs. Licensing Corp. v. Adobe Inc.*, 402 F. Supp. 3d 855, 866 (N.D. Cal. 2019) (citation omitted). "Even when an in-house attorney leads a discussion or takes an active role in a meeting, this does not necessarily make the entire communication privileged." *De Coster*, 2025 WL 904465, at *5 (W.D. Wash. Mar. 25, 2025). Thus, a party asserting privilege over communications with in-house counsel must make a "clear showing" that "the 'speaker' made the communication for the purpose of obtaining or providing legal advice" from in-house counsel in their capacity as a "legal advisor." *Oracle Am., Inc. v. Google, Inc.*, 2011 WL 3794892, at *3, 4 (N.D. Cal. Aug. 26, 2011) (simplified).

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A party challenging a privilege claim may seek "an order compelling disclosure or discovery" under Federal Rule of Civil Procedure Rule 37(a). A party challenging a clawback may also "move the Court for an order compelling disclosure," Dkt. #256 (ESI Order) ¶ 13, and "present the [allegedly privileged] information to the court under seal for a determination of the claim." Fed. R. Civ. P. 26(b)(5)(B).

The Court can conduct an *in camera* review "to determine whether disputed materials fit within the privilege." *In re Grand Jury Investigation*, 974 F.2d 1068, 1074 (9th Cir. 1992); *see FTC v. Amazon.com, Inc.*, No. 2:23-cv-00932-JHC, Dkt. #242 at 4. The threshold for *in camera* review is "not high." *L.D. v. United Behavioral Health*, 2022 WL 3139520, at *11 (N.D. Cal. Aug. 5, 2022). The moving party need only show "a factual basis sufficient to support a good faith belief that *in camera* inspection may reveal evidence that information in the materials is not privileged." *In re Grand Jury*, 974 F.2d at 1074-75.

ARGUMENT

Amazon is engaged in systematic privilege abuse intended to manipulate evidence for litigation, hide damaging evidence from enforcers and the Court, and pass off Amazon's purported justifications for its policies as bona fide business judgments. To ensure the integrity of this judicial proceeding, Plaintiffs and the Court must know the full extent of Amazon's manipulation.

Plaintiffs respectfully request that the Court conduct an *in camera* review of the clawed-back documents submitted with this motion to evaluate Amazon's privilege claims over those documents and the broader universe of P&C Protocol documents. *See supra,* Background III. Plaintiffs further request that the Court compel Amazon to produce *all* P&C Protocol documents it has withheld on privilege grounds, including (1) instructions for writing business documents,

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(2) documents reflecting the implementation of the P&C Protocol, including lawyers' revisions of business documents, and (3) instructions to privilege cloak or destroy business documents. To that end, the Court should order Amazon to conduct a comprehensive privilege re-review based on the appropriate legal standard and, to confirm compliance with that order, should conduct an *in camera* review of a sample of the documents Amazon maintains are privileged after its re-review to ensure that Amazon is applying the correct privilege standard.

I. THE P&C PROTOCOL AND ITS IMPLEMENTATION ARE NOT PRIVILEGED

A. Neither a Communications Policy Nor Its Implementation Are Privileged Under Ninth Circuit Law

When communications "implicate both legal and business concerns," privilege only applies if "the primary purpose of the communication is to give or receive legal advice," rather than business advice. *In re Grand Jury*, 23 F.4th at 1091-92; *Epic Games, Inc. v. Apple Inc.*, 161 F.4th 1162, 1179 (9th Cir. 2025). Communications are not privileged merely because they concern compliance with a corporate policy. *See Grand Jury*, 23 F.4th at 1094 (classifying compliance with corporate policy as a "business reason[]"); *Stevens v. Corelogic, Inc.*, 2016 WL 397936, at *4 (S.D. Cal. Feb. 2, 2016) ("[A] corporate legal compliance policy . . . even if based on the advice of legal counsel, is primarily a 'business' policy rather than a 'legal' policy."); *see also Epic*, 161 F.4th at 1179-1180 (documents concerning compliance with court order were not privileged). Although "conversations between counsel and the corporate client leading up to the adoption of [a] policy" may be privileged, "the policy itself would not be protected." *Stevens*, 2016 WL 397936, at *4. Otherwise, a company could claim that "because its decision on how to market or advertise a product . . . was based on legal advice," "the company's business policies are themselves privileged." *In re Domestic Drywall Antitrust Litig.*, 2014 WL 5090032, at *4 (E.D. Penn. Oct. 9, 2014) (rejecting such an argument). "The privilege does not permit an

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attorney to conduct his client's business affairs in secret," *In re Grand Jury Subpoenas*, 803 F.2d 493, 496 (9th Cir. 1986), and does not allow a client to shroud its business in secrecy by using lawyers to establish and implement business communications policies.

