PERKINS COIE LLP
BOBBIE WILSON (No. 148317)
bwilson@perkinscoie.com
CHRISTOPHER KAO (No. 237716)
ckao@perkinscoie.com
BRIAN P. HENNESSY (No. 226721)
bhennessy@perkinscoie.com
J. PATRICK CORRIGAN (No. 240859)
pcorrigan@perkinscoie.com
3150 Porter Drive
Palo Alto, CA 94304
Telephone: 650.838.4300
Facsimile: 650.838.4350

Attorneys for Plaintiff
craigslist, Inc.

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.

Case No. CV 12-03816 CRB

CRAIGSLIST, INC.'S CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO BIFURCATE AND STAY DEFENDANTS' AMENDED COUNTERCLAIMS

Hearing: March 29, 2013
Time: 10:00 a.m.
Courtroom: 6, 17th Floor
Before: Hon. Charles R. Breyer

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SUMMARY OF ARGUMENT

craigslist, Inc. ("craigslist") respectfully requests that this Court grant its motion to bifurcate and stay Defendant 3Taps, Inc.'s ("3Taps") and Defendant PadMapper, Inc.'s ("PadMapper") antitrust counterclaims pursuant to Rule 42 of the Federal Rules of Civil Procedure. Granting the motion will save substantial time and resources for the Court, the parties, and potential third parties, as the resolution of craigslist's claims is likely to eliminate or at least significantly narrow and simplify Defendants' counterclaims. The savings will be considerable in this case, as Defendants' broad counterclaims will expand and prolong this case dramatically, and in ways wholly unnecessary to the resolution of the underlying issues that prompted it. Granting the motion will also avoid substantial prejudice to craigslist, as Defendants will continue unlawfully scraping craigslist's computers and redistributing scraped content—and encouraging others to do so as well—until craigslist's claims are adjudicated. The appropriate time to bifurcate and stay the antitrust counterclaims is now, before discovery begins and the unnecessary expense and delay involved in litigating Defendants' antitrust claims begin to mount.

INTRODUCTION

As craigslist set forth in its opening brief, because the resolution of its affirmative claims against 3Taps and PadMapper could either moot or at least greatly streamline Defendants' antitrust counterclaims, those claims should be bifurcated and stayed pending resolution of craigslist's claims.

Although Defendants argue in their oppositions that their antitrust counterclaims go well beyond craigslist's claims in this case, and thus would be unaffected by their resolution, Defendants' assertions are belied by the Amended Counterclaims. No matter how Defendants attempt to recast them now, their antitrust counterclaims are all fundamentally premised on their contention that craigslist's underlying claims have no merit because craigslist cannot lawfully protect the data stored in its computers and the content displayed on its website. Whether Defendants can willfully "scrape" data and content from craigslist and redistribute it without authorization (and indeed encourage others to build their own businesses based on it), is at the heart of nearly all of the statutory and common law claims craigslist has asserted, and is the

threshold issue for Defendants' antitrust counterclaims. If this Court determines that craigslist's claims against Defendants have merit and are not a "sham," then Defendants' antitrust claims will necessarily fail, or at a minimum their scope will be greatly reduced. The time and expense spent investigating, analyzing, arguing and adjudicating those claims would be wasted.

Moreover, the waste is likely to be immense. Defendants' antitrust counterclaims raise a myriad of issues and potentially implicate many third parties that are entirely irrelevant to the underlying dispute and will needlessly complicate and prolong the case. As discussed in craigslist's opening brief, antitrust claims are notoriously time-consuming and expensive to litigate, as they require an understanding of product and geographic markets, the parties' and third parties' motives and history of dealing, and hypothetical scenarios of competition and market organization, among other things. Proceeding with the antitrust claims now would greatly expand the scope of discovery in this case, requiring the parties to collect (and this Court to supervise) vast amounts of documents and data and to retain specialized experts and economists to perform detailed company and market analyses, all of which might be completely unnecessary.

