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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CRAIGSLIST, INC., a Delaware corporation,

Plaintiff,

v.

3TAPS, INC., a Delaware corporation; PADMAPPER, INC., a Delaware corporation; DISCOVER HOME NETWORK, Inc., a Delaware corporation d/b/a LOVELY; BRIAN R. NIESSEN, an individual, and Does 1 through 25, inclusive.

Defendants.

3TAPS, INC., a Delaware corporation,

Counter-claimant,

CRAIGSLIST, INC., a Delaware corporation

Counter-defendant.

CASE NO.: CV-12-03816 CRB

DEFENDANT 3TAPS, INC.'S OPPOSITION TO CRAIGSLIST'S MOTION TO BIFURCATE AND STAY DEFENDANTS' AMENDED COUNTERCLAIMS

Honorable Charles R. Breyer

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SUMMARY OF ARGUMENT

Defendant 3taps, Inc. ("3taps") respectfully requests that this Court deny the motion of craigslist, Inc. ("craigslist") to bifurcate and stay discovery on 3taps' counterclaims. For three independent reasons, craigslist cannot meet its burden to prove that bifurcation and a stay would promote judicial economy and avoid inconvenience or prejudice to the parties.

First, contrary to craigslist's contention, 3taps' counterclaims are not "premised almost exclusively" on activity that is subject to *Noerr-Pennington* immunity, but instead are based on a multi-faceted monopolization scheme and independent conspiracy allegations. Hence, 3taps' counterclaims would not be mooted, or substantially narrowed, if craigslist were to prevail on its claims. Accordingly, bifurcation is unwarranted. *See eBay, Inc. v. Bidder's Edge, Inc.*, No. C-99-21200 RMW, 2000 WL 1863564, at *4 (N.D. Cal. July 25, 2000).

Second, craigslist's claims and 3taps' counterclaims and defenses are highly intertwined and likely will involve evidence that overlaps substantially. As a result, bifurcation and staying discovery would be inefficient and inconvenient for the parties and the Court. *See Netflix, Inc. v. Blockbuster, Inc.*, No. C 06-02361 WHA, 2006 WL 2458717, at *10 (N.D. Cal. Aug. 22, 2006).

Third, at this early juncture in the litigation, craigslist's motion is premature. craigslist's arguments in favor of separate trials are speculative because it is too early to know which of the parties' claims will survive pretrial motions and need to be adjudicated, or whether a single trial would be feasible. *Cf. Netflix*, 2006 WL 2458717, at *10; *see also ACS Commc'ns, Inc. v. Plantronics, Inc.*, No. CIV. 95-20294 SW, 1995 WL 743726, at *2 (N.D. Cal. Dec. 1, 1995).

Finally, even if the Court were to order separate trials, it should deny craigslist's request to stay discovery on 3taps' counterclaims. Such bifurcated discovery would be inefficient, inconvenient to the parties and potentially prejudicial to 3taps. *See Donnelly Corp. v. Reitter & Shefenacker USA Ltd. P'Ship*, No. 1:00-CV-751, 2002 WL 31418042, at *8 (W.D. Mich. Aug. 13, 2002).

PRELIMINARY STATEMENT

Defendant 3taps, Inc. ("3taps") respectfully requests that the Court deny the motion of craigslist, Inc. ("craigslist") to bifurcate and stay discovery on 3taps' amended counterclaims.

It was not long ago that craigslist welcomed competition from innovators (like 3taps) that create new products utilizing user-generated factual content posted on craigslist's website. In July 2010, on the question and answer site quora.com, craigslist's founder, Craig Newmark, responded to the question: "*Why hasn't anyone built any products on top of craigslist data? Is it a matter of craigslist policy not letting people use the data?*" He wrote: "*Actually, we take issue with only services which consume a lot of bandwidth, it's that simple.*" Indeed, as late as February 2012, craigslist's terms of use ("TOU") unambiguously stated that craigslist does *not* claim ownership of user-generated posts, that those posts are posted in a "public area" and that the posts are "non-exclusive"—i.e., users can post their own factual content anywhere else they please.

But craigslist reversed course once it realized that competition was emerging to challenge its monopolistic grip over a number of online classified advertising markets. Recognizing that it was too late to innovate to protect its monopoly positions, craigslist launched a broad-based scheme aimed at blocking the very competition it purportedly welcomed. craigslist's overall scheme has it all: anticompetitive TOU provisions; affirmative acts to sabotage the electronic copying ("scraping") of publicly-available facts, even when that scraping was performed via Google caches and did not even involve accessing craigslist's website; deception of users concerning whether their posts are visible to other users; and the assertion of sham copyright claims as a tactical weapon to scare off innovative competitors. Thus, while craigslist attempts to cast its claims as a dispute over its long-held intellectual property rights, in reality craigslist only recently attempted to hijack user-generated factual content in order to assert tactical (and sham) infringement claims as part of a much broader anticompetitive plan.

