IN THE

Supreme Court of the United States

DANTE DEMARTINI, CURTIS BURNS JR., NICHOLAS ELDEN, JESSIE GALVAN, CHRISTOPHER JOSEPH GIDDINGS-LAFAYE, STEVE HERRERA, HUNTER JOSEPH JAKUPKO, DANIEL DERMOT ALFRED LOFTUS, BEOWULF EDWARD OWEN, AND IVAN CALVO-PÉREZ,

Applicant,

v.

MICROSOFT CORPORATION, A WASHINGTON CORPORATION.,

Respondents.

APPENDIX TO APPLICATION FOR EMERGENCY TEMPORARY INJUNCTION PENDING NINTH CIRCUIT APPEAL

JOSEPH R. SAVERI
STEVEN N. WILLIAMS
CADIO ZIRPOLI
DAVID H. SEIDEL
KATHLEEN MCMAHON
JOSEPH SAVERI LAW FIRM, LLP
601 CALIFORNIA STREET, SUITE 1000
SAN FRANCISCO, CA 94108
TELEPHONE: (415) 500-6800

JOSEPH M. ALIOTO SR.

Counsel of Record

ALIOTO LAW FIRM

ONE SANSOME STREET, 35TH FLOOR

SAN FRANCISCO, CA 94104

TELEPHONE: (415) 434-9200

EMAIL: JMALIOTO@ALIOTOLAW.COM

Counsel for Applicant

July 15, 2023

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UNITED STATES COURT OF APPEALS



FOR THE NINTH CIRCUIT

JUL 14 2023

MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS

DANTE DEMARTINI; et al.,

No. 23-15846

Plaintiffs-Appellants,

D.C. No. 3:22-cv-08991-JSC Northern District of California, San Francisco

v.

ORDER

MICROSOFT CORPORATION,

Defendant-Appellee,

SONY INTERACTIVE ENTERTAINMENT LLC; BLIZZARD, INC.,

Intervenors-Pending.

Before: RICHARD C. TALLMAN, SANDRA S. IKUTA, and DANIEL P. COLLINS, Circuit Judges.

The motion for injunctive relief (Docket Entry Nos. 7, 42) is denied. *See Feldman v. Ariz. Sec'y of State*, 843 F.3d 366, 367 (9th Cir. 2016) ("The standard for evaluating an injunction pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction."); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (defining standard for preliminary injunction in district court).

All other pending motions will be resolved by separate order.

The existing briefing schedule remains in effect.

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No. 23-15846

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANTE DEMARTINI, CURTIS BURNS JR., NICHOLAS ELDEN, JESSIE GALVAN, CHRISTOPHER JOSEPH GIDDINGS-LAFAYE, STEVE HERRERA, HUNTER JOSEPH JAKUPKO, DANIEL DERMOT ALFRED LOFTUS, BEOWULF EDWARD OWEN, AND IVAN CALVO-PÉREZ

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of California
No. 3:22-cv-08991-JSC
Hon. Judge Jacqueline Scott Corley

APPELLANT'S OPENING BRIEF REDACTED

Joseph R. Saveri (State Bar No. 130064) Steven N. Williams (State Bar No. 175489) Cadio Zirpoli (State Bar No. 179108) David H. Seidel (State Bar No. 307135) Kathleen McMahon (State Bar No. 340007) JOSEPH SAVERI LAW FIRM, LLP 601 California Street, Suite 1000 San Francisco, CA 94108 Telephone: (415) 500-6800

Joseph M. Alioto Sr. **ALIOTO LAW FIRM** One Sansome Street, 35th Floor San Francisco, CA 94104 Telephone: (415) 434-9200

Attorneys for Appellants Dante Demartini, Curtis Burns Jr., Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermont Alfred Loftus, Beowulf Edward Owen and Ivan Calvo-Perez

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INTRODUCTION

Plaintiffs are video game consumers who brought suit to stop Microsoft's unlawful acquisition of Activision Blizzard, Inc. pursuant to Sections 7 and 16 of the Clayton Act. Under Section 7, any merger that might substantially lessen competition is unlawful. 15 U.S.C. § 18. And Section 16 provides a right of action to anyone that is threatened with loss or damage from a violation of the antitrust laws, including Section 7. 15 U.S.C § 26. Plaintiffs sought to arrest the merger, and filed a motion for preliminary injunction to ensure that the merger could be adequately scrutinized on the merits before irreparable harm to competition in video game markets would occur.

The district court denied Plaintiffs' motion for a preliminary injunction. In fact, the district court did not even require Microsoft to oppose Plaintiffs' motion on the merits. Instead, the district court assumed that the merger would substantially lessen competition, but the district court still denied Plaintiffs' motion for preliminary injunction on the grounds that Plaintiffs could not specifically demonstrate any "immediate irreparable harm" to them personally from the merger. Thus, even assuming the merger would immediately and substantially harm competition in the relevant markets, the district court still cleared the way for Microsoft to merge before Plaintiffs' claims could be heard.

In holding that Plaintiffs could not show "immediate irreparable harm," the district court applied the wrong legal standard. The district court adopted required Plaintiffs to prove that the merger would cause *direct and specific personal irreparable harm* to these Plaintiffs *immediately* upon consummation of the merger. The district court ignored the general proof of harm to competition in the markets that Plaintiffs participate in and rely on. This heightened standard was in error. And it is directly contrary to both Supreme Court and Ninth Circuit precedent, which unequivocally holds that on motions for preliminary injunctions under Sections 7 and 16 of the Clayton Act, a lessening of competition constitutes an irreparable injury under the law.

If the district court's heightened standard is affirmed, it would insulate anticompetitive mergers from private suits, including suits brought by states on behalf of their consumers. And it would conflict with binding Supreme Court and Ninth Circuit authority directly on point. In short, it would upend the private merger enforcement mechanism enshrined by Congress in the Clayton Act.

Moreover, even under the district court's erroneous standard, Plaintiffs established threatened irreparable harm. The district court erred in failing to consider Plaintiffs' uncontroverted evidence, and credited Microsoft's arguments without record support. Thus, in addition to applying the wrong legal standard, the

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district court also abused its discretion in failing to correctly consider the Plaintiffs' unchallenged evidence of the threatened harms they will sustain.

Plaintiffs therefore ask the Ninth Circuit to reverse the district court's order, to remand to the district court to hold an evidentiary hearing, and to apply the correct legal standard on Plaintiffs' motion for preliminary injunction before Microsoft merges and irreparably harms competition in the relevant markets.

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction pursuant to 28 U.S.C. §1292(a)(1). The district court has jurisdiction pursuant to 28 U.S.C. § 1331 because this suit is brought under Section 7 and 16 of the Clayton Act, 15 U.S.C. §§ 18, 26. The district court entered an order denying Plaintiffs' motion for preliminary injunction on May 19, 2023, and Plaintiffs timely filed a notice of appeal pursuant to 28 U.S.C. § 1292(a) on June 2, 2023. *See* 2-ER-182.

ISSUE(S) PRESENTED

- (1) Did the district court err in holding Plaintiffs could not meet the irreparable harm element for a preliminary injunction where the district court acknowledged: (1) the merger threatens to substantially lessen competition in the relevant markets; and (2) Plaintiffs directly participate in and rely on those relevant markets?
- (2) Did the district court err in failing to adequately consider the uncontested evidence that Plaintiffs are threatened with irreparable harm from this merger?

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(3) Did the district court err in holding that any irreparable harm to competition and to these Plaintiffs could be fully cured through a subsequent order requiring Microsoft and Activision to unwind and divest from the merger?

STATEMENT OF THE CASE

Plaintiffs filed a lawsuit to stop Microsoft's proposed merger with

Activision Blizzard, Inc., the world's most successful independent triple-A video
game publisher. Activision owns the immensely popular and important *Call of*Duty franchise, among other multibillion-dollar triple-A video game franchises.

Activision is currently one of the few remaining independent triple-A game
publishers in the world, and a leading competitor in the triple-A video game
market. On January 18, 2022, Microsoft announced plans to acquire Activision.

Microsoft agreed to pay \$68.7 billion in an all-cash transaction (the "Merger").

Upon consummation of the Merger, Activision would be wholly owned by
Microsoft and the separate corporate existence of Activision will immediately
cease to exist. 2-ER-138 at §2.1.

¹ "Triple-A" video games are an industry term for the world's most sophisticated video games defined by their high development costs, superior graphics quality and output, expectations of high unit sales and revenue. Triple-A games are published by a small number of well-financed game publishers with large development and publishing teams that are supported by extensive marketing. "AAA" video game franchises often generate multibillion-dollar revenue. *See* 4-ER-463, 4-ER-505-506, 5-ER-639

Unless the deadline is extended by Microsoft and Activision, either party may terminate the Merger agreement after July 18, 2023. *See* 2-ER-144 at §8.1(c).

Microsoft is a dominant market participant. Microsoft is widely known for its ownership of the Windows operating system, Microsoft's suite of office and email software, and its cloud-computing capabilities. Microsoft is also a leading participant in the video-gaming market. In addition to Sony and Nintendo, Microsoft is one of only three video game console manufacturers. 5-ER-625–26. Notably, Microsoft is one of the leading publishers of triple-A video games. 5-ER-623–24, 630–32. Microsoft's dominant position with respect to video games derives from its significant position—and market share—in several connected mechanisms for playing and distributing video games. These include: (1) High Performance Consoles (including Microsoft's Xbox); (2) Cloud Gaming Services (including Microsoft's Xbox Cloud Gaming and Azure cloud computing services) (3) Personal Computer ("PC") Operating Systems (a market famously dominated by Microsoft Windows); and (4) Multi-Game Subscriptions (including Microsoft's Xbox Game Pass). Even without the Merger, Microsoft presently controls a substantial portion of the video game industry. It controls numerous video game platforms for which games are developed, and also publishes substantial triple-A video games itself. 5-ER-630-642. The Merger would make Microsoft the world's

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third-largest video game company by revenue. Its market share in the United States is even higher.

The Merger raises serious antitrust concerns and likely violates federal antitrust law. If allowed to proceed, it would eliminate Activision as an important independent competitor as well as one of the few remaining independent triple-A game publishers in the world. 5-ER-620–21. The Merger would immediately eliminate the direct and substantial competition between Microsoft and Activision in the triple-A video game market. 5-ER-630–32, 638–644. Microsoft and Activision are two of the largest video game publishers in the United States. *Id.* By eliminating the competition between these two giants, an upward pressure on price and a downward pressure on innovation and quality would be felt in the triple-A game market. 5-ER-644–45.

The Merger would allow Microsoft to obtain and control key Activision gaming content. Microsoft could—and likely would—leverage Activision content vertically to foreclose competition by making Activision titles exclusive to Microsoft's platforms including: (1) High Performance Consoles; (2) Cloud Gaming Services; (3) personal computer ("PC") Operating Systems; and (4) Multi-Game Subscriptions. *See* 5-ER-633–38. Microsoft will be able to foreclose its rivals from offering consumers many of the world's most popular video game franchises, including *Call of Duty*. The likelihood of such anticompetitive conduct

is high. As numerous economists and regulators have concluded, once the Merger is consummated, Microsoft would have significant—if not irresistible—economic incentives to make *Call of Duty* and Activision's other video game content exclusive to Microsoft's platforms and distribution channels, such as Xbox, Xbox Game Pass (including its cloud-gaming functionality), and Windows. *See*, *e.g.*, *id*. Indeed, Microsoft is well aware of the strong economic advantages exclusivity provides. Microsoft has a documented history of acquiring video game developers just to make those video games exclusive to Microsoft video game platforms. Microsoft did so, even after telling antitrust regulators they would not. *See* § II.D, *infra*.

I. Background on Microsoft and Their Video Game Ecosystem

Microsoft is one of the largest global technology companies in the world, founded in 1975 and headquartered in Redmond, Washington. Microsoft's shares are publicly traded on the Nasdaq exchange. Microsoft has a market capitalization of over 2.5 trillion dollars. Microsoft owns the dominant computer operating system, Windows, and is a leading provider of cloud computing services through its Azure computing platform. Microsoft is a leading manufacturer of other software and hardware as well.

Microsoft is a leading participant in video gaming. Microsoft offers a wide range of products, including its own video games developed internally by its Xbox

Game Studio. Xbox Game Studio develops triple-A games like the *Halo* franchise almost entirely exclusively for Microsoft's own video game platforms. Currently, Microsoft has a roughly 15% market share of triple-A game publishers in North America, while Activision has a roughly 21% market share. 5-ER-630–32, 641. The Merger will make Microsoft the largest triple-A game publisher in a market with only four other major independent market participants. *Id*.

Microsoft dominates the market for personal computer operating systems through Microsoft's Windows. Video games must be specifically developed for a particular operating system. Microsoft's Windows operating system accounts for roughly 80% of the personal computer operating system market worldwide, and accounts for over 90% of computer gaming worldwide. Its nominal competitors are Apple's OSX and the Linux operating system, each possessing tiny market shares in gaming relative to Microsoft.

In the Multi-Game Library Subscription market, Microsoft currently offers the Xbox Game Pass subscription service. Multi-Game Subscriptions offer players a library of content for a monthly subscription. Currently Xbox Game Pass has roughly 60% market share in the Multi-Game Subscription market. Its next closest competitor, Apple's "Arcade" subscription service, constitutes 9% of this market. With respect to Subscription Services for triple-A games, Microsoft's Xbox Game

Pass already has a 68% market share compared to its next largest competitor, Sony, which has a mere 9% market share.

In the High-Performance Console market, Microsoft's Xbox console has only one competitor, Sony's PlayStation console. Microsoft has a 45-47% share of this market already. *See* 5-ER-629. Internal Microsoft documents show that this merger is part of a long-term plan to "spend Sony out of business" in the console and multi-game library subscription markets by buying up and cornering enough of the triple-A content. *See* 5-ER-711.

In the nascent Cloud Gaming market, Microsoft offers Xbox Cloud Gaming, which it currently bundles with its Multi-Game Library Subscription, Xbox Game Pass Ultimate. Microsoft utilizes its own Azure cloud computing platform to facilitate its cloud gaming services. 5-ER-719, 724–26. Cloud gaming is widely regarded as the future of video gaming. Cloud gaming provides the ability to play games from any device by streaming the game from cloud servers. Currently, Microsoft is the market leader of cloud gaming, with the Xbox Cloud Gaming service comprising roughly 60% of the Cloud Gaming market. Indeed, foreign competition enforcers have found that Microsoft's existing advantage in the personal computer OS market, along with having its own cloud computing infrastructure, gives it an advantage in this market and Microsoft has the incentive to make Activision games exclusive to Xbox Cloud Gaming. 4-ER-611–12.

Microsoft has the ability to foreclose Activision's gaming content from current and future cloud-gaming providers, including new market entrants. *See id.*; 5-ER-637–38. Microsoft has done it before. In 2018, Microsoft acquired Playground Games, makers of the triple-A racing franchise, *Forza Horizon*. Internal documents show that one of the primary purposes of the acquisition was to ensure *Forza Horizon* would be exclusive to Microsoft gaming platforms. 5-ER-672 ("secure key high-value content"); 5-ER-673 ("Exclusive content continues to be a significant platform differentiator"). Microsoft admitted that it can "best defend its existing position of strength on console through compelling exclusive content" 5-ER-705.

Microsoft acquired ZeniMax Media and its game publisher arm Bethesda in 2021, when Bethesda was one of only a handful of remaining independent triple-A game publishers. During the regulatory process regarding its acquisition of ZeniMax, Microsoft assured the European Commission's competition authority that Microsoft would not have the incentive to cease or limit making ZeniMax games available for purchase on rival consoles. 4-ER-471–72; 4-ER-514 at ¶ 44; 5-ER-636. Unfortunately, Microsoft reneged on those assurances. After receiving merger approval, Microsoft proceeded to make Zenimax's triple-A titles *Redfall*, *Starfield* and *Elder Scrolls VI* exclusive to Microsoft video game platforms. *Id.*, *See* § II.D, *infra*. Immediately after the acquisition, Microsoft directed Bethesda

(ZeniMax) developers to stop working on a PlayStation version of *Redfall* already in production. 3-ER-228–29. Microsoft has already demonstrated its *modus operandi* of acquiring critical triple-A content in order to foreclose it from its rivals, all while publicly declaring no incentive to do so.

II. The Plaintiffs

Plaintiffs are gamers and spend many hours each week playing video games with friends, especially *Call of Duty*. Their personal interest is undeniable and strong: online video game play is an integral part of their social lives, one of the primary ways they interact with friends and family. 2-ER-110–13; 162–181.

Multiplayer games like *Call of Duty, World of Warcraft, Overwatch*, and *Diablo* (all triple-A games from Activision) allow players to chat with others as they play online, enabling the Plaintiffs to stay connected with their closest friends and family in different locations throughout the country. Plaintiffs have spent hundreds, if not thousands, of dollars on video games and video gaming. *See* 2-ER-111 at ¶¶ 3, 5–8; 2-ER-103 at ¶¶ 3, 5–8. Additionally, Plaintiffs have spent hundreds, if not thousands, of hours playing video games. 2-ER-111 at ¶¶ 4, 9; 2-ER-113 at ¶¶ 4, 9.

Plaintiffs play video games on high performance consoles, namely PlayStation and Xbox, as well as on personal computers primarily using Microsoft's Windows operating systems. *See* 2-ER-110–113; 162–181. The

Plaintiffs subscribe to different multi-game library subscription services, including Microsoft's Game Pass Ultimate and Sony's PlayStation Plus. *See* 2-ER-163 at ¶ 5; 2-ER-167 at ¶ 13; 2-ER-170 at ¶ 4; 2-ER-171 at ¶ 12; 2-ER-174 at ¶ 3; 2-ER-177 at ¶ 5; 2-ER-180 at ¶ 4.

For each Plaintiff, the availability of video game titles on a platform is one of the biggest factors that has affected and will affect their decision to purchase a video game console. Activision games are particularly important. For example, if the Merger occurs and Microsoft makes Activision games exclusive to Xbox, Plaintiffs would be forced to purchase an Xbox to play new *Call of Duty* titles or other Activision games. If the prices of important gaming content, such as that of Activision titles, were to increase, then the Plaintiffs would purchase such titles at inflated prices.

III. Procedural History of the District Court Proceedings

On December 20, 2022, Plaintiffs filed a Complaint and a Motion for a Preliminary Injunction in the United States District Court for the Northern District of California pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, alleging that the Merger violates Section 7 of the Clayton Act, 15 U.S.C § 18, and requesting a preliminary injunction until Plaintiffs' case was heard on the merits (22-cv-08991-JSC). On January 31, 2023, Microsoft filed a Motion to Dismiss

Plaintiffs' Complaint, alleging that, among other things, Plaintiffs lacked standing and that they were not entitled to injunctive relief.

On March 16, 2023, the district court took the motion under submission and granted Plaintiffs leave to file an amended complaint and vacated the motion hearing on Plaintiffs' Motion for a Preliminary Injunction. On April 10, 2023, Plaintiffs filed an Amended Complaint seeking to enjoin the Merger as unlawful under Section 7 of the Clayton Antitrust Act. On April 19, 2023, Microsoft filed a Motion to Dismiss Plaintiffs' First Amended Complaint. On April 24, 2023, Plaintiffs filed a renewed motion for preliminary injunction. 2-ER-214. On May 12, 2023, the district court held a motion hearing regarding Microsoft's Motion to Dismiss and Plaintiffs' Motion for a Preliminary Injunction. The court did not, however, require Microsoft to oppose Plaintiffs' motion for preliminary injunction on the merits. The district court only required that Microsoft address the issue of whether Plaintiffs could show immediate irreparable harm from the merger to warrant preliminary relief. See 1-ER-2. On May 19, 2023, the district court denied Plaintiffs' Motion for a Preliminary Injunction on the grounds that Plaintiffs could not demonstrate immediate irreparable harm. Id. On June 2, 2023, Plaintiffs filed a Notice of Appeal. 2-ER-224. The Motion to Dismiss was granted in part and denied in part on June 27, 2023. 2-ER-12-20.

On June 12, 2023, the Federal Trade Commission ("FTC") filed a Complaint for a Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act against Activision and Microsoft, in the United States District Court for the Northern District of California (3:23-cv-02880-JSC). On June 13, 2023, the district court ordered that the FTC's action be related to Plaintiffs' action. On June 13, 2023, the district court granted the FTC's request for a temporary restraining order pursuant to the Federal Trade Commission Act Section 13(b), 15 U.S.C. §53(b), to maintain the status quo while the FTC's Complaint is pending, and ordered that Microsoft and Activision shall not close or consummate their proposed Merger until five business days after the Court rules on the FTC's request for a preliminary injunction or a date set by the Court, whichever is later. The district court set an evidentiary hearing on the FTC's request for a preliminary injunction for June 22, June 23, June 27, June 28, and June 29, 2023. Those proceedings have commenced.

SUMMARY OF THE ARGUMENT

First, the district court erred as a matter of law in holding that irreparable harm to competition in a market does not constitute irreparable harm to consumers who actively participate in and rely on that market. The district court erroneously held that for a preliminary injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, private plaintiffs must prove that upon consummation of the merger,

they would immediately be irreparably harmed in a personal and discrete manner, other than the loss to competition in a market in which they personally and regularly participate. The district court adopted Microsoft's misguided interpretation of the irreparable harm element, applying a gravely heightened standard that, if adopted, would effectively eliminate private plaintiffs' ability to secure preliminary relief to prevent consummation of an unlawful merger that threatens competition. Indeed, if the heightened standard were the law, not only would private plaintiffs be denied the opportunity to challenge and block mergers before they irreparably harm competition, but so too would State Attorneys General, who bring private antitrust claims on behalf of their residents. The district court's adoption of the heightened standard is contrary to both Supreme Court and Ninth Circuit precedent, which have already addressed this exact issue. See, e.g., California v. Am. Stores Co., 492 U.S. 1301, 1304 (1989) (lessening of competition "is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent"); Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1023 (9th Cir. 2016) ("A lessening of competition constitutes an irreparable injury under our case law.").

Second, the district court erred by failing to adequately consider Plaintiffs' uncontested evidence, which demonstrated beyond question that this merger threatens Plaintiffs with irreparable harm. The district court failed even to

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acknowledge the majority of Plaintiffs' evidence and made contrary findings of fact without evidentiary support.

Third, the district court erred in holding that even assuming the merger would substantially lessen competition, and even assuming that these plaintiffs would be harmed, any harm could simply be remedied through a subsequent order of divestiture, unwinding the merger at some later date. But the district court's holding failed to recognize the irreparable nature of a merger's potential harm to competition, and the difficulty—and undesirability—of unwinding a \$68 billion merger between some of the largest corporations in the world, after they have already merged.

STANDARD OF REVIEW

On appeal of an order denying a motion for preliminary injunction, the Ninth Circuit reviews the district court's "legal conclusions de novo and its factual findings for clear error." *Ramos v. Wolf*, 975 F.3d 872, 887 (9th Cir. 2020) (citing *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017)). Thus, "[t]he denial of a motion for preliminary injunction will be reversed only if the district court abused its discretion or based its decision on an erroneous legal premise." *F.T.C. v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984).

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ARGUMENT

I. Under the Clayton Act, Lessening of Competition Constitutes an Irreparable Injury for Purposes of a Preliminary Injunction

Under binding Supreme Court and Ninth Circuit authority, the substantial lessening of competition in a market constitutes irreparable harm to consumers in that market. *See Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) ("a lessening of competition constitutes an irreparable injury under [the] law."); *California v. Am. Stores Co.* ("American Stores F"), 492 U.S. 1301, 1304 (1989) ("[L]essening of competition 'is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent.""). The district court failed to follow this binding authority. For that reason, the district court's order should be reversed and remanded, so that the district court can hold an evidentiary hearing and rule on Plaintiffs' motion for preliminary injunction according to the correct standard.

