

THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

Case No. 2:23-cv-01495-JHC

**AMAZON'S ECONOMICS DAY
HEARING STATEMENT**

1 Pursuant to the Court’s December 2, 2024 Order, ECF No. 365, Amazon respectfully
2 submits this written statement concerning the topics to be addressed at the March 7, 2025 hearing.

3 **I. Introduction**

4 Plaintiffs claim that Amazon has unlawfully maintained a monopoly through allegedly
5 exclusionary conduct in violation of Section 2 of the Sherman Act.¹ In antitrust cases such as this,
6 rigorous economic analysis will inform the central questions the Court must ask: In what market
7 or markets must we look for any anticompetitive and procompetitive effects? Have Plaintiffs
8 demonstrated that Amazon possesses monopoly power in such market(s)? Have Plaintiffs
9 established a prima facie case by demonstrating the challenged conduct is not competition on the
10 merits but rather has the purpose and effect of excluding competition without providing a better
11 product to consumers? If so (and only if so), has Amazon demonstrated its conduct also has
12 procompetitive effects? The Court will need to apply economic concepts, and evaluate economic
13 evidence, in assessing each of these questions.

14 The Parties identified eleven economic topics for the Court, *see* ECF No. 290, and Amazon
15 will be ready to discuss them at the March 7 hearing. This submission groups those topics into
16 key issues that Amazon views as likely to be particularly useful to the Court in this matter.

17 **Relevant Markets (Topics 2-5):** Plaintiffs in a monopoly maintenance case must establish
18 the existence of “relevant markets,” which is a hybrid legal and economic concept that essentially
19 defines the arena in which competition occurs. This is foundational in an antitrust case because
20 an overly narrow or broad market definition may lead to inaccurate conclusions about the
21 defendant’s competitive position and any alleged competitive harm caused by the conduct at issue.
22 A vigorous competitive process naturally leads more efficient companies—those that provide
23 consumers with what they want, at prices they like—to succeed where others may not. The
24 antitrust laws do not prohibit such competition and such success; to the contrary, they encourage
25 it. Defining relevant markets provides necessary context to assess economic (and other) evidence

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27 ¹ For an overview of the applicable legal framework for monopoly maintenance claims, see *FTC v. Qualcomm Inc.*,
969 F.3d 974, 989-92 (9th Cir. 2020) and *Epic Games, Inc. v. Apple*, 67 F.4th 946, 998-99 (9th Cir. 2023).

1 regarding whether a defendant’s challenged conduct has harmed competition, or whether it is
2 evidence of vigorous competition among companies.

3 **Monopoly Power (Topics 6-8):** To support their claims, Plaintiffs must show that
4 Amazon has “monopoly power,” which is defined as the power to profitably and durably raise
5 prices above (or, the corollary, to reduce output below) “competitive” levels in a relevant market.
6 Because prices and output change for myriad reasons in a competitive market, and because it is
7 exceedingly difficult for a court to assess what a “competitive” price is, well-founded economic
8 evidence is critical. The assessment by courts and economists of whether a defendant may possess
9 monopoly power is generally based on both the defendant’s share of the relevant market, as well
10 as whether there are substantial and durable barriers to entry and expansion in the relevant market
11 that prevent existing and potential competitors from driving prices back down in the event a
12 putative monopolist raises them.

13 **Exclusionary Conduct vs. Competition on the Merits (Topics 9-11):** Because the
14 antitrust laws exist to protect competition, and not individual competitors, the laws encourage
15 companies to compete vigorously and do not punish them for their resulting success, provided that
16 it flows from competition on the merits as opposed to excluding competitors from the relevant
17 market through anticompetitive means. Economic evidence can provide insight into the reasons
18 why a defendant has or has not been successful in the marketplace and whether certain conduct
19 should be considered exclusionary, or whether it is tough (but lawful) competition on the merits.
20 Economists recognize, for example, that conduct can promote competition, even where it limits
21 certain actions by other market participants. Economic evidence can also help the Court assess
22 whether the conduct has resulted in anticompetitive effects in the relevant markets.

23 **The Economics of Amazon’s Store (Topic 1):** In assessing relevant markets, monopoly
24 power, and exclusionary conduct and its impact, economists will consider the economic principles
25 that underlie the structure and dynamics of Amazon’s store, including the policies, programs, and
26 practices that are designed to benefit consumers, align the incentives of the sellers who participate
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1 alongside Amazon in Amazon's store, and the ways in which Amazon's business model is a result
2 of the product differentiation and innovation encouraged by the antitrust laws.