As *part* of this overall scheme, craigslist has filed suit against 3taps, PadMapper, Inc. ("PadMapper") and Discover Home Network, Inc. d/b/a Lovely ("Lovely"), asserting seventeen causes of action relating to 3taps' alleged scraping and misappropriation of content posted on craigslist's website. craigslist alleges, *inter alia*, infringement of copyrights in its users' posts—

which craigslist seeks to enforce as the purported "exclusive licensee" of this content—and that 3taps' "unauthorized accessing" of craigslist's website constitutes trespass and violates the Computer Fraud and Abuse Act ("CFAA").

3taps filed a counterclaim asserting seven causes of action against craigslist. Specifically, 3taps alleges that craigslist has engaged in an overall monopolization scheme in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, to stifle competition in three relevant markets for the onboarding, indexing and real-time search of online classified ads. This scheme consists of six elements of antitrust misconduct, including craigslist's: serial sham litigation (and threatened litigation) against innovating websites utilizing classified ad data indexed by 3taps; copyright misuse; "ghosting";[1] unreasonably restrictive TOU; anticompetitive restrictions on Google caches; and efforts to block 3taps and third parties from scraping the user-generated content posted on its website. As alleged, each element of the scheme is an antitrust violation, and the overall scheme itself is an independent violation of the antitrust laws.

Further, 3taps alleges two separate violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, based on (1) the unreasonably restrictive TOU that craigslist imposes on its users, and (2) craigslist's alleged agreement with Google to restrict the availability of content posted on craigslist that can be obtained through scraping Google caches. Finally, 3taps alleges that craigslist's anticompetitive conduct constitutes unfair competition, in violation of California Business and Professions Code § 17200 *et seq.*, and unlawful interference with 3taps' economic advantage.

craigslist did not seek to dismiss any of 3taps' counterclaims and filed an answer on January 31, 2013. For its part, 3taps has moved to dismiss four of craigslist's claims, including the counts alleging copyright infringement and CFAA violations. At this early stage, no discovery has been taken, and trial has not been scheduled. Yet, craigslist has filed this motion requesting *separate trials* and to stay discovery on 3taps' counterclaims, arguing that adjudicating craigslist's claims first will promote judicial economy, expedite the litigation, reduce costs to the parties and

[1] As explained in 3taps' First Amended Counterclaim ("FAC"), "ghosting" is craigslist's practice of refusing to upload posts or transmit messages it believes are linked to its competitors, while falsely informing users that such content has been posted or transmitted. (FAC ¶¶ 14, 124-29.)

the Court, reduce juror confusion and avoid prejudice to craigslist. (craigslist's Motion ("Mot."), at 3.)

Under long-settled precedent, craigslist cannot meet its burden to prove that bifurcation and a stay of discovery would promote judicial economy and avoid inconvenience or prejudice to the parties. First, craigslist's motion is predicated on the erroneous contention that, if craigslist were to prevail on its claims, 3taps' counterclaims would be mooted in their entirety, or at least substantially narrowed. In reality, all of 3taps' counterclaims will survive regardless of the disposition of craigslist's claims. Therefore, bifurcating and staying 3taps' counterclaims cannot narrow the issues requiring trial and would be inefficient.

Second, craigslist's motion should be denied because the parties' claims and defenses are highly intertwined, and the relevant evidence likely will overlap substantially. Under craigslist's proposed approach, the parties and the Court face the prospect of duplicative discovery, including the repeated depositions of multiple witnesses, and the presentation of the same issues and evidence to two different juries. As a result, bifurcating trials and discovery would not promote judicial economy and would be inconvenient and more costly for the parties.

Third, at minimum, craigslist's motion should be denied as premature. craigslist contends that a single trial on the parties' claims would be too complex, confusing for the jury and prejudicial to craigslist. But, as numerous courts have recognized, these types of arguments are too speculative when a litigation is nowhere near trial; indeed, it is too early to know which of the parties' claims will survive pretrial motions and actually need to be adjudicated at trial. (3taps, as noted above, has filed a motion to dismiss four of craigslist's claims, and it anticipates filing a motion for summary judgment to dismiss the remainder of those claims.)

For each of these reasons, craigslist's motion should be denied in its entirety. If, however, the Court were to grant craigslist's motion for separate *trials*, it still should deny craigslist's request to stay *discovery* on 3taps' counterclaims. Such bifurcated discovery would be inefficient, inconvenient to the parties and potentially prejudicial to 3taps.