Documents concerning the P&C Protocol are not privileged, because the "primary purpose" of those documents is not the provision or receipt of legal advice. The P&C Protocol is a "communication policy." *See, e.g.*, Ex. 16 at FTCRTL0000159, FTCRTL0000204, FTCRTL0000230. [redacted] Further, because the P&C Protocol is a communications policy, not legal advice, both lawyers and non-lawyers enforce the same protocol to manipulate evidence for antitrust proceedings. *See* Ex. 65 at -817 ([redacted]); Ex. 55 at -824 [redacted]; Ex. 66 at -275 [redacted]

Even if the P&C Protocol arose out of legal concerns, the protocol, communications about the protocol, and edits made under the protocol, are not privileged. Many corporate policies are motivated by legal concerns, but that does not make them privileged and does not extend privilege to documents subject to those policies. *See, e.g.*, *Domestic Drywall*, 2014 WL 5090032 at *4 (antitrust compliance policy whose "purpose is to help insure [sic] that its employees do not violate the antitrust laws" was not privileged). If privilege applied so broadly, any company could adopt a communications policy based on potential or pending litigation concerns and use it to strategically shield documents from discovery. *See, e.g.*, *Grand Jury*, 23 F.4th at 1093 (rejecting expansion of attorney client privilege to documents created "'because of'

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litigation concerns" as "it would create perverse incentives for companies to add layers of lawyers to every business decision in hopes of insulating themselves from scrutiny in any future litigation.").

In his deposition, Amazon in-house counsel [redacted] disputed that Amazon altered documents to minimize evidence that could be used against Amazon in litigation, but his explanations confirm that the P&C Protocol is not legal advice. [redacted] testified that [redacted] [redacted]. Ex. 67 at 114:13-115:1, 185:10-20, 250:2-252:12. These are all business purposes, and [redacted] *Id.* at 264:25-265:13. When "edits [to a document] do not reflect any legal analysis or advice" and "[t]here is also no request for legal advice in the document," then the document "is not privileged." *De Coster*, 2025 WL 904465 at *6 (W.D. Wash. Mar. 25, 2025). Thus, in-house attorneys' edits to business documents and guidance about how to write business documents are not privileged: they reflect communications advice, not legal advice, in their capacity as business advisors. This is particularly true where such guidance is broadly distributed within the company. *See, e.g.*, *Stevens*, 2016 WL 397936, at *5 (rejecting argument that compliance policy distributed widely within company was confidential for purposes of attorney client privilege); *see* Ex. 11 ([redacted]); Ex. 11A; Ex. 13 at -882 ([redacted]); Ex. 13A.

Tellingly, allowing Amazon to claim privilege over the P&C Protocol and related documents is not necessary to "effectuate" privilege's "limited purpose" to encourage "complete

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disclosure by the client." *Gray*, 876 F.2d at 1415 (citations omitted). Companies like Amazon—that generate hundreds of billions of dollars in revenue and employ hundreds of thousands of people—are not going to stop writing business documents, communicating internally about their business, or enforcing corporate policies because those documents are discoverable in litigation. That is because the primary purpose of such communications is to *operate the business*, not to seek or provide legal advice. Those communications are not privileged. *See Grand Jury*, 23 F.4th at 1092.

Permitting Amazon to cloak its manipulation of evidence through privilege also will not promote "the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. Amazon's P&C Protocol does not shape Amazon's business conduct to comply with the law. Rather, it is a means of obscuring Amazon's business conduct to prevent fair adjudication by the courts. It "refers not to prior wrongdoing, but to future wrongdoing" and its concealment, which undermines "the proper functioning of [the] adversary system of justice." *United States v. Zolin*, 491 U.S. 554, 562-63 (1989) (citation and emphasis omitted). Extending privilege protections to the P&C Protocol would not be "compliance-enhancing"—it would undermine the judicial system. *Teleglobe*, 493 F.3d at 360-61 (emphasis omitted).