On a motion for a preliminary injunction, courts consider four factors: (1) the movant's likelihood of success on the merits; (2) the movant's likelihood of irreparable harm if the preliminary injunction is not issued; (3) a balancing of the equities; and (4) the public interest. *See, e.g., Boardman*, 822 F.3d at 1020; *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Here, in ruling on Plaintiffs' motion for a preliminary injunction, the district court assumed that Microsoft's \$68 billion acquisition of Activision would substantially lessen

competition across all the relevant markets alleged. *See* 1-ER-6 ("[T]he Court will assume Plaintiffs have met their burden of showing a likelihood of success on the merits."). Indeed, the district court did not even require Microsoft to oppose Plaintiffs' motion on the merits, because the Court assumed the merger would harm competition. 1-ER-2 ("At the Court's direction, Microsoft's opposition to the motion addresses only the issues of irreparable harm and the bond.").

But the district court ignored the assumption it made. Plaintiffs were denied its benefit. Despite assuming the Merger would harm competition, the district court failed to apply it according to *American Stores* and *Boardman*. Under those cases, a finding of harm to competition in a market suffices to establish the necessary irreparable harm to consumers of that market for a preliminary injunction. Instead, the district court adopted a novel—and erroneous—legal standard under which plaintiffs must show specific immediate irreparable harm to them other than the harm to competition. 1-ER-8. The district court denied Plaintiffs' motion for preliminary injunction on that basis alone. The district court's adoption of an incorrect legal standard was error.

A. Controlling Authority Holds That Lessening of Competition Is Irreparable Harm

California v. American Stores and Boardman control here. In American Stores, the state of California, acting as parens patriae on behalf of its resident

consumers,² brought suit under Section 16 of the Clayton Act to stop a merger between two grocery store chains. *See California v. Am. Stores Co.*, 697 F. Supp. 1125, 1134 (C.D. Cal. 1988). The state "alleged that Californians will be irreparably harmed if the proposed merger is completed" because the merger might "lessen competition." *Id.* The state sought a preliminary injunction, pointing to the harm to competition. The district court granted the injunction finding the "[1]essening of competition . . . is recognized as precisely the kind of irreparable injury that the interlocutory remedies under the Clayton Act were intended to prevent." *Id.*

The district court did not require specific proof of harm to any particular individual immediately upon consummation. It did not require proof of irreparable harm in any direct and specific manner. *Id.* Proof of generalized harm to competition likely resulting from the merger sufficed. The district court focused on what would happen to competition in the marketplace generally as a matter of economics and antitrust law, not its specific impact on particular consumers. The

When states bring *parens patriae* actions on behalf of their consumers, such actions are treated as actions brought by private litigants and must meet the same requirements. Phillip E. Areeda & Herbert Hovenkamp, An Analysis of Antitrust Principles and Their Application ¶ 325b (3d ed. 2007) (Areeda & Hovenkamp 3d ed.) (citing *New York v. Kraft Gen. Foods, Inc.*, 862 F. Supp. 1030 (S.D.N.Y.), aff'd, 14 F.3d 590 (2d Cir. 1993)) ("When the states acting as *parens patriae* bring suit, . . . they act as private parties and must therefore meet the irreparable harm requirement."). Indeed, in *California v. American Stores* itself, the Supreme Court treated the state as a private litigant and applied the same standard applicable here. *See California v. Am. Stores Co.* ("*American Stores II*"), 495 U.S. 271, 295–96 (1990) ("A private litigant, however, must have standing—in the words of § 16, he must prove 'threatened loss or damage' to his own interests in order to obtain relief.").

court did not find it necessary to identify or separate anticompetitive effects with respect to individual consumers. Unlike a claim for damages, there was no requirement that plaintiff show individualized causation or damages. As the district court held, "[i]f the Court is to make a determination as to whether this merger is anticompetitive, the State is correct in its assertion that the egg must be examined before it becomes an [omelet]. The Court therefore finds that plaintiff has made an adequate showing of irreparable injury." *Id.* In so doing, the court recognized that proving damages with respect to a transaction that had not yet occurred was not required.

The Ninth Circuit affirmed, specifically addressing the required showing of irreparable injury to establish the basis for an injunction. The Ninth Circuit also recognized that generalized proof of harm to competition is sufficient. The Ninth Circuit held: "We agree with the district court that [lessening of competition] is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent." *See California v. Am. Stores Co.*, 872 F.2d 837, 844 (9th Cir. 1989). The Ninth Circuit did not require the plaintiffs to show any specific or individualized personal irreparable injury the moment the merger occurred. Relying on the generalized proof of lessening of competition in the marketplace, the Ninth Circuit held that this proof would be sufficient. And because the plaintiffs had shown a likelihood of success on the merits, "the district

court's determination of irreparable harm follows naturally from its holding," since a likelihood of success on the merits by definition means a likelihood of a lessening of competition. *Id.* Although the Ninth Circuit upheld the district court's analysis and holding on irreparable injury, the Ninth Circuit reversed issuance of the preliminary injunction on the separate grounds that a preliminary injunction constituted an indirect divestiture, which the court held was only available to the government, and not available to private plaintiffs. *Id.* at 844–45.

The plaintiffs appealed to the Supreme Court. The Supreme Court stayed the Ninth Circuit decision, thereby re-instituting the preliminary injunction pending resolution of the appeal. The Supreme Court's order left little doubt that it was sufficient for a plaintiff to show irreparable harm based solely on generalized proof that the merger would likely lessen competition. Justice O'Connor explained: "I am persuaded that applicant has set forth sufficient reasons for granting a stay in this case. I agree with both the District Court and the Court of Appeals that applicant has made an adequate showing of irreparable injury." Am. Stores I, 492 U.S. at 1304. The Court cited to the district court decision and held that "[the] lessening of competition 'is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent." Id. The Supreme Court's order thus settled that, under Section 16, generalized proof that a merger might substantially lessen competition under Section 7 is proof of injury

sufficient to establish a threat of irreparable harm to market participants to warrant preliminary relief.

The Ninth Circuit reaffirmed this bedrock principle in *Boardman*, 822 F.3d at 1023. In *Boardman*, fisherman challenged the merger of two seafood processors. *Id.* at 1015. The district court granted a preliminary injunction and the defendants appealed. The defendants specifically argued that a preliminary injunction was unwarranted because there was no immediate danger of irreparable harm. The Ninth Circuit affirmed the preliminary injunction. First, generalized proof of harm to competition was sufficient. The Court re-affirmed that "a lessening of competition constitutes an irreparable injury under [the] law." *Id.* at 1023. Second, the Ninth Circuit analyzed whether the merger might occur before plaintiffs could prove their claims on the merits. *Id.* Finding that the merger might consummate before the case could be adjudicated, the Court held the threat of immediate irreparable harm was satisfied. *Id.*

Both cases are directly on point. Both cases concerned actions on behalf of market participants seeking to prevent harm to competition in those markets. Both cases were brought under Section 16 of the Clayton Act, 15 U.S.C. § 26. Both cases did not require proof of direct and immediate harm to individual plaintiffs upon consummation of the merger. Both cases held that a lessening of competition constitutes an irreparable injury to justify preliminary relief. And both cases

measured the "immediacy" of irreparable harm from when the merger might consummate, not when specific downstream anticompetitive effects would directly materialize against the market participants. Both were ignored or misconstrued by the district court.

The district court's attempts to distinguish *American Stores* and *Boardman* fail. 1-ER-7–8. With respect to *American Stores*, the district court's order stated that the "trial court [in *American Stores*] found that the plaintiffs established that, absent a preliminary injunction, the defendant would 'rapidly restructure the newly-acquired company and its assets and disable the acquired chain from operating independently of the parent,' and that it would be 'extremely difficult' to unwind the merger." 1-ER-8 (quoting *Am. Stores*, 697 F. Supp. at 1134).

The district court's attempt to distinguish *American Stores* with respect to the likelihood of post-merger retrospective relief is contrary to authority. The district court concluded as a factual matter that if the *American Stores* merger had been allowed to consummate, "it would be 'extremely difficult" to provide effective remedy post-merger, unlike the Merger here. 1-ER-8. But the trial court in *American Stores* merely cited to caselaw for the general proposition that preventing harm through prospective injunctive relief is more efficient and more consistent with the interests of justice than post-merger remedies, which include divestiture, unwinding the merger, or damages. The same basic principle applies

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here too. The trial court in *American Stores* did not make any specific factual finding regarding the ease of post-merger divestiture. As numerous other courts have found, "prospective relief is a more effective remedy" than "retrospective relief," because it is difficult to unwind already consummated mergers. *See, e.g.*, *Am. Stores*, 697 F. Supp. at 1134. Indeed, courts have even refused to unwind unlawful mergers because of the great harm that unwinding already consummated mergers causes. *See Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118 (N.D. Cal. 2011). The same is true here. The district court mistakenly applied this point exactly backwards by concluding it would be better to address anticompetitive concerns after the Merger is consummated. 1-ER-9–10 ("Should the merger survive European review and the FTC administrative action . . . the Court will be able to hold a trial on the merits [after the merger is already consummated] and finally decide the issue before Plaintiffs suffer any irreparable harm.").

Moreover, the Supreme Court did not base its holding on this supposedly dispositive concern in its order issuing a preliminary injunction. *See Am. Stores I*, 492 U.S. at 1304. The Supreme Court did not hold that a preliminary injunction is only available where it is proven that a defendant will rapidly restructure the newly-acquired company. Nor was there any specific factual finding of the sort. Rather, the Supreme Court held that the "lessening of competition" is what constitutes the irreparable harm; not the alleged "restructuring" of the entities. *Id*.

The district court's treatment of *Boardman* fares no better. In *Boardman*, the sole focus of the "immediacy" requirement was the timing and status of the merger. *Boardman*, 822 F.3d at 1023. Because the *Boardman* merger could be consummated before the plaintiffs' claims could be heard, the court readily concluded that the harm was immediate. *Id*. Here, given the timing of the merger, the harm is even more immediate. Under the terms of the Merger, the transaction could happen at any time before that deadline. 2-ER-271 at ¶ 2.3. Under *Boardman*, the threatened harm is immediate. *Boardman*, 822 F.3d at 1022-23.

The district court ignored and failed to apply the central holdings of *California v. American Stores* and *Boardman*—that "[a] lessening of competition constitutes an irreparable injury under [the] law." *See Boardman*, 822 F.3d at 1023; *Am. Store I*, 492 U.S. at 1304. Indeed, it is not cited anywhere in the court's order.

B. The District Court's Novel Standard Improperly Required Proof of Specific and Immediate Irreparable Injury to Plaintiffs Other Than Harm to Competition

Instead, the district court applied an unprecedented and incorrect standard. The district court required plaintiffs to make a specific individualized showing of irreparable injury to plaintiffs at the moment the merger is consummated. *See* 1-ER-6–10. The district court mistakenly set the bar so high, it would effectively eliminate preliminary relief, even where a merger would substantially harm competition.

The standard adopted by the district court would require a plaintiff to not only show a likelihood that the merger may substantially lessen competition in a market in which the plaintiff participates, but also that the merger would cause that plaintiff specific irreparable injury "immediately" upon consummation of the merger. In addition, the district court held that any such injury was not irreparable so long as it could be cured by a subsequent order to unwind the merger and provide an award of damages. 1-ER-9 ("[T]he plaintiff's injury could be immediate only if the merger, or particular aspects of the merger, could not be undone."). For example, the Court mistakenly focused its inquiry on whether Microsoft would make games currently played by Plaintiffs "stop working" immediately after the merger. 1-ER-6. In other words, the Court required proof of how and when the harm to competition would specifically and irreparably injure plaintiffs. 1-ER-5-10. Such a chain of causation—which must be analyzed in a hypothetical future post-merger—is not required. Such a requirement would effectively preclude preliminary relief in claims brought under Section 7 and 16 of the Clayton Act, because such proof is largely impossible. A merger's specific downstream effects on a market, including its effects on competition, prices, and consumers, take time to manifest. Higher prices, reduced output, or reduced innovation do not happen overnight. Effects on competition include effects on business decisions which may ultimately affect prices and other market conditions.

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They take some time. To require proof of such effects on day one would in effect render the statute a nullity because no merger agreement has such demonstrably instantaneous harmful effects.³

Sections 7 and 16 do not require this kind or level of individualized proof with respect to particular consumers or competitors. Section 7 proscribes all prospective mergers that might substantially lessen competition. 15 U.S.C. § 18. And Section 16 provides for preliminary relief to those that are threatened with loss or damage from the harm to competition. 15 U.S.C. § 26. These sections address harm to the marketplace and harm competition within that marketplace. Consideration of these issues involves analysis of market dynamics as a result of the merger, including issues like market concentration, and the likely effect of the merger on prices, output, innovation, supply and demand, and other economic considerations.

Instead, the district court adopted a separate and novel requirement that plaintiff prove a direct causal link between the proposed merger and particular transactions or purchases plaintiffs made or were to make. This strays far away from Congress's intent, which focuses on protecting competition and stopping concentration in its incipiency. If the district court's heightened standard were

³ If this court upholds such a requirement, merging companies could simply implement a policy of delaying anticompetitive actions sufficient to eliminate any plaintiff's ability to show the type of immediate irreparable injury that Microsoft sought and the district court required. Such a holding would upend merger enforcement in this country.

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adopted by this Court, litigation over mergers under Sections 7 and 16 of the Clayton Act will be bogged down in tangential evidentiary hearings over whether the plaintiffs had sufficiently demonstrated a chain of specific causation with respect to transactions yet to occur, beginning "immediately" after consummation of the merger. It would further require that plaintiffs show that the specific harm is irreparable. The district court's standard would add an additional causation element to claims brought under Section 7 and 16.

It also ignores the axiomatic proposition declared in *American Stores* and *Boardman* that where a plaintiff has adequate antitrust standing to bring suit, and where harm to competition in a given market sufficiently affects the plaintiffs' own interests, harm to competition in that market constitutes irreparable harm to those market participants. And it constitutes irreparable harm for purposes of a preliminary injunction without the need to prove precisely how the lessening of competition will manifest itself into discrete irreparable harms against the individual plaintiffs "immediately" upon consummation.

Indeed, in many mergers, the substantial harm to competition may never manifest itself in the form of discrete irreparable harm to individual consumers, and certainly not on day one. Where the lessening of competition takes the form of reductions in innovation of product quality, such harm is difficult or often impossible to prove or quantify with respect to any particular consumer. Other

market conditions are impossible to tie to specific consumers. What innovations will never come about due to a merger's harm to competition? What new technologies will never be developed? What new market entrants will be denied the opportunity to enter the market? And therefore, what choices will consumers lose? The answers to these questions are often not capable of the specific answer required by the district court. The harm that Section 7 consequently focuses on is the harm to competition and the competitive process.

C. The Limiting Principle Is Whether the Plaintiffs Are Personally Threatened with Loss or Damage from Harm to Competition in the Relevant Markets

The district court concluded that *American Stores* and *Boardman* could not mean what they said, because if so, it would eliminate the separate irreparable harm element from the standard. *See* 1-ER-7 (holding that "an injunction 'does not follow from success on the merits as a matter of course" and citing *Winter v. Nat'l Resources Def. Council, Inc.*, 555 U.S. 7, 32 (2008)). Not so. Nor is this Plaintiffs' position. There is no automatic entitlement to a preliminary injunction. The limiting principle is provided by Section 16 of the Clayton Act. 15 U.S.C. § 26. *See American Stores II*, 495 U.S. at 296 ("A private litigant, however, must have standing—in the words of § 16, he must prove "threatened loss or damage" to his own interests in order to obtain relief.") (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 107 (1986)).

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In *United States v. Borden Co.*, 347 U.S. 514, (1954), the Supreme Court explained that a plaintiff is entitled to injunctive relief where the "threatened loss or damage" is "of a sort personal to the plaintiff." *Id.* at 518.⁴ As *Borden* explains, Plaintiffs must show that they are sufficient market participants such that harm to competition in that market is personal to them, *Borden*, 347 U.S. at 518, and that they are indeed "threatened with loss or damage" from the lessening of competition in the relevant market. 15 U.S.C. § 26. Plaintiffs readily meet this standard.

Plaintiffs are consumers who have purchased and will purchase goods and services (video games, video game consoles, streaming services, multi-game library subscriptions, operating systems) in the future. Under those circumstances—such as the grocery store consumers in *American Stores*, or the fisherman in *Boardman*—where the plaintiff has antitrust standing and is sufficiently threatened with harm from a loss of competition in a market they participate in and rely on, the "lessening of competition constitutes an irreparable injury under [the] law." *Boardman*, 822 F.3d at 1023.

⁴ In *Borden*, the Department of Justice sought an injunction against ten Chicago dairies. *Id.* at 515. Prior to the lawsuit, the dairies had been sued by a competitor that had obtained an injunction. The defendant sought to dismiss the government's suit on the grounds that the government's injunction claim was "useless," because the private plaintiff had already obtained an injunction. *Id.* The Supreme Court rejected that claim finding "[t]hese private and public actions were designed to be cumulative, not mutually exclusive." *Id.* at 518.

Indeed, the district court confirmed that these Plaintiffs have standing to pursue injunctive relief against this merger in her order largely denying Microsoft's motion to dismiss. *See* 2-ER-12–20. The district court acknowledged that these plaintiffs are threatened with irreparable harm from the lessening of competition in the relevant video game markets alleged. 2-ER-13–16. There can thus be little dispute that these Plaintiffs are precisely the type of Plaintiffs for which a lessening of competition constitutes an irreparable injury under the law for purposes of receiving a preliminary injunction.

D. The District Court's Opinion Would Undermine Congress's Intent and the Statutory Framework.

If the district court's order is left to stand it would also drastically curtail the statutory framework established by Congress and confirmed by both the Supreme Court and this Court. As part of Congress' statutory scheme to prohibit all mergers and acquisitions that may substantially lessen competition, Congress established a private right of action as an important means to stop economic concentration through mergers. Section 16 of the Clayton Act provides in relevant part that "[a]ny person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage" from an unlawful merger or acquisition. 15 U.S.C. § 26. As explained in *American Stores II*, the Clayton Act's provisions "manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers." 495 U.S. at 284. By encouraging vigorous private litigation to police

unlawful mergers, Congress sought to "subject[] mergers to searching scrutiny" through private lawsuits such as this. *Id.* at 285. Indeed, "[p]rivate enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition." *Id.* at 284.

The district court's order would drastically curtail actions by private plaintiffs—including by states on behalf of their consumers—from bringing suit against mergers that might substantially lessen competition as Congress intended. Without any realistic opportunity to achieve preliminary relief before a merger consummates, plaintiffs cannot prevent real harm to competition in the markets they participate in and rely on, which constitutes irreparable harm. *See Am. Stores I*, 492 U.S. at 1304; *Boardman*, 822 F.3d at 1023.

II. Even Under Microsoft's and the District Court's Erroneous Standard, The Court Abused its Discretion in Failing to Adequately Consider the Uncontested Evidence

Even under the erroneous standard applied, the district court abused its discretion in failing to adequately consider key uncontroverted record evidence. At the court's direction, Microsoft did not oppose plaintiffs' motion on the merits. 1- ER-2. Yet the court largely ignored plaintiffs' unchallenged evidence with respect to the issue of irreparable harm. Instead, it relied on facts outside the record, failing to correctly apply the law to the evidence before it. Instead of considering the evidence of irreparable harm, the district court failed to recognize it or ignored it.

The conclusion that there is no irreparable harm when the court failed to consider the evidence before it is an abuse of discretion. In light of the extensive record below, this Court should hold that Plaintiffs meet the irreparable harm element and remand for the district court to hold an evidentiary hearing to properly address Plaintiffs' motion for preliminary injunction.

A. The Court Failed to Adequately Consider Whether a Lessening of Competition Would Irreparably Harm These Plaintiffs

The Court abused its discretion because it failed to give due weight and consideration to the fact that these Plaintiffs are consumers who participate in the markets affected by the likely reduction in competition. The Court assumed that this merger would substantially lessen competition in the five markets alleged in Plaintiffs' motion. 1-ER-6 ("For purposes of this Order, the Court will assume Plaintiffs have met their burden of showing a likelihood of success on the merits."). Those markets are (1) triple-A video games; (2) consoles; (3) multi-game library subscriptions; (4) cloud-gaming services; and (5) computer operating systems. 5-ER-626–641. Plaintiffs participate in and rely on all five markets.⁵

⁵ Plaintiffs submitted declarations showing that they participate in and rely on those markets for recreation and social interaction. 2-ER-101–104; 153–172. All of them rely on triple-A games. *Id.* All of them rely on consoles to play those games. *Id.* Beowulf Owen, Hunter Jukupko, Jessie Galvan, Curtis Burns, and Daniel Loftus all rely on multi-game library subscription services to access games. 2-ER-154 at ¶ 5; 2-ER-158 at ¶13; 2-ER-162 at ¶ 12; 2-ER-165 at ¶ 3; 2-ER-168 at ¶ 5; 2-ER-171 at ¶ 4. Beowulf Owen relies on Microsoft's cloud-gaming service to play games with friends across different platforms. *See* 2-ER-154–155 at ¶¶ 5, 12.

As consumers, Plaintiffs benefit from competition in the five relevant markets. *A fortiori*, Plaintiffs are irreparably harmed by the reduction or absence of competition. The court assumed that the merger would reduce competition in each market. A substantial lessening of competition within these markets—as the district court assumed—without question irreparably harms them. Just like grocery stores consumers, a reduction in competition will harm them. *See Am. Stores I*, 492 U.S. at 1304. But the district court never gave adequate consideration to the Plaintiffs' declarations showing that they depend and rely on competition in the relevant markets. The district court assumed the merger would harm competition in markets the Plaintiffs participate in and rely on, but failed to correctly apply that assumption.

B. The District Court Failed to Adequately Consider the Uncontroverted Evidence that the Merger Would Immediately Cause an "Upward Pressure on the Price of AAA Games"

In Plaintiffs' motion for a preliminary injunction, Plaintiffs submitted two expert reports showing that the merger would substantially lessen competition. 5-ER-615–660; 4-ER-540–613. Both reports demonstrated that this merger will

Beowulf Owen and Dante DeMartini rely on the Windows operating system and Beowulf Owen also relies on the Linux operating system to run their games. 2-ER-154 at \P 8; 2-ER-165 at \P 3.

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substantially lessen competition in and across numerous markets. This evidence was uncontroverted.

Critically, for purposes of the irreparable harm element, the uncontested expert economic report by Professor Cabral demonstrated that "[t]he day the merger is consummated, the upward pressure on the price of [triple-A] games will begin to be felt" due to the internalization of the externality of competition. 5-ER-644-45. Professor Cabral's report further demonstrated that the Herfindahl-Hirschman index of market concentration is often correlated to market prices. 5-ER-639. And Professor Cabral's report showed that upon consummation, the HHI index in the market for triple-A games would increase significantly. See 5-ER-641–42. The economic analysis conducted by the Cornerstone Report was in accord. See, e.g., 4-ER-607. Microsoft argued only that it would take some time for Plaintiffs to experience these effects, and that price increases do not represent irreparable harm because monetary damages can be compensated after the fact. It was thus uncontested that this merger would put an immediate upward pressure on prices in several of the markets.

Further, the economic reports showed that the merger will cause an immediate downward pressure on innovation. As shown in Professor Cabral's report, "one of the incentives for product improvement is to capture demand from rival offerings. To the extent that rival offerings are now part of the same entity"—

which would be the case as soon as Microsoft and Activision combine—"such incentive disappears the day the merger is consummated. Lower investment levels will be observed soon after the merger, whereas the effects of this lower investment will be felt over time." 5-ER-644—45. The Cornerstone Report concluded the same. *See, e.g.*, 4-ER-607 (stating that merger would allow Microsoft to make reductions in innovation and quality.). There was thus uncontroverted evidence that this merger would likely reduce the quality and innovation in the markets. The evidence demonstrated that immediately upon consummation of the merger, upward pressures on price and downward pressures on innovation would be felt. *See, e.g.*, 5-ER-644—45.6

Even though the evidence was uncontroverted, and again despite the assumption of the reduction of competition, the district court failed to consider this evidence in determining irreparable harm. Even under the district court's erroneous standard, the district court failed to consider that higher prices constitute irreparable harm. *See Am. Stores*, 697 F. Supp. at 1133 (concerning monetary harm to consumers from higher grocery store prices); *Boardman*, 822 F.3d at 1021–22 (monetary harm to fisherman through reduced fish prices).