ARGUMENT

I. STANDARD FOR A MOTION TO BIFURCATE UNDER FEDERAL RULE OF CIVIL PROCEDURE 42(b)

A court can order bifurcation of claims for trial "[f]or convenience, to avoid prejudice, or to expedite and economize." Fed. R. Civ. P. 42(b). "In the Ninth Circuit, '[b]ifurcation . . . is the exception rather than the rule of normal trial procedure.'" *GEM Acquisitionco, LLC v. Sorenson Grp. Holdings, LLC*, No. C 09-01484 SI, 2010 WL 1729400, at *3 (N.D. Cal. Apr. 27, 2010) (ellipsis in original; citation omitted). "The usual course is that all claims in a case—even if founded on different causes of action—are tried together, as such an approach is generally considered the most efficient for the court and the parties." *J2 Global Commc'ns, Inc. v. Protus IP Solutions*, No. CV 06-00566 DDP (AJWx), 2009 WL 910701, at *3 (C.D. Cal. Mar. 31, 2009).

> Five issues for a court to consider when deciding whether to bifurcate are: (1) whether separate trials would be in furtherance of convenience; (2) whether separate trials would avoid prejudice; (3) whether separate trials would serve judicial economy; (4) whether separate trials would reduce the risk of jury confusion; and (5) whether the issues are clearly separable.

Datel Holdings Ltd. v. Microsoft Corp., No. C-09-05535 EDL, 2010 WL 3910344, at *2 (N.D. Cal. Oct. 4, 2010).

In considering these factors, courts recognize that "[b]ifurcation should be ordered only when the separation will result in judicial economy and will not unduly prejudice any party." *Id.* "'It is the interest of efficient judicial administration that is to be controlling under the rule, rather than the wishes of the parties.'" *Netflix, Inc. v. Blockbuster, Inc.*, No. C 06-02361 WHA, 2006 WL 2458717, at *9 (N.D. Cal. Aug. 22, 2006) (citation omitted). With regard to judicial economy, courts consider "(1) whether evidence to be offered in the [separate trials] will overlap, *see Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004), and (2) whether unnecessary costs can be avoided by resolution of 'dispositive preliminary issues,' *Jinro America, Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 998 (9th Cir. 2001)." *Zaldana v. KB Home*, No. C-08-3399 MMC, 2010 WL 4313777, at *2 (N.D. Cal. Oct. 26, 2010). "'With respect to both discovery and trial,' the moving party has the 'burden of proving that the bifurcation will promote

judicial economy and avoid inconvenience or prejudice to the parties.'" *Netflix*, 2006 WL 2458717, at *9 (quoting *Spectra-Physics Lasers, Inc. v. Uniphase Corp.*, 144 F.R.D. 99, 101 (N.D. Cal. 1992)).

Here, because craigslist cannot meet its burden with regard to either bifurcation or staying discovery on 3taps' counterclaims, its motion should be denied.

II. CRAIGSLIST'S MOTION TO BIFURCATE AND STAY DISCOVERY ON 3TAPS' COUNTERCLAIMS SHOULD BE DENIED

craigslist's motion should be denied for three independent reasons. First, contrary to craigslist's argument, 3taps' counterclaims will survive regardless of the disposition of craigslist's claims. Second, because the parties' claims and defenses are intertwined and their evidence likely will overlap substantially, bifurcating trials and discovery would not be efficient or convenient for the Court or the parties. Third, at this early stage in the litigation, craigslist's motion is premature, and its arguments are too speculative to warrant either bifurcation or a stay of discovery.

A. Because 3taps' Counterclaims Will Survive Regardless of the Resolution of craigslist's Claims, craigslist's Motion Should Be Denied

craigslist's motion is predicated on the erroneous argument that 3taps' antitrust counterclaims would be entirely mooted, or significantly narrowed, if craigslist were to prevail on its claims. (Mot. at 1, 3-6, 9.) Because 3taps' counterclaims will survive in their entirety regardless of the disposition of craigslist's claims, bifurcation and staying discovery is unwarranted, and craigslist's motion should be denied.