Federal Rule of Civil Procedure 42 was designed to avoid this waste. It provides courts the power to bifurcate and stay claims for convenience, economy and to avoid prejudice. Reorganizing this case to litigate and adjudicate craigslist's affirmative claims first, followed, if necessary, by a streamlined and simplified antitrust case, would accomplish all three goals: it would conserve the resources of the parties, the Court and third parties, lead to a faster resolution of the case overall, and avoid substantial prejudice to craigslist. The time to bifurcate and stay the antitrust counterclaims is now, before discovery begins and the substantial savings and efficiency Rule 42 attempts to preserve are lost.

ARGUMENT

I. FOR ECONOMY, EFFICIENCY AND FAIRNESS, THE COURT SHOULD BIFURCATE AND STAY DEFENDANTS' ANTITRUST COUNTERCLAIMS.

Defendants argue, on the one hand, that resolving craigslist's affirmative claims against them would have little, if any, effect on their antitrust counterclaims. At the same time,

Defendants argue that craigslist's claims and the antitrust counterclaims are "highly intertwined" such that bifurcation does not make sense in this case. Defendants are wrong on both counts.

As discussed below, the issues in common between craigslist's claims and the antitrust counterclaims are a reason *to* bifurcate and stay, as they are *threshold issues* for the antitrust claims and could moot or at least greatly simplify and streamline those claims. Moreover, Defendants ignore the complicated and non-overlapping issues raised by their antitrust counterclaims, which go far beyond the issues raised by craigslist's claims and might be completely unnecessary to address.

A. Resolving craigslist's Claims Could Moot, Or At A Minimum Significantly Streamline, the Antitrust Claims.

Defendants agree that craigslist's underlying claims and Defendants' antitrust counterclaims are "highly intertwined." (Defendant 3Taps, Inc.'s Opposition to Craigslist's Motion to Bifurcate and Stay Defendants' Amended Counterclaims ("3taps Opp.") at 9-13; PadMapper, Inc.'s Opposition to Craigslist, Inc.'s Motion to Bifurcate and Stay Defendants' Amended Counterclaims ("PadMapper Opp.") at 6-7.) Indeed, this overlap is the entire point of craigslist's motion to bifurcate. Resolving the common issues could moot or at least streamline and simplify the numerous antitrust issues Defendants have raised.

As an initial matter, Defendants' argument that this Court should not bifurcate any claims unless one set of claims has the potential to *entirely* moot another set of claims is wrong. There is nothing in Rule 42 to support Defendants' proposed rule, and courts regularly bifurcate and stay claims when one set of claims has the potential to simplify, even if not moot entirely, another set of claims. That is particularly true when the second set of claims are as time- and resource-intensive as antitrust claims. *See, e.g., Masimo Corp. v. Philips Elecs. N. Am. Corp.*, Civ. Action No. 09-80-JJF-MPT, 2010 WL 925864, at *2-3 (D. Del. Mar. 11, 2010) (bifurcating and staying antitrust counterclaims because, in part, "there is a possibility that a trial on [the] patent claims will *simplify* some of [the] antitrust counterclaims") (emphasis added); *Monsanto Co. v. E.I. du Pont De Nemours & Co.*, No. 4:09CV00686 ERW, 2009 WL 3012584, at *2-3 (E.D. Mo. Sept. 16, 2009) (bifurcating and staying all antitrust counterclaims other than those "that will not

potentially be eliminated *or narrowed* by resolution of Plaintiffs' patent claims") (emphasis added); *Hal Leonard Publ'g Corp. v. Future Generations, Inc.*, No. 93 Civ 5290 (JSM), 1994 WL 163987, at *1 (S.D.N.Y. Apr. 22, 1994) (staying discovery on antitrust claims because "a separate trial on [one set of issues] will *streamline* the issues for the second trial") (emphasis added).