C. The District Court Abused Its Discretion in Erroneously Finding, Without Evidence, that Microsoft has "Written Agreements" that

⁶ Plaintiffs' declarations show, at minimum, that they rely on and purchase triple-A games, including from Activision *See* 2-ER-153–172.

preclude Microsoft from Foreclosing Activision's Games From Microsoft's Rivals

The district court did acknowledge one type of specific irreparable harm. The Court recognized that if Microsoft foreclosed Activision's games from Microsoft's rival platforms, Plaintiffs would be irreparably harmed. 1-ER-6. Plaintiffs submitted substantial evidence on this point. Plaintiffs submitted record evidence from Microsoft's own files showing that Microsoft intends to do so. *See* § II.D, *infra*. Plaintiffs also submitted uncontroverted expert testimony that Microsoft has the incentive to do so. 4-ER-517–537; 5-ER-633–38. Plaintiffs also showed that in the past, despite remonstration to the contrary, Microsoft did in fact foreclose rivals from the content it acquired. *See* § II.D, *infra*. Microsoft's only response was that it had entered into two limited agreements to make one game from Activision (*Call of Duty*) available under limited terms to Nvidia and Nintendo for a ten-year period. *See* 4-ER-391–407; 4-ER-408–412.

The district court rejected and ignored Plaintiffs' evidence on the grounds that it was merely speculation. 1-ER-6–7 ("Plaintiffs' speculation that Microsoft could violate its written agreements is insufficient to meet their burden of showing a likelihood of immediate irreparable harm."). And the district court found as a factual matter that Microsoft had "written agreements" that preclude Microsoft from making *Call of Duty* exclusive. 1-ER-7 ("notwithstanding its written

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agreements to the contrary"). This constituted an abuse of discretion for several reasons.

First, the Court's factual assertion that Microsoft has "written agreements" precluding it from making Activision games exclusive is not supported by the record. Microsoft cites to only two agreements. One with Nvidia, 4-ER-391–407, and one with Nintendo, 74-ER-408-412. Nvidia and Nintendo are only two of Microsoft's many platform-side competitors. There is no similar agreement with Sony, for example. Thus, there are no written agreements in the record that would preclude Microsoft from foreclosing Activision's games (including *Call of Duty*) from the PlayStation console. There are no written agreements in the record that would preclude Microsoft from bringing Activision games to Xbox Game Pass (Microsoft's multi-game library subscription service) but foreclosing Activision games from PlayStation's rival game subscription service, PlayStation Plus. There are no written agreements that would preclude Microsoft from foreclosing Activision's content from the Mac or Linux operating systems. Indeed, there are no written agreements to stop Microsoft from foreclosing its rivals other than Nvidia and Nintendo. Thus, for the district court to conclude that Microsoft's two written agreements with Nvidia and Nintendo preclude any foreclosure by Microsoft in the relevant markets constitutes clear error.

 $^{^7}$ The agreements are also illusory and effectively unenforceable. But Plaintiffs do not appeal on that basis.

Second, the two agreements with Nvidia and Nintendo, only apply to *Call of Duty*. They do not apply to the several other triple-A games that Activision currently publishes, or the games that Activision will publish in the future. Plaintiffs' declarations show that *Call of Duty* is not the only Activision game they play on platforms that compete with Microsoft. *See* 2-ER-163 at ¶ 3; 2-ER-166 at ¶ 4; 2-ER-174 at ¶ 4; 2-ER-180 at ¶ 3.

Third, Microsoft made a vague allegation in its motion that there is a third agreement, in addition to the agreements with Nvidia and Nintendo. Microsoft asserted in its opposition that there is an agreement between Activision and Sony that requires Activision to continue to provide some undisclosed *Call of Duty* support to Sony until sometime in 2024. 4-ER-444 at lines 24–27. This is entirely unsupported. Microsoft did not put any such agreement into the record or make any declarations about its terms. Microsoft merely cited to vague testimony that Microsoft and Activision provided to the FTC during the administrative proceeding which references an expiring agreement between Sony and Activision. 4-ER-351-54; 356-376; 377-90; 413-430. But no terms of that agreement were disclosed. No declarations about the alleged agreement were provided. And the agreement itself was not submitted. The Court appeared to find that there are "written agreements" that preclude Microsoft from foreclosing Call of Duty from Sony through the end of 2023 or 2024. 1-ER-7. But that is not supported by the

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record. It was simply accepted by the district court without examination or analysis.

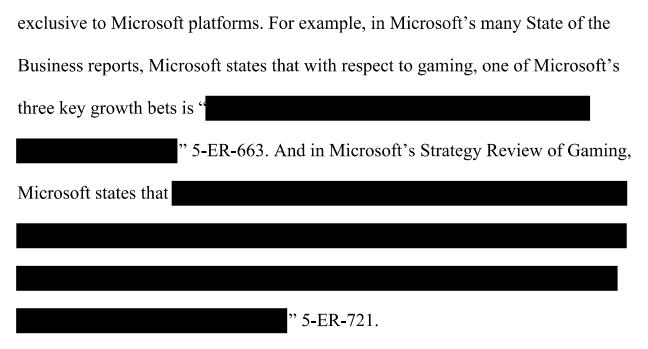
Fourth, even assuming that there is a current undisclosed agreement between Activision and Sony that precludes Microsoft from foreclosing Call of Duty from PlayStation through the end of 2023 or 2024, the district court failed to consider that Microsoft could still immediately cease development of Call of Duty for PlayStation for all future titles that would have been released to PlayStation in 2025 and beyond. Triple-A games like *Call of Duty* take years to develop. Thus, Microsoft could cut development of *Call of Duty* for all titles that are currently in development to be released in 2025 and beyond. That would constitute irreparable harm to these Plaintiffs, because even if the effects of that foreclosure strategy were not felt by the Plaintiffs until 2025, ceasing of development immediately upon consummation of the merger would guarantee that harm even if it would be felt sometime in the future. A subsequent order of divestiture could not undue the lost development and put production cycles of Activision content for the PlayStation back on track. The harm would occur immediately upon consummation of the merger even if the direct harm would not materialize against the Plaintiffs until the future. Nor does the vague and undisclosed agreement appear to apply to the multi-game library subscription market or the cloud-gaming

market and, thus, Microsoft could immediately foreclose Activision games from PlayStation's rival offerings of multi-game subscriptions or cloud-gaming services.

D. The District Court Failed to Adequately Consider the Uncontroverted Evidence that Microsoft is Likely to Make Activision's Games Exclusive to Microsoft Platforms

In addition to finding no irreparable harm based on Microsoft's two "written agreements," the district court also failed to consider any of the evidence in the record showing that Microsoft is likely to foreclose Activision games from Microsoft's rivals. The district court dismissed it all in one sentence by saying that Plaintiffs' "speculation" on this is insufficient. 1-ER-6-7. Plaintiffs' motion for a preliminary injunction demonstrated how Microsoft is likely to make Activision's games exclusive (or partially exclusive) to Microsoft's platforms in consoles (Xbox), library subscriptions (Xbox Game Pass), computer operating systems (Windows) and cloud-gaming (Xbox Cloud Gaming and Xbox Game Pass Ultimate). 5-ER-754-56. Even under the district court's standard, the threat that Microsoft will foreclose Activision's games is clearly irreparable harm to these plaintiffs because they rely on playing Activision games on non-Microsoft platforms, such as PlayStation. See 2-ER-166 at ¶¶ 3-4; 2-ER-170 at ¶¶ 3-4; 2-ER-174 at ¶¶ 3–4; 2-ER-177 at ¶¶ 3–5; 2-ER-180 at ¶¶ 3–4.

First, once again the district court failed to consider the uncontroverted evidence that Microsoft's core gaming strategy is to make gaming content



Microsoft's core strategy is borne out by its prior acquisitions. For example, in one of Microsoft's prior acquisitions of an independent game content developer, Microsoft disclosed that it was purchasing the company in order to gain access to its popular triple-A content (*Forza Horizon 3*) to make it exclusive to Microsoft. 5-ER-673 ("

""); 5-ER-705

Second, the district court failed to consider the uncontroverted evidence that not only has Microsoft done *the identical thing* in the past, but has also *similarly denied* to regulators that it would do so, but then did so anyway. The uncontroverted evidence showed that when Microsoft bought Zenimax in 2021 for \$7.5 billion, Microsoft assured regulators that it did not have the incentive to make

Zenimax (Bethesda) games exclusive. *See* 4-ER-471; 5-ER-755 (citing the publicly available European commission decision, see paragraphs 102, 106, 107, 108, 114, available at

https://ec.europa.eu/competition/mergers/cases1/202124/m10001 438 3.pdf). Yet despite Microsoft's statements that they lack the incentive, Microsoft has made the decision to make numerous ZeniMax triple-A games exclusive, including *Redfall*, Starfield, and Elder Scrolls VI. See, e.g., Sisi Jiang, Microsoft Explains Why Elder Scrolls VI Will Be Exclusive And Call of Duty Won't, Kotaku, Nov. 23, 2022, available at https://kotaku.com/call-of-duty-xbox-exclusive-elder-scrolls-6microsoft-1849818356. According to an interview with the designer of *Redfall*, development for the PlayStation 5 was ongoing at the time Zenimax was acquired by Microsoft. Immediately after the acquisition, Microsoft directed the developers to stop work on the version for the PlayStation 5 and instead to direct all resources to the Xbox version, as well as preparing the game to be launched exclusively on Xbox Game Pass. He stated: "We got bought by Microsoft and that was a huge sea change. They said, 'no PlayStation 5. Now we're gonna do Game Pass, Xbox, and PC." 3-ER-229.

Third, the district court failed to consider the uncontroverted expert opinions that Microsoft has the short term and long term incentive to make Activision's gaming content exclusive to Microsoft platforms. 5-ER-633–38; 4-ER-517–537;

541, 551–62. As explained by Professor Cabral, "Microsoft would have both the ability and the incentive to engage in partial and/or total foreclosure strategies" with Activision's triple-A content, because "Microsoft's benefits from foreclosing competition outweigh the possible short-term costs in terms of lower sales." 5-ER-634. Sony's expert material confirms this. *See*, *e.g.*, 4-ER-517–537. And Microsoft's own internal communications confirm the expert analysis. *See*, *e.g.*, 5-ER-711 (stating that it may be that it "[t]otally would have been worth it to lose \$2B or \$3B" to ensure that Microsoft, as opposed to its competitors, "owns most of the valuable content" in order to create a "moat" against competition). Microsoft did not rebut any of this evidence.

The uncontroverted evidence in the record shows that these Plaintiffs face a real threat that Microsoft will foreclose Activision's important content from Microsoft rivals, ceasing development of these games on PlayStation and other platforms that Plaintiffs use.

E. The District Court failed to Adequately Consider the Uncontroverted Evidence that this Merger could Significantly Damage the PlayStation's Competitive Standing, or Even Put PlayStation or PlayStation Plus Out of Business

The district court failed to adequately consider the uncontroverted evidence showing that the Merger threatens irreparable harm to Sony. *See* 5-ER-711; 4-ER-515. Plaintiffs submitted internal email communications from Matt Booty,

Microsoft's Head of Xbox Game Studios to Microsoft's Chief Financial Officer of Xbox, stating that Microsoft may be able to "spend Sony out of business." Matt Booty wrote:

A different view to the general view below might be that we (Microsoft) are in a very unique position to be able to go spend Sony out of business. If we think that video game content matters in 10 years, we might look back and say, "Totally would have been worth it to lose \$2B or \$3B in 2020 to avoid a situation where Tencent, Google, Amazon or even Sony have become the Disney of games and own most of the valuable content." For example, it is practically impossible for anyone to start a new video streaming service at scale at this point. What content do you base it on? Things like Hulu and CBS All Access will be trivial players in the space. In games, Google is 3 to 4 years away from being able to have a studio up and running. Amazon has shown no ability to execute on game content. Content is the one moat that we have, in terms of a catalog that runs on current devices and capability to create new. Sony is really the only other player who could compete with Game Pass and we have a 2 year and 10M subs lead.

5-ER-711. Microsoft made no effort to explain or rebut this email.

Plaintiffs also submitted additional evidence showing the threat to Sony's competitive standing, including how important Activision's *Call of Duty* is to PlayStation. 4-ER-454–472; 4-ER-473–496. Plaintiffs also submitted a sworn Declaration from Jim Ryan, President of Sony's PlayStation business, expressing these very real concerns. 4-ER-498–515. The district court failed to consider the threat to Sony's competitive standing as irreparable harm to these gamers. Putting PlayStation, or PlayStation's multi-game library subscription or cloud-gaming services out of business would certainly constitute irreparable harm to these Plaintiffs who not only rely on the PlayStation to play triple-A games, but also who

rely on competition between Microsoft and Sony to ensure the benefits of competition in the console market, the multi-game library subscription market, the cloud-gaming market, and the triple-A gaming market. *See* 2-ER-110–113, 162–181.

III. The District Court Abused Its Discretion by Holding that Harm to Competition Can Be Cured Post-Merger Through an Order to Unwind and Divest From the Merger

The district court also abused its discretion by holding that any irreparable harm from the merger could simply be cured by a subsequent order of divestiture. If the district court were correct, no preliminary relief would ever be warranted, because any harm to competition or to the plaintiffs could simply be cured after the fact. But courts recognize that relief after the merger is already consummated and harm to competition is accomplished, relief post-merger cannot put the parties or the state of competition back to what it was ex-ante. *See*, *e.g.*, *Am. Stores*, 697 F. Supp. at 1134 ("If the Court is to make a determination as to whether this merger is anticompetitive, the State is correct in its assertion that the egg must be examined before it becomes an [omelet]."); *Taleff*, 828 F. Supp. 2d at 1125 (dismissing suit seeking divestiture because of the "costs and complexities of unwinding [the] merger," and the "serious prejudice and hardship [to defendant] as a result of divestiture").

CONCLUSION

For the foregoing reasons, the order of the district court denying Plaintiffs' motion for a preliminary injunction should be reversed. This Court should hold that these Plaintiffs do face irreparable harm from the merger sufficient to warrant preliminary relief under *California v. American Stores* and *Boardman*. This Court should therefore remand Plaintiffs' motion for preliminary injunction back to the district court to hold an evidentiary hearing on the likelihood of success on the merits and adjudicate whether Plaintiffs are entitled to a motion for preliminary injunction under the proper legal standard.

Date: June 27, 2023 Joseph R. Saveri

/s/ Joseph R. Saveri
Joseph R. Saveri (State Bar No. 130064)
Steven N. Williams (State Bar No. 175489)
Cadio Zirpoli (State Bar No. 179108)
David H. Seidel (State Bar No. 307135)
Kathleen McMahon (State Bar No. 340007)
JOSEPH SAVERI LAW FIRM, LLP
601 California Street, Suite 1000
San Francisco, CA 94108
Telephone: (415) 500-6800

Joseph M. Alioto Sr. **ALIOTO LAW FIRM**One Sansome Street, 35th Floor
San Francisco, CA 94104
Telephone: (415) 434-9200

Attorneys for Appellants Dante Demartini, Curtis Burns Jr., Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermont Alfred Loftus, Beowulf Edward Owen and Ivan Calvo-Perez Case: 23-15846, 06/28/2023, ID: 12744374, DktEntry: 29, Page 53 of 54

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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9th Cir. Case Number 23-15846

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Signature _/s/_Joseph R. Saveri Date: June 27, 2023 (use "s/[typed name]" to sign electronically filed documents)

No. 23-15846

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANTE DEMARTINI, CURTIS BURNS JR., NICHOLAS ELDEN, JESSIE GALVAN, CHRISTOPHER JOSEPH GIDDINGS-LAFAYE, STEVE HERRERA, HUNTER JOSEPH JAKUPKO, DANIEL DERMOT ALFRED LOFTUS, BEOWULF EDWARD OWEN, AND IVAN CALVO-PEREZ

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of California
No. 3:22-cv-08991-JSC
Hon. Judge Jacqueline Scott Corley

APPELLANTS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL

Joseph R. Saveri (State Bar No. 130064) Steven N. Williams (State Bar No. 175489) Cadio Zirpoli (State Bar No. 179108) David H. Seidel (State Bar No. 307135) Kathleen McMahon (State Bar No. 340007) JOSEPH SAVERI LAW FIRM, LLP 601 California Street, Suite 1000 San Francisco, CA 94108

Telephone: (415) 500-6800

Joseph M. Alioto Sr. **ALIOTO LAW FIRM** One Sansome Street, 35th Floor San Francisco, CA 94104 Telephone: (415) 434-9200

Attorneys for Appellants Dante Demartini, Curtis Burns Jr., Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermont Alfred Loftus, Beowulf Edward Owen and Ivan Calvo-Perez

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CMA, Anticipated Acquisition by Microsoft of Activision Blizzard, Inc., Final Report, April 26, 2023, available at
https://assets.publishing.service.gov.uk/media/644939aa529eda000 c3b0525/Microsoft Activision Final Report .pdf

Microsoft's opposition establishes that there is no harm from temporarily preserving the status quo. Although Microsoft disputes Plaintiffs' likelihood of winning on appeal, and disputes Plaintiffs will be irreparably harmed, Microsoft makes no showing (or even argument) as to the balance of hardships and the public interest. Microsoft thus concedes it faces no harm in granting this motion.

I. ASKING THE DISTRICT COURT TO ISSUE TEMPORARY RELIEF PENDING THIS APPEAL WOULD HAVE BEEN IMPRACTICABLE

Microsoft disputes that it would have been impracticable first to move the district court for temporary relief pending appeal. But it would have been impractical and futile to have done so.

First, it would have been futile because a temporary injunction pending this appeal was essentially denied when the district court denied Plaintiffs' application for a preliminary injunction pending a trial on the merits. A temporary injunction pending appeal and a motion for a preliminary injunction both require a showing of threatened irreparable harm. *See Lopez v. Heckler*, 713 F.2d 1432, 1435–36 (9th Cir. 1983). Thus, had Plaintiffs first moved in the district, Plaintiffs would have been required to ask the district court to address the same irreparable harm issue, which had just been denied.

Moreover, one issue in Plaintiffs' appeal is whether the Court applied the correct legal standard in adjudicating the irreparable harm element in Plaintiffs' motion for a preliminary injunction. The district court incorrectly held that it was

not sufficient for Plaintiffs to prove through generalized proof that the merger likely harmed competition in videogame markets, instead holding Plaintiffs to a higher burden of proving that the merger would cause direct and immediate injuries to the individual Plaintiffs from day one of the merger. See Plaintiffs' Opening Appellate Brief. Based on the application of the incorrect legal standard, the district court already ruled that Microsoft was free to merge. Asking the Court to reconsider the issue under the same erroneous standard would have been futile.

Further, moving first in the district court would also have been impracticable due to the timing of the Merger and the need to obtain prompt resolution from the Ninth Circuit. The district court's order denying Plaintiffs' motion for preliminary injunction was issued on May 19, 2023, just two days before Microsoft was able to merge. See Ex. A at p. 2 line 12. A noticed motion filed on May 19, 2023, would have taken at least thirty-five days to be heard. See N.D. Cal. Local Rule 7-2. And there is no guarantee when and if the district court would have ruled on the motion. There was thus insufficient time to move first in the district court, given the district court did not deny Plaintiffs' motion until two days before Microsoft could merge.²

^{1 &}quot;Ex." references refer to the exhibits attached to the Declaration of Joseph R. Saveri filed concurrently with this reply.

2 Microsoft cites to several cases from outside the Ninth Circuit to argue that the "impracticable" standard under Federal Rule of Appellate Procedure 8(a) is a high bar. But courts recognize that where there is inadequate time to move first in the district court, such a motion would be "impracticable." See, e.g., Commonwealth v. Beshear, 981 F.3d 505, 508 (6th Cir. 2020).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THIS APPEAL

"In deciding whether to grant an injunction pending appeal, the court 'balances the plaintiff's likelihood of success against the relative hardship to the parties." Se. Alaska Conservation Council v. U.S. Army Corps of Engineers, 472 F.3d 1097, 1100 (9th Cir. 2006) (quoting Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 415 F.3d 1078, 1092 (9th Cir.2005). "The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." Lopez, 713 F.2d at 1435.

Microsoft confuses the "likely success" element of this motion. Microsoft argues that Plaintiffs must satisfy this Court that they are likely to succeed on the underlying merits of their Section 7 claim—here, whether the merger "might substantially lessen competition" in any relevant market. 15 U.S.C. § 18. But that is not the correct showing of likely success for this motion because Plaintiffs are not asking this Court to issue a preliminary injunction. On this motion, which merely seeks a temporary injunction pending this appeal in order to remand to the district court to hold a hearing in the first instance on whether the merger is likely to lessen competition for purposes of a preliminary injunction, Plaintiffs must demonstrate that they are likely to succeed *on this appeal. See, e.g., California v. Am. Stores Co.*, 492 U.S. 1301, 1307 (1989) (issuing temporary injunction pending

appeal to the Supreme Court because the potential irreparable harm to competition outweighed the potential harm in delaying the merger, and there was at least a "reasonable probability" that the appeal to the Supreme Court would be successful). As Plaintiffs' Opening Appellate Brief shows, they are likely to succeed on the appeal for numerous reasons, including that the district court's order applied the incorrect legal standard to its analysis of irreparable harm in direct contravention of binding Supreme Court and Ninth Circuit authority under *California v. American Stores*, 492 U.S. 1301, 1304 (1989) and *Boardman v. Pacific Seafood Group*, 822 F.3d 1011, 1023 (9th Cir. 2016).

Further, the district court assumed for purposes of the preliminary injunction motion that Plaintiffs will prevail on the merits of their Section 7 claim. Ex. B at 1, 5. The district court did not allow Plaintiffs to have an evidentiary hearing to call any witnesses and offer documentary evidence in support of their claim. Rather, the district court assumed, without deciding, that Plaintiffs would prevail. *Id.* Plaintiffs' appeal therefore seeks to remand Plaintiffs' motion for preliminary injunction back to the district court to properly address the motion with an evidentiary hearing on the merits.

Moreover, the district court assumed Plaintiffs would prevail on the merits for good reason. As demonstrated in Plaintiffs' Opening Appellate Brief, there is substantial evidence that this merger will lessen competition. *See* Appellant's

Opening Brief § II.D. Moreover, the Competition and Markets Authority in the United Kingdom has already blocked the merger over antitrust concerns. See CMA, Anticipated Acquisition by Microsoft of Activision Blizzard, Inc., Final Report, April 26, 2023.³ And the FTC filed a suit in the Northern District of California seeking to enjoin the merger too.⁴

The uncontroverted evidence shows that Plaintiffs are likely to prevail on their Section 7 claim, just as the district court assumed. Under Section 7, Plaintiffs must show that Microsoft's \$68.7 billion merger with Activision might substantially lessen competition. 15 U.S.C. § 18. Congress's passage of Section 7 of the Clayton Act was specifically and unequivocally intended to stop concentration in its incipiency. The very objective of Section 7 of the Clayton Act was to "prevent accretions of power," even those "which 'are individually so minute as to make it difficult to use the Sherman Act test against them." United States v. Aluminum Co. of Am., 377 U.S. 271, 280 (1964).

Far from a small accretion of power, Microsoft's proposed acquisition would be one of, if not the, largest technology merger of all time. The merger is a clear

³ available at

https://assets.publishing.service.gov.uk/media/644939aa529eda000c3b0525/Microsoft Activision Final Report .pdf.