Courts are facing widespread privilege abuse by companies attempting to hide their unlawful conduct, particularly in major antitrust enforcement cases. *See, e.g.*, *United States v. Google LLC*, 747 F. Supp. 3d 1, 186-87 (D.D.C. 2024) (describing Google's "Communicate with Care" program designed to "avoid creating a paper trail for regulators and litigants"); *Epic Games, Inc. v. Apple Inc.*, 781 F. Supp. 3d 943, 996-97 (N.D. Cal. 2025) (finding that privilege claims were used "to conceal Apple's real decisionmaking process"), *aff'd in relevant part,* 161 F.4th 1162 (9th Cir. 2025); *see also In re Facebook, Inc.*, 655 F. Supp. 3d 899, 933 (N.D. Cal.

2023) (practice of teaching employees "to improperly 'privilege' documents based on their perceived sensitivity" supported finding of bad faith);[3] *see also supra* Background I.C (explaining Amazon's systemic practice of abusing privilege designations). Attorney-client privilege does not "require [courts] to acquiesce" to such "manipulation." *See In re Sealed Case*, 676 F.2d 793, 822 (D.C. Cir. 1982). Accordingly, the Court should reject Amazon's privilege claims over its efforts to manipulate the evidentiary record.

B. Work-Product Protection Does Not Apply

In the handful of instances where Amazon asserts work product protection,[4] the doctrine does not apply because the documents at issue concern business decisions and were not prepared because of anticipated litigation. *Grand Jury*, 23 F.4th at 1091.

"It is well established that documents prepared in the ordinary course of business are not protected by the work-product doctrine because they would have been created regardless of the litigation." *Slack v. Swift Transp. Co. of Ariz., LLC*, 2016 WL 11815753, at *2 (W.D. Wash. Nov. 3, 2016); *see also U.S. v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011) (work-product applies only to documents that "would not have been created in substantially similar form but for the prospect of litigation."). Here, Amazon implemented and enforced the P&C Protocol to create broadly applicable communications policies and to alter business documents that *would* have been created independent of litigation. *See, e.g.*, Ex. 8A at -001 to -002; Ex. 9A at -938 to -940; Ex. 12A at -914 to -915. Moreover, work-product provides only "qualified" protection that is

[3] *See also* U.S. Dep't of Justice, Assistant Attorney General Gail Slater Delivers Remarks to the Ohio State University Law School (Aug. 29, 2025), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-gail-slater-delivers-remarks-ohio-state-university-law-school (describing recent privilege abuse: "The vast majority of the problematic conduct the Antitrust Division sees takes place below the surface.").

[4] Ex. 15 (excerpted log entries for Exs 8, 9, 12); Ex. 16 (FTCRTL003961, FTCRTL0006065, FTCRTL0021995, FTCRTL0022465, FTCRTL0022890, FTCRTL0039746, FTCRTL0039747). Where Amazon did not assert work-product protection for a P&C Protocol document in its privilege log, any such claim is waived. *See De Coster*, 2025 WL 904465, at *7 (W.D. Wash. Mar. 25, 2025) (finding that Amazon waived work-product protection by failing to include the assertion in its privilege log).

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defeated here by Plaintiffs' "substantial need" for the materials that—by design—are not available through other means. Fed. R. Civ. P. 26(b)(3)(A)(ii).

II. THE CRIME-FRAUD (AND MISCONDUCT) EXCEPTION TO PRIVILEGE APPLIES TO THE P&C PROTOCOL

If the Court finds that any part of the P&C Protocol is protected, the crime-fraud exception to privilege is an independent reason the Court should compel the production of those documents. Should the Court reach this issue, it should conduct an *in camera* review of clawed-back Exhibits 8A through 14A and the documents identified in Exhibit 16 to determine the scope of the exception.

