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10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13 CRAIGSLIST, INC., a Delaware
 corporation,

14 Plaintiff,

15 v.

16 3TAPS, INC., a Delaware corporation;
 17 PADMAPPER, INC., a Delaware
 corporation; DISCOVER HOME
 18 NETWORK, Inc., a Delaware corporation
 d/b/a LOVELY; BRIAN R. NIESSEN, an
 19 individual, and Does 1 through 25,
 inclusive,

20 Defendants.
 21

Case No. CV 12-03816 CRB

**CRAIGSLIST INC.'S NOTICE OF MOTION
 AND MOTION TO BIFURCATE AND STAY
 DEFENDANTS' AMENDED
 COUNTERCLAIMS AND MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

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

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NOTICE OF MOTION AND MOTION

TO THE COURT, ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on March 29, 2013, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the United States District Courthouse, Courtroom 6, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Charles R. Breyer Plaintiff craigslist, Inc. (“craigslist”) will, and hereby does, move the Court to bifurcate and stay 3Taps, Inc.’s (“3Taps”) and PadMapper, Inc.’s (“PadMapper”) (collectively, “Defendants”), amended counterclaims, which are premised on craigslist’s alleged anticompetitive conduct in violation of the antitrust laws. Defendants’ amended counterclaims are referred to collectively herein as “antitrust counterclaims.”

Proceeding with the antitrust counterclaims concurrently with craigslist’s claims would add immense expense, complexity and delay to the case. Yet all of this potential expense and effort would be avoided if craigslist succeeds on its claims against Defendants, because success on those claims would render the antitrust issues in this case moot altogether, or substantially narrow their scope. Further, concurrent litigation raises the risk of juror confusion and prejudice to craigslist. To preserve judicial economy, promote efficiency and avoid prejudice, confusion, undue expense and delay, craigslist respectfully requests a bifurcation and stay of Defendants’ antitrust counterclaims. This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, any reply memorandum, the pleadings and files in this action, and such other matters as may be presented at or before the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

1 craigslist commenced this action to stop Defendants from misappropriating content from
2 craigslist's website and redistributing that content without authorization. Indeed, Defendant
3 3Taps has boasted publicly that it mass harvests tens of millions of postings from craigslist in
4 "real time," which it then makes available to whomever and on whatever terms 3Taps chooses.
5 3Taps' customers, like Defendants PadMapper and Discover Home Network, Inc. d/b/a Lovely
6 ("Lovely"), and others, use this stolen content to populate their own websites. PadMapper and
7 Lovely, for example, each allow users to search for rental apartments, but the listings on their
8 website are largely misappropriated from craigslist. At its core, therefore, this case is about
9 Defendants' blatant and willful violation of craigslist's rights, including craigslist's intellectual
10 property rights.
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12
13 In response to craigslist's complaint, Defendants have each filed counterclaims asserting
14 various antitrust violations, all of which are completely baseless in craigslist's view. More
15 importantly, these counterclaims are premised almost exclusively on craigslist's protected *Noerr-*
16 *Pennington* activity and its rightful protection of its rights. Specifically, Defendants' principal
17 allegation in their counterclaims is that craigslist is improperly asserting and enforcing its rights
18 against them, thereby denying them access to craigslist's content in violation of the antitrust laws.
19 If craigslist establishes that its rights have been violated by Defendants, Defendants' antitrust
20 counterclaims, which are premised on craigslist's alleged inappropriate or baseless assertion of
21 those rights, would be rendered moot or, at a minimum, substantially limited.

22 Although the underlying conduct central to both craigslist's claims and Defendants'
23 antitrust counterclaims is the same, the legal theories, requisite discovery and ultimate evidentiary
24 support for the antitrust counterclaims are vastly different and more expansive in substance and
25 scope than what is necessary for craigslist's claims. Accordingly, Defendants' antitrust
26 counterclaims add immense expense, complexity and delay, all of which will be entirely
27 unnecessary after craigslist establishes that its claims against Defendants are well-founded. It is
28 for these reasons that courts commonly bifurcate and stay antitrust claims in circumstances like

1 these, and the Court should likewise exercise its discretion and do so here. To preserve judicial
2 economy, promote efficiency and avoid undue prejudice, expense and delay for all parties,
3 craigslist's motion to bifurcate and stay should be granted.