3 **The Reliability of Evidence and Methodologies (All Topics):** The Court will need to
4 assess the reliability and soundness of the data and methodologies of the economic evidence
5 submitted by the Parties. Seeking to extrapolate a market-wide conclusion as to whether the
6 conduct at issue has harmed competition from limited anecdotes, for example, does not represent
7 a sound methodology.

8 **II. Economic Concepts**

9 **A. Relevant Markets**

10 As most courts, including the Ninth Circuit, have recognized, "defining the relevant market
11 is indispensable to a monopolization claim." *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc.*,
12 875 F.2d 1369, 1373 (9th Cir. 1989).² A relevant market provides context that allows the Court to
13 assess whether challenged conduct harmed competition such that the defendant could profitably
14 raise prices above a competitive level. As an example, if the challenged conduct harmed only
15 1 of 10 substantial competitors in a relevant market, the Court should give little weight to a
16 complaint from that one competitor and should view with skepticism an econometric analysis that
17 relies on that complaint to show that the conduct purportedly led to higher prices for consumers.

18 In defining the relevant product market, economists include all competitors that
19 meaningfully limit the defendant's ability to profitably raise prices (or restrict output). Many
20 markets consist of products that differ considerably from each other but nonetheless are reasonable
21 substitutes in the eyes of consumers. Economists recognize that competitors' efforts to
22 differentiate their products do not necessarily cause those products to exist in different antitrust
23 markets. Economists thus employ accepted methodologies based on reliable quantitative and
24 qualitative tools and evidence (e.g., data on customer preferences and purchases and ordinary-
25 course assessments of competition, etc.) to assess competition and customer substitution between

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27 ² While some courts acknowledge the theoretical possibility of establishing a Section 2 violation without reference to
a relevant market, they virtually never do so in specific cases, for the reasons discussed in the text.

1 different products to help determine which competitors to include in the relevant market.³ To do
2 so, economists often rely on the Hypothetical Monopolist Test (“HMT”), which is an accepted
3 methodology that seeks to identify the narrowest market in which a hypothetical monopolist could
4 profitably impose a small but significant non-transitory increase in price (“SSNIP”). *Epic Games*,
5 67 F.4th at 975.⁴

6 As to Plaintiffs’ consumer-facing alleged market of “online superstores,” economists can
7 use these tools to assess whether this market captures all of the retailers (and each of the channels
8 in which those retailers offer products for sale) that customers see as reasonable substitutes for
9 products that are available in Amazon’s store. As an example, Plaintiffs allege that retailers who
10 focus on particular categories of products, such as Chewy and Home Depot, are outside the
11 relevant market because they do not offer the same one-stop-shopping experience for more than
12 one category of consumer products.⁵ As one respected antitrust scholar has explained, this alleged
13 market strains common sense: A “customer seeking to outfit a kitchen can readily buy the toaster
14 from Amazon, the blender from Target.com, and the microwave from a brick-and-mortar
15 department store,” which indicates that the relevant market is broader than asserted by Plaintiffs.
16 See Herbert Hovenkamp, *Antitrust and eMarkets*, Stan. L. & Pol’y Rev. (forthcoming 2025)
17 (manuscript at 27) (available on SSRN).⁶ Thus, for example, Plaintiffs’ allegation that Target.com
18 sales are within the market, but that Target brick-and-mortar sales are outside that market, can be

19 ³ Economists may seek to estimate the cross-elasticity of demand, which measures the extent to which consumers will
20 switch to another product in response to an increase in the price of the first product (or vice versa). *Rebel Oil Co.,*
21 *Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995); see also *Epic Games*, 67 F.4th at 975. Similarly,
22 economists also may seek to assess the cross-elasticity of supply, which measures the extent to which other companies
23 can expand or begin offering new supply of products in response to a significant price increase.

24 ⁴ With regard to any risk that the HMT could be rendered inaccurate by the “cellophane fallacy” or could otherwise
25 lead to an overly broad market definition, economists can conduct analyses to address such risks. Economists should
26 not, however, substitute rigorous analyses like the HMT with isolated or anecdotal evidence that does not reflect
27 market-wide behavior.