Just as importantly, as craigslist argued in its opening brief, the issues raised by craigslist here *do* have the potential (and craigslist believes are likely) to moot Defendants' antitrust counterclaims. At the broadest level, to assert claims for antitrust violations, Defendants must prove injury-in-fact and an antitrust injury. *See, e.g., In re Online DVD Rental Antitrust Litigation*, No. M 90-2029 PJH, 2011 WL 5883772, at *5 (N.D. Cal. Nov. 23, 2011), citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see also Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 371 (9th Cir. 2003). If this Court affirms craigslist's claims, Defendants' business of scraping craigslist content, redistributing it, and encouraging others to build businesses based on that content is unlawful. And if their business is unlawful, Defendants have suffered no injury, have no right to recover any alleged damages, and have no standing to assert their antitrust claims. *See, e.g., Datel Holdings LTD. v. Microsoft Corp.*, No. C-09-05535 EDL, 2010 WL 3910344, at *4 (N.D. Cal. Oct. 4, 2010) (observing that "to the extent that litigation of Defendant's . . . claim reveals that Plaintiffs' memory cards are unlawful circumvention devices, [Ninth Circuit case law] may bar Plaintiffs' antitrust claims at least as to the memory cards"); *see also Mischalski v. Ford Motor Co.*, 935 F. Supp. 203, 205 (E.D.N.Y. 1996) (noting in the tort and contracts context the "widely recognized principle that a person should not be permitted to take advantage of his or her own wrongdoing by predicating a legal or equitable claim on the person's own fraudulent, immoral or illegal conduct").

Further, each category of conduct Defendants allege as the basis for their antitrust counterclaims has the potential to be mooted.

First, Defendants allege that craigslist has threatened and filed lawsuits, including this one, based on claims that are objectively baseless. (*See, e.g.*, Defendant 3Taps, Inc.'s First Amended Counterclaim ("3Taps FAC") ¶¶ 106-118; PadMapper, Inc.'s First Amended Counterclaim ("PadMapper FAC") ¶¶ 36-41.) If craigslist prevails on its claims, Defendants'

allegation that the suit is a sham is moot. *USS-POSCO Indus. v. Contra Costa Cnty. Building & Constr. Trades Council*, 31 F.3d 800, 810-11 (9th Cir. 1994). Without any reasoning, Defendant 3Taps argues that its claim of "serial sham litigation" would survive even if craigslist prevails on its underlying claims. (3Taps Opp. at 7-8.) Even if that were true, however, resolving craigslist's claims would greatly simplify the serial sham litigation claim, as courts look to the dispositions and analyses of the claims that have been brought in determining whether a series of lawsuits was a sham. *See, e.g., Kaiser Found. Health Plan, Inc. v. Abbott Lab., Inc.*, 552 F.3d 1033, 1046-47 (9th Cir. 2009) (dismissing sham serial litigation claim after reviewing the outcomes and courts' analyses of the subject litigation); *see also Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-05780 JW, 2010 WL 3291750, at *14 (N.D. Cal. Jul. 20, 2010) (dismissing defendants' allegation "that Facebook maintained monopoly power by threatening potential new entrants to the social networking market with baseless intellectual property lawsuits" on the ground that "[i]f Facebook has the right to manage access to and use of its website, then there can be nothing anticompetitive about taking legal action to enforce that right"). This is only logical. If craigslist's suit against Defendants is meritorious, it stands to reason that any similar lawsuits against other Defendants would likewise be meritorious.

Second, Defendants allege that craigslist has asserted copyrights over its content without legal basis and without standing. (*See, e.g.,* 3Taps FAC ¶¶ 119-123; PadMapper FAC ¶¶ 42-45.) They argue that these counterclaims are inseparable from their defense of copyright misuse, and thus the counterclaims must be tried in tandem with craigslist's claims. (*See, e.g.,* PadMapper Opp. at 7.) Defendants have it exactly backwards. The fact that the same allegation is made for both sets of claims is a reason to bifurcate the claims, because a decision on one will resolve the other. Whether craigslist owns copyrights in its content is put directly at issue by craigslist's claims and the asserted defenses. If craigslist prevails, Defendants' allegation that craigslist misuses the copyright laws will be moot, just like their claims of sham litigation. *See Arista Records, Inc. v. Flea World, Inc.*, 356 F. Supp. 2d 411, 428 (D.N.J. 2005) ("[T]he fact of enforcing a valid copyright, without more, simply cannot constitute copyright misuse.").