4 **PROCEDURAL BACKGROUND**

5 craigslist filed its Complaint on July 20, 2012, bringing claims against Defendants for
6 copyright infringement, contributory copyright infringement, federal trademark infringement,
7 federal false designation of origin, federal dilution, federal cyberpiracy, California trademark
8 infringement, common law trademark infringement, California unfair competition, and breach of
9 contract. Dkt. No. 1. craigslist amended its Complaint on November 20, 2012, adding Brian
10 Niessen and Discover Home Network, Inc. d/b/a Lovely as defendants and bringing additional
11 claims against all defendants for, among other things, violations of the Computer Fraud and
12 Abuse Act, the California Comprehensive Computer Data Access and Fraud Act, trespass, and
13 misappropriation. Dkt. No. 41.

14 3Taps filed its Answer and Counterclaims on September 24, 2012 (Dkt. No. 20), and
15 amended its Counterclaims on December 21, 2012 (Dkt. No. 47). In its amended counterclaims,
16 3Taps asserts seven counts against craigslist for monopolization and attempted monopolization
17 under the Sherman Act, § 2, unlawful agreements in restraint of trade under the Sherman Act, § 1,
18 California unfair competition, and interference with economic advantage (collectively, "3Taps'
19 antitrust counterclaims"). Dkt. No. 47. Central to each of 3Taps' antitrust counterclaims are
20 assertions that 3Taps should have unfettered and free access to craigslist's protected content, and
21 that craigslist's refusal to allow this access is anticompetitive.

22 Specifically, 3Taps now admits in its antitrust counterclaims that it scrapes content from
23 craigslist's website and indexes and categorizes this content into a database, which it makes
24 available to its customers. *Id.* ¶¶ 6, 8, 12, 14 (7:6-7), 92, 115, 176 ("Thus, since August 2012,
25 3taps also has used third parties that scrape data from the craigslist website to obtain the content
26 that 3taps needs to create indexed data for downstream specialized search engines."). 3Taps
27 asserts, however, that craigslist's efforts—by requesting that Defendants cease and desist their
28 conduct and by bringing this alleged "sham" lawsuit—to prevent 3Taps and others from

1 misappropriating and redistributing craigslist's content is improper. *Id.* ¶¶ 14, 117-18, 179-80.
 2 3Taps' claimed injuries include loss of capital investments, lost business opportunities, lost users
 3 and partners, and reduced valuation of its businesses. *Id.* ¶¶ 226-30.

4 PadMapper filed its Answer to Complaint and Counterclaims on October 30, 2012 (Dkt.
 5 No. 32), and amended its Counterclaims on December 21, 2012 (Dkt. No. 44). PadMapper's
 6 counterclaims largely mimic 3Taps' antitrust counterclaims. PadMapper asserts four claims for
 7 relief against craigslist for, among other things, monopolization and attempted monopolization
 8 under the Sherman Act, § 2, and California unfair competition (collectively, "PadMapper's
 9 antitrust counterclaims"). Dkt No. 44. PadMapper's antitrust counterclaims are premised on a
 10 subset of the allegations in 3Taps' antitrust counterclaims. *Id.* ¶¶ 36-56.

11 ARGUMENT

12 I. THE COURT SHOULD BIFURCATE AND STAY DEFENDANTS' ANTITRUST 13 COUNTERCLAIMS PENDING RESOLUTION OF CRAIGSLIST'S CLAIMS

14 Resolution of craigslist's claims will either render moot, or significantly narrow,
 15 Defendants' antitrust counterclaims, which involve separate and complex legal issues that will
 16 require significantly more time, expense and discovery to litigate. Therefore, bifurcating and
 17 staying the antitrust counterclaims will promote judicial economy, expedite the litigation, reduce
 18 the costs to the parties and the Court, and reduce juror confusion and prejudice.

19 A. Legal Standards for Bifurcation

20 Pursuant to Federal Rule of Civil Procedure ("Rule") 42(b), the Court may bifurcate entire
 21 claims, counterclaims, or any number of individual issues for "convenience, to avoid prejudice, or
 22 to expedite and economize." Bifurcation may be appropriate based on a showing of any one of
 23 these factors. *Gen. Patent Corp. Int'l v. Hayes Microcomputer Prods., Inc.*, No. SA CV 97-429-
 24 GLT ANX, 1997 WL 770874, at *2 (C.D. Cal. Oct. 20, 1997). "It is implicit that the court also
 25 [has] power to limit discovery to the segregated issues. One of the purposes of Rule 42(b) is to
 26 permit deferral of costly and possibly unnecessary discovery proceedings pending resolution of
 27 potentially dispositive preliminary issues." *Ellingson Timber Co. v. Great N. Ry. Co.*, 424 F.2d
 28 497, 499 (9th Cir. 1970) (internal citation omitted). The decision to bifurcate and the manner in

1 which it is accomplished lies in the sound discretion of the district court and will not be disturbed
 2 on appeal absent an abuse of that discretion. *Airlift Int'l, Inc. v. McDonnell Douglas Corp.*, 685
 3 F.2d 267, 269 (9th Cir. 1982), (limited on other grounds by *Matter of McLinn*, 739 F.2d 1395 (9th
 4 Cir. 1984).