Plaintiffs' complaint was filed in December, 2022. The FTC's action was filed on June 12, 2023. It was ordered related to Plaintiffs' pending case. Ex. C. Plaintiffs moved to join with the FTC action so that the parties would not need to have two separate hearings before the same judge. Ex. D. Despite the FTC's action being related to Plaintiffs' previously filed action, the district court denied Plaintiffs' motion to join the FTC action and precluded them participating in the preliminary injunction hearing. Ex. E.

attempt by Microsoft to monopolize the multi-game library subscription, cloud-gaming, and high-performance console markets, and to further entrench its monopoly power in the computer operating systems market, where it already holds roughly 98% of the market for operating systems with respect to computer games. This merger is also the culmination of repeated acquisitions by both Microsoft and Activision that have already greatly concentrated the industry.

III. THE BALANCE OF EQUITIES AND RELATIVE HARDSHIPS SUPPORT PRESERVING THE STATUS QUO

In deciding whether to grant a temporary injunction pending an appeal of a motion for a preliminary injunction, courts consider the relative hardship of the parties, and whether temporary relief is in the public interest. *See, e.g., Lopez*, 713 at 1435–36; *Benisek v. Lamone*, 201 L. Ed. 2d 398, 138 S. Ct. 1942, 1944 (2018); *Am. Stores*, 492 U.S. at 1307. Microsoft's opposition does not address this element and therefore concedes it. Indeed, Microsoft put forward no evidence or argument that it would be harmed by any delay in merging.

There are strong public interests weighing in favor of issuance of an injunction preventing the merger pending the resolution of the appeal. The first is the public interest in effective enforcement of the antitrust laws. *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). Plaintiffs are threatened with irreparable harm to competition if the merger is allowed to consummate without a hearing on the merits of Plaintiffs' motion for preliminary injunction. The district

court has yet to address whether this merger might substantially lessen competition. Plaintiffs must be entitled to an evidentiary hearing on their motion for a preliminary injunction before the merger is allowed to consummate.

Moreover, the interests of Plaintiffs in preventing damage to the marketplace from an anticompetitive merger is high. See Am. Stores, 492 U.S. at 1307 ("[B]alancing the stay equities persuades me that the harm to applicant if the stay is denied, in the form of a substantial lessening of competition in the relevant market, outweighs the harm respondents may suffer as a result of a stay of the mandate."). The public interest has a strong interest in preserving competition in the marketplace, particularly in the case of a multibillion industry effecting dozens of businesses and millions of consumers. "Foremost among the public equities in any merger case is the need to protect the public's interest in free and open competition." FTC v. Bass Bros. Enterprises, No. C84-1304, 1984 WL 355, at *23 (N.D. Ohio June 6, 1984). Were the merger to be consummated, and later found to be in violation of the antitrust laws, the remedies available at that juncture would be more limited and would come at a high cost. As numerous courts have recognized, in the event that a merger is found to be illegal under the antitrust laws, there are only two main remedies: (1) divestiture and (2) damages. Divestiture the "unscrambling of the egg"—is expensive, requiring the parties to the mergers to change or modify business practices and disrupting managers, employees and

customers. While some damages may be available, it is far preferable to prevent the injury in the first place.

Microsoft, however, does not contend—and has failed to show—that it would be harmed were the merger to be enjoined pending the resolution of this appeal. Microsoft concedes this point for good reason. There is no harm that would be suffered. Temporarily preventing the merger merely preserves the status quo. The only possible harm is some delay to the merger. Microsoft and Activision can extend the July 18, 2023 deadline at any time. *See* Ex. F, §8.1(c). There is no compelling reason for not maintaining the current status of the parties, and Microsoft has wholly failed to articulate any harm in delay. *See F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001).

The lack of harm from delaying the merger is further demonstrated by Microsoft's litigation conduct to date. Plaintiffs first brought suit in December, 2022. Since then, Microsoft has never taken the position that the proceedings should be expedited in any fashion. Indeed, the contrary is true. Microsoft has sought to delay the proceedings at every opportunity. Microsoft filed a motion to stay Plaintiffs' litigation until after the FTC's trial, scheduled for August, 2023. Ex. G, 4:16-17. Then, Microsoft moved to dismiss Plaintiffs' complaint on the grounds that Plaintiffs claims were not yet ripe, contending again that Plaintiffs' claims should await the resolution of the FTC action, set for trial in August 2023. Ex. H,

11–14. Notably, Microsoft contended that after the FTC trial, Plaintiffs could then be given their opportunity to "be heard on a preliminary injunction motion."). *Id.* at 14:24–25. Microsoft has never asked the district court, or the Ninth Circuit, to expedite any facet of these proceedings. Ironically, through its opposition, Microsoft demands that the Plaintiffs pursue impracticable and futile motion practice in the district court to further delay things.

Indeed, any prejudice to Microsoft is entirely its own doing. Microsoft could have sought to expedite the proceedings, not delay them. Perhaps most importantly, Microsoft could—and can—extend the deadline for closing the Merger. Microsoft cannot now claim that the arbitrary merger deadline that Microsoft and Activision set (and which can be easily amended by the parties), precludes Plaintiffs' ability to have their motion for a preliminary injunction properly heard on the merits. *See U.S. v. Hosp. Affiliates Int'l, Inc.*, No. 80-3672, 1980 WL 1983, at *5 (E.D. La. Oct. 9, 1980) ("The public interest, 'as specifically protected by Section 7 of the Clayton Act, outweighs any harm to defendants brought about by the position in which defendants contracted to place themselves in."").

IV. PLAINTIFFS ARE THREATENED WITH IRREPARABLE HARM

Microsoft also contends that Plaintiffs face no possible irreparable harm from consummation of the merger. But that is wrong. As demonstrated in Plaintiffs' Opening Appellate Brief Plaintiffs are threatened with irreparable harm

from this merger—both from the lessening of competition that this merger will cause, as well as direct harms to these Plaintiffs. As discussed in Plaintiffs' Opening Appellate Brief, the "lessening of competition constitutes an irreparable injury under [the] law." *Boardman*, 822 F.3d at 1023. Since the district court assumed that this merger would substantially lessen competition across numerous markets that these Plaintiffs participate in and rely on, there is no question that this merger may cause irreparable harm to these Plaintiffs and to the public at large.

Second, Plaintiffs submitted substantial evidence in their motion for a preliminary injunction that these Plaintiffs are threatened with irreparable harm even under the district court's erroneous standard. *See* Plaintiffs' Opening Appellate Brief §II.D. The district court largely failed to consider this evidence. *Id.*

Further, the district court recently issued an order denying Microsoft's motion to dismiss. Ex. I. In the district court's order, the district court confirmed that these Plaintiffs have standing to bring these claims and are in fact threatened with irreparable harm from this merger. *See id.*, 2–5.

V. CONCLUSION

The Court should issue a temporary injunction preventing Microsoft from merging pending Plaintiffs' appeal.

Date: June 27, 2023 Joseph R. Saveri

/s/ Joseph R. Saveri (State Bar No. 130064)

Steven N. Williams (State Bar No. 175489) Cadio Zirpoli (State Bar No. 179108) David H. Seidel (State Bar No. 307135) Kathleen McMahon (State Bar No. 340007) JOSEPH SAVERI LAW FIRM, LLP 601 California Street, Suite 1000 San Francisco, CA 94108 Telephone: (415) 500-6800

Joseph M. Alioto Sr. **ALIOTO LAW FIRM** One Sansome Street, 35th Floor San Francisco, CA 94104 Telephone: (415) 434-9200

Attorneys for Appellants Dante Demartini, Curtis Burns Jr., Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermont Alfred Loftus, Beowulf Edward Owen and Ivan Calvo-Perez

No. 23-15846

In the

United States Court of Appeals for the Ninth Circuit

DANTE DEMARTINI, CURTIS BURNS JR., NICHOLAS ELDEN, JESSONY GALVAN, CHRISTOPHER JOSEPH GIDDINGS-LAFAYE, STEVE HERRERA, HUNTER JOSEPH JAKUPKO, DANIEL DERMOT ALFRED LOFTUS, BEOWULF EDWARD OWEN, AND IVAN CALVO-PÉREZ

Plaintiff - Appellant

v.

MICROSOFT CORPORATION, a Washington corporation

Defendant – Appellee

On Appeal from the United States District Court for the Northern District of California

Case no. 3:22-cv-08991-JSC Honorable Jacqueline Scott Corley

APPELLEE'S RESPONSE TO MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL

Valarie C. Williams
Tania Rice
ALSTON & BIRD LLP
560 Mission Street, Suite 2100
San Francisco, CA 94105
Telephone: (415) 243-1000
valarie.williams@alston.com

tania.rice@alston.com

Adam B. Banks

WEIL, GOTSHAL & MANGES LLP 767 Fifth Avenue

New York, NY 10153 Telephone: (212) 310-8000 adam.banks@weil.com

Counsel for Defendant – Appellee

B. Parker Miller
Robert H. Poole
ALSTON & BIRD LLP
1201 West Peachtree Street, Suite 4900
Atlanta, GA 30309
Telephone: (404) 881-7000
parker.miller@alston.com
robert.poole@alston.com

David R. Venderbush ALSTON & BIRD LLP 90 Park Avenue 15th Floor New York, NY 10016 Telephone: (212) 210-9400 david.venderbush@alston.com

Rakesh N. Kilaru Anastasia M. Pastan WILKINSON STEKLOFF LLP 2001 M Street NW, 10th Floor Washington, DC 20036 Telephone: (202) 847-4000 rkilaru@wilkinsonstekloff.com apastan@wilkinsonstekloff.com

Additional Counsel for Defendant-Appellee

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INTRODUCTION

Plaintiffs are ten video game enthusiasts seeking to enjoin the \$68.7 billion merger of Microsoft Corporation ("Microsoft") and Activision Blizzard ("Activision"). They seek this drastic remedy based on speculative fears that they might pay higher prices for new versions of their favorite games, or be compelled to purchase new gaming consoles to play them at some unknown point in the future. The district court properly denied Plaintiffs' request to block the merger because Plaintiffs failed to show they would suffer immediate irreparable harm if the transaction closes.

Plaintiffs' motion for a temporary injunction pending appeal similarly fails to meet the exacting standard for the extraordinary injunctive relief they seek. The motion is deficient and should be denied for three independent reasons. *First*, the motion is not properly before this Court, because Plaintiffs failed to first move in the district court, as the Federal Rules of Appellate Procedure require, and have not shown that it would have been impracticable to do so. *Second*, Plaintiffs fail to make, and thus forfeit, any argument that they are likely to succeed on the merits of their antitrust claims—a necessary predicate to the award of an injunction blocking the merger. *Third*, Plaintiffs fail to persuade on the only relevant issue they do address, and as the district court correctly concluded, Plaintiffs have not shown that they will be immediately and irreparably harmed by the proposed merger.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Merger Agreement

In January 2022, Microsoft and Activision entered into and publicly announced a merger agreement for Microsoft to acquire Activision for \$68.7 billion. 1-ER-002. Microsoft makes the Xbox, a prominent video game platform. *Id.* Activision develops and publishes various video games, including the popular game *Call of Duty. Id. Call of Duty* is a multi-player, cross-platform game, which gamers can play by themselves or with their friends across the platforms on which it is currently offered: Microsoft Xbox, Sony PlayStation, and personal computers. *Id.*

Activision and Sony are operating under a contract (which Microsoft will assume upon closing its acquisition of Activision) that makes *Call of Duty* available on PlayStation until at least the end of 2024. Ex. C § 2.4; Ex. D at 112:2-113:21. Microsoft also has made Sony an offer to extend that access for ten more years. Ex. B at ¶¶ 335-36. Further, Microsoft has entered into multiple ten-year contracts to make *Call of Duty* and other Activision content available on competing platforms post-merger, including on cloud gaming services (on which *Call of Duty* has not previously been available). *See* Exs. E at 1 and F at 8. The next title in the *Call of*

¹ Plaintiffs' Motion attaches as exhibits documents formatted as an excerpted record. Microsoft will cite Plaintiffs' documents using the excerpted record format "#-ER-###." Microsoft will cite to the exhibits filed in support of this response as "Ex. #."

Duty franchise is not expected until November 2023. Ex. O. New generations of consoles are released every five to ten years. Ex. B at ¶ 50.

II. Plaintiffs' Lawsuit

In December 2022—almost a year after the merger was announced—Plaintiffs filed their lawsuit seeking to block the merger under the Clayton Act. 1-ER-003. In March 2023, the district court dismissed Plaintiffs' initial complaint for failure to state a claim. 1-ER-003. Twenty days later, Plaintiffs filed an Amended Complaint. 1-ER-004. The Amended Complaint alleges that, after the merger, Microsoft will make *Call of Duty* and other Activision Blizzard content exclusive to Microsoft platforms and subscription services leading to higher prices for future Activision content and other harms for gamers. *See generally* Ex. B at ¶¶ 123-28. Microsoft's motion to dismiss the Amended Complaint remains pending in the district court.

III. Plaintiffs' Original Preliminary Injunction Motion

In April 2023, Plaintiffs moved for a preliminary injunction to block the closing of the merger until after a trial on the merits of their request for a permanent injunction. 1-ER-001. In connection with their motion for a preliminary injunction, six of the Plaintiffs submitted declarations stating that they play existing versions of *Call of Duty* and several other games on a variety of platforms, including the PlayStation, Xbox, and Windows PC. 1-ER-002-03. The district court exercised its

discretion to consider first whether (1) Plaintiffs would suffer immediate, irreparable harm upon the closing of the merger, and (2) Plaintiffs would be required to post a bond if the preliminary injunction were granted. *Id.* Plaintiffs never objected to the district court's sequencing of the issues. Plaintiffs did not ask the district court to also rule on the other preliminary injunction factors: likelihood of success on the merits, balance of the equities, and public interest.

IV. The District Court's Denial

On May 19, 2023, the district court denied Plaintiffs' motion for a preliminary injunction because Plaintiffs failed to show a likelihood of immediate, personal irreparable harm. ER 002-03. The district court found "nothing in the record that suggests upon the merger Microsoft can do anything to make these *Call of Duty* versions currently owned by Plaintiffs somehow stop working, let alone that it would do so," so nothing would immediately change with the merger. 1-ER-005. It further found that "it is not likely Microsoft will make any new version of *Call of Duty* that becomes available before a decision on the merits exclusive to Microsoft." *Id.* And the court found that "Plaintiffs' *speculation* that Microsoft could violate its written agreements [to make the games available to competitors] is insufficient to meet their burden of showing a likelihood of immediate irreparable harm." 1-ER-005-006 (emphasis added). The court also found that "following the merger, Activision will continue to exist as a subsidiary of Microsoft," and therefore, potential harm, if any,

from a merger could be undone after the merger. 1-ER-008. Because Plaintiffs had not shown that they would suffer immediate, irreparable harm, the district court had no occasion to address the other factors required to issue a preliminary injunction. 1-ER-009.

V. Plaintiffs' Appeal and Motion for Preliminary Injunction in This Court

On June 2, 2023—14 days after the district court's order denying Plaintiffs' motion for a preliminary injunction, Plaintiffs filed a notice of appeal. *See* 3:22-cv-08991-JSC, ECF No. 207. Plaintiffs then waited seven more days—for a total of 21 days after the district court's order—to file this motion seeking an injunction pending the appeal. Mot. at 11. Plaintiffs did not file a motion for a preliminary injunction pending appeal with the district court. *Id.* at 3.

VI. The Federal Trade Commission's Motion for Preliminary Injunction in the District Court

On June 12, 2023, the Federal Trade Commission ("FTC") filed a complaint in the District Court for the Northern District of California seeking a temporary restraining order and preliminary injunction. *See* 23-cv-2880-JSC, ECF No. 1. On June 13, 2023, the FTC's parallel action was designated as related to the Plaintiffs' action below and assigned to the same district court judge. *See* 3:22-cv-08991-JSC, ECF No. 216. On the same day, the district court granted the FTC a temporary restraining order preventing Microsoft's merger with Activision until five days after the district court rules on the FTC's request for a preliminary injunction, or another

date set by the district court in the future, whichever is latest. 23-cv-2880-JSC, at ECF No. 37. The district court scheduled an evidentiary hearing on the FTC's preliminary injunction request for June 22nd, 23rd, 27th, 28th, and 29th. 23-cv-2880-JSC, at ECF No. 76.

<u>ARGUMENT</u>

I. Plaintiffs' Motion Should Be Denied Because They Failed to Move in the District Court.

At the threshold, the Court should deny Plaintiffs' motion for a preliminary injunction pending appeal because Plaintiffs failed to bring that motion first in the district court, and they offer no valid excuse for that failure.

Federal Rule of Appellate Procedure 8(a) requires that "[a] party must ordinarily move first in the district court for . . . an injunction while an appeal is pending" unless they can "show that moving first in the district court would be impracticable." Where this requirement is not met, a motion is not "properly before" the court of appeals and should be denied. *Agudath Isr. of Am. v. Cuomo*, 980 F.3d 222, 225 (2d Cir. 2020).

Here, Plaintiffs concede that they did not first move in the district court. *See* Mot. at 3. Rather than pointing to any impracticability of doing so, Plaintiffs argue only that they "did not move for an injunction pending appeal in the district court first[] because the district court already denied Plaintiffs' Motion for Preliminary Injunction." *Id.* This cannot meet the standard for showing impracticability, as

confirmed by numerous courts. Indeed, "under [this] definition no party seeking a stay of a district court ruling pending appeal would need to move in the district court first." *Gerber v. Herskovitz*, No. 22-1075, 2022 U.S. App. LEXIS 14890, at *3 (6th Cir. May 31, 2022); *see also, e.g., Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 43 (1st Cir. 2021) ("We disagree with plaintiff that the district court's rejection of plaintiff's claims on the merits suffices to show that moving first in the district court would have been impracticable."); *Bayless v. Martine*, 430 F.2d 873, 879 n.4 (5th Cir. 1970) ("It does not follow from the refusal to grant a preliminary injunction pending a trial in the court below that the district court would refuse injunctive relief pending an appeal.").

Nor could Plaintiffs have shown impracticability even had they tried to do so: Plaintiffs could have sought an injunction pending appeal in the district court any time during the 21 days they waited between the district court's decision and filing their motion in this Court. *See Agudath Isr.*, 980 F.3d at 225 (finding a failure to demonstrate impracticability "particularly in light of the fact that a full eleven days elapsed after the district court's ruling before Agudath Israel sought relief from this Court").

Plaintiffs' failure to first move in the district court necessitates denying their motion. *See, e.g., Scholl v. Mnuchin,* 2020 U.S. App. LEXIS 32275, at *1-2 (9th Cir. Oct. 13, 2020) (denying stay pending appeal solely because "appellants have not

established that it would have been impracticable to present the stay motion and the evidence on which appellants rely to the district court in the first instance").

II. Plaintiffs Fail to Argue, Much Less Show, That They Are Likely to Succeed on the Merits of Their Antitrust Claims.

An injunction pending appeal, just like a preliminary injunction, is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008); see Feldman v. Ariz. Sec'y of State's Office, 843 F.3d 366, 367 (9th Cir. 2016) (en banc) (the same analysis applies to injunctions pending appeal as to preliminary injunctions). The party seeking the injunction must establish that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. Winter, 555 U.S. at 20. Alternatively, the moving party may also demonstrate that "serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." All. For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011) (quoting Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)). "Of course, plaintiffs must also satisfy the other *Winter* factors": whether the plaintiff would likely experience irreparable harm and whether an injunction is in the public interest. *Id.*

Plaintiffs, however, fail to present—and thus forfeit—any argument that they are likely to succeed on the merits of their antitrust claims or even that their claims

raise "serious questions." Plaintiffs' failure to address the issue is glaring. Antitrust claims hinge on specific economic facts about the particular markets at issue—facts that are entirely absent from Plaintiffs' short motion. *See United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990) (antitrust cases "must make economic sense"); *Dehoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 (9th Cir. 2018) (to prevail on a Section 7 claim, a plaintiff must show a "reasonable probability" that the merger will substantially lessen competition in the relevant market). Plaintiffs also offer no real support for their assertion that the balance of equities tip in their favor or that the public interest favors an injunction, relying solely on generic, unsupported statements about harm to competition. *See* Mot. at 8-9, 11. Nor were any of these factors addressed below, because the district court did not need to reach them. 1-ER-009. Plaintiffs' failure to present this Court with any argument on these essential factors is a second, independent reason why their motion must be denied.

Plaintiffs try to sidestep this fatal shortcoming by mischaracterizing the district court's decision and the well-established standard for seeking injunctive relief. As Plaintiffs see it, because the district court addressed only the irreparable harm prong of the analysis, they need only show irreparable harm to justify an injunction of the merger. But this is not the standard: Plaintiffs must meet *every* prong of the analysis to secure injunctive relief. It would thus be improper to grant an injunction pending appeal based only on a finding about irreparable harm.

Microsoft did not have the opportunity to present its merits arguments in the below proceeding, because the district court asked it to brief the issue of irreparable harm first. Plaintiffs vaguely suggest that the district court concluded that they were likely to succeed on the merits, but that is not so. Mot. at 3. The district court "assume[d] without deciding Plaintiffs have established a likelihood of success on the merits" in order to first address the issue of irreparable harm. 1-ER-001 (emphasis added). "[A]ssumptions are not holdings." Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1323 (11th Cir. 2023). As the district court explicitly stated, it was not addressing the merits of Plaintiffs' antitrust claims and would receive further briefing and argument on that issue only if Plaintiffs could show irreparable harm. It certainly did not resolve the merits in Plaintiffs' favor. An injunction cannot be imposed on any such assumption.

Plaintiffs should not be permitted to skip the line and ask this Court to issue an injunction, without any argument on the likelihood of success on the merits in this Court and without a complete record on that issue in the lower court. Even were Plaintiffs able to show on appeal that they will be irreparably harmed by the merger (they are not), the relief they would be entitled to is only the opportunity to have the district court consider the remaining prongs of the analysis in the first instance—not the injunction Plaintiffs seek from this Court. Plaintiffs' deficient presentation of

these critical issues only underscores the significance of their procedural failure to first seek an injunction pending appeal from the district court.

Because Plaintiffs failed to properly address a likelihood of success on the merits and other necessary elements, their motion must be denied.²

III. Plaintiffs Still Cannot Show Immediate, Irreparable Harm.

Plaintiffs' motion to this Court fails—as it did in the district court—because Plaintiffs fail to meet the required standard of personal and immediate irreparable harm. To obtain injunctive relief under Rule 8, a movant must show a likelihood of irreparable injury to the applicant that will occur while the appeal is pending. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020); *Nken v. Holder*, 556 U.S. 418, 434 (2009). Showing a mere possibility of irreparable injury is insufficient. *Winter*, 555 U.S. at 7. Further, under both Section 16 of the Clayton Act and the regular factors for a preliminary injunction, Plaintiffs must show that the irreparable injury is immediate and personal to them. *See* 15 U.S.C. § 26 (allowing a preliminary injunction upon "a showing that the danger of irreparable loss or damage is immediate"); *United States v. Borden Co.*, 347 U.S. 514, 518

² Even if an injunction was justified, Plaintiffs would need to post a bond sufficient to cover Microsoft's anticipated costs and damages of compliance, which would include, at least, the \$3 billion "Breakup Fee" that Microsoft will have to pay if an injunction causes the transaction to fail to close. *See* Ex. C § 8.3(c); Fed. R. App. P. 8(a)(2)(E) (permitting the Court to "condition relief on a party's filing a bond or other security in the district court"). Whether a bond is needed and in what amount is yet one more issue Plaintiffs' Motion fails to address.

(1954) ("Under [Section 16], a private plaintiff may obtain injunctive relief against [antitrust] violations only on a showing of 'threatened loss or damage'; and *this must be of a sort personal to the plaintiff*") (emphasis added); *City of Los Angeles v. Lyons*, 461 U.S. 95, 103, 111 (1983) (injunctive relief can only be issued to prevent a "substantial and immediate irreparable injury"); *Immigrant Legal Res. Ctr. v. City of McFarland*, 827 F. App'x 749, 751-52 (9th Cir. 2020) ("The standard for preliminary injunctions, however, requires irreparable harm to the plaintiffs themselves.").