1. Bifurcation and Staying Discovery Is Unwarranted When Resolution of One Party's Claims Will Not Moot the Other Party's Claims

As courts have recognized, bifurcating trials and discovery does not further judicial economy when resolution of one party's claims will not moot the other party's antitrust claims. *See, e.g.*, *Datel Holdings*, 2010 WL 3910344, at *4-5 (denying motion to bifurcate and stay discovery on antitrust claims, which could not be mooted entirely); *eBay, Inc. v. Bidder's Edge, Inc.*, No. C-99-21200 RMW, 2000 WL 1863564, at *4 (N.D. Cal. July 25, 2000) (denying bifurcation and stay of discovery where disposition of plaintiff's claims would not obviate

defendant's antitrust counterclaims); *ACS Commc'ns, Inc. v. Plantronics, Inc.*, No. Civ. 95-20294 SW, 1995 WL 743726, at *2 (N.D. Cal. Dec. 1, 1995) (because "antitrust claim [would] be unaffected by the disposition of the infringement claim," "arguments that the patent infringement claim should be tried first to simplify the antitrust issues [were] unpersuasive").[2]

The decision in *eBay* is instructive. In that case, the plaintiff alleged that the defendant, an Internet auction aggregation website, accessed the plaintiff's website without authorization and misappropriated content. *eBay*, 2000 WL 1863564, at *1. The defendant filed antitrust counterclaims alleging, *inter alia*, that the plaintiff's lawsuit was sham and that the plaintiff was illegally blocking the defendant from accessing its website. *See id.* at *1-2 & n.2. The plaintiff moved to bifurcate and stay discovery on the counterclaims, arguing that "if it prevail[ed] on the merits of any of its claims, it [would] establish that the litigation was not a 'sha[m].'" *Id.* at *4. But the court denied the motion, explaining that, even if eBay were to prevail, "such a conclusion [would] not dispose of [defendant's] counterclaims as [defendant] allege[d] anti-competitive activities that [did] not fall under *Noerr-Pennington* immunity." *Id.*

Similarly here, while craigslist contends that almost all of its alleged misconduct is subject to *Noerr* immunity, 3taps' allegations are far broader. Indeed, as discussed below, *none* of 3taps' counterclaims would be mooted, or significantly narrowed, even if craigslist were to prevail on its claims. Thus, craigslist's motion would not further judicial economy and should be denied.

2. 3taps' Monopolization Scheme Claims Will Not Be Mooted

3taps' counterclaims will survive in their entirety regardless of the disposition of craigslist's claims. craigslist's argument to the contrary is based on the incorrect assertion that 3taps' "counterclaims are premised almost exclusively on craigslist's protected *Noerr-Pennington* activity." (Mot. at 1.)[3] In reality, 3taps alleges that craigslist has engaged in an overall

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[2] *See also J2 Global*, 2009 WL 910701, at *4-5 (denying motion to bifurcate and stay discovery, where trial on plaintiff's claims would not completely moot defendant's counterclaims).

[3] The *Noerr-Pennington* doctrine immunizes government petitioning activity from antitrust scrutiny, unless that conduct "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *E. R.R. Presidents* *(cont'd)*

monopolization scheme with six elements. 3taps further alleges that each element of the scheme is an antitrust violation and that the combined effect of the scheme is an independent violation of the antitrust laws.[4] (FAC ¶¶ 235, 250, 266.) Only one of these elements, craigslist's alleged sham litigation and sham cease and desist letters, can be subject to *Noerr* immunity. (*Id.* ¶ 14.) The remaining parts of the scheme include craigslist's: copyright misuse (*id.* ¶¶ 119-23); "ghosting" (*id.* ¶¶ 124-29); improperly restrictive TOU imposed on users (*id.* ¶¶ 130-36); anticompetitive restrictions on Google caches (*id.* ¶¶ 137-46); and blocking 3taps and third parties from scraping user-generated content posted on craigslist's website. (*Id.* ¶¶ 147-52.) None of this misconduct is government petitioning activity, and therefore, it cannot be subject to *Noerr* immunity. Thus, as a matter of law, 3taps' counterclaims cannot be mooted by the resolution of craigslist's claims.

Further, 3taps' sham litigation and sham cease and desist letter allegations would not be mooted even if craigslist were to prevail on its claims. craigslist is accused of *serial sham litigation* (and threatening litigation) against a multitude of parties. (FAC ¶¶ 14, 106-08.) Such allegations are not subject to the test the Supreme Court articulated in *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), which holds that a winning lawsuit cannot be sham. *Id.* at 60 n.5. Rather, as the Ninth Circuit has explained:

> When dealing with a series of lawsuits, the question is not whether any one of them has merit . . . but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. The inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?

USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, 31 F.3d 800, 811 (9th Cir. 1994). Thus, even if craigslist were to prevail on its claims, this outcome would not resolve the question of whether craigslist's actions against all of the entities it targeted were brought for an

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Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961); *see also United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965).

[4] *See City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) (explaining that "it would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect" and that courts should consider the "'synergistic effect' of the mixture of the elements") (citation omitted).

improper purpose.