Third, Defendants allege that craigslist's business practices, such as its terms of use, restrictions on search engine caches, and attempts to prevent "scraping" of its content, are anticompetitive and have no legitimate business purpose. (*See, e.g.*, 3Taps FAC ¶¶ 124-152; PadMapper FAC ¶¶ 46-56.) However, if this Court determines that craigslist's claims against Defendants are valid, and that craigslist can protect its website from scrapers like 3Taps—through its Terms of Use or by other means—then Defendants' counterclaims based on allegedly improper business practices will similarly be mooted.

Finally, Defendants argue that even if all of the above were true, their claims would still survive because even lawful conduct can be the basis for antitrust liability, if it is part of an overall scheme that is deemed unlawful. (*See* 3Taps Opp. at 8; PadMapper Opp. at 8-9.) For the reasons described above, craigslist disagrees that Defendants' counterclaims would survive a decision in craigslist's favor on craigslist's claims. But even if Defendants were correct, resolving craigslist's claims first would at a minimum clarify and simplify Defendants' allegation of an overall scheme. After all, "if all [a court is] shown is a number of perfectly legal acts, it becomes much more difficult to find overall wrongdoing." *City of Anaheim v. So. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992). Moreover, if simply alleging an overall scheme makes bifurcating the issues improper, Rule 42 would be obsolete in antitrust cases.

This interplay between craigslist's affirmative claims and the Defendants' antitrust counterclaims sets this case apart from *eBay, Inc. v. Bidder's Edge, Inc.*, No. C-99-21200 RMW, 2000 WL 1863564 (N.D. Cal. Jul. 25, 2000), cited by Defendants. In that case, Defendants' antitrust claims extended beyond the conduct in question on the underlying claims. For example, the defendant in that case based its antitrust counterclaims in part on eBay's alleged interference with an advertising contract entered into by the defendant and a third party, Krause Publications, Inc., the publisher of "eBay Magazine." *Id.* at *2-*3. In contrast, in this case, all of Defendants' antitrust claims could be mooted or at least narrowed and simplified by a decision on the merits of craigslist's claims, as the antitrust counterclaims are all ultimately based on craigslist's efforts to protect its data and content from scrapers like 3Taps. For that reason, this Court should bifurcate and stay the antitrust claims until the threshold questions are answered. *See, e.g., Chip-Mender,*

Inc. v. Sherwin-Williams Co., No. C 05-3465 PJH, 2006 WL 13058, at *13 (N.D. Cal. Jan. 3, 2006) (bifurcating and staying antitrust claims where "[p]roceeding on the antitrust claims simultaneously with the patent claims may delay resolution of the case by increasing its complexity, whereas many issues will likely be mooted by addressing the patent claims first").

B. Defendants' Antitrust Counterclaims Will Expand And Prolong The Case Dramatically And In Ways Irrelevant To craigslist's Claims.

As discussed above, all parties agree there is overlap between craigslist's claims and the antitrust counterclaims. Indeed, that is why craigslist is seeking to bifurcate the claims—because the core issues relevant to both sets of claims are overlapping.

Defendants ignore, however, that the antitrust claims raise numerous issues that are *not* overlapping and would expand and prolong the litigation dramatically. For example, litigating and adjudicating Defendants' antitrust claims requires discovery, analysis, presentation and adjudication of at least the following issues, all of which are irrelevant to craigslist's claims:

- What are the relevant product markets?
- What are the relevant geographic markets?
- How are those product and geographic markets composed—past, present and future?
- What are their barriers to entry?
- Is there the ability to exclude others?
- Is there the ability to raise prices?
- Are there substitute products or services?
- Why have other companies allegedly left the relevant markets?
- Why have other companies allegedly not entered the relevant markets?
- Is there cross-elasticity of demand in the relevant products or services?
- What are the pro-competitive justifications for various practices in the relevant markets?
- Have Defendants suffered a cognizable antitrust injury?