Under the crime-fraud doctrine, communications between a lawyer and their client "made in furtherance of a crime, fraud, or other misconduct[,] which includes future or ongoing wrongdoings," are not privileged. *Altaa Invs., LLC v. Prod. Cap., LLC*, 2022 WL 21309976, at *1 (C.D. Cal. July 15, 2022) (citing *United States v. Zolin*, 491 U.S. 554, 562 (1989)); *see United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002). "A party seeking to vitiate the attorney-client privilege under the crime-fraud exception must satisfy a two-part test." *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009). "First, the party must show that 'the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme.'" *Id.* (citation omitted). Second, it must show that the attorney-client communications are "sufficiently related to" and made "in furtherance of" that scheme. *Id.* A party need not prove misconduct "beyond a reasonable doubt," or show a "*completed* crime or fraud"; it need only provide "reasonable cause to believe" that "the client . . . consulted the attorney in an *effort* to complete one." *See In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) (citations omitted).

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Courts have found that litigation misconduct similar to that at issue here is sufficient to invoke the crime-fraud exception. "The title of crime-fraud exception 'is a bit of a misnomer' given that 'many courts have applied the exception to situations falling well outside of the definitions of crime or fraud,' so long as the other 'types of misconduct are fundamentally inconsistent with the basic premises of the adversary system.'" *Sonrai Sys., LLC v. Romano*, 2020 WL 7027567, at *8 (N.D. Ill. Nov. 30, 2020) (quoting *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 281 (E.D. Va. 2004)) (cleaned up). For example, courts have applied the exception to spoliation. *See In re Sealed Case*, 754 F.2d 395, 400–02 (D.C. Cir. 1985) (applying exception to "pervasive and systematic scheme to destroy or alter subpoenaed evidence"); *Sonrai*, 2020 WL 7027567, at *8–9 (deletion of data). Courts have also applied the exception to other bad faith litigation conduct. *See Wachtel v. Guardian Life Ins. Co.*, 239 F.R.D. 376, 382–83 (D.N.J. 2006) (ordering *in camera* review based on evidence of misleading statements to law enforcement, obstruction, non-preservation of documents, and failure to conduct adequate search for documents). Similarly, "a lawyer's unprofessional conduct may vitiate the work product privilege," because "[t]he integrity of the adversary process is not furthered by protecting a lawyer who steps outside his role as 'an officer of the court . . . .'" *Moody v. I.R.S.*, 654 F.2d 795, 800 (D.C. Cir. 1981).

Amazon's use of privilege markings to cloak business documents from discovery, its instructions to delete raw notes, and the systematic alteration and sanitization of relevant documents, with [redacted], is litigation misconduct that falls outside the protection of the attorney-client privilege. As explained above, Amazon has instructed its employees to systematically apply privilege markings to relevant business documents, even when employees are not seeking or providing

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legal advice, with the intent to conceal them from enforcers and the Court. *See supra* Background I.C. For example, an Amazon attorney requested [redacted] Ex. 61 at -279. Deliberately applying privilege markings to discussions of sensitive topics, rather than requests for legal advice, is evidence of bad faith. *See In re Facebook, Inc.*, 655 F. Supp. 3d at 933. Such an approach is an attempt to abuse the attorney client privilege, even when some of the improperly marked documents are ultimately produced. *Napster*, 479 F.3d at 1090 ("The client's abuse of the attorney-client relationship, not his or her successful criminal or fraudulent act, vitiates the privilege."); *cf. supra* Background II (summarizing Amazon's adjudicated misuse of privilege to improperly withhold tens of thousands of documents in multiple cases).

As also explained above, [redacted] By deleting some documents and hiding changes to others behind privilege claims, Amazon attempts to deprive the Court of the ability to see and consider the full, unsanitized record.

The involvement of attorneys in Amazon's P&C Protocol is clear. As just described, Amazon attorneys instructed employees to use baseless privilege markings. *See* Ex. 61 at -279. [redacted]

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[redacted]

Amazon's P&C Protocol is, at the very least, "misconduct . . . fundamentally inconsistent with the basic premises of the adversary system." *Sonrai Sys.*, 2020 WL 7027567 at *8 (citation omitted). The intentional effect of the P&C Protocol, put simply, is to sanitize or conceal evidence relevant to Plaintiffs' claims, directly undermining the adversarial system and implicating the crime-fraud exception to privilege.[5] An *in camera* review, which is warranted on these facts, would likely reveal direct evidence of an intent to mislead regulators and the Court in eventual litigation. *See* Ex. 44 at -677, Ex. 18 at -162; *see also* Ex. 9A at -938; Ex. 10A at -661.