⁵ Plaintiffs’ consumer-facing “Online Superstore Market” also excludes “[o]nline purchases of perishable grocery
products.” 2d Am. Compl., ECF No. 327 ¶ 162. And Plaintiffs’ seller-facing “Online Marketplace Services Market”
excludes any services provided by first-party vendor relationships, and any services provided by software-as-a-service
 (“SaaS”) providers like Shopify. *Id.* ¶¶ 193-202.

⁶ The markets Plaintiffs have alleged include hundreds of thousands of products that are often sold by different sets of
competitors, and economists will need to evaluate whether there is an economic justification for this approach when
markets are typically defined on a product-by-product or service-by-service basis.

1 tested using these economic techniques to determine whether consumers view Target’s website
2 and brick-and-mortar store as substitutes when shopping.

3 As to Plaintiffs’ seller-facing alleged market for “online marketplace services,” economists
4 can assess whether the alleged market includes all available service options that a seller can use to
5 reach consumers. This could include, for example, integrated services (e.g., those provided to
6 sellers by Walmart) as well as a set of services that a seller can engage on its own (e.g., a website
7 and customer interface from Shopify with fulfillment services offered by FedEx).

8 **B. Monopoly Power**

9 Monopoly power means that a company has the “substantial ability to control prices or
10 exclude competition.” *Epic Games*, 67 F.4th at 998 (internal quotation marks and citation
11 omitted). But monopoly power is not the same as market power. To be cognizable, monopoly
12 power must be “durable”—it must survive the test of time. *Id.*⁷ Monopoly power means that a
13 company does not face pressure to lower prices, invest in innovation, or enhance quality or
14 customer service because it does not face competitive constraints from actual or potential
15 competitors. Here, Plaintiffs must first establish that (i) their alleged relevant markets exist, and
16 (ii) Amazon has a high share (typically 70% or more) of each relevant market. But a large market
17 share is not sufficient by itself to establish monopoly power because “any attempt to raise prices
18 above the competitive level will lure into the market new competitors able and willing to offer
19 their commercial goods or personal services for less.” *Syufy*, 903 F.2d at 664. Plaintiffs thus also
20 must show that there are durable and significant barriers that prevent new companies from entering
21 the relevant market or existing companies in the market from expanding their share.

22 In considering whether there are significant barriers to entry, economists look to a range of
23 potential evidence. Reviewing prior successful entry and/or expansion of other companies is a
24 common way to evaluate the existence of barriers to competition. For example, with respect to
25 Plaintiffs’ alleged online superstore market, economists will assess what the efforts of established

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27 ⁷ See also *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990) (“Is this the type of situation where market forces are likely to cure the perceived problem within a reasonable period of time?”).

1 retailers like Walmart, Nordstrom, Macy’s, Kohl’s, and Kroger to launch and grow online stores
2 that also provide opportunities for third-party sellers—as well as the launch and growth in the
3 United States from new retailers like Temu and Shein—indicate about the existence of any
4 meaningful barriers to entry or expansion.⁸ Similarly, economists can assess whether barriers exist
5 when established brick-and-mortar retailers have expanded and diversified operations, including
6 by improving their online stores and by offering hybrid “multichannel” or “omnichannel”
7 shopping experiences that provide consumers the opportunity to combine the conveniences of
8 online searching, shopping, and/or payment with the conveniences of in-store shopping, in-store
9 pickup, and in-store returns. As to Plaintiffs’ seller-facing market, economists will consider,
10 among other things, the expansion of seller service providers, including efforts by Shopify,
11 BigCommerce, UPS, FedEx, and the efforts by a host of logistics and fulfillment companies to
12 develop services for sellers.

13 Economists also recognize that a monopolist is less likely to invest in innovation because
14 the existence of a durable monopoly alleviates the need to incur such costs. Economists can thus
15 consider whether Amazon’s historical and continuing investments in innovation are consistent
16 with this principle, including with respect to Amazon’s fulfillment network, the expanded benefits
17 available to Amazon Prime members, and the ongoing effort to launch new tools, services, and
18 programs for third-party sellers.

19 Economists could theoretically consider whether there is any direct evidence of Amazon’s
20 ability to raise prices above competitive levels while restricting output in a relevant market,
21 although such evidence is rarely available. *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C.
22 Cir. 2001) (en banc). Here, Plaintiffs largely focus on two types of supposedly direct evidence.