For the same reasons the district court found that Plaintiffs would not suffer harm prior to a trial on the merits, Plaintiffs will not face any harm prior to the resolution of their appeal—likely within a similar time frame. As the district court found, a merger will not harm Plaintiffs over the next several months because they will still be able to play the *Call of Duty* titles they currently own "exactly the same way they played with their friends before the merger." 1-ER-005. The next title in the *Call of Duty* series (the series which each Plaintiff focuses on as important to him) is not expected to be released until November and is subject to contractual commitments that it will be available on at least the same platforms as before.

³ Under the current schedule, briefing on Plaintiffs' appeal will conclude by August 18, 2023.

Plaintiffs do not mount a challenge to the district court's finding that the merger will not affect the next versions of the game.

Instead, Plaintiffs offer red herrings and legal arguments that have been consistently rejected. *First*, their claim that the district court "ignored and failed to consider key evidence" is meritless. Mot. at 5. For example, although the district court did not name the Plaintiffs' expert in its Order, there is no indication that the court did not consider it when it found that the alleged anticompetitive price effects would not "begin to be felt" immediately after the merger. Mot. at 5. Similarly, Plaintiffs' reference to a single email presenting a thought experiment regarding business strategy—dated prior to the execution of numerous contracts to make *Call of Duty* available on competing platforms—does nothing to rebut the district court's finding that there is no immediate threat of Microsoft making *Call of Duty* exclusive to its platforms in light of those contractual commitments. 1-ER-005-06. Plaintiffs' evidence was before the district court. Their best evidence does nothing to undermine the court's correct factual findings.

Second, Plaintiffs' argument that the district court should have held that "harm to competition in a market . . . constitute[s] irreparable harm to consumers who actively participate in that market" is legally wrong. Mot. at 4. Under Plaintiffs' theory, if they are likely to succeed on the merits of their claim—showing that the merger will harm competition in a market—then the immediate irreparable harm

prong is also met for any "participant" in that market. But as the district court recognized, that argument improperly conflates two separate prongs of the preliminary injunction analysis by presuming that a likelihood of success on the merits necessarily equals irreparable harm to any "participant" in the relevant market. See 1-ER-006. As the district court noted, the Supreme Court has rejected this argument, holding that an injunction "does not follow from success on the merits as a matter of course." Winter, 555 U.S. at 32; 1-ER-006 (citing Winter); see also Hooks v. Nexstar Broad., Inc., 54 F.4th 1110-15 (9th Cir. 2022) (reversing a district court's finding that "when there is a likelihood of success on the merits there is an inference of irreparable harm to union representation from the continuation of the unfair labor practice."). Plaintiffs' legal argument would effectively eliminate the personal harm requirement from black letter injunctive relief law. See Borden Co., 347 U.S. at 518 (private plaintiffs may seek injunctive relief against violations of federal antitrust law, but "only on a showing of 'threatened loss or damage'; and this must be of a sort personal to the plaintiff"); *Immigrant Legal Res. Ctr.*, 827 F. App'x at 75172 ("The standard for preliminary injunctions, however, requires irreparable harm to the plaintiffs themselves."). The district court's holding was correct and in line with other judges' rejection of Plaintiffs' very same arguments. See Malaney v. *UAL Corp.*, No. 3:10-CV-02858-RS, 2010 U.S. Dist. LEXIS 106049, at *46 (N.D. Cal. Sep. 27, 2010), aff'd, 434 F. App'x 620 (9th Cir. 2011).

Plaintiffs continue to rely on the two inapposite cases that they cited below and which were readily distinguished by the district court. See Mot. at 4-5. As the district court explained, "Plaintiffs' reliance on Boardman v. Pacific Seafood Group, 822 F.3d 1011 (9th Cir. 2016) and California v. American Stores Co., 495 U.S. 271 (1990) . . . is misplaced." 1-ER-006. Both cases featured harms to competition that were direct and personal to the plaintiffs. In American Stores, the California Attorney General brought suit on behalf of all California residents to challenge the proposed merger between California's largest supermarket chain with the nation's fourth largest supermarket chain. California ex rel. Van de Kamp v. Am. Stores Co., 697 F. Supp. 1125, 1134 (C.D. Cal. 1988), aff'd in part, 872 F.2d 837, 844 (9th Cir. 1989), stay granted, 492 U.S. 1301, 1304 (1989), rev'd, 495 U.S. 271 (1990). California consumers faced personal harm because the court found that the merger would permanently and irrevocably impact the state's grocery supply, which even if monetary in nature, would be "extremely difficult, if at all possible," to remedy. See id. As the district court below explained, "[t]he immediate irreparable harm to consumers from fewer grocery store choices upon chain store consolidation is unlike the distant harm proffered here." 1-ER-007.

In *Boardman*, fishermen who sold fish in the market at issue challenged a merger that they claimed would create a monopoly for the purchase of caught fish. 822 F.3d at 1016-17, 1023. To establish irreparable harm, the *Boardman* plaintiffs

provided detailed declarations supporting that the defendant was likely to unilaterally set fish prices below competitive market levels, causing the fishermen to struggle and be unable to maintain their fishing vessels. Ex. G at ¶¶ 5, 7. The *Boardman* plaintiffs established an irreparable injury personal to themselves—a monopsony that would immediately threaten their livelihood. 822 F.3d at 1022-23. As the district court here explained, "[t]he Ninth Circuit did not hold that a threat of irreparable harm, even if not immediate, is sufficient for issuance of a preliminary injunction." 1-ER-007.

Plaintiffs failed to show a personal harm similar to those harms analyzed in *American Stores* and *Boardman*. As the district court below correctly noted, even assuming evidence existed that Microsoft would make Activision games exclusive upon closing the merger (it does not), Plaintiffs will continue to access and play their *Call of Duty* titles on their preferred gaming platforms pending the trial below. 1-ER-005. The same is true for the pendency of this appeal.

Separately, Plaintiffs also fail to show that their purported future harms of paying more money for video games and consoles is irreparable, which is a question the district court did not reach. *See* Exs. H at ¶ 10; I at ¶ 15; J at ¶¶ 15, 16, 17, 19; K at ¶¶ 15, 17, 18, 19; L at ¶¶ 11, 12, 13; M at ¶¶ 15, 16, 17. Buying a new console, subscribing to new services, and paying increased prices for games are monetary harms that are reparable through money damages. *See American Passage Media*

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Corp. v. Cass Communications, Inc., 750 F.2d 1470, 1473-74 (9th Cir. 1985)

(monetary damages are not irreparable harm); Taleff v. Sw. Airlines Co., 828 F.

Supp. 2d 1118, 1122-23 (N.D. Cal. 2011), aff'd on other grounds, 554 F. App'x 598

(9th Cir. 2014) (dismissing merger challenge brought under Sections 7 and 16 of the

Clayton Act, because allegations that the plaintiffs were threatened with higher ticket

prices and paying more for less service could be remedied with monetary damages).

Plaintiffs' failure to show immediate, irreparable harm is yet another reason

why their motion should be denied.

CONCLUSION

For all or any of these reasons, the Court should deny Plaintiffs' Motion for

Preliminary Injunction Pending Appeal.

Dated: June 20, 2023

Respectfully submitted,

By: /s/ Valarie C. Williams

Valarie C. Williams Alston & Bird LLP

Counsel for Defendant-Appellee

Microsoft Corporation

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Federal Rules of

Appellate Procedure 27(d). The brief is 17 pages. The type size and typeface comply

with Rule 32(a)(5).

Dated: June 20, 2023

By: <u>/s/ Valarie C. Williams</u>

Valarie C. Williams

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANTE DEMARTINI, CURTIS BURNS JR., NICHOLAS ELDEN, JESSIE GALVAN, CHRISTOPHER JOSEPH GIDDINGS-LAFAYE, STEVE HERRÉRA, HUNTER JOSEPH JAKUPKO, DANIEL DERMOT ALFRED LOFTUS, BEOWULF EDWARD OWEN, AND IVAN CALVO-PÉREZ

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation

Defendant-Appellee [or Defendant-Appellant].

On Appeal from the United States District Court for the Northern District of California No. 3:22-cv-08991-JSC Hon. Judge Jacqueline Scott Corley

MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL UNDER SEAL

Joseph R. Saveri (State Bar No. 130064) Steven N. Williams (State Bar No. 175489) Cadio Zirpoli (State Bar No. 179108) JOSEPH SAVERI LAW FIRM, LLP 601 California Street, Suite 1000

San Francisco, CA 94108 Telephone: (415) 500-6800

Joseph M. Alioto Sr. **ALIOTO LAW FIRM** One Sansome Street, 35th Floor San Francisco, CA 94104 Telephone: (415) 434-9200

Attorneys for Appellants Dante Demartini, Curtis Burns Jr., Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermont Alfred Loftus, Beowulf Edward Owen and Ivan Calvo-Perez

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INTRODUCTION

Plaintiffs seek temporary interim relief to preserve the status quo pending the resolution of Plaintiffs' appeal of the district court's denial of Plaintiffs' motion for preliminary injunction. As of right now, Microsoft's proposed merger with Activision has not occurred. Plaintiffs seek to enjoin that merger and sought temporary injunctive relief to prevent it. Plaintiffs appeal from the denial of the temporary injunction. The merger is imminent and can be closed at any time.

Unless temporary relief is granted now, Microsoft will be able to acquire and merge with Activision before the Ninth Circuit can address whether Plaintiffs are entitled to a preliminary injunction. Absent this relief, Plaintiffs' appeal will be rendered a nullity, and the damage that Plaintiffs seek to prevent as a consequence of the merger will have already occurred. Indeed, in such event, competition will likely be irreparably harmed—as the Court below assumed—and Plaintiffs will lose their opportunity to appeal. Just as the Supreme Court did in *California American Stores*, 492 U.S. 1301, 1304 (1989), Plaintiffs ask this Court to issue a temporary injunction to preserve the status quo pending Plaintiffs' appeal. The alternative—trying to unscramble the egg after the merger has happened—is no substitute. It is ineffective and inefficient to try to restore the parties ex-post to the positions that they are now in.

The district court's order assumed that the merger would substantially lessen competition. See ER-005 ("For purposes of this Order, the Court will assume Plaintiffs have met their burden of showing a likelihood of success on the merits."). But the district court held that Plaintiffs were not entitled to a preliminary injunction because they did not demonstrate that the consummation of the merger would immediately and irreparably harm them, and further, that even if the merger would harm them, any harm could be undone by a subsequent order of divestiture post-merger. See ER-008 ("[P]laintiff's injury could be immediate only if the merger, or particular aspects of the merger, could not be undone.") The district court erred as a matter of law by concluding that irreparable harm to competition could not satisfy Plaintiffs' requirement of showing threatened irreparable harm for purposes of a preliminary injunction. The district court's order failed to follow the Supreme Court and the Ninth Circuit's clear holding that "[a] lessening of competition constitutes an irreparable injury under our case law." See Boardman v. Pac. Seafood Group, 822 F.3d 1011, 1023 (9th Cir. 2016); Am. Stores, 492 U.S. at 1304.

LEGAL STANDARD

This motion is brought pursuant to Federal Rule of Appellate Procedure 8(a). "In deciding whether to grant an injunction pending appeal, the court 'balances the plaintiff's likelihood of success against the relative hardship to the

parties." See Alaska Conservation Council v. U.S. Army Corps of Engineers, 472 F.3d 1097, 1100 (9th Cir. 2006) (quoting Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 415 F.3d 1078, 1092 (9th Cir. 2005).

Pursuant to Federal Rule of Appellate Procedure 8(a)(2)(A)(i), Plaintiffs did not move for an injunction pending appeal in the district court first, because the district court already denied Plaintiffs' Motion for Preliminary Injunction, which is the subject of Plaintiffs' appeal. Thus, it would have been impractical and futile to first move in the district court for an injunction pending appeal, which also includes a requirement of showing possible irreparable harm, where the district court already held that Plaintiffs could not meet the irreparable harm element under an erroneous interpretation of the law.

ARGUMENT

Plaintiffs ask the court for interim temporary relief to preserve the status quo until the Ninth Circuit can address Plaintiffs' appeal. Without temporary relief, Microsoft is imminently likely to consummate the merger before the Ninth Circuit can resolve whether Plaintiffs are entitled to a preliminary injunction, which, as the Court assumed, might irreparably harm competition in several markets in the video game industry. *See* ER-005 ("The Court will assume Plaintiffs have met their burden of showing likelihood of success on the merits"). In that event, Plaintiffs

would lose the opportunity to appeal and competition will likely be irreparably harmed.

Plaintiffs are likely to win on appeal because the district court erred as a matter of law in several respects and failed to consider key evidence in the record below. Plaintiffs will file their opening brief as soon as possible, but a short summary of why Plaintiffs are likely to prevail on their appeal is set forth here.

First, the district court erred as a matter of law by holding that irreparable harm to competition in a market does not constitute irreparable harm to consumers who actively participate in that market. The district court's order, which adopted Microsoft's theory of the irreparable harm element for a preliminary injunction under Section 16 of the Clayton Act, is directly contrary to both Supreme Court and Ninth Circuit precedent. In America Stores, the Supreme Court issued an injunction pending plaintiffs' appeal to the Supreme Court because a "lessening of competition is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent." 492 U.S. at 1304. And in Boardman, the Ninth Circuit reaffirmed this bedrock principle of the Clayton Act for purposes of a preliminary injunction, holding that "[a] lessening of competition constitutes an irreparable injury under our case law." 822 F.3d at 1023. In both cases, the courts analyzed the immediacy element based on when the merger might occur, not when the effects of harm to competition would ultimately materialize

against the plaintiffs. The district court here assumed that the merger would substantially lessen competition. ER-005. Yet it denied the injunction, in contravention of applicable Supreme Court and Ninth Circuit precedent. Indeed, the district court ignored and inexplicably did not address *American Stores* and *Boardman's* key holdings: that a lessening of competition constitutes an irreparable injury for purposes of a preliminary injunction under Section 16 of the Clayton Act. This was clear error, subject to review *de novo*.

Second, the district court's order ignored and failed to consider key evidence in the record below. The evidence demonstrated that these Plaintiffs are indeed threatened with irreparable harm. For example, the Court failed to address the testimony of Plaintiffs' expert, which stated, among other things, that "[t]he day the merger is consummated, the upward pressure on the price of [Triple-A video games] will begin to be felt" due to the reduction in competition between Microsoft and Activision. ER-043. Appellee did not controvert this evidence, instead contending that it would take some time for Appellants and other gamers to experience these effects. The Court did not explain why the potential for higher grocery prices in American Stores and reduced prices for wholesale fish in Boardman were sufficient to satisfy the irreparable harm element, yet uncontroverted evidence that the merger would lessen competition and increase prices was insufficient here. In doing so, the district court failed to correctly apply

the legal standard to the facts before it. In both *American Stores* and *Boardman*, cases brought by private plaintiffs, the district courts merely found that the mergers might lessen competition and might increase prices and did not require plaintiffs to show more with respect to the manifestation of anticompetitive effects. *See State of Cal. by Van de Kamp v. Am. Stores Co.*, 697 F. Supp. 1125, 1134 (C.D. Cal. 1988); *Boardman*, 822 F.3d at 1022–23. Indeed, here the district court in fact assumed that these anticompetitive effects would likely occur but nonetheless refused to enter the injunction, contrary to the applicable law. *Am. Stores*, 492 U.S. at 1304 ("[L]essening of competition is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent."); *see also* 15 U.S.C. § 26.

The Court also failed to consider uncontroverted evidence that Microsoft had the intention to put its main competition, the Sony PlayStation, out of the market; and that this merger is a part of that strategy. In an internal email, Microsoft's Head of Xbox Game Studios stated the following to Microsoft's Chief Financial Officer of Xbox:

A different view to the general view below might be that we (Microsoft) are in a very unique position to be able to go spend Sony out of business. If we think that video game content matters in 10 years, we might look back and say, "Totally would have been worth it to lose \$2B or \$3B in 2020 to avoid a situation where Tencent, Google, Amazon or even Sony have become the Disney of games and own most of the valuable content." For example, it is practically impossible for anyone to start a new video streaming service at scale

at this point. What content do you base it on? Things like Hulu and CBS All Access will be trivial players in the space. In games, Google is 3 to 4 years away from being able to have a studio up and running. Amazon has shown no ability to execute on game content. Content is the one moat that we have, in terms of a catalog that runs on current devices and capability to create new. Sony is really the only other player who could compete with Game Pass and we have a 2 year and 10M subs lead.

ER-011. Nor did the district court consider or address the uncontroverted evidence that this merger has the potential to drastically harm PlayStation's ability to compete. ER-061–78. Assuming that this merger might harm competition, including the ability of Microsoft's competitors across several markets to compete (or even, as Microsoft thinks, might put PlayStation out of business) as the district court assumed, the district court erred in holding that Plaintiffs could not show immediate irreparable harm to themselves. As the Plaintiffs' uncontroverted declarations established, harm to competition in the video game industry would certainly harm these Plaintiffs.

Nor did the district court consider the substantial—and also uncontroverted—evidence showing that Microsoft has strong and admitted incentives to make gaming content exclusive to Microsoft platforms. Microsoft has previously reneged on promises to regulators to preserve competition and access to key gaming content after prior acquisitions. For example, when Microsoft acquired another large gaming company ZeniMax in 2021 for \$7.5 billion, they assured regulatory agencies that they did not have the incentive to make ZeniMax games

exclusive. Yet immediately after consummating the merger, they did just that, immediately halting development of games that were currently being developed for PlayStation. In a recent interview with the developer for Bethesda's *Redfall*, the developer stated: "We got bought by Microsoft and that was a huge sea change. They said, 'no PlayStation 5. Now we're gonna do Game Pass, Xbox, and PC."" *See Microsoft Scrapped a PS5 Version of Redfall, Says Arkane Director*, IGN, available at https://me.ign.com/en/ps5/206501/news/microsoft-scrapped-a-ps5-version-of-redfall-says-arkane-director. Microsoft may do the same here absent relief from this Court.

The balance of equities strongly tip in Plaintiffs' favor. The "lessening of competition is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent." *Am. Stores*, 492 U.S. at 1304. Here, the district court assumed that this merger might substantially lessen competition. Thus, if Plaintiffs would prevail on their appeal but Microsoft is allowed to merge before that, it must be assumed that irreparable harm to competition will occur. And the record evidence in this case supports the district court's assumption. *See* ER-011, ER-015–46, ER-061–78. Inexplicably, the district court misapplied this assumption.

Granting this motion only has the potential effect of preserving the status quo *ex ante*, possibly delaying Microsoft's merger of Activision. Possible delay of

the merger, to preserve and maintain the current situation, is far outweighed by possible irreparable harm to competition. Because this merger may irreparably harm competition and the public interest and the balance of equities tips sharply in Plaintiffs' favor, temporary relief should issue so long as there are serious questions going to the merits of Plaintiffs' appeal. See, e.g., F.T.C. v. Food Town Stores, Inc., 539 F.2d 1339, 1346 (4th Cir. 1976) (granting "injunction pending appeal prohibiting the parties from the consummation of a merger," and holding that the Court would "grant a motion to advance the appeal and direct the clerk to fix an accelerated briefing schedule," to ensure that any delay to the merger should the appeal fail be mitigated); Am. Stores, 492 U.S. at 1307 (issuing temporary injunction pending appeal to the Supreme Court because the potential irreparable harm to competition outweighed the potential harm in delaying the merger, and there was at least a "reasonable probability" that the appeal to the Supreme Court would be successful); Providence Journal Co. v. Federal Bureau of Investigation, 595 F.2d 889, 890 (1st Cir. 1979) (holding that if "denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay."); Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir.1977) (holding that the court "is not required to find that ultimate success by the movant

is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits").

In contrast, it would be difficult if not impossible to restore the parties' current situation ex post, if the merger is consummated. Courts have repeatedly noted the difficulty of "unscrambling the egg" or "unringing the bell" in this situation. See State of Cal. by Van de Kamp v. Am. Stores Co., 697 F. Supp. 1125, 1134 (C.D. Cal. 1988) ("If the Court is to make a determination as to whether this merger is anticompetitive, the State is correct in its assertion that the egg must be examined before it becomes an omlette."); See also, William J. Baer, Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodina Act, October 31, 1996, available at https://www.ftc.gov/news-events/news/speeches/reflections-20years-merger-enforcement-under-hart-scott-rodino-act (discussing how mergers cannot be "unscrambled" after they are consummated)." Indeed, the harm to Defendants in unwinding the merger would be much greater than delaying it. See Taleff v. Sw. Airlines Co., 828 F. Supp. 2d 1118, 1124 (N.D. Cal. 2011), aff'd, 554 F. App'x 598 (9th Cir. 2014) (rejecting divestiture after a merger because the court would have to compel defendants that had already integrated their operations to separate, causing undue hardship to defendant). Moreover, it is far more consistent with the interests of justice to prevent the harm to competition before it occurs, instead of trying to calculate damages or restore the position of the parties through

an injunction after the merger has happened. *See Boardman*, 822 F.3d at 1024 ("[T]he central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition ... that these statutes recognize as *vital to the public interest*."). The equities and the public interest favor temporarily enjoining the merger until the Ninth Circuit can adjudicate this appeal.

CONCLUSION

The Court should issue a temporary injunction preventing Microsoft from merging pending Plaintiffs' appeal.

Date: June 9, 2023 Joseph R. Saveri

/s/ Joseph R. Saveri
Joseph R. Saveri (State Bar No. 130064)
Steven N. Williams (State Bar No. 175489)
Cadio Zirpoli (State Bar No. 179108)
JOSEPH SAVERI LAW FIRM, LLP
601 California Street, Suite 1000
San Francisco, CA 94108
Telephone: (415) 500-6800

Joseph M. Alioto Sr. **ALIOTO LAW FIRM** One Sansome Street, 35th Floor San Francisco, CA 94104 Telephone: (415) 434-9200

Attorneys for Appellants Dante Demartini, Curtis Burns Jr., Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermont Alfred Loftus, Beowulf Edward Owen and Ivan Calvo-Perez

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

DANTE DEMARTINI, et al., Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Case No. 22-cv-08991-JSC

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 135

Plaintiff recreational video game players seek to block the proposed merger between Microsoft Corporation and Activision Blizzard, Inc. Plaintiffs allege "Microsoft will seek to make [Activision]'s gaming content exclusive or partially exclusive to Microsoft's own platforms and foreclose [Activision]'s gaming content from rival video game platforms." (Dkt. No. 84 ¶ 12.)¹ They sue under Sections 7 and 16 of the Clayton Act. Now pending before the Court is Plaintiffs' motion to preliminarily enjoin the merger pending a final decision on the merits. (Dkt. No. 135.) At the Court's direction, Microsoft's opposition to the motion addresses only the issues of irreparable harm and the bond. After carefully considering the parties' submissions and having had the benefit of oral argument on May 12, 2023, the Court DENIES Plaintiffs' motion. Assuming without deciding Plaintiffs have established a likelihood of success on the merits, they fail to demonstrate they will be personally irreparably harmed if the merger occurs before a merits decision.

¹ Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

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Plaintiffs live in various cities throughout the United States and purchase both video games and video game platforms. (Dkt. No. 84 at 24-26; Dkt. No. 140 ¶ 2-3, 6; Dkt. No. 145 ¶ 2-3, 5; Dkt. No. 146 ¶¶ 2-4, 7; Dkt. No. 147 ¶¶ 2-4, 7; Dkt. No. 148 ¶¶ 2, 4, 7; Dkt. No. 149 ¶ 2-3, 7.) They primarily play Call of Duty. (See Dkt. No. 140 ¶ 11; Dkt. No. 145 ¶ 4; Dkt. No. 146 ¶ 11; Dkt. No. 147 ¶ 6, 18; Dkt. No. 148 ¶ 12; Dkt. No. 149 ¶ 10.) Activision is the developer and publisher of Call of Duty. In January 2022, Microsoft, the maker of the Xbox, announced its proposed acquisition of Activision for \$68.7 billion dollars. (Dkt. No. 84 ¶¶ 7, 10-11.)