Moreover, even if craigslist's litigation conduct, or any other element of the overall scheme, were deemed lawful, it would still be relevant to 3taps' Sherman Act § 2 claims. Courts in this jurisdiction have recognized that, in cases arising under Section 2, "'anticompetitive' conduct may include otherwise *legal* conduct," and "courts must consider all of an alleged monopolist's related conduct in the aggregate." *Tele Atlas N.V. v. NAVTEQ Corp.*, No. C-05-01673 RS, 2008 WL 4911230, at *1 (N.D. Cal. Nov. 13, 2008). Accordingly, even if some elements of an alleged monopolization scheme are not themselves unlawful, courts will consider the combined effect of all the elements. *See Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1183 (N.D. Cal. 2012) (while plaintiffs failed to plead "sufficient facts for a standalone bundling claim," bundling allegations could be considered as part of plaintiffs' Section 2 claim); *Tele Atlas*, 2008 WL 4911230, at *2-3 (although plaintiff could not prove that defendant's alleged tying conduct was itself unlawful, the jury still could consider that conduct in determining whether defendant violated Section 2); *Hynix Semiconductor Inc. v. Rambus Inc.*, 527 F. Supp. 2d 1084, 1097-98 (N.D. Cal. 2007) (protected litigation conduct "can be part of an 'anticompetitive scheme' claim" when it is "causally connected" to "other aspects of the scheme [that] independently produce anticompetitive harms"). Thus, even if some of craigslist's alleged misconduct—including its litigation conduct—is deemed lawful, it would still be necessary to determine whether, as alleged (FAC ¶¶ 235, 250, 266), the scheme was intended to and did adversely affect competition.

3. 3taps' Other Claims Will Not Be Mooted

In addition to its Sherman Act § 2 claims, 3taps also alleges *independent* violations of Sherman Act § 1 based on (1) craigslist's unreasonably restrictive TOU and (2) craigslist's anticompetitive restrictions on Google caches. Specifically, 3taps alleges that the TOU craigslist imposes on its users unreasonably restrain competition in the relevant markets for the onboarding, indexing and real-time search of online classified ads. (FAC ¶¶ 277-86.) 3taps also alleges that craigslist has entered into an agreement with Google that has caused Google to reduce the availability of content posted on craigslist's website that can be obtained through scraping of Google caches and that this agreement unreasonably restrains competition in the same relevant

markets. (*Id.* ¶¶ 287-98.) These counterclaims do not implicate conduct that can be *Noerr*-immune, and therefore, they will need to be adjudicated regardless of the disposition of craigslist's claims.

Further, because 3taps' antitrust allegations cannot be mooted by the resolution of craigslist's claims, 3taps' counterclaims alleging unfair competition (*id.* ¶¶ 299-306) and interference with economic advantage (*id.* ¶¶ 307-12) also will survive.

B. The Parties' Claims and Defenses Are Highly Intertwined, and Their Evidence Likely Will Overlap Substantially

craigslist also argues that bifurcation is appropriate because separating the parties' "claims will result in little, if any, duplication of proof." (Mot. at 8.)[5] Once again, craigslist is incorrect. The parties' claims and defenses are highly intertwined, and their evidence likely will overlap substantially. Thus, craigslist's motion should be denied because bifurcation and staying discovery on 3taps' counterclaims would be inefficient and inconvenient for the parties and the Court.

1. Bifurcation of Trials and Discovery Is Inappropriate When the Parties' Claims Involve Overlapping Issues and Evidence

When evaluating whether bifurcation will promote judicial economy, one of the main factors courts consider is "whether evidence to be offered in the [separate trials] will overlap." *Zaldana*, 2010 WL 4313777, at *2 (citing *Hangarter*, 373 F.3d at 1021). Courts routinely deny motions to bifurcate when the parties' claims implicate *some* overlapping legal and factual issues. *See, e.g.*, *Datel Holdings*, 2010 WL 3910344, at *5 ("[B]ecause there may be *at least some overlap* in factual and legal issues between the DMCA claim and the antitrust claim, bifurcation is not appropriate." (emphasis added)); *J2 Global*, 2009 WL 910701, at *3 (denying bifurcation where "at least some evidence [would] be relevant to both sets of claims"); *Netflix*, 2006 WL 2458717, at *9-10 (denying motion to bifurcate and stay antitrust counterclaims because "[c]onducting

[5] Notably, this contention is belied by craigslist's concession that "the underlying conduct central to both craigslist's and [3taps'] antitrust counterclaims is the same." (Mot. at 1; s*ee also id.* at 6 ("[T]he core conduct at issue in craigslist's claims and [3taps'] antitrust counterclaims is the same.").)

discovery on overlapping issues in tandem will ultimately reduce the expenses and time of this litigation for both parties").[6]

For example, in *Netflix*, the court concluded that "[i]t [would] be more efficient in this action to conduct discovery and pretrial proceedings together" because "[t]he issues overlap[ped] greatly." *Netflix*, 2006 WL 2458717, at *10. The court explained that a determination on the defendant's antitrust counterclaim would be "closely related to a determination as to the validity of the patents" on which the plaintiff's infringement suit was based. *Id.* As a result, similar evidence would be "relevant to both inquiries." *Id.* Moreover, "[t]he same evidence [would] also be pertinent to [the defendant's] affirmative defenses of inequitable conduct and patent misuse." *Id.*

Similarly here, the parties' claims and defenses involve overlapping issues and evidence, which is further reason to deny craigslist's motion.