23 In the consumer-facing market, Plaintiffs allege that Amazon’s decisions about advertising
24 and so-called self-preferencing have degraded the quality of the search results that customers

26 ⁸ Although “scale” and “network effects” may in some circumstances constitute barriers to entry, economists assessing
27 whether such claimed barriers to entry are substantial and durable will consider the extent to which such phenomena
actually apply to the facts here and prevent other online and brick-and-mortar retailers from competing with Amazon
for the same customers.

1 receive when shopping in Amazon’s store. Economists will seek to test this theory, including by
2 asking whether increases in advertisements and/or self-preferencing, to the extent they exist,
3 consistently degrade the shopping experience (otherwise, such decisions could not be evidence of
4 monopoly power) and whether other retailers who are not alleged to be monopolists have engaged
5 in similar conduct (in which case, the conduct is presumptively efficient and procompetitive).

6 In the seller-facing market, Plaintiffs allege that Amazon has been able to raise the fees it
7 charges to sellers without losing sellers. Economists will evaluate whether those fees in fact reflect
8 the cost or value of services that Amazon offers, and will need to make apples-to-apples
9 comparisons between Amazon and other companies in the market to ensure any such comparisons
10 provide meaningful economic assessments of alleged monopoly power.

11 **C. Exclusionary Conduct vs. Competition on the Merits**

12 The antitrust laws do not punish a competitor for “growth or development as a consequence
13 of a superior product, business acumen, or historic accident.” *Epic Games*, 67 F.4th at 998
14 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). Economists thus ask
15 whether the challenged conduct reflects competition on the merits (e.g., the conduct is designed to
16 improve a product or service) or whether the conduct excludes competitors from the marketplace
17 (e.g., substantially forecloses competitors from reaching consumers without providing any benefit
18 to consumers).⁹ Here, economists look at the particular policies and practices that Plaintiffs
19 identify (e.g., Amazon’s practice of matching the prices offered by other retailers) to assess
20 whether they block other companies from competing, or whether they instead reflect Amazon’s
21 procompetitive efforts to compete for each sale. And consistent with the applicable legal standard,
22 economists will consider whether each category of conduct on its own leads to anticompetitive
23 effects. *See, e.g., Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130, 1142 (9th Cir. 2022)
24 (“[When] each individual action alleged ... does not rise to anticompetitive conduct in the relevant
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26 ⁹ If exclusionary, there must be a “preliminary showing of significant and more-than-temporary harmful effects on
27 *competition* (and not merely upon a competitor or customer) before ... practices can rise to the level of exclusionary
conduct.” *Am. Pro. Testing Serv. v. Harcourt Brace Jovanovich Legal & Pro. Pubs.*, 108 F.3d 1147, 1151 (9th Cir.
1997) (emphasis in original) (internal quotation marks and citation omitted).

1 market, their collective sum likewise does not.”); *In re Epipen Mktg., Sales Practices & Antitrust*
2 *Litig.*, 44 F.4th 959, 982 (10th Cir. 2022) (“[C]ourts disaggregate the exclusionary conduct into its
3 component parts before applying the relevant law.”).

4 **i. Conduct Addressing Free-Riding and Minimizing Externalities**

5 Conduct may promote competition—in which case it is not exclusionary conduct—even if
6 it limits the actions of other companies. And companies often employ such conduct to address
7 problems economists recognize as “free-riding” and “externalities.”

8 Free-riding arises when one company (here, a third-party seller) seeks to reap the
9 advantages of investments made by another company (here, Amazon), but does not bear some or
10 all of the costs. This can deter a company like Amazon from making the investments in the first
11 instance, and it can result in negative externalities, which are costs to Amazon, consumers, and
12 other sellers that occur as a result of the seller free-riding. Amazon has made significant
13 investments in creating a reliable and secure consumer experience and a reputation for competitive
14 prices in its store. When a third-party seller relies on Amazon’s reputation, but then fails to deliver
15 a quality experience or a competitive price, a customer is likely to associate the negative experience
16 with Amazon and thus the resulting reputational harm is suffered by Amazon and everyone
17 participating in Amazon’s store, not just the one third-party seller. Because of this, some third-
18 party sellers may have an incentive to increase profits in the short-term by offering products that
19 do not function as advertised, promising unrealistic delivery speeds, manipulating customer
20 reviews, or by raising prices significantly.