Plaintiffs are concerned that after the merger Microsoft will make Call of Duty exclusive to Microsoft platforms and subscription services and that the merger will lead to inflated prices for future Call of Duty titles. Plaintiffs all declare that games within the Call of Duty franchise are important to them because they communicate with friends or family regularly via the game. (Dkt. No. 140 ¶¶ 5, 9; Dkt. No. 145 ¶¶ 6-7; Dkt. No. 146 ¶¶ 6, 14; Dkt. No. 147 ¶¶ 5-6; Dkt. No. 148 ¶¶ 5-6, 10; Dkt. No. 149 ¶¶ 6, 10.) Most of them attest the availability of *Call of Duty* and other Activision games influences which platform or platforms they buy; they currently play on a variety of platforms, including the PlayStation, Xbox, and Windows PC. (Dkt. No. 140 ¶¶ 4, 6-8, 10; Dkt. No. 146 ¶¶ 3, 7-9, 11; Dkt. No. 147 ¶¶ 4, 7-9; Dkt. No. 148 ¶¶ 3, 8-9, 11-12; Dkt. No. 149 ¶¶ 4, 7-8, 11.) Each testifies he has played video games for many years, sometimes for hours a day, or describes himself as an "avid gamer." (Dkt. No. 140 ¶ 3; Dkt. No. 145 ¶ 3; Dkt. No. 146 ¶ 4; Dkt. No. 147 ¶ 3; Dkt. No. 148 ¶ 4; Dkt. No. 149 ¶ 3.) According to Plaintiffs, playing Call of Duty with friends enhances their quality of life and as such, they will likely purchase the platform on which they can play the game with their friends. (Dkt. No. 140 ¶¶ 11, 13; Dkt. No. 145 ¶¶ 7, 9; Dkt. No. 146 ¶¶ 5-7; Dkt. No. 147 ¶¶ 5-6; Dkt. No. 148 ¶¶ 5-7; Dkt. No. 149 ¶¶ 6-7; Dkt. No. 169 ¶ 10; Dkt. No. 170 ¶ 10.)

Plaintiffs would be affected by the anticipated exclusivity of *Call of Duty* in different ways. Mr. Loftus and Mr. Galvan do not own Microsoft's console, the Xbox, and instead play Call of Duty on their Sony console, the PlayStation. (Dkt. No. 140 ¶ 4, 14; Dkt. No. 147 ¶ 4, 14.) They testify that if Call of Duty became exclusive to the Xbox they would not be able to play

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future versions of the game on the PlayStation and thus would likely purchase the Microsoft platform to play *Call of Duty*. (Dkt. No. 140 ¶¶ 13, 15; Dkt. No. 147 ¶¶ 13, 15.) Mr. Burns prefers to play games on PlayStation and would likely switch consoles to continue playing Call of Duty. (Dkt. No. 145 ¶¶ 8-9.) Mr. Jakupko plays games on PlayStation but states he would likely purchase Microsoft platforms in the future for access to Call of Duty. (See Dkt. No. 148 ¶ 3, 18.) Mr. Owen prefers to play games on Linux over Windows PC. (Dkt. No. 149 ¶ 8.) But if Call of Duty was made exclusive to any platform, he would likely buy the platform with Call of Duty. (Id. ¶ 11.) Several Plaintiffs also attest they would likely subscribe to Microsoft's subscription services to play Call of Duty if it was exclusively added to the service and they expect to use or already use cloud gaming services. (See Dkt. No. 140 ¶¶ 4, 16; Dkt. No. 145 ¶ 5; Dkt. No. 146 $\P\P$ 3; Dkt. No. 147 $\P\P$ 4, 16; Dkt. No. 148 $\P\P$ 17; Dkt. No. 149 \P 12.) Mr. Owen and Mr. DeMartini submitted supplemental declarations stating they have purchased most Call of Duty titles for the past several years and will be purchasing the next Call of Duty title that is released. (Dkt. No. 169 ¶¶ 3, 5, 7; Dkt. No. 170 ¶¶ 3, 5, 7.)

The Federal Trade Commission ("FTC") is also concerned about the merger's anticompetitive effects and has authorized an administrative complaint against the proposed merger. See Complaint, Microsoft Corp. & Activision Blizzard, Inc., FTC Docket No. 9412 (Dec. 8, 2022). In early December 2022, the FTC alleged the vertical merger violates Section 7 of the Clayton Act because Microsoft has shown past practices of acquiring gaming content and then proceeding to withhold that content from rival platforms. *Id.* ¶¶ 1, 12, 124. According to the administrative action's scheduling order, the parties are proceeding toward a trial date of August 2, 2023. See Scheduling Order, Microsoft Corp. & Activision Blizzard, Inc., FTC Docket No. 9412 (Jan. 4, 2023).

A few weeks after the FTC filed its administrative action, Plaintiffs filed their initial complaint against Microsoft, alleging the vertical and horizontal merger violated Section 7 of the Clayton Act. (Dkt. No. 1.) This Court granted Microsoft's motion to dismiss Plaintiffs' complaint with leave to amend on the grounds the complaint did not "plausibly allege the merger creates a reasonable probability of anticompetitive effects in any relevant market." (Dkt. No. 74 at 1.) In

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April 2023, Plaintiffs filed their first amended complaint and moved for preliminary injunctive relief, seeking an order blocking the merger until a final merits decision. (Dkt. Nos. 84, 135.)

DISCUSSION

Section 16 of the Clayton Act entitles any person "to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26; see also DeHoog v. Anheuser-Busch InBev SA/NV, 899 F.3d 758, 762 (9th Cir. 2018) (under Section 16, any person may sue for injunctive relief against threatened loss or damage by a violation of Section 7 of the Clayton Act).

Preliminary Injunction Standard

A plaintiff seeking a preliminary injunction must establish (1) likelihood to succeed on the merits; (2) likelihood to suffer irreparable harm absent the preliminary relief; (3) the balance of equities tips in their favor; and (4) the injunction is in the public interest. See Where Do We Go Berkeley v. Cal. Dep't of Transp., 32 F.4th 852, 859 (9th Cir. 2022); Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008). Alternatively, where there is a "serious question" as to the merits and a balance of hardships that tips sharply toward the plaintiff, a preliminary injunction may issue if the plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public interest. All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

Section 16 also addresses when a private party may obtain a preliminary injunction to enjoin a threatened violation of the antitrust laws: "upon the execution of a proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate." 15 U.S.C. § 26. Thus, to obtain a preliminary injunction under Section 16, "[a] plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1022 (9th Cir. 2016) (emphasis in original) (cleaned up). Further, the threatened loss or damage must be personal to the private plaintiff. See California v. Am. Stores Co., 495 U.S. 271, 296 (1990) ("A private litigant . . . must prove 'threatened loss or damage' to his own interests in order to obtain relief.");

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see also Malaney v. UAL Corp., No. 3:10-CV-02858-RS, 2010 WL 3790296, at *13 (N.D. Cal. Sept. 27, 2020) (in deciding whether plaintiffs have shown irreparable harm for purposes of a Section 16 preliminary injunction, the court can only consider those injuries the plaintiffs advance that are personal to them were the merger to occur), aff'd on other grounds, 434 F. Appx. 620 (9th Cir. 2011).

В. Plaintiffs Have Not Met Their Irreparable Harm Burden

For purposes of this Order, the Court will assume Plaintiffs have met their burden of showing a likelihood of success on the merits. The question is whether they have also met their burden of demonstrating *immediate* irreparable harm. They have not.

Plaintiffs' declarations support an inference they will personally be injured if Microsoft makes Activision's games, specifically Call of Duty, exclusive to Microsoft's platforms and subscription services. They plausibly attest to their loyalty to the Call of Duty franchise and thus that each will purchase a different console or subscription service, or pay an inflated price, if needed to continue to play Call of Duty, especially if needed to play with their friends.

Assuming without deciding that such injury is irreparable, Plaintiffs have not, however, demonstrated they likely face an immediate threat of irreparable harm if the merger is not blocked before a decision on the merits can be rendered. See Am. Passage Media Corp. v. Cass Comme 'ns, Inc., 750 F.2d 1470, 1473 (9th Cir. 1985) (holding plaintiffs must establish irreparable harm is *likely*, not just possible, to obtain a preliminary injunction); *Boardman*, 822 F.3d at 1022 (holding plaintiffs must establish *immediate* irreparable harm).

First, Plaintiffs currently plays *Call of Duty* on Xbox, on Windows PC, or on PlayStation. There is nothing in the record that suggests upon the merger Microsoft can do anything to make these Call of Duty versions currently owned by Plaintiffs somehow stop working, let alone that it would do so. Thus, the day after the merger they can play exactly the same way they played with their friends before the merger.

Second, the record establishes it is not likely Microsoft will make any new version of Call of Duty that becomes available before a decision on the merits exclusive to Microsoft. (Dkt. No. 134-9 at 17; Dkt. No. 162-3 at 12; Dkt. No. 161-4 at 17; Dkt. No. 162-5.) Plaintiffs' speculation

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that Microsoft could violate its written agreements is insufficient to meet their burden of showing
a likelihood of immediate irreparable harm. Further, if Microsoft were to suddenly announce it is
going to make Call of Duty exclusive, notwithstanding its written agreements to the contrary, a
preliminary injunction could be entered at that time. In Saint Alphonsus Medical Center-Nampa,
Inc. v. St. Luke's Health System, Ltd., for example, a hospital chain challenged the merger of a
competitor with a large medical group and sought a preliminary injunction enjoining the merger
until trial on the merits. The trial court found that any irreparable injury would likely not occur
before trial because an existing contract minimized consumer harms, any anticompetitive effects
would gradually take place over time, and the merger's terms and structure showed the transaction
could be unwound. No. 1:12-CV-560-BLW, 2012 WL 6651167, at *2-4 (D. Idaho, Dec. 20,
2012). The court also held that if certain anticompetitive effects manifested prior to trial—
namely, reduced patient referrals to the plaintiff which would jeopardize the hospital's existence—
the plaintiff could seek a preliminary injunction at that time. <i>Id.</i> at *3.

As the preliminary injunction hearing established, Plaintiffs' argument, at bottom, is if they have shown a likelihood the merger will have anticompetitive effects, and thus a likelihood of success on the merits, they have shown the irreparable harm required for issuance of a preliminary injunction. But that is not the law. See Winter, 555 U.S. at 32 (holding an injunction "does not follow from success on the merits as a matter of course"); see also California v. Valero Energy Corp., No. C 17-03786, 2017 WL 4122830, at *3, 5 (N.D. Cal. Aug. 23, 2017) (on a motion for preliminary injunction in a Clayton Act action challenging a merger, finding at least serious questions as to whether merger would result in anticompetitive effects, but denying preliminary injunction because the plaintiffs had not established any irreparable harm before a trial on the merits).

Plaintiffs' reliance on Boardman v. Pacific Seafood Group, 822 F.3d 1011 (9th Cir. 2016) and California v. American Stores Co., 495 U.S. 271 (1990) to support their proposition is misplaced. In Boardman, fishermen sought to preliminarily enjoin a merger between two seafood processors on the grounds the merger would create a monopsony in the "West Coast input markets" for certain fish. 822 F.3d at 1022-23. The defendants argued the plaintiffs had not

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shown an immediate danger of irreparable harm because they had terminated their proposed
merger, and stipulated they would not revive the transaction without giving the Oregon Attorney
General and the district court 60-days' notice. <i>Id.</i> at 1023. The Ninth Circuit held the record
supported the district court's finding the fishermen were likely to suffer irreparable harm before a
decision on the merits could be issued because, in effect, the 60-days' notice was insufficient
given the defendants' history of negotiating in secret. <i>Id.</i> The Ninth Circuit did not hold that a
threat of irreparable harm, even if not immediate, is sufficient for issuance of a preliminary
injunction.

California v. American Stores Co., 495 U.S. 271 (1990), also does not support Plaintiffs' insistence that once they show a likelihood of success on the merits they are entitled to a preliminary injunction. American Stores involved a merger of the fourth largest supermarket chain in California with the largest California supermarket chain. 495 U.S. at 275. After the merger, but before the chains integrated their businesses, the California Attorney General, on behalf of California consumers, sought to preliminarily enjoin the merger's consummation. The trial court found that the plaintiffs established that without a preliminary injunction, the defendant would "rapidly restructure the newly-acquired company and its assets and disable the acquired chain from operating independently of the parent" and that it would be "extremely difficult" to unwind the merger. California v. Am. Stores Co., 697 F. Supp. 1125, 1134 (C.D. Cal. Sept. 29, 1988). Allowing the chains to combine would reduce competition and have an immediate effect on California consumers. The Ninth Circuit affirmed the trial court's likelihood of success and irreparable harm findings, but concluded the injunction was essentially divestiture which was not an available remedy. California v. Am. Stores Co., 872 F.2d 837 (9th Cir. 1989). The Supreme Court reversed the Ninth Circuit and held divestiture is an available remedy to private plaintiffs challenging a merger. American Stores, 495 U.S. at 284-85. The immediate irreparable harm to consumers from fewer grocery store choices upon chain store consolidation is unlike the distant harm proffered here. So, the American Stores opinions cannot reasonably be read as holding a showing of a likelihood of success in a merger case means personal and immediate irreparable harm has been established.

Northern District of California

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Plaintiffs also assert that immediately upon the merger Microsoft will have the incentive not to invest in video game development for platforms outside Microsoft and thus their injury starts immediately upon the merger, even if they will not personally experience those effects for some time. But even assuming a plaintiff could demonstrate irreparable harm under that theory, the plaintiff's injury could be immediate only if the merger, or particular aspects of the merger, could not be undone. Plaintiffs have not demonstrated that fact, especially given that following the merger Activision will continue to exist as a subsidiary of Microsoft. See Reilly v. Medianews Group, Inc., No. C 06-04332, 2006 WL 2419100, at *6 (N.D. Cal. July 28, 2006) (in denying application for temporary restraining order seeking to stop newspaper merger, holding should the plaintiff "ultimately prove successful in this action divestiture of the newspapers at issue remains an option"); see also Saint Alphonsus Med. Ctr.-Nampa, Inc., 2012 WL 6651167, at *2-4 (trial court finding that irreparable injury would likely not occur before trial because an existing contract minimized consumer harms and the terms of the merger and the structure of the merger showed the transaction could be unwound); American Stores, 495 U.S. at 281 ("Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of [Section] 7 has been found." (internal quotation marks and citation omitted)).

In sum, Plaintiffs have not demonstrated a likelihood of personal irreparable harm before a decision on the merits can be rendered. After the merger (if it happens), they can play Call of Duty exactly as they played just before the merger. And, to the extent they fear they will be unable to play newer versions on the console or subscription service of their choice, or will have to pay inflated prices for future versions, such harm (assuming, without deciding, it constitutes irreparable harm) will not occur between now and a trial on the merits. A preliminary injunction is thus unwarranted.

CONCLUSION

Microsoft has produced (and continues to produce) to Plaintiffs the discovery produced in the FTC action. It is also providing Plaintiffs with transcripts from the depositions in that matter. Should the merger survive European review and the FTC administrative action, or at least survive

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United States District Court Northern District of California in a form Plaintiffs believe still poses a risk of anticompetitive harm to them, the Court will be able to hold a trial on the merits and finally decide the issue before Plaintiffs suffer any irreparable harm. So, Plaintiffs' motion for preliminary injunction is DENIED because they have not met their burden to demonstrate an immediate threat of personal irreparable harm.

IT IS SO ORDERED.

Dated: May 19, 2023

JACOUELINE SCOTT CORLEY
United States District Judge

I, Beowulf Owen, hereby declare as follows:

- 1. I am making this declaration in support of Plaintiffs' Reply in Support of Motion for Preliminary Injunction and Order to Show Cause. I have personal knowledge of the statements, and if called as a witness, I would competently testify about them.
 - 2. I am a resident of Las Cruces, New Mexico.
- 3. I have played at least eleven different unique titles from the *Call of Duty* Franchise, including all of the most recent *Call of Duty* games since 2019.
 - 4. I have played *Call of Duty* titles for well over 2000 hours in total.
- 5. I have purchased every single *Call of Duty* title since the release of *Modern* Warfare 3 in 2011, with the exception of *Call of Duty WW2*, which includes all of the following titles: *Call of Duty Black Ops 4* (2018); *Call of Duty Infinite Warfare* (2016); *Call of Duty Black Ops 3* (2015); *Call of Duty Advanced Warfare* (2014); *Call of Duty Ghosts* (2013) and; *Call of Duty Black Ops 2* (2012).
- 6. I have owned over nine different video game platforms, including consoles by Xbox, PlayStation, and Nintendo.
- 7. I will be purchasing the next *Call of Duty* title that is released (and intend on purchasing the next *Call of Duty* on prerelease).
 - 8. I purchase approximately eight new video games every year.
 - 9. I play video games with friends approximately 625 hours per year.
- 10. Playing video games is an outlet that enhances the quality of my life personally, socially, and mentally.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 8th, 2023.



Case No. 3:22-cv-08991-JSC

SUPPLEMENTAL DECLARATION OF BEOWULF OWEN IN SUPPORT OF REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE

1	I, Dante DeMartini, hereby declare as follows:
2	1. I am making this Supplemental Declaration in support of Plaintiffs' Reply in
3	Support of Motion for Preliminary Injunction and Order to Show Cause. I have personal
4	knowledge of the statements, and if called as a witness, I would competently testify about them.
5	2. I am a resident of San Francisco.
6	3. I have played at least 21 different unique titles from the <i>Call of Duty</i> Franchise,
7	including all of the most recent Call of Duty games since 2019.
8	4. I have played <i>Call of Duty</i> titles for well over 5000 hours in total.
9	5. I have purchased every single <i>Call of Duty</i> title released since 2019 (<i>Call of Duty</i> :
10	Modern Warfare II (2022); Call of Duty: Warzone 2.0 (2022); Call of Duty: Vanguard (2021); Call of
11	Duty: Black Ops Cold War (2020); Call of Duty: Modern Warfare (2019).
12	6. I have owned over 18 different video game platforms, including consoles by
13	Xbox, PlayStation, and Nintendo.
14	7. I will be purchasing the next <i>Call of Duty</i> title that is released.
15	8. I purchase approximately 4-5 new video games every year.
16	9. I play video games with friends approximately 1000+ hours per year.
17	10. Playing video games is an outlet that enhances the quality of my life personally,
18	socially, and mentally.
19	I declare under penalty of perjury that the foregoing is true and correct. Executed on May
20	8, 2023.
21	CocuSigned by:
22	Dante Dollar
23	By:
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28	Case No. 3:22-cv-08991-JSC 1
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SUPPLEMENTAL DECLARATION OF DANTE DEMARTINI

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EXHIBIT A TO STUART DECLARATION

EXECUTION VERSION

AGREEMENT AND PLAN OF MERGER

by and among

MICROSOFT CORPORATION,

ANCHORAGE MERGER SUB INC.

and

ACTIVISION BLIZZARD, INC.

Dated as of January 18, 2022

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Exhibit A – Fourth Amended and Restated Certificate of Incorporation of the Surviving Corporation

AGREEMENT AND PLAN OF MERGER

THIS AGREEMENT AND PLAN OF MERGER (this "**Agreement**") is made and entered into as of January 18, 2022, by and among Microsoft Corporation, a Washington corporation ("**Parent**"), Anchorage Merger Sub Inc., a Delaware corporation and a wholly owned subsidiary of Parent ("**Merger Sub**"), and Activision Blizzard, Inc., a Delaware corporation (the "**Company**"). Each of Parent, Merger Sub and the Company are sometimes referred to as a "**Party**." All capitalized terms that are used in this Agreement have the meanings given to them in <u>Article I</u>.

RECITALS

- A. The Company Board has (i) determined that it is in the best interests of the Company and its stockholders to enter into this Agreement providing for the merger of Merger Sub with and into the Company (collectively with the other transactions contemplated by this Agreement, the "Merger") in accordance with the General Corporation Law of the State of Delaware (the "DGCL") upon the terms and subject to the conditions set forth herein and declared this Agreement advisable; (ii) approved the execution and delivery of this Agreement by the Company, the performance by the Company of its covenants and other obligations hereunder, and the consummation of the Merger upon the terms and subject to the conditions set forth herein; (iii) directed that the adoption of this Agreement be submitted to a vote at a meeting of the stockholders of the Company; and (iv) resolved to recommend that the stockholders of the Company vote in favor of the adoption of this Agreement in accordance with the DGCL.
- B. The boards of directors of each of Parent and Merger Sub have approved the execution and delivery of this Agreement, the performance of their respective covenants and other obligations hereunder, and the consummation of the Merger upon the terms and subject to the conditions set forth herein and the board of directors of Merger Sub has declared this Agreement advisable, directed that the adoption of this Agreement be submitted to a vote of Parent in its capacity as Merger Sub's sole stockholder and resolved to recommend that Parent vote in favor of the adoption of this Agreement in accordance with the DGCL.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing premises and the representations, warranties, covenants and agreements set forth herein, as well as other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and accepted, and intending to be legally bound hereby, Parent, Merger Sub and the Company agree as follows:

ARTICLE I DEFINITIONS & INTERPRETATIONS

- 1.1 *Certain Definitions*. For all purposes of and pursuant to this Agreement, the following capitalized terms have the following respective meanings:
- (a) "Acceptable Confidentiality Agreement" means a customary confidentiality agreement containing provisions that require any counterparty thereto (and any of its Affiliates and

representatives named therein) that receives non-public information of or with respect to the Company to keep such information confidential (it being understood that such agreement need not contain provisions that would prohibit the making of any Acquisition Proposal) and with other terms that are no less restrictive in the aggregate to such counterparty (and any of its Affiliates and representatives named therein) than the terms of the Confidentiality Agreement.

- (b) "Acquisition Proposal" means any offer or proposal (other than an offer or proposal by Parent or Merger Sub) relating to an Acquisition Transaction.
- (c) "Acquisition Transaction" means any transaction or series of related transactions (other than the Merger) involving:
- (i) any direct or indirect purchase or other acquisition by any Person or "group" (as defined pursuant to Section 13(d) of the Exchange Act) of Persons, whether from the Company or any other Person(s), of securities representing more than 15% of the total outstanding voting power of the Company after giving effect to the consummation of such purchase or other acquisition, including pursuant to a tender offer or exchange offer by any Person or "group" of Persons that, if consummated in accordance with its terms, would result in such Person or "group" of Persons beneficially owning more than 15% of the total outstanding voting power of the Company after giving effect to the consummation of such tender or exchange offer;
- (ii) any direct or indirect purchase (including by way of a merger, consolidation, business combination, recapitalization, reorganization, liquidation, dissolution or other transaction), license or other acquisition by any Person or "group" (as defined pursuant to Section 13(d) of the Exchange Act) of Persons of assets (including equity securities of any Subsidiary of the Company) constituting or accounting for more than 15% of the revenue, net income or consolidated assets of the Company and its Subsidiaries, taken as a whole; or
- (iii) any merger, consolidation, business combination, recapitalization, reorganization, liquidation, dissolution or other transaction involving the Company (or any of its Subsidiaries whose business accounts for more than 15% of the revenue, net income or consolidated assets of the Company and its Subsidiaries, taken as a whole) in which the stockholders of the Company (or such Subsidiary) prior to such transaction will not own at least 85%, directly or indirectly, of the surviving company.
- (d) "Affiliate" means, with respect to any Person, any other Person that, directly or indirectly, controls, is controlled by or is under common control with such Person. For purposes of this definition, the term "control" (including, with correlative meanings, the terms "controlling," "controlled by" and "under common control with"), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of that Person, whether through the ownership of voting securities, by contract or otherwise.
- (e) "Anti-Money Laundering Laws" means all applicable statutes, laws, rules, regulations or other requirements concerning anti-money laundering, proceeds of crime, combatting terrorism financing, and related financial recordkeeping and reporting, money transmission, money

service businesses, casinos, and other regulated financial institutions of all jurisdictions where the Company or any of its Subsidiaries conduct business.