This list is not intended to be exhaustive. It is intended simply to illustrate, using the allegations raised in the pleadings, how the antitrust claims expand the scope and complexity of this case.

Not only is the list of issues in the antitrust column long, these issues are among the most complicated and resource-intensive to litigate. *See, e.g., Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 317 (7th Cir. 2012) ("Antitrust suits are notoriously costly."); *Mayor & City Council of Baltimore v. Citigroup, Inc.*, _ F.3d _, Nos. 10-0722-CV(L), 10-0867-CV(CON), 2013 WL 791397, at *5 (2d Cir. Mar. 5, 2013) (expressing concern over "propelling defendants into expensive antitrust discovery"); *Am. Steel Erectors, Inc. v Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68, 77, n.7 (1st Cir. 2008) (observing that "antitrust suits ordinarily entail massive discovery and are expensive to defend"); *Carlisle Corp. v. Hayes*, 635 F. Supp. 962, 967-68 (S.D. Cal. 1986) (observing the "extensive and protracted discovery inherent in trial of [] antitrust issues"); Manual for Complex Litigation (Fourth) § 30 (observing that antitrust cases involve "voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money"), cited in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 905-06 (9th Cir. 2008).

To take just one example, Defendants have alleged, collectively, three relevant product submarkets and an undisclosed number of geographic markets corresponding to every local market for which craigslist posts advertisements. (*See, e.g.,* 3Taps FAC ¶¶ 157-213; PadMapper FAC ¶¶ 9-35.) As a result, the antitrust claims raised in this suit could require defining (with the assistance of expert economists), analyzing, and presenting and weighing evidence relating to hundreds of separate markets. Further, Defendants' allegations potentially implicate many third parties, including companies that currently occupy the relevant markets (*see, e.g.,* 3Taps FAC ¶ 11, 95-104, 107, 310), companies that Defendants allege have left the relevant markets (*see, e.g.,* 3Taps FAC ¶ 118, 123, 203, 227), companies that Defendants allege would otherwise have entered the relevant markets (were it not for craigslist's allegedly unlawful conduct) (*see, e.g.,* 3Taps FAC ¶ 61, 79, 85, 118, 120-123, 167, 189, 203, 215, 238, 310), and companies Defendants allege are benchmarks for their own valuations (*see, e.g.,* 3Taps FAC ¶¶ 228, 229). These third

parties may be the subject of extensive discovery, adding substantial expense to the parties as well as placing a substantial burden on this Court and those third parties.

Given the disproportionate burden the antitrust claims are likely to place on the parties, this Court and third parties, those claims should be bifurcated and stayed pending a resolution of craigslist's claims, which are likely to moot or at least narrow the antitrust claims, as explained above.

C. The Balance of Potential Prejudice Weighs Heavily in Favor of Bifurcation.

Rule 42 is also intended to avoid prejudice to the parties, and here the risk of prejudice from litigating the claims in tandem is far greater than the risk of prejudice from litigating them sequentially. Collectively, Defendants cite three sources of prejudice from a bifurcation and stay because: (1) witnesses' memories may fade; (2) Defendants will incur additional expense; and (3) this Court might improperly deny a discovery request that appeared not to be calculated to lead to relevant evidence related to the first trial, but during discovery in the second trial is shown to have led to evidence relevant to the first. (3Taps Opp. at 15; PadMapper Opp. at 5-6.) None of these arguments has merit.

First, the risk of witnesses' memories fading is remote, at best. Both Defendants rely on *Intel Corp. v. Via Technologies, Inc.*, No. C 99-03062 WHA, 2001 WL 777085 (N.D. Cal. Mar. 20, 2001), for their argument that staying the case would "prejudice the ability of counsel to pin down the recollections of party witnesses." *Id*. at *7. In that case, however, the party opposing a stay identified a key witness who "could 'not recall' whether he had intended to defraud the PTO when he withheld the manual." *Id*. Here, neither Defendant has pointed to any indications of memory lapses. And for good reason. Given that Defendants' allegations relate to conduct that allegedly occurred very recently (sometime after 2010, according to 3Taps, *see* 3Taps Opp. at 1), the risk of memories fading is minimal.