21 To limit this risk, and to ensure that all of the sellers in its store live up to Amazon’s
22 reputation for a reliable and high-quality service as well as competitive prices, Amazon has an
23 incentive to regulate the conduct of third-party sellers in Amazon’s store. One way to do so is by
24 imposing what economists recognize as procompetitive “vertical restraints.” Economists will thus
25 evaluate whether the conduct challenged by the Plaintiffs reflects Amazon’s efforts to promote
26 competition by preserving a high-quality consumer experience (including by offering competitive
27 prices and fast and reliable delivery) and otherwise maintaining customer satisfaction. This

1 includes, for example, the evaluation of Amazon’s Select Competitor Featured Offer
2 Disqualification (“SC-FOD”) process, the Standards for Brands Selling in Amazon’s Store
3 (“ASB”) policy, the Customer Experience Ambassador (“CXA”) program, and the eligibility
4 requirements for receiving the Amazon Prime badge.

5 **ii. Quantifying Any Anticompetitive Effect**

6 If the Court were to determine that some conduct is exclusionary under the antitrust laws,
7 economists can help evaluate whether the negative effects that Plaintiffs allege (e.g., higher prices)
8 actually exist. And if they exist, whether such effects are actually caused by the exclusionary
9 conduct and, if so, whether such effects are market-wide. To test Plaintiffs’ hypothesis,
10 economists might analyze available data and employ statistical methods to test whether the
11 challenged conduct caused prices to rise as alleged in a statistically significant fashion. With
12 respect to SC-FOD, for example, economists could evaluate whether sellers successfully raise
13 prices with other retailers (as Plaintiffs allege) or whether a seller typically responds by lowering
14 the price for its product in Amazon’s store (which is inconsistent with Plaintiffs’ theory). Finally,
15 economists will assess whether there are other potential causes of the alleged effects, as well as
16 what would have occurred in the market in the absence of the allegedly exclusionary conduct.

17 **D. The Economics of Amazon’s Store**

18 When assessing the conduct in this case, economists will also consider economic concepts
19 that reflect the structure and operation of Amazon’s store. *First*, in assessing competition,
20 economists will ask whether consumers have benefited, such as through improved prices, greater
21 supply, or greater quality of goods regardless of whether individual competitors have failed or
22 succeeded. As discussed above in Section II.C, Amazon has sought to address free-riding and
23 externalities occurring in its store by regulating seller conduct to ensure that customers receive low
24 prices, accurate reviews, and fast and reliable delivery.

25 *Second*, economists will consider whether Amazon has been successful through product
26 innovation and differentiation. This concept is reflected in Amazon’s intense focus on establishing
27 and maintaining customer trust by offering an improved shopping experience that brings long-term

1 satisfaction to consumers. Over time, this has allowed Amazon to compete with all manner of
2 well-established online and brick-and-mortar retailers, such as Walmart, Target, Nordstrom,
3 Kohls, Home Depot, Costco, Walgreens, Best Buy, Wayfair, as well as any number of locally
4 owned shops and corner stores, among many others. Amazon has also raised the bar across the
5 retail industry. Established retailers have responded to Amazon's innovation by opening up their
6 own stores to third-party sellers and expanding their online store offerings. Retailers have also
7 used their existing brick-and-mortar footprint and improved online stores to offer consumers an
8 omnichannel shopping experience. And Amazon's provision of extraordinary customer service
9 has caused retailers to work to improve price, selection, customer service, return policies, and
10 delivery times.

11 **E. The Reliability of Evidence and Methodologies**

12 In assessing all of the economic evidence in this case, the Court will need to determine its
13 reliability and persuasive value. In doing so, economists typically consider both the reliability of
14 any data (e.g., any concerns about inaccurate or inconsistent data) as well as the methodology used
15 in any economic analysis (e.g., whether the methods are statically reliable or consistent with
16 established practice). On this second point, economists will be particularly cautious not to
17 extrapolate broad or general conclusions from inadequate or biased data. This is often a concern
18 when isolated or anecdotal examples, as opposed to statically reliable, market-wide data, are used
19 as the basis for an economic analysis. Economists would not, for example, accept as reliable an
20 analysis of market-wide effects on prices and output based on cherry-picked statements in a
21 defendant's business documents, or the anecdotal testimony of a limited and unrepresentative
22 sample of market participants.

23 **III. Conclusion**

24 Economic analyses will play an important role at each step of the analytical framework that
25 applies to Plaintiffs' monopoly maintenance claims. Throughout this work, economists should be
26 guided, above all else, by the foundational principle that the antitrust laws are to be invoked only
27 if competition itself is harmed to the detriment of consumers.

1 DATED this 28th day of February, 2025.

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