III. AMAZON'S PRIVILEGE ABUSE WARRANTS EFFECTIVE RELIEF

As detailed above, Amazon's P&C Protocol was designed to manipulate and cloak in privilege a broad range of communications to prevent discovery by enforcers or in litigation. *See supra* Background I. This is part of an extensive pattern of privilege abuse by the company. *See supra* Background II. These facts support a broad finding that Amazon's privilege claims over P&C Protocol documents are unsupported, and that Amazon must produce these documents to Plaintiffs.

The Court should order Amazon to produce the unredacted, clawed-back versions of Exhibits 8A, 9A, 10A, 11A, 12A, 13A, and 14A, and the documents identified in Exhibit 16. The Court should also order Amazon to produce *all* P&C Protocol documents after conducting a

[5] If the Court decides that any subset of P&C Protocol documents contains protected legal advice and is not subject to the crime-fraud exception, Plaintiffs may bring further challenges to ensure the fairness of the proceedings. Under the "fairness principle," a party may not use privilege "as both a shield and a sword" by "asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003). The court "gives the holder of the privilege a choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it." *Id.* at 720. Thus, if Amazon maintains its privilege claims, the Court should preclude it from introducing evidence and making arguments that are implicated by P&C Protocol documents.

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comprehensive privilege re-review pursuant to the appropriate legal standard—not the standard that Amazon has apparently applied in prior reviews and re-reviews. The Court should then ensure Amazon is applying the correct privilege standard by conducting an *in camera* review of 50 assertedly privileged documents chosen by Plaintiffs.[6]

A privilege re-review—under threat of sanctions if Amazon continues to improperly withhold non-privileged documents—is appropriate in these circumstances. *Cf. Epic*, 781 F. Supp. 3d at 996-97 (sanctioning party whose strategic privilege claims were "unwarranted, wasted party resources, and delayed the Court's ability to effectuate relief"). A re-review is also the only way to ensure that Amazon does not continue to withhold P&C Protocol documents, because Amazon's privilege log does not provide information that would let Plaintiffs or the Court identify which documents were implicated by Amazon's P&C Protocol. *See Wright v. Allstate Fire & Cas. Ins. Co.*, 2022 WL 1213444, at *6 (W.D. Wash. Apr. 25, 2022) ("[F]ailure to provide sufficient detail for a court to evaluate claims of attorney-client privilege . . . waives any claimed protection."). For example, Amazon's privilege log entry for Exhibit 9 claims the document [redacted] of the business document's subject matter. Ex. 15 at FTCRTL0045250. That privilege log entry is at best misleading. If Amazon had not produced the underlying document (before clawing it back), there is no way Plaintiffs could have identified it as affected by Amazon's P&C Protocol. The privilege log entries for other clawed-back documents cited in this motion are similarly misleading, *see* Ex. 15 at FTCRTL0022526, AMZ_LOG_000204132, or so vague as to be meaningless, *see* Ex. 15 at 0043501.

[6] Plaintiffs reserve their rights to seek further relief, including sanctions, based on the results of that review.

Finally, an *in camera* review of Amazon's post-re-review privilege claims is necessary to provide effective relief. Amazon has represented that it engaged in extensive privilege review and re-review processes for this and related cases, consistent with the standard articulated by this Court. *See, e.g.*, *De Coster*, Dkt. #203 at 1-2; *De Coster*, Dkt. #255 at ¶ 11 & Ex. 1 at ¶¶ 14-16, 29-33; Dkt. #405. Moreover, in the Private Plaintiff cases, the Court has already ordered Amazon to produce all documents "for which it cannot make a clear showing that a primary purpose of the communication was to request or provide legal advice." *De Coster*, Dkt. #277 at 1. But the clawed-back documents cited in this motion—*all* of which were clawed back after the Court's order in *De Coster*—show that Amazon is misapplying that standard. If Plaintiffs and the Court cannot rely on Amazon to faithfully apply the law to its privilege calls and produce an accurate privilege log, a review and enforcement mechanism is needed to ensure Amazon's compliance with the law and ensure that the Court can decide this case informed by the full documentary record.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to compel should be granted.

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Respectfully submitted,

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I certify that this memorandum contains 7,861 words, in compliance with the Court's order in Dkt. #592.

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I HEREBY CERTIFY that on January 30, 2026, I electronically filed a true and correct copy of the foregoing document using the United States District Court for the Western District of Washington's CM/ECF System.

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