2. craigslist's Claims and 3taps' Counterclaims and Defenses Implicate Overlapping Issues and Evidence

craigslist's claims and 3taps' counterclaims and defenses involve several overlapping issues that likely will turn on the same evidence.

For example, craigslist asserts that 3taps is infringing craigslist's copyrights on its *users'* postings. In its counterclaims, 3taps alleges that craigslist has engaged in sham litigation and copyright misuse, in part, because craigslist does not have standing to assert copyrights attributable to this content.[7] 3taps further alleges that craigslist knows it lacks standing and that this knowledge is evidenced by craigslist's attempt last summer to impose a clickwrap agreement purportedly

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[6] *See also Synopsys, Inc. v. Magma Design Automation*, No. CIVA 05-701(GMS), 2006 WL 1452803, at *4 (D. Del. May 25, 2006) ("[W]ere the court to bifurcate, the evidentiary presentation in one case would likely be substantially duplicative of the evidentiary presentation in the other. In addition, bifurcation would likely create further duplication of evidence because both juries would need to be educated in the same relevant technology. Accordingly, the court concludes that neither jury confusion nor efficiency weigh in favor of bifurcating the antitrust claims from the infringement claims."); *Genentech, Inc. v. Wellcome Found. Ltd.*, No. 88-330, 1990 WL 69187, at *14 (D. Del. Mar. 8, 1990) ("The Court is convinced that the anticipated overlapping of evidence on all issues counsels toward a unified trial particularly since no real prejudice will inure to any of the parties.").

[7] 3taps also plans to invoke copyright misuse as a defense to craigslist's infringement claims.

requiring users to "confirm" that craigslist is the exclusive licensee of all posted content.[8] After only three weeks, craigslist abandoned this provision in the face of user outrage and widespread public criticism. (FAC ¶¶ 14, 111.) craigslist, on the other hand, contends that the clickwrap agreement was just a "confirmation" of craigslist's exclusive licensee status, which is purportedly conveyed through Section 3 of craigslist's TOU, even though that section mentions neither the word "copyright" nor "exclusive." (3taps' Reply in Support of Mot. to Dismiss, Dkt. No. 62, at 8-10.)[9] Thus, craigslist's copyright infringement claim is significantly intertwined with 3taps' sham litigation and copyright misuse claims, and relevant evidence relating to these issues—including evidence regarding craigslist's imposition of the provision purporting to "confirm" its status as an exclusive licensee—will overlap substantially.

The issue of harm to craigslist's website likewise is integral to both craigslist's trespass claim and 3taps' allegation that craigslist is wrongfully blocking 3taps and third parties from scraping user-generated content posted on craigslist. In order to prevail on its trespass claim, craigslist will have to prove that the scraping performed by 3taps or third parties its employs "'actually did, or threaten[s] to, interfere with the intended functioning of [craigslist's computer] system, as by *significantly reducing* its available memory and processing power.'" *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1069 (N.D. Cal. 2012) (quoting *Intel Corp. v. Hamidi*, 71 P.3d 296, 306 (Cal. 2003)).[10] 3taps, on the other hand, alleges that scraping by third parties employed by 3taps does not adversely impact the functionality of craigslist's website, and there is no legitimate business justification for craigslist's efforts to block scrapers. Instead, 3taps claims that craigslist seeks to block scrapers solely to inhibit competition and that this misconduct is part

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[8] Notably, craigslist implemented this clickwrap provision on July 16, 2012 (FAC ¶¶ 14, 111), only four days before it filed its initial complaint against 3taps and PadMapper.

[9] Incredibly, the same section of the TOU states that craigslist "does not control, is not responsible for and makes no representations or warranties with respect to any user content." (3taps' Mot. to Dismiss, Dkt. No. 48, at 3.)

[10] If craigslist's CFAA claim were to survive 3taps' motion to dismiss, craigslist also would attempt to establish harm to its website attributable to this scraping. (*See* craigslist FAC ¶ 217.)

of craigslist's overall scheme. (FAC ¶¶ 14, 147-50.)[11] Thus, the effects, if any, of scraping on the functionality of craigslist's website is another intertwining issue raised by the parties' claims.