Second, Defendants' complaint that they will incur greater expense is also not a reason to deny the motion. For all the reasons discussed above and in craigslist's opening brief, the resources and time required to litigate and adjudicate the claims together will be far greater than if craigslist's claims are resolved first.

Third, Plaintiffs' convoluted concern about incorrect discovery orders is beside the point. Parties must litigate and courts must decide the proper bounds of discovery in every case, and there is always the risk that relevant evidence lies in unexpected places, and that orders limiting discovery may foreclose that evidence. The fact that discovery in the second case could bring to light evidence after the fact does not mean that it was incorrect to bifurcate the claims in the first place, or that the discovery orders were wrong at the time they were entered.

In contrast to the minimal and speculative risk of prejudice to Defendants, craigslist faces real and substantial prejudice if the antitrust claims are not bifurcated and stayed. Defendants continue to build their businesses on the back of craigslist's hard work and investment. Defendants' antitrust counterclaims will delay any resolution of craigslist's affirmative claims, and thus its ability to enforce its rights and protect its data, likely by several years. Meanwhile, Defendants will continue to use craigslist's content and marks in operating their businesses, and to encourage others to begin unlawfully scraping data from craigslist or displaying scraped content on their websites. This conduct, if continued unabated and allowed to grow, directly harms craigslist. Its computers and processing capabilities are harmed by the incessant scraping, its business is damaged by the proliferation of businesses using content illegally obtained from craigslist, and its community of users is aggravated by the unchecked redistribution of their postings without their permission.

There is also a risk that litigating craigslist's underlying claims and antitrust claims together will cause confusion. Intellectual property law and antitrust law are each complicated, and the evidence collected and presented, particularly relating to the antitrust claims, is likely to be voluminous. As craigslist explained in its opening brief, the risk of juror confusion is significant. *See, e.g., Seiko Epson Corp. v. Glory South Software Mfg., Inc.,* No. 06-CV-477-BR, 2010 WL 256505, at *5 (D. Or. Jan. 19, 2010) (bifurcating antitrust counterclaims because "[o]n balance . . . a jury trial of this patent case will be challenging enough without the simultaneous inclusion of antitrust issues"*); Donnelly Corp. v. Reitter & Schefenacher USA Ltd. P'ship*, No. 1:00-CV-751, 2002 WL 31418042, at *6 (W.D. Mich. Aug. 13, 2002) ("A trial requiring the determination of patent validity, infringement, and antitrust violations places a heavy burden on

any jury."). Defendants claim that any risk of confusion can be eliminated through jury instructions, but as courts have noted, the effectiveness of jury instructions is uncertain, at best. *See, e.g., Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.") (citation omitted). Perhaps the risk would be less if the parties were committed to keeping the issues distinct. But as 3Taps' preliminary statement makes clear, Defendants intend to use their misleading narrative of craigslist's role in the marketplace to taint craigslist's rights.

The significant risk of prejudice to craigslist distinguishes this case from *Netflix, Inc. v. Blockbuster, Inc.*, No. C 06-02361 WHA, 2006 WL 2458717 (N.D. Cal. Aug. 22, 2006), relied on by Defendants. In that case, the plaintiff could not demonstrate any prejudice from litigating the claims together. *Id*. at *10. In contrast, here the risk of prejudice to craigslist is real and substantial, and thus the antitrust claims should be bifurcated and stayed.