- (f) "Antitrust Law" means collectively the Sherman Antitrust Act of 1890, the Clayton Antitrust Act of 1914, the HSR Act, the Federal Trade Commission Act of 1914, and all other Laws that are designed or intended to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade or significant impediments or lessening of competition or the creation or strengthening of a dominant position through merger or acquisition, in any case that are applicable to the Merger.
- (g) "Audited Company Balance Sheet" means the consolidated balance sheet (and the notes thereto) of the Company and its consolidated Subsidiaries as of December 31, 2020, set forth in the Company's Annual Report on Form 10-K filed by the Company with the SEC for the fiscal year ended December 31, 2020.
- (h) "**Business Day**" means each day that is not a Saturday, Sunday or other day on which banks in the City of New York, New York are authorized or required by applicable Law to be closed.
- (i) "Chosen Courts" means the Court of Chancery of the State of Delaware or, to the extent that the Court of Chancery of the State of Delaware does not have subject matter jurisdiction, any state or federal court in the State of Delaware.
 - (i) "Code" means the Internal Revenue Code of 1986, as amended.
 - (k) "Company Board" means the Board of Directors of the Company.
- (1) "Company Capital Stock" means the Company Common Stock and the Company Preferred Stock.
- (m)"Company Common Stock" means the common stock, par value \$0.000001 per share, of the Company.
- (n) "Company Intellectual Property" means any Intellectual Property that is owned or purported to be owned by the Company or any of its Subsidiaries.
- (o) "Company Material Adverse Effect" means any change, event, violation, inaccuracy, effect or circumstance (each, an "Effect") that, individually or taken together with all other Effects that exist or have occurred prior to the date of determination of the occurrence of the Company Material Adverse Effect, (a) has had or would reasonably be expected to have a material adverse effect on the business, assets, liabilities, financial condition or results of operations of the Company and its Subsidiaries, taken as a whole, or (b) would, or would reasonably be expected to, prevent or delay past the Termination Date the ability of the Company to consummate the transactions contemplated by this Agreement; provided that, in the case of clause (a) only, none of the following (by itself or when aggregated), to the extent occurring after the date of this Agreement, will be deemed to be or constitute a Company Material Adverse Effect or will be taken into account

when determining whether a Company Material Adverse Effect has occurred or may, would or could occur:

- (i) changes in general economic conditions in the United States or any other country or region in the world, or changes in conditions in the global economy generally;
- (ii) changes in conditions in the financial markets, credit markets or capital markets in the United States or any other country or region in the world, including (A) changes in interest rates or credit ratings in the United States or any other country; (B) changes in exchange rates for the currencies of any country; or (C) any suspension of trading in securities (whether equity, debt, derivative or hybrid securities) generally on any securities exchange or over-the-counter market operating in the United States or any other country or region in the world;
- (iii) any Effect generally affecting the industries in which the Company and its Subsidiaries conduct business;
- (iv) changes in regulatory, legislative or political conditions in the United States or any other country or region in the world;
- (v) any geopolitical conditions, outbreak of hostilities, acts of war, sabotage, terrorism or military actions (including any escalation or general worsening of any such hostilities, acts of war, sabotage, terrorism or military actions) in the United States or any other country or region in the world;
- (vi) earthquakes, hurricanes, tsunamis, tornadoes, floods, mudslides, wild fires or other natural disasters, weather conditions and other similar force majeure events in the United States or any other country or region in the world;
- (vii) any epidemics, pandemics or contagious disease outbreaks (including COVID-19) and any political or social conditions, including civil unrest, protests and public demonstrations or any other COVID-19 Measures that relate to, or arise out of, an epidemic, pandemic or disease outbreak (including COVID-19) or any change in such COVID-19 Measures, directive, pronouncement or guideline or interpretation thereof, or any material worsening of such conditions threatened or existing as of the date of this Agreement, in the United States or any other country or region in the world;
- (viii) the public announcement or pendency of this Agreement or the Merger, it being understood that the exceptions in this clause (viii) will not apply with respect to references to Company Material Adverse Effect of the representations and warranties contained in Section 3.5 (and in Section 7.2(a) and Section 8.1(e) to the extent related to such portions of such representations and warranties);
- (ix) any action taken or refrained from being taken, in each case, which Parent has expressly approved, consented to or requested in writing following the date of this Agreement or which is required by the terms of this Agreement;

- (x) changes or proposed changes in GAAP or other accounting standards or Law (or the enforcement or interpretation of any of the foregoing);
- (xi) changes in the price or trading volume of the Company Common Stock or Indebtedness of the Company and its Subsidiaries, in and of itself (it being understood that any cause of such change may, subject to the other provisions of this definition, be deemed to constitute a Company Material Adverse Effect and may be taken into consideration when determining whether a Company Material Adverse Effect has occurred);
- (xii) any failure, in and of itself, by the Company and its Subsidiaries to meet (A) any public estimates or expectations of the Company's revenue, earnings or other financial performance or results of operations for any period; or (B) any internal budgets, plans, projections or forecasts of its revenues, earnings or other financial performance or results of operations (it being understood that any cause of any such failure may, subject to the other provisions of this definition, be deemed to constitute a Company Material Adverse Effect and may be taken into consideration when determining whether a Company Material Adverse Effect has occurred);
 - (xiii) any Transaction Litigation; and
- (xiv) any of the matters set forth in Section 1.1(o)(xiv) of the Company Disclosure Letter;

provided further, that with respect to clauses (i) through (vii) and (x) of this definition, such Effects shall be taken into account in determining whether a "Company Material Adverse Effect" has occurred or would reasonably be expected to occur, in each case, to the extent that such Effect has had a disproportionate adverse effect on the Company and its Subsidiaries relative to other companies operating in the industries in which the Company and its Subsidiaries conduct business, in which case only the incremental disproportionate adverse impact of such Effect may be taken into account in determining whether there has occurred a Company Material Adverse Effect.

- (p) "Company Options" means any outstanding options to purchase shares of Company Common Stock granted pursuant to any of the Company Stock Plans.
- (q) "Company Preferred Stock" means the preferred stock, par value \$0.000001 per share, of the Company.
- (r) "Company Products" means any products, content and services of the Company or its Subsidiaries.
- (s) "Company Stock-Based Award" means each outstanding right of any kind, contingent or accrued, to receive or retain shares of Company Common Stock or receive a cash payment equal to or based on, in whole or in part, the value of Company Common Stock, in each case, granted pursuant to any of the Company Stock Plans (including performance shares, performance-based units, market stock units, restricted stock, restricted stock units, phantom units, deferred stock units and dividend equivalents), other than Company Options.

- (t) "Company Stock Plans" means (i) the compensatory equity plans set forth in Section 1.1(t) of the Company Disclosure Letter and (ii) any other compensatory equity plans or Contracts of the Company, including option plans or Contracts assumed by the Company pursuant to a merger, acquisition or other similar transaction.
- (u) "Company Stockholders" means the holders of shares of Company Common Stock.
- (v) "Continuing Employees" means each individual who is an employee of the Company or any of its Subsidiaries immediately prior to the Effective Time and continues to be an employee of Parent or one of its Subsidiaries (including the Surviving Corporation) immediately following the Effective Time, but only for so long as such individual is so employed.
- (w) "Contract" means any written contract, subcontract, note, bond, mortgage, indenture, lease, license, sublicense or other binding agreement.
 - (x) "COVID-19" means SARS-Co V-2, SARS-Co V-2 variants or COVID-19.
- (y) "COVID-19 Measures" means quarantine, "shelter in place," "stay at home," workforce reduction, social distancing, shut down, closure, sequester, safety or similar laws, directives, restrictions, guidelines, responses or recommendations of or promulgated by any Governmental Authority, including the Centers for Disease Control and Prevention and the World Health Organization, or other reasonable actions taken, in each case, in connection with or in response to COVID-19 and any evolutions, variants or mutations thereof or related or associated epidemics, pandemics or disease outbreaks.
- (z) "Credit Facility" means the revolving credit facility commitments extended to the Company pursuant to the terms and conditions of the Credit Facility Agreement.
- (aa) "Credit Facility Agreement" means the Credit Agreement, dated as of October 11, 2013, among the Company, the guarantors party thereto, Bank of America, N.A., as administrative agent, and the other parties thereto, as amended by the First Amendment, dated as of November 2, 2015, the Second Amendment, dated as of November 13, 2015, the Third Amendment, dated as of December 14, 2015, the Fourth Amendment, dated as of March 31, 2016, the Fifth Amendment, dated as of August 23, 2016, the Sixth Amendment, dated as of February 3, 2017, and the Seventh Amendment, dated as of August 24, 2018.
- (bb) "**DOJ**" means the United States Department of Justice or any successor thereto.
- (cc) "Environmental Law" means any Law relating to pollution, the protection of the environment (including ambient air, surface water, groundwater or land) or exposure of any Person with respect to Hazardous Substances or otherwise relating to the production, use, storage, treatment, transportation, recycling, disposal, discharge, release or other handling of any Hazardous Substances, or the investigation, clean-up or remediation thereof.

- (dd) "**ERISA**" means the Employee Retirement Income Security Act of 1974, as amended, and the regulations promulgated thereunder.
 - (ee) "Exchange Act" means the Securities Exchange Act of 1934.
- (ff) "Exchange Ratio" means a fraction (i) the numerator of which is the Merger Consideration and (ii) the denominator of which is the Parent Stock Price, rounded to four decimal places (with amounts 0.00005 and above rounded up).
- (gg) "Foreign Investment Law" means any applicable Laws, including any state, national or multi-jurisdictional Laws, that are designed or intended to prohibit, restrict or regulate actions by foreigners to acquire interests in or control over domestic equities, securities, entities, assets, land or interests.
- (hh) "FTC" means the United States Federal Trade Commission or any successor thereto.
- (ii) "GAAP" means generally accepted accounting principles, consistently applied, in the United States.
- (jj) "Government Official" means any officer or employee of a government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on behalf of, such public international organization, including but not limited to directors, officers, managers, employees and other agents of any enterprise owned directly or indirectly by a government or public international organization.
- (kk) "Governmental Authority" means any government, governmental or regulatory (including any stock exchange or other self-regulatory organization) entity or body, department, commission, board, agency or instrumentality, and any court, tribunal, arbitrator or judicial body, in each case whether federal, state, county or provincial, and whether local or foreign.
- (ll) "Hazardous Substance" means any substance, material or waste that is characterized or regulated by a Governmental Authority pursuant to any Environmental Law as "hazardous," "pollutant," "contaminant," "toxic" or "radioactive," including petroleum and petroleum products, polychlorinated biphenyls and friable asbestos.
- (mm) "HSR Act" means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.
- (i) indebtedness for borrowed money (including any principal, premium, accrued and unpaid interest, related expenses, prepayment penalties, commitment and other fees, sale or liquidity participation amounts, reimbursements, indemnities and all other amounts payable in connection therewith); (ii) liabilities evidenced by bonds, debentures, notes or other similar instruments or debt securities; (iii) liabilities pursuant to or in connection with letters of credit or banker's acceptances or

similar items (in each case whether or not drawn, contingent or otherwise); (iv) liabilities related to the deferred purchase price of property or services other than those trade payables incurred in the ordinary course of business; (v) liabilities arising from cash/book overdrafts; (vi) liabilities pursuant to capitalized leases; (vii) liabilities pursuant to conditional sale or other title retention agreements; (viii) liabilities with respect to vendor advances or any other advances; (ix) liabilities arising out of interest rate and currency derivative arrangements, forward contracts and any other arrangements designed to provide protection against fluctuations in interest or currency rates; (x) deferred purchase price liabilities related to past acquisitions; (xi) liabilities with respect to deferred compensation for services; (xii) liabilities arising in connection with earnouts, holdbacks, purchase price adjustments or other contingent payment obligations; (xiii) liabilities under sale-and-leaseback transactions, agreements to repurchase securities sold and other similar financing transactions; (xiv) liabilities arising from any breach of any of the foregoing; and (xv) indebtedness of the type referred to in clauses (i) through (xiv) of others guaranteed by the Company or any of its Subsidiaries or secured by any Lien.

- (oo) "Industry Standards" means all industry and self-regulatory organization standards, to the extent applicable to the Company or its Subsidiaries, including, to the extent applicable to the Company or its Subsidiaries, standards of the Entertainment Software Ratings Board, the International Game Developers Association, Games Rating Authority and Video Standards Council.
- (pp) "Intellectual Property" means all worldwide intellectual property rights, including all: (i) patents, trade secrets, know-how, confidential data, algorithms, inventions, methods and processes; (ii) copyrights (including copyrights in IT Assets) and database rights; (iii) moral rights, rights of publicity, "name and likeness" and similar rights; (iv) trademarks, service marks, corporate, trade and d/b/a names, logos, trade dress, domain names, social and mobile media identifiers and other source indicators, and all goodwill and all common law rights related thereto ("Marks"); and (v) registrations, applications, renewals, divisions, continuations, continuations-in-part, re-issues, re-examinations, foreign counterparts and equivalents of any of the foregoing.
- (qq) "Intervening Event" means any positive change, effect, development, circumstance, condition, event or occurrence that (i) materially improves the business, assets or operations of the Company, (ii) as of the date of this Agreement was not known to the Company Board, or the consequences of which (based on facts known to the members of the Company Board as of the date of this Agreement) were not reasonably foreseeable as of the date of this Agreement, and (iii) is not related to an Acquisition Proposal.
 - (rr) "IRS" means the United States Internal Revenue Service or any successor thereto.
- (ss)"IT Assets" means all hardware, firmware, middleware, software, databases, websites, applications, code, systems, networks and other computer, communication and information technology assets and equipment, including any of the foregoing incorporated into or used to support, host or service Company Products.

- (tt) "**Knowledge**" of a Person, with respect to any matter in question, means (i) with respect to the Company, the actual knowledge of the individuals set forth on <u>Section 1.1(tt)</u> of the Company Disclosure Letter; and (ii) with respect to Parent, the actual knowledge of the individuals set forth on <u>Section 1.1(tt)</u> of the Parent Disclosure Letter, in each case after reasonable inquiry of those employees who would reasonably be expected to have actual knowledge of the matter in question.
- (uu) "Law" means any federal, state, local, municipal, foreign, multi-national or other law, statute, constitution, ordinance, code, decree, order (including any executive order), directive, judgment, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Authority and any order or decision of an applicable arbitrator or arbitration panel.
- (vv) "**Legal Proceeding**" means any claim, action, charge, lawsuit, litigation, hearing, investigation, inquiry, or other similarly formal legal proceeding, in each case, brought by or pending before any Governmental Authority, arbitrator, mediator or other tribunal.
- (ww) "Lien" means any lien, encumbrance, pledge, security interest, claim and defect, covenant, imperfection, mortgage, deed of trust, hypothecation, encroachment, easement, use restriction, right-of-way, charge, adverse ownership interest, attachment, option or other right to acquire an interest, right of first refusal or conditional sale or similar restriction on transfer of title or voting and other restriction of title.
- (xx) "Material Contract" means any of the following Contracts (but excluding Employee Plans):
- (i) any "material contract" (as defined in Item 601(b)(10) of Regulation S-K promulgated by the SEC) with respect to the Company and its Subsidiaries, taken as whole;
- material Contracts to which the Company or any of its Subsidiaries grants or is granted a license to use (or grants, is granted or shares rights or interests in or to use) any Intellectual Property, content, characters, features, data (excluding Personal Data) or IT Assets, including the following Contracts, to the extent they are material Contracts: (A) in-bound and outbound licenses, royalty, consent, release, ownership, exclusivity, publishing, distribution, development, research and source code escrow agreements; (B) purchase options, rights of first refusal or negotiation, most favored nation, best price, price or content parity granted by the Company or any of its Subsidiaries; (C) hosting, support, maintenance, development, security and testing agreements; (D) sales and distribution agreements; (E) Contracts pursuant to which the Company or any of its Subsidiaries shares or makes available data (excluding Personal Data) generated in connection with usage of Company Products; and (F) non-disclosure and/or invention assignment agreements (for which only representative forms must be disclosed herein), in each case, other than (w) agreements for distribution of Company Products that would not be prohibited by Section 5.2(t) if entered into after the date hereof; (x) licenses granted by the Company or its Subsidiaries in the ordinary course of business or in connection with the provision or sale of any Company Products, in each case, consistent with past practice; (y) non-exclusive licenses of

commercially available software or other technology granted to the Company or its Subsidiaries; or (z) any licenses to software and materials licensed as open-source, public-source or freeware;

- (iii) any Contract containing any covenant (A) materially limiting the right of the Company or any of its Subsidiaries or their respective Affiliates to engage in any line of business or to compete with any Person in any line of business or in any geographic area that is material to the Company; (B) prohibiting the Company or any of its Subsidiaries from engaging in any material business with any Person or levying a material fine, charge or other payment for doing so; or (C) granting any material "most favored nation" status or similar pricing rights, granting exclusive material sales, distribution, marketing, streaming or other exclusive rights for a material period of time or granting material rights of first offer or rights of first refusal for a material period of time, in the case of each of clauses (A) through (C), other than any such Contracts that (x) are not material to the Company and its Subsidiaries, taken as a whole or (y) may be cancelled without liability to the Company or its Subsidiaries upon notice of thirty (30) days or less;
- (iv) any Contract (A) relating to the disposition or acquisition of more than \$35,000,000 of assets by the Company or any of its Subsidiaries after the date of this Agreement other than in the ordinary course of business; (B) pursuant to which the Company or any of its Subsidiaries will acquire any ownership interest of more than \$35,000,000 in any other Person or other business enterprise other than any Subsidiary of the Company; or (C) that is an agreement with respect to any acquisition or divestiture of more than \$35,000,000 pursuant to which the Company or any of its Subsidiaries has continuing indemnification, "earn-out" or other contingent payment obligations;
- (v) any mortgages, indentures, guarantees, loans or credit agreements, security agreements or other Contracts relating to Indebtedness, in each case in excess of \$25,000,000, other than (A) accounts receivables and payables in the ordinary course of business; (B) loans to wholly owned Subsidiaries of the Company in the ordinary course of business; and (C) extensions of credit to customers in the ordinary course of business;
- (vi) any Lease or Sublease set forth in <u>Section 3.14(b)</u> or <u>Section 3.14(c)</u> of the Company Disclosure Letter;
- (vii) any Contract providing for indemnification of any officer, director or employee by the Company or any of its Subsidiaries;
- (viii) any Contract that involves a material joint venture, joint development agreement (of Intellectual Property or otherwise), collaboration agreement, strategic alliance or strategic partnership, limited liability company, partnership or other similar agreement or arrangement relating to the formation, creation, operation, management or control of any of the foregoing;
- (ix) any Contract containing any support, maintenance or service obligation on the part of the Company or any of its Subsidiaries that represents revenue in excess of \$25,000,000

on an annual basis, other than those Contracts that may be cancelled without liability to the Company or any of its Subsidiaries upon notice of ninety (90) days or less;

- (x) any Contract that prohibits the payment of dividends or distributions in respect of the capital stock of the Company or any of its Subsidiaries, prohibits the pledging of the capital stock of the Company or any Subsidiary of the Company, prohibits the issuance of guarantees by the Company or any Subsidiary of the Company or grants any rights of first refusal or rights of first offer or similar rights or that limits or proposes to limit the ability of the Company or any of its Subsidiaries or Affiliates to sell, transfer, pledge or otherwise dispose of any assets or businesses in excess of \$50,000,000;
- (xi) any Contract that contains a put, call or similar right pursuant to which the Company or any of its Subsidiaries could be required to purchase or sell, as applicable, any equity interests of any Person or assets, in each case with a value in excess of \$35,000,000;
- (xii) any Contract that (A) is with a Significant Vendor or (B) resulted in payments by the Company or its Subsidiaries of more than \$35,000,000 during the 12 months ended December 31, 2021 or is reasonably likely to result in payments by the Company or its Subsidiaries of more than \$35,000,000 during the 12 months ending December 31, 2022;
- (xiii) any Contract that (A) is with a Significant Customer or (B) resulted in payments to the Company or its Subsidiaries of more than \$25,000,000 during the 12 months ended December 31, 2021 or is reasonably likely to result in payments to the Company or its Subsidiaries of more than \$25,000,000 during the 12 months ending December 31, 2022; and
- (xiv) any Contract that is an agreement that is material to the Company and its Subsidiaries, taken as a whole, with any Governmental Authority.
 - (yy) "Merger Consideration" means \$95.00 in cash, without interest.
 - (zz) "NASDAQ" means The Nasdaq Stock Market.
- (aaa) "Open Source License" means any license for open source, public source or freeware software that is considered an open source software license by the Open Source Initiative or a free software license by the Free Software Foundation, including any version of the GNU General Public License, GNU Lesser/Library General Public License, Affero General Public License, Apache Software License, Mozilla Public License, BSD License, MIT License and Common Public License.
- (bbb) "Owned Company Shares" means the Cancelled Owned Company Shares and the Specified Owned Company Shares, collectively.
- (ccc) "Parent Common Stock" means the common stock, par value \$0.00000625 per share, of Parent.

- (ddd) "Parent Material Adverse Effect" means any Effect that would, or would reasonably be expected to, prevent or materially impede or materially delay, or prevents or materially impedes or materially delays, the consummation by Parent or Merger Sub of the Merger and the other transactions contemplated by this Agreement.
- (eee) "Parent Stock Plan" means Parent's 2001 Stock Plan, as amended and restated.
- (fff) "Parent Stock Price" means an amount equal to the volume weighted average price per share rounded to four decimal places (with amounts 0.00005 and above rounded up) of Parent Common Stock on NASDAQ (as reported by Bloomberg L.P. or another authoritative source mutually selected by Parent and the Company) for the five consecutive trading days ending with the last trading day ending immediately prior to the Closing Date.
- (ggg) "Permitted Liens" means any of the following: (i) liens for Taxes, assessments and governmental charges or levies either not yet delinquent or that are being contested in good faith and by appropriate proceedings and for which appropriate reserves have been established to the extent required by GAAP; (ii) mechanics, carriers', workmen's, warehouseman's, repairmen's, materialmen's or other similar liens or security interests that are not yet due or that are being contested in good faith and by appropriate proceedings; (iii) third Person leases, subleases and licenses (other than capital leases and leases underlying sale and leaseback transactions) entered into in the ordinary course of business; (iv) pledges or deposits to secure obligations pursuant to workers' compensation Laws or similar legislation or to secure public or statutory obligations; (v) pledges and deposits to secure the performance of bids, trade contracts, leases, surety and appeal bonds, performance bonds and other obligations of a similar nature, in each case in the ordinary course of business; (vi) defects, imperfections or irregularities in title, easements, covenants and rights of way (unrecorded and of record) and other similar liens (or other encumbrances of any type), in each case that do not, and are not reasonably likely to, adversely affect in any material respect the current use or occupancy of the applicable property owned, leased, used or held for use by the Company or any of its Subsidiaries; (vii) zoning, building and other similar codes or restrictions which are not violated in any material respect by the current use or occupancy of the real property subject thereto; (viii) liens the existence of which are disclosed in the notes to the consolidated financial statements of the Company included in the Company SEC Reports filed as of the date of this Agreement; (ix) licenses to Company Intellectual Property entered into in the ordinary course of business consistent with past practice; (x) any other liens that do not secure a liquidated amount, that have been incurred or suffered in the ordinary course of business, and that would not, individually or in the aggregate, have a Company Material Adverse Effect; and (xi) statutory, common law or contractual liens of landlords under Leases or liens against the fee interests of the landlord or owner of any Leased Real Property.
- (hhh) "**Person**" means any individual, corporation (including any non-profit corporation), limited liability company, joint stock company, general partnership, limited partnership, limited liability partnership, joint venture, estate, trust, firm, Governmental Authority or other enterprise, association, organization or entity.