A third example of the intertwining nature of the parties' claims relates to craigslist's TOU. craigslist accuses 3taps of breaching its TOU, while 3taps alleges that the TOU are anticompetitive. 3taps also intends to rely on the fact that the TOU violate the antitrust laws as a defense to craigslist's breach claim. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 81-82 (1982) (antitrust illegality defense to a breach of contract suit "should be entertained in those circumstances where its rejection would be to enforce conduct that the antitrust laws forbid"). As a result, the issue of whether craigslist's TOU are anticompetitive will be integral to the resolution of craigslist's breach claim and 3taps' claims under Sherman Act §§ 1 and 2.

Fourth, craigslist's breach of TOU claim also is intertwined with 3taps' allegation that craigslist has caused Google to limit the availability in Google caches of user-generated content posted on craigslist's website. Specifically, 3taps will argue, in part, that it only began using third parties to scrape craigslist's website after craigslist's misconduct caused 3taps to lose the ability to rely on Google caches as its source of user-generated content posted on craigslist. Previously, 3taps sourced content posted on craigslist via Google caches, without directly accessing craigslist's website. (FAC ¶¶ 141-46.) Accordingly, to the extent 3taps now is breaching craigslist's TOU (provided they are even enforceable), such a breach is attributable to craigslist's antitrust misconduct, and therefore, is not actionable. But most significantly, here, these issues also are inextricably intertwined.

In sum, a great deal of the parties' claims and defenses are highly intertwined, and the relevant evidence likely will overlap substantially. If craigslist's motion were granted, the parties likely would engage in duplicative discovery, including taking depositions of multiple witnesses twice, and present the same issues and evidence to two different juries. Moreover, a separate trial

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[11] In *eBay*, the court recognized that if the defendant's "automated crawling of [plaintiff's] website is determined to be lawful, [plaintiff's] alleged blockage of [defendant's] search activity may also provide a basis for an antitrust violation." *eBay*, 2000 WL 1863564, at *2 n.2.

solely on craigslist's claims would deprive the jury of the ability to view craigslist's claims in the context of its monopolization scheme. Accordingly, craigslist's motion should be denied.

C. At Minimum, craigslist's Motion Is Premature

craigslist's arguments that bifurcation *for trial* is necessary are premature and speculative. No discovery has been taken in this case, no pretrial motions have been decided, and no trial date has been scheduled. In similar circumstances, courts have denied motions to bifurcate and stay discovery, recognizing that it is more efficient to conduct pretrial proceedings in tandem and preserve the opportunity for a single trial. *See Matsushita Elec. Indus. Co. v. CMC Magnetics Corp.*, No. C 06-04538 WHA, 2007 WL 219779, at *3 (N.D. Cal. Jan. 29, 2007) (where the parties had "five months of fact discovery" remaining, "[t]rial bifurcation at this stage of the proceedings [was] premature" and "would foreclose the possibility of trying the issues at the same time"); *ACS Commc'ns*, 1995 WL 743726, at *2 ("Since no discovery has taken place, it is difficult to ascertain the complexity of the claims. . . . If it becomes apparent after further discovery that separate trials are more convenient and economical, the Court can bifurcate the patent infringement and antitrust issues at that time.").[12]

The district court's analysis in *Netflix* is on point. In that decision, the court denied a motion to bifurcate and stay discovery on antitrust counterclaims because "[a]llowing both side's cases to go forward now will preserve the option of both being tried together. To rule the other way would foreclose this option." *Netflix*, 2006 WL 2458717, at *10. The court further explained:

> [W]e are a long way from trial now. The immediate task is discovery. By allowing both sides to develop their cases we will be in a better position later to decide the extent to which both cases should be tried to a jury.
>
> . . . It may be that the evidence discovered ultimately justifies handling the trial by chapters. For purposes of pretrial proceedings, however, [plaintiff]'s claims and [defendant's antitrust] counterclaims are to proceed in tandem.

Id.

[12] *See also eBay*, 2000 WL 1863564, at *4 ("If, at the time of the pretrial conference, all of the current claims and counterclaims remain at issue, the court will consider bifurcating the trial to make it more understandable to the fact finder.").

Here, craigslist's motion should be denied for the same reasons. craigslist argues that a single trial on the parties' claims would be too complex, confusing for the jury and prejudicial to craigslist. (Mot. at 6-8.)[13] But a trial date has not even been scheduled in this case, and it is too early to know which of the parties' claims will survive pretrial proceedings and need to be adjudicated at trial. (Indeed, 3taps has filed a motion to dismiss four of craigslist's claims and anticipates filing a motion for summary judgment to dismiss the remainder of those claims.) Given the uncertainty, bifurcation is unwarranted at this juncture. After discovery and pretrial motions, the parties and the Court will have a greater understanding of the claims that will be tried, the relevant evidence and the feasibility of conducting a single trial. Thus, at minimum, the Court should deny craigslist's motion as premature and preserve the opportunity for a single trial. craigslist can seek bifurcation at the pretrial conference, provided its claims still survive.