II. CRAIGSLIST'S MOTION IS NOT PREMATURE; DEFENDANTS' ANTITRUST COUNTERCLAIMS SHOULD BE BIFURCATED AND STAYED *NOW*, BEFORE DISCOVERY.

craigslist's motion to bifurcate is not premature, as Defendants contend. The key juncture in the cost curve of any case is the start of discovery. Once discovery begins, including document production, deposition preparation, and expert analysis, costs begin to skyrocket. Indeed, studies have indicated that discovery can account for as much as 90% of the litigation costs in cases where it is actively used. *See* Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000), cited in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007). The heavy toll of discovery is particularly true in antitrust cases, which require layers of additional investigation, analysis, argument and adjudication.

For that reason, courts have found that when claims should be bifurcated and stayed, the start of discovery is the proper time to do so. *See, e.g., Masimo*, 2010 WL 925864, at *3 (bifurcating antitrust counterclaims and staying antitrust discovery because, among other reasons, "the court is cognizant of the need to prevent the parties from conducting discovery that will

ultimately prove unnecessary"); *Global Candle Gallery Licensing Co. v. Nabozny*, No. 8:08-cv-2532, 2009 WL 3852794, at *4 (M.D. Fla. Nov. 18, 2009) (bifurcating antitrust counterclaims and staying antitrust discovery because "[a]ntitrust discovery is typically extensive, expensive, and requires the parties to hire special experts"); *Square D Co. v. E.I. Elecs., Inc.*, No. 06-C-5079, 2009 WL 136177, at *2-3 (N.D. Ill. Jan. 15, 2009) (bifurcating antitrust counterclaims and staying antitrust discovery because, among other reasons, "discovery in *any* antitrust case can quickly become enormously expensive and burdensome to defendants") (internal quotations and citation omitted); *Polycom, Inc. v. Codian, Ltd.*, No. 2:05-CV-520 (DF), 2007 WL 7658922, at *3 (E.D. Tex. Apr. 23, 2007) (bifurcating antitrust counterclaims and staying antitrust discovery because "discovery will be more streamlined and will be less burdensome after completion of the scheduled patent infringement trial").

Nonetheless, Defendants argue that a decision on whether to bifurcate and stay the antitrust claims should be delayed because discovery is needed to understand the claims and determine whether they should be bifurcated. Although that may be true in some cases, it is not true here. The claims, defenses and counterclaims are spelled out in nearly 200 pages of pleadings, and the areas of overlap and non-overlap are well-known, as is indicated by Defendants' detailed descriptions of the issues in their opposition briefs. No discovery is needed to determine, for instance, that issues of market composition, share, and dominance are completely irrelevant to craigslist's claims.

Defendants also argue that bifurcation and stay will impede settlement. The explanation provided in the cases cited by Defendants is that the parties learn through discovery the facts underlying their claims, and therefore are better able to assess their risk. Again, that may be true in other cases, but there is a bigger hurdle to settlement here. The question looming over this case is not a *factual* question, but a *legal* one: can Defendants "scrape" data and content from craigslist and redistribute it without authorization? Litigating that question as quickly as possible is the most effective way to resolve the dispute between the parties.

CONCLUSION

Rule 42 provides courts with a tool to conserve resources and avoid prejudice, and this case illustrates the circumstances in which it can be most effective. The claims that prompted this case have the potential to eliminate, or at least narrow and simplify, Defendants' broad antitrust counterclaims, which otherwise will expand this case dramatically in ways wholly unnecessary to resolving craigslist's claims and highly prejudicial to craigslist. For reasons of economy, efficiency, and fairness, craigslist respectfully requests that this Court grant its motion to bifurcate and stay Defendants' antitrust counterclaims.

March 15, 2013

PERKINS COIE LLP

By: /s/ Bobbie Wilson
Bobbie Wilson (SBN 148317)
BWilson@perkinscoie.com

Attorneys for Plaintiff
craigslist, Inc.

I, Brian Hennessy, hereby attest, pursuant to N.D. Cal. Local Rule 5-1(i)(3), that the concurrence to the filing of this document has been obtained from each signatory hereto.

March 15, 2013

PERKINS COIE LLP

By: /s/ Brian Hennessy
Brian Hennessy (SBN 226721)
BHennessy@perkinscoie.com

Attorneys for Plaintiff
craigslist, Inc.