5 **B. Bifurcating and Staying Defendants' Antitrust Counterclaims Will Best Serve**
 6 **Judicial Economy, Prevent Delay and Undue Expenditures, and Avoid**
 7 **Prejudice to All**

8 **1. Defendants' antitrust counterclaims will be moot or significantly**
 9 **narrowed if craigslist prevails on its claims.**

10 The crux of Defendants' antitrust counterclaims in this case is that craigslist is improperly
 11 asserting its rights in an effort to block Defendants from accessing craigslist's website, scraping
 12 all the content there, and then redistributing that content to third parties. Whether labeled as
 13 "sham lawsuits," "sham cease and desist letters," "improperly restrictive terms of use," etc., each
 14 of Defendants' claims are based on this same fundamental argument. If craigslist prevails on its
 15 claims here, however, they can hardly be considered objectively baseless or inappropriately
 16 asserted. Accordingly, Defendants' antitrust counterclaims will be obviated or at least
 17 significantly narrowed by resolution of craigslist's claims against Defendants.

18 In similar situations, courts commonly bifurcate and stay antitrust counterclaims where—
 19 as here—resolution of the plaintiff's claims will obviate the antitrust claims. *See, e.g., Chip-*
 20 *Mender, Inc. v. Sherwin-Williams Co.*, No. C 05-3465 PJH, 2006 WL 13058, at *13-14 (N.D.
 21 Cal. Jan. 3, 2006) (at the motion to dismiss stage, bifurcating and staying discovery on antitrust
 22 claims because they might be mooted); *Fujitsu Ltd. v. Nanya Tech. Corp.*, Nos. C 06-6613 CW, C
 23 07-3672 CW, 2007 WL 2220912, at *1-2 (N.D. Cal. Aug. 1, 2007) (bifurcating and staying
 24 antitrust counterclaims because doing so "may dispose of the antitrust counterclaims altogether");
 25 *Carlisle Corp. v. Hayes*, 635 F. Supp. 962, 967-68 (S.D. Cal. 1986) (bifurcating and staying
 26 discovery on antitrust and unfair competition counterclaims because they might be mooted);
 27 *Pharmacia, AB v. Hybritech, Inc.*, Civ. No. 84-669-T(CM), 1984 WL 1479, at *1 (S.D. Cal. Oct.
 28 19, 1984) (bifurcating trial and staying discovery of antitrust counterclaims because trial of the
 plaintiff's patent claims may "obviate" trial on the antitrust counterclaims); *see also Masimo*

1 *Corp. v. Philips Elecs. N. Am. Corp.*, Civ. Action No. 09-80-JJF-MPT, 2010 WL 925864, at *3
2 (D. Del. Mar 11, 2010) (bifurcating and staying discovery and trial of antitrust counterclaims
3 because, inter alia, “there [was] a possibility that a trial on [Plaintiff’s] patent claims [would]
4 potentially eliminate or simplify [Defendant’s] antitrust counterclaims”); *Baxter Int’l, Inc. v. Cobe*
5 *Lab, Inc.*, No. 89 C 9460, 1992 WL 77665, at *2, 4 (N.D. Ill. Apr. 7, 1992) (bifurcating and
6 staying discovery and trial of antitrust counterclaim because of common issues, prejudice to
7 plaintiff in defending claims simultaneously, the possibility of jury burden and confusion, and the
8 possibility that antitrust counterclaim issues could be rendered moot).

9 This Court’s decision in *ASM America, Inc. v. Genus, Inc.*, No. 01-2190 EDL, 2002 WL
10 24444 (N.D. Cal. Jan. 9, 2002), is instructive. In that case, plaintiff ASM brought patent
11 infringement claims against defendant Genus, which in turn asserted antitrust counterclaims for
12 sham litigation, predatory pricing, attempted monopolization based on patent accumulation, and
13 fraudulently procured patents. *Id.* at *6. At the motion to dismiss stage of the case, ASM moved
14 to bifurcate and stay Genus’ antitrust counterclaims until the resolution of ASM’s patent claims.
15 *Id.* at *5. The Court granted the motion, ruling that a stay would promote an efficient resolution
16 of the case, which outweighed any prejudice to Genus. *Id.* at *6-7.