III. EVEN IF THE COURT WERE TO ORDER BIFURCATION FOR TRIAL, DISCOVERY ON 3TAPS' COUNTERCLAIMS SHOULD NOT BE STAYED

Finally, if the Court were to order separate trials on the parties' claims, it should still deny craigslist's motion to stay discovery on 3taps' counterclaims. Staying discovery on 3taps' counterclaims would be inefficient, inconvenient and potentially prejudicial to 3taps. Indeed, even when courts grant bifurcation, they frequently deny motions to stay discovery because joint discovery: (1) obviates disputes "between the parties about what is and is not related to which claims and thus what discovery is permitted now and what discovery has been stayed"; (2) "facilitates settlement" by "permitting the parties to have the complete picture of all available evidence"; (3) "eliminates the possibility" of prejudice "inuring from interpretation of a stay on discovery";[14] and (4) allows "the two separate trials to be conducted in swifter succession."

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[13] Notably, craigslist's arguments ignore the fact that, even if craigslist's motion were granted, a trial solely on craigslist's claims still would require discovery and presentation regarding several aspects of 3taps' counterclaims. As explained above (*see supra* pp. 10 n.7, 12), 3taps intends to invoke copyright misuse as a defense to craigslist's infringement claims, and antitrust illegality as a defense to craigslist's breach of TOU claim.

[14] For example, a court could deny a discovery request because it did not appear calculated to lead to pertinent information related to the first trial. But, if the request would have led to relevant

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Donnelly Corp. v. Reitter & Shefenacker USA Ltd. P'Ship, No. 1:00-CV-751, 2002 WL 31418042, at *8 (W.D. Mich. Aug. 13, 2002).[15] Further, joint discovery would avoid potential harm to 3taps because, following a stay, "[t]he further passage of time may prejudice the ability of counsel to pin down the recollections of party witnesses." *Intel Corp. v. Via Techs., Inc.*, No. C 99-03062 WHA, 2001 WL 777085, at *7 (N.D. Cal. Mar. 20, 2001).

Moreover, a stay of discovery regarding 3taps' counterclaims would be particularly unwarranted because, as discussed above, these counterclaims will not be mooted by craigslist's claims. As a result, there is no potential efficiency in delaying 3taps' discovery, which necessarily will occur. *See Monsanto Co. v. E.I. du Pont de Nemours & Co.*, No. 4:09CV00686 ERW, 2009 WL 3012584, at *3 (E.D. Mo. Sept. 16, 2009) ("Because these [antitrust] claims cannot be mooted by resolution of the infringement action, allowing discovery to proceed does not increase the potential that the parties will conduct discovery that will ultimately prove unnecessary, and such a course will likely reduce delay in resolving all issues before the Court."); *J2 Global*, 2009 WL 910701, at *4 ("[W]here the Court is not convinced that the resolution of the first set of claims will preclude the necessity of the second trial[,] a stay in discovery may merely delay the expenditure of resources until the future, when the events at issue in the case will be temporally remote.").

CONCLUSION

For the foregoing reasons, 3taps respectfully requests that the Court deny craigslist's motion.

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information, the requesting party would suffer prejudice. *See Donnelly Corp.*, 2002 WL 31418042, at *8.

[15] *See also Drennan v. Md. Cas. Co.*, 366 F. Supp. 2d 1002, 1008 (D. Nev. 2005) ("Joint discovery is more convenient to the parties and would further judicial economy. With joint discovery, the parties will be better informed with regard to settlement efforts. Moreover, any discovery disputes likely will pertain to both causes of action. Finally, joint discovery will expedite resolution of the entire matter by permitting the second trial, if necessary, to commence immediately after the first."); *Ecrix Corp. v. Exabyte Corp.*, 191 F.R.D. 611, 614 (D. Colo. 2000) (denying discovery stay to avoid disputes over what information related to stayed antitrust claims and to allow for quicker resolution of the later antitrust trial); *Dentsply Int'l, Inc. v. New Tech. Co.*, No. 96-272 MMS, 1996 WL 756766, at *6 (D. Del. Dec. 19, 1996) ("[A] stay of discovery on antitrust issues would most likely devolve into a series of time-consuming and expensive discovery disputes as to whether particular discovery is directed at the patent or antitrust claims. Efficiency dictates that discovery on all claims, including the antitrust counterclaims, continue apace.").

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