17 Noting that it “is a common practice in federal courts to stay antitrust counterclaims until
18 after” a trial on the patents, the Court agreed that resolution of the patent claims would
19 “substantially narrow or eliminate the antitrust claims.” *Id.* at *6 (citing cases). In contrast,
20 Genus’ alleged “irreparable harm r[a]ng somewhat hollow, however, in light of its failure to bring
21 its antitrust claims against ASM independently.” *Id.* Given “the wide swath of non-overlapping
22 discovery on the antitrust claims that will be required,” “proceeding on the antitrust claims
23 simultaneously with the patent claims may well delay resolution of the case by increasing its
24 complexity exponentially.” *Id.* at *7. As a result, the Court ruled that the benefit of “judicial
25 economy certain to result from a stay” outweighed any prejudice. *Id.*

26 The same is true here. Bifurcating and staying discovery of Defendants’ antitrust
27 counterclaims is warranted because these counterclaims will be rendered moot upon resolution of
28 craigslist’s claims. *Gen. Patent Corp. Int’l*, 1997 WL 770874, at *1 (bifurcating and staying

1 certain patent claims in favor of proceeding on other, potentially dispositive patent claims and
 2 noting that “[b]ifurcation is particularly appropriate when resolution of a single claim or issue
 3 could be dispositive of the entire case.”) (quoting *Cook v. United Serv. Auto. Ass’n*, 169 F.R.D.
 4 359 (D. Nev. 1996)). The Court can avoid the risk of wasted effort by addressing craigslist’s
 5 claims first. “[T]here is simply no point in burdening the Court or the parties unless and until it
 6 becomes clear that the antitrust issues will go forward.” *Square D Co. v. E.I. Elecs., Inc.*, No. 06
 7 C 5079, 2009 WL 136177, at *3 (N.D. Ill. Jan. 15, 2009) (bifurcating and staying antitrust
 8 counterclaims from patent claims). On this basis alone, the Court should bifurcate and stay
 9 Defendants’ antitrust counterclaims.

10 **2. Defendants’ antitrust counterclaims increase the legal and factual**
 11 **complexity of the case and will inevitably delay the proceedings.**

12 Additionally, the Court should bifurcate and stay Defendants’ antitrust counterclaims
 13 because these claims raise many additional complex legal and factual issues that have no
 14 relevance to the substantive claims brought by craigslist at the root of this action. Although the
 15 core conduct at issue in craigslist’s claims and Defendants’ antitrust counterclaims is the same,
 16 the antitrust counterclaims necessarily involve entirely distinct legal issues, demand much
 17 broader discovery, and would entail a much longer trial.

18 The antitrust counterclaims and craigslist’s claims involve separate, complex bodies of
 19 law. See *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995) (affirming
 20 bifurcation of antitrust counterclaims and noting that antitrust counterclaims and copyright claims
 21 were “discrete” and involved “separate, complex bodies of law”). Consequently, the
 22 documentary proof and fact and expert witness testimony needed to support these claims are
 23 vastly different, with the antitrust counterclaims increasing the time and expense of discovery far
 24 in excess of that needed to litigate craigslist’s claims. See *Bell Atl. Corp. v. Twombly*, 550 U.S.
 25 544, 558-59 (2007) (citing numerous sources for the “unusually high cost of discovery in antitrust
 26 cases” and the “extensive scope of discovery in antitrust cases”); *Cascade Health Solutions v.*
 27 *PeaceHealth*, 515 F.3d 883, 905-06 (9th Cir. 2008) (“Antitrust litigation can . . . involve
 28 voluminous documentary and testimonial evidence, extensive discovery, complicated legal,

1 factual, and technical (particularly economic) questions, numerous parties and attorneys, and
2 substantial sums of money Antitrust trials usually are long, and there often are controversies
3 over settlements and attorney fees.”) (internal quotation and citations omitted).

4 Courts often bifurcate and stay antitrust counterclaims expressly because trial and
5 discovery of antitrust claims involve a disproportionate amount of time and effort, and have a
6 tendency to delay trial on other claims, including those protecting intellectual property rights.
7 *See, e.g., Carlisle*, 635 F. Supp. at 967-68 (bifurcating trial and staying antitrust counterclaims,
8 and noting that “[i]n view of the extensive and protracted discovery inherent in trial of the
9 antitrust issues, this is a particularly advantageous result.”) (quoting *Pharmacia, AB*, 1984 WL
10 1479, at *1); *Components, Inc. v. W. Elec. Co.*, 318 F. Supp. 959, 966-67 (D. Me. 1970)
11 (bifurcating and staying discovery and trial of antitrust counterclaims due to differing and
12 burdensome issues, proof, and testimony at trial; likelihood that discovery and trial of the antitrust
13 claims would be wide-ranging and take “many months”; and lack of prejudice); *Henan Oil Tools,*
14 *Inc. v. Eng’g Enters., Inc.*, 262 F. Supp. 629, 631 (S.D. Tex. 1966) (bifurcating and staying
15 discovery and trial of antitrust counterclaims from patent claims because “both involve large and
16 complex bodies of laws,” “[a]ntitrust actions frequently require protracted trials,” and differing
17 issues, proof, and testimony at trial would be burdensome on the trier of fact); *Fischer & Porter*
18 *Co. v. Sheffield Corp.*, 31 F.R.D. 534, 539-40 (D. Del. 1962) (bifurcating and staying discovery
19 and trial of antitrust counterclaims from patent claims because the issues, proof and witnesses
20 were “substantially different,” and the patent trial would be ready “within the foreseeable future
21 and will probably take about five to eight trial days” whereas the antitrust trial would not be ready
22 for at least a year and trial would take two months) (internal quotation and citation omitted).

23 For example, the antitrust counterclaims here will require both parties to expend a
24 significant amount of money and time consulting with expert antitrust economists, performing
25 detailed market research, producing market definition and market share reports, analyzing
26 competitive intent and assessing impact to competition, determining whether there were
27 legitimate business rationales for conduct, and conducting complex company and market
28 valuations for damages purposes, all of which are completely unrelated to craigslist’s claims.

1 Separating craigslist's claims and the antitrust claims will result in little, if any, duplication of
2 proof and will significantly reduce the likelihood of delay and the parties' costs. *See Chip-*
3 *Mender*, 2006 WL 13058, at *13 ("Proceeding on the antitrust claims simultaneously with the
4 patent claims may delay resolution of the case by increasing its complexity"); *see also Fischer &*
5 *Porter Co.*, 31 F.R.D. at 539-40 (bifurcating and staying antitrust counterclaims on convenience
6 and efficiency grounds and noting that despite some potential overlap, the issues and evidence
7 were "substantially different" and "it [did] not necessarily follow that separation [would] require
8 a duplication of preparation") (internal quotation and citation omitted). For the economy and
9 convenience of the Court and the parties, the Court should address craigslist's claims first.

10 Moreover, given the complexity of the parties' claims and separate bodies of law
11 involved, the risk of juror confusion and prejudice to craigslist is significant. Defendants will
12 undoubtedly try to deflect attention from their own misdeeds by employing monopolization
13 rhetoric to cloud the issues and cast aspersions upon craigslist. *Triad*, 64 F.3d at 1338 (affirming
14 bifurcation of misuse defense and antitrust counterclaims from copyright infringement claims,
15 noting that the "district court justifiably did not want the jury to muddle" the claims); *ASM*, 2002
16 WL 24444, at *6-7 (finding that prejudice to the plaintiff in litigating its patent claim
17 simultaneously with antitrust counterclaims outweighed any prejudice to defendant-
18 counterclaimant) (citing *Baxter Intern., Inc.*, 1992 WL 77665); *Square D*, 2009 WL 136177, at *2
19 (bifurcated and stayed antitrust counterclaims from patent claims noting "[b]eyond the expense,
20 antitrust issues and patent issues are notoriously difficult for juries to comprehend; combining the
21 two in a single trial would just compound the problem of juror confusion"). Indeed, the only
22 benefit in proceeding with the antitrust counterclaims simultaneously with craigslist's claims is
23 for Defendants to unnecessarily delay and drive up the cost of craigslist rightfully enforcing its
24 rights. *See Twombly*, 550 U.S. at 557-59 (recognizing that the expense associated with antitrust
25 discovery can be used as a tactic to achieve settlement even in anemic cases).

26 Defendants will suffer no prejudice if their antitrust counterclaims are bifurcated and
27 stayed, having only raised them in response to craigslist's claims. Should any of Defendants'
28

1 antitrust counterclaims remain after resolution of craigslist’s claims, discovery and trial of such
2 claims will have been narrowed, saving both parties and the Court substantial time and expense.

3 **CONCLUSION**

4 For the foregoing reasons, because Defendants’ antitrust counterclaims will be obviated
5 by resolution of craigslist’s claims, and the bifurcation and stay will minimize juror confusion,
6 prevent undue prejudice, and reduce the time and expense of litigation, thereby promoting judicial
7 economy, craigslist’s motion to bifurcate and stay should be granted.

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9 February 8, 2013

PERKINS COIE LLP

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

17 February 8, 2013

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