- (iii)"**Personal Data**" means all information that identifies, is capable of identifying (directly or indirectly, either alone or in combination with other data) or otherwise relates to an individual person or household, personal or personally identifiable data or information, including personal data (or the equivalent) as defined in any applicable Law.
- (jjj)"**Privacy Laws**" means all U.S., state and foreign Laws relating to Personal Data, including the European Union's General Data Protection Regulation and ePrivacy Directive, the UK General Data Protection Regulation, the California Consumer Privacy Act, the Illinois Biometric Information Privacy Act, the Children's Online Privacy Protection Act, the Personal Information Protection and Electronic Documents Act 2000, the UK Data Protection Act of 2018, and any other Laws governing the privacy, security, integrity, accuracy, Processing or other protection of Personal Data.
- (kkk) "Privacy Policies" means all (i) policies, representations, and statements relating to Personal Data and/or the Processing thereof, including those posted or made publicly available or provided to end users, employees or business partners in any media by the Company or its Subsidiaries and (ii) Industry Standards governing Personal Data or cybersecurity.
- (lll)"**Process**" or "**Processing**" means, with respect to data (including Personal Data), the use, collection, creation, receipt, processing, aggregation, storage, maintenance, adaption, alteration, transfer, transmission, disclosure, dissemination, combination, erasure, destruction, deidentification, pseudonymizing or anonymizing of such data, any other operation or set of operations that is performed on data or on sets of data, in each case, whether or not by automated means, and any other form of processing, including as defined by or under any applicable Law.
 - (mmm) "Sarbanes-Oxley Act" means the Sarbanes-Oxley Act of 2002.
- (nnn) "SEC" means the United States Securities and Exchange Commission or any successor thereto.
 - (000) "Securities Act" means the Securities Act of 1933.
- (ppp) "Senior Notes" means the (i) 3.400% senior notes due September 15, 2026 issued pursuant to the Indenture, dated as of September 19, 2016, by and among the Company, the Trustee, and the guarantors party thereto (the "Indenture"), (ii) 3.400% senior notes due June 15, 2027 issued pursuant to the Base Indenture, dated as of May 26, 2017, between the Company and the Trustee (the "Base Indenture"), as supplemented by the First Supplemental Indenture, dated as of May 26, 2017, between the Company and the Trustee (together with the Base Indenture, the "First Supplemental Indenture"), (iii) 1.350% senior notes due September 15, 2030 issued pursuant to the Base Indenture, as supplemented by the Second Supplemental Indenture, dated as of August 10, 2020, between the Company and the Trustee (together with the Base Indenture, the "Second Supplemental Indenture"), (iv) 4.500% senior notes due June 15, 2047 issued pursuant to the First Supplemental Indenture and (v) 2.500% senior notes due September 15, 2050 issued pursuant to the Second Supplemental Indenture.

- (qqq) "**Significant Customer**" means each of the 10 largest customers to the Company and its Subsidiaries (or groups of related customers) by accounts receivable, taken as a whole, at December 31, 2021, which customers are set forth on <u>Section 1.1(qqq)</u> of the Company Disclosure Letter.
- (rrr) "**Significant Vendor**" means (i) each of the 10 largest suppliers, vendors, content partners or service providers to the Company and its Subsidiaries (or groups of related vendors or suppliers) by payments on invoices, taken as a whole, during the 12-month period ended on December 31, 2021, which vendors are set forth on <u>Section 1.1(rrr)</u> of the Company Disclosure Letter; and (ii) any other material vendors or suppliers of the Company with material agreements with the Company who are data center, data processing, cloud or hosting vendors.
- (sss) "**Specified Litigation**" means any of the matters set forth on <u>Section 1.1(sss)</u> of the Company Disclosure Letter.
- (ttt)"**Specified OSS License**" means an Open Source License that (i) requires that source code be licensed, distributed, released, conveyed or made available if such software (or any software incorporating, derived from, linking to or with the same) is licensed, distributed, modified, released, conveyed or otherwise made available or accessible to any third party ("**Distributed**"); (ii) requires that the right to make derivative works of such software be granted to any licensee of such software if any such software is Distributed to other Persons; (iii) requires that the software be Distributed to any licensee if it is Distributed to other Persons and that each licensee further Distribute such software on the same license terms if it is Distributed and/or (iv) expressly grants a patent license, covenant not to sue or non-assertion covenant of such license if any software governed by such license is Distributed to other Persons.
- (uuu) "**Specified Owned Company Shares**" means all shares of Company Common stock held by the Specified Subsidiary as of immediately prior to the Effective Time.
- (vvv) "**Specified Subsidiary**" means Amber Holding Subsidiary Co., a Delaware corporation and a wholly owned Subsidiary of the Company.
- (www) "Subsidiary" of any Person means (i) a corporation more than 50% of the combined voting power of the outstanding voting stock of which is owned, directly or indirectly, by such Person or by one or more other Subsidiaries of such Person or by such Person and one or more other Subsidiaries of such Person or such Person and one or more other Subsidiaries thereof, directly or indirectly, is the general partner and has the power to direct the policies, management and affairs of such partnership; (iii) a limited liability company of which such Person or one or more other Subsidiaries of such Person or such Person and one or more other Subsidiaries of such Person, directly or indirectly, is the managing member and has the power to direct the policies, management and affairs of such company; or (iv) any other Person (other than a corporation, partnership or limited liability company) in which such Person or one or more other Subsidiaries of such Person or such Person and one or more other Subsidiaries of such Person or such Person and one or more other Subsidiaries of such Person or such Person or one or more other Subsidiaries of such Person or such Person and one or more other Subsidiaries of such Person, directly or indirectly, has at least a majority ownership or the power to direct the policies, management and affairs thereof (including by

contract). Notwithstanding the foregoing, the entities set forth on Section 1.1(www) of the Company Disclosure Letter (each, a "Specified JV Entity" and together, the "Specified JV Entities") shall not be deemed to be Subsidiaries of the Company, except that with respect to the definition of Company Material Adverse Effect, representations and warranties set forth in 3.5(a), 3.5(c), 3.6, 3.8, 3.20, 3.21, 3.22, and 3.23 and the covenants set forth in Section 5.2, the term "Subsidiary" in such definition, representations and warranties and covenants shall be deemed to include the Specified JV Entities; provided, that such representations and warranties shall be deemed to be made to the Knowledge of the Company insofar as they relate to any Specified JV Entity.

- (xxx) "Superior Proposal" means any bona fide written Acquisition Proposal for an Acquisition Transaction that the Company Board has determined in good faith (after consultation with the Company's financial advisor and outside legal counsel) is on terms that would be more favorable, from a financial point of view, to the Company Stockholders (in their capacity as such) than the Merger (taking into account any revisions to this Agreement made or proposed in writing by Parent prior to the time of such determination and after taking into account those factors and matters deemed relevant in good faith by the Company Board, including the identity of the Person making the proposal, the conditionality of such proposal, the likelihood of consummation in accordance with the terms of such proposal, and the legal, financial (including the financing terms), regulatory, timing and other aspects of such proposal). For purposes of the reference to an "Acquisition Proposal" in this definition, all references to "15%" in the definition of "Acquisition Transaction" will be deemed to be references to "50%."
- (yyy) "**Tax Contest**" means any inquiry, audit, examination, hearing, trial, appeal, or other administrative or judicial proceeding with respect to any Taxes or Tax Returns of Company.
- (zzz) "**Tax Group**" means any "affiliated group" of corporations within the meaning of Section 1504 of the Code (or any similar affiliated, combined, consolidated, or unitary group or arrangement for group relief for state, local, or foreign Tax purposes).
- (aaaa) "Taxes" means any United States federal, state, local and non-United States taxes, charges, fees, levies, imposts, duties, and other similar assessments or charges of any kind whatsoever, imposed by any Governmental Authority in the nature of a tax, including gross receipts, income, profits, sales, use, occupation, value added, ad valorem, transfer, franchise, withholding, payroll, employment, excise and property taxes, assessments and any similar government charges and impositions of any kind, together with all interest, penalties and additions imposed with respect to such amounts.
- (bbbb) "**Transaction Litigation**" means any Legal Proceeding against the Company or any of its Subsidiaries or Affiliates or directors or otherwise relating to, involving or affecting the Company or any of its Subsidiaries or Affiliates, in each case in connection with, arising from or otherwise relating to the Merger or any other transaction contemplated by this Agreement, including any Legal Proceeding alleging or asserting any misrepresentation or omission in the Proxy Statement.

(cccc) "**Trustee**" means Wells Fargo Bank, National Association, as trustee under the Indenture, the Base Indenture, the First Supplemental Indenture or the Second Supplemental Indenture, as applicable.

(dddd) "WARN" means the United States Worker Adjustment and Retraining Notification Act and any similar U.S. state or U.S. local Law.

1.2 *Additional Definitions*. The following capitalized terms have the respective meanings given to them in the respective Sections of this Agreement set forth opposite each of the capitalized terms below:

Term	Section Reference		
Agreement	Preamble		
Alternative Acquisition Agreement	5.3(a)		
Assumed Company Option	2.8(c)(i)		
Assumed Company Stock-Based Award	2.8(c)(ii)		
Base Indenture	1.1(ppp)		
Book-Entry Shares	2.9(b)		
Burdensome Condition	6.2(b)		
Bylaws	3.1		
Cancelled Owned Company Shares	2.7(a)(ii)		
Capitalization Date	3.7(a)		
Certificate of Merger	2.2		
Certificates	2.9(b)		
Charter	3.1		
Closing	2.3		
Closing Date	2.3		
Collective Bargaining Agreement	3.19(a)		
Company	Preamble		
Company Board Recommendation	3.3(a)		
Company Board Recommendation Change	5.3(c)(i)		
Company Disclosure Letter	1.4(a)		
Company Employee	3.18(i)		
Company Plans	6.9(b)		
Company Recent SEC Reports	Article III		
Company SEC Reports	3.9		
Company Securities	3.7(d)		
Company Stockholder Meeting	6.4(a)		
Company Termination Fee	8.3(b)(i)		
Comparable Plans	6.9(b)		
Confidentiality Agreement	9.4		
Consent	3.6		
D&O Insurance	6.8(c)		
DGCL	Recitals		

Term	Section Reference
Dissenting Company Shares	2.7(b)(i)
Effect	1.1(o)
Effective Time	2.2
Electronic Delivery	9.12
Employee Plans	3.18(a)
ERISA Affiliate	3.18(a)
Exchange Fund	2.9(a)
FinCEN	3.21(d)
First Supplemental Indenture	1.1(000)
Indemnified Persons	6.8(a)
Indenture	1.1(ppp)
Initial Termination Date	8.1(c)
Injunction	8.1(b)
International Employee Plan	3.18(a)
Lease	3.14(b)
Leased Real Property	3.14(b)
Maximum Annual Premium	6.8(c)
Merger	Recitals
Merger Sub	Preamble
New Plans	6.9(c)
Notice Period	5.3(d)(ii)(3)
OFAC	3.21(c)
Old Plans	6.9(c)
Owned Real Property	3.14(a)
Parent	Preamble
Parent Disclosure Letter	1.4(b)
Parent Qualified Plan	6.9(d)
Parent Recent SEC Reports	Article IV
Parent Termination Fee	8.3(c)(i)
Party	Preamble
Paying Agent	2.9(a)
Payoff Letter	6.16(d)
Permits	3.20
Proxy Statement	6.3(a)
Representatives	5.3(a)
Repurchase Transaction	6.16(c)
Repurchase Transaction Notice	6.16(c)
Requisite Stockholder Approval	3.4
Revolving Credit Facility Termination	6.16(d)
Sanctioned Countries	3.21(c)
Sanctioned Person	3.21(c)
Sanctions	3.21(c)
Second Supplemental Indenture	1.1(ppp)

Term	Section Reference		
Sublease	3.14(c)		
Surrendered Company Stock-Based Award	2.8(a)		
Surviving Corporation	2.1		
Tax Returns	3.17(a)(i)		
Termination Date	8.1(c)		

1.3 *Certain Interpretations*.

- (a) When a reference is made in this Agreement to an Article or a Section, such reference is to an Article or a Section of this Agreement unless otherwise indicated. When a reference is made in this Agreement to a Schedule or Exhibit, such reference is to a Schedule or Exhibit to this Agreement, as applicable, unless otherwise indicated.
- (b) When used herein, (i) the words "hereof," "herein" and "herewith" and words of similar import will, unless otherwise stated, be construed to refer to this Agreement as a whole and not to any particular provision of this Agreement; and (ii) the words "include," "includes" and "including" will be deemed in each case to be followed by the words "without limitation."
- (c) Unless the context otherwise requires, "neither," "nor," "any," "either" and "or" are not exclusive.
- (d) The word "extent" in the phrase "to the extent" means the degree to which a subject or other thing extends, and does not simply mean "if."
- (e) When used in this Agreement, references to "\$" or "Dollars" are references to U.S. dollars.
- (f) The meaning assigned to each capitalized term defined and used in this Agreement is equally applicable to both the singular and the plural forms of such term, and words denoting any gender include all genders. Where a word or phrase is defined in this Agreement, each of its other grammatical forms has a corresponding meaning.
- (g) When reference is made to any party to this Agreement or any other agreement or document, such reference includes such party's successors and permitted assigns. References to any Person include the successors and permitted assigns of that Person.
- (h) Unless the context otherwise requires, all references in this Agreement to the Subsidiaries of a Person will be deemed to include all direct and indirect Subsidiaries of such entity.
- (i) A reference to any specific legislation or to any provision of any legislation includes any amendment to, and any modification, re-enactment or successor thereof, any legislative provision substituted therefor and all rules, regulations and statutory instruments issued thereunder or pursuant thereto, except that, for purposes of any representations and warranties in this Agreement that are made as a specific date, references to any specific legislation will be deemed to refer to such

legislation or provision (and all rules, regulations and statutory instruments issued thereunder or pursuant thereto) as of such date. References to any agreement or Contract are to that agreement or Contract as amended, modified or supplemented from time to time.

- (j) Except as otherwise provided herein, all accounting terms used herein will be interpreted, and all accounting determinations hereunder will be made, in accordance with GAAP.
- (k) The table of contents and headings set forth in this Agreement are for convenience of reference purposes only and will not affect or be deemed to affect in any way the meaning or interpretation of this Agreement or any term or provision hereof.
- (l) References to "from" or "through" any date mean, unless otherwise specified, from and including or through and including such date, respectively.
- (m) The measure of a period of one month or year for purposes of this Agreement will be the date of the following month or year corresponding to the starting date. If no corresponding date exists, then the end date of such period being measured will be the next actual date of the following month or year (for example, one month following February 18 is March 18 and one month following March 31 is May 1).
- (n) The Parties agree that they have been represented by legal counsel during the negotiation and execution of this Agreement and therefore waive the application of any Law, regulation, holding or rule of construction providing that ambiguities in an agreement or other document will be construed against the Party drafting such agreement or document.
- (o) No summary of this Agreement or any Exhibit, Schedule or other document delivered herewith prepared by or on behalf of any Party will affect the meaning or interpretation of this Agreement or such Exhibit or Schedule.
- (p) The information contained in this Agreement and in the Company Disclosure Letter and the Parent Disclosure Letter is disclosed solely for purposes of this Agreement, and no information contained herein or therein will be deemed to be an admission by any Party to any third Person of any matter whatsoever, including (i) any violation of Law or breach of contract; or (ii) that such information is material or that such information is required to be referred to or disclosed under this Agreement.
- (q) The representations and warranties in this Agreement are the product of negotiations among the Parties and are for the sole benefit of the Parties. Any inaccuracies in such representations and warranties are subject to waiver by the Parties in accordance with <u>Section 8.5</u> without notice or liability to any other Person. In some instances, the representations and warranties in this Agreement may represent an allocation among the Parties of risks associated with particular matters regardless of the knowledge of any of the Parties. Consequently, Persons other than the Parties may not rely on the representations and warranties in this Agreement as characterizations of actual facts or circumstances as of the date of this Agreement or as of any other date.

(r) Documents or other information or materials will be deemed to have been "made available" by the Company if such documents, information or materials have been (i) continuously made accessible to Parent by 4:00 p.m., Pacific time, on the date of this Agreement by means of a virtual data room managed by the Company at www.datasite.com; or (ii) delivered or provided to Parent or its Affiliates or Representatives by 4:00 p.m., Pacific time, on the date of this Agreement.

1.4 Disclosure Letters.

- Parent and Merger Sub on the date of this Agreement (the "Company Disclosure Letter") will be disclosed under separate and appropriate Section and subsection references that correspond to the Sections and subsections of Article III and Article V to which such information relates. The information set forth in each Section or subsection of the Company Disclosure Letter will be deemed to be an exception to (or, as applicable, a disclosure for purposes of) (i) the representations and warranties (or covenants, as applicable) of the Company that are set forth in the corresponding Section or subsection of this Agreement; and (ii) any other representations and warranties (or covenants, as applicable) of the Company that are set forth in this Agreement, but in the case of this clause (ii) only if the relevance of that disclosure as an exception to (or a disclosure for purposes of) such other representations and warranties (or covenants, as applicable) is reasonably apparent on the face of such disclosure.
- (b) The information set forth in the disclosure letter delivered by Parent and Merger Sub to the Company on the date of this Agreement (the "Parent Disclosure Letter") will be disclosed under separate and appropriate Section and subsection references that correspond to the Sections and subsections of Article IV to which such information relates. The information set forth in each Section or subsection of the Parent Disclosure Letter will be deemed to be an exception to (or, as applicable, a disclosure for purposes of) (i) the representations and warranties (or covenants, as applicable) of Parent and Merger Sub that are set forth in the corresponding Section or subsection of this Agreement; and (ii) any other representations and warranties (or covenants, as applicable) of Parent and Merger Sub that are set forth in this Agreement, but in the case of this clause (ii) only if the relevance of that disclosure as an exception to (or a disclosure for purposes of) such other representations and warranties (or covenants, as applicable) is reasonably apparent on the face of such disclosure.

ARTICLE II THE MERGER

2.1 The Merger. Upon the terms and subject to the conditions set forth in this Agreement and the applicable provisions of the DGCL, on the Closing Date, (a) Merger Sub will be merged with and into the Company; (b) the separate corporate existence of Merger Sub will thereupon cease; and (c) the Company will continue as the surviving corporation of the Merger and a Subsidiary of Parent. The Company, as the surviving corporation of the Merger, is sometimes referred to herein as the "Surviving Corporation."

adoption, approval or recommendation with respect to such Acquisition Proposal; or (3) a Company Board Recommendation Change.

- (g) *Breach by Representatives*. The Company agrees that any action taken by any Representative (other than any employee or consultant of the Company who is not at the senior vice president level or above or other officer of the Company) of the Company that, if taken by the Company, would be a breach of this <u>Section 5.3</u>, then such action will be deemed to constitute a breach by the Company of this <u>Section 5.3</u>.
- 5.4 No Control of the Company's Business. The Parties acknowledge and agree that the restrictions set forth in this Agreement are not intended to give Parent or Merger Sub, directly or indirectly, the right to control or direct the business or operations of the Company or its Subsidiaries at any time prior to the Effective Time. Prior to the Effective Time, the Company and its Subsidiaries will exercise, consistent with the terms, conditions and restrictions of this Agreement, complete control and supervision over their own business and operations.

ARTICLE VI ADDITIONAL COVENANTS

- 6.1 Required Action and Forbearance; Efforts.
- (a) Reasonable Best Efforts. Upon the terms and subject to the conditions set forth in this Agreement and provided that at all times the provisions of Section 6.2 shall govern the matters set forth therein, Parent and Merger Sub, on the one hand, and the Company, on the other hand, will use their respective reasonable best efforts to (A) take (or cause to be taken) all actions; (B) do (or cause to be done) all things; and (C) assist and cooperate with the other Parties in doing (or causing to be done) all things, in each case as are necessary, proper or advisable pursuant to applicable Law or otherwise to consummate and make effective, in the most expeditious manner practicable, the Merger, including by using reasonable best efforts to:
 - (i) cause the conditions to the Merger set forth in <u>Article VII</u> to be satisfied;
- (ii) (1) seek to obtain all consents, waivers, approvals, orders and authorizations from Governmental Authorities; and (2) make all registrations, declarations and filings with Governmental Authorities, in each case that are necessary or advisable to consummate the Merger; and
- (iii) (1) seek to obtain all consents, waivers and approvals and (2) deliver all notifications pursuant to any Material Contracts (or other applicable Contracts of the Company or its Subsidiaries) in connection with this Agreement and the consummation of the Merger so as to seek to maintain and preserve the benefits to the Surviving Corporation of such Material Contracts (or other applicable Contracts of the Company or its Subsidiaries) as of and following the consummation of the Merger, in each of cases (1) and (2) to the extent directed to do so by Parent following consultation therewith.

and do, or cause to be done, all things reasonably necessary, proper or advisable on its part pursuant to applicable Law and the rules and regulations of NASDAQ to cause (a) the delisting of the Company Common Stock from NASDAQ as promptly as practicable after the Effective Time; and (b) the deregistration of the Company Common Stock pursuant to the Exchange Act as promptly as practicable after such delisting.

6.15 Additional Agreements. If at any time after the Effective Time any further action is necessary or desirable to carry out the purposes of this Agreement or to vest the Surviving Corporation with full title to all properties, assets, rights, approvals, immunities and franchises of either of the Company or Merger Sub, then the proper officers and directors of each Party will use their reasonable best efforts to take such action. Without limiting the foregoing, the Company shall take the actions set forth on Section 6.15 of the Company Disclosure Letter.

6.16 Senior Notes; Credit Facility.

- (a) Senior Notes. Notwithstanding anything to the contrary in this Agreement, prior to the Effective Time, the Company shall give any notices and take all other actions necessary in accordance with the terms of the Indenture, the First Supplemental Indenture, the Second Supplemental Indenture and the Senior Notes, which actions shall include, without limitation, the Company (or its Subsidiaries) (i) giving any notices that may be required in connection with the Merger and the other transactions contemplated by this Agreement, (ii) preparing any supplemental indentures required in connection with the Merger and the other transactions contemplated by this Agreement and the consummation thereof to be executed and delivered to the Trustee at or prior to the Effective Time, in form and substance reasonably satisfactory to the Trustee and Parent, and (iii) delivering any opinions of counsel required to be delivered prior to the Effective Time and any officer's certificates or other documents or instruments, as may be necessary to comply with all of the terms and conditions of the Indenture, the First Supplemental Indenture and the Second Supplemental Indenture in connection with the Merger and the other transactions contemplated by this Agreement, provided that opinions of counsel required by the Indenture, the First Supplemental Indenture or the Second Supplemental Indenture, as may be necessary to comply with all of the terms and conditions of the Indenture, the First Supplemental Indenture or the Second Supplemental Indenture in connection with the Merger and the other transactions contemplated by this Agreement shall be delivered by Parent and its counsel to the extent required to be delivered at or after the Effective Time.
- (b) *Notifications under Senior Notes*. The Company shall provide Parent and its counsel reasonable opportunity to review and comment on any notices, certificates, press releases, supplemental indentures, legal opinions, officer's certificates or other documents or instruments required to be delivered pursuant to or in connection with the Indenture, the First Supplemental Indenture, the Second Supplemental Indenture or the Senior Notes in connection with the Merger and the other transactions contemplated by this Agreement prior to the dispatch or making thereof, and the Company shall promptly respond to any reasonable questions from, and reflect any reasonable comments made by, Parent or its counsel with respect thereto prior to the dispatch or making thereof.

reasonably informed of any material development in such matter and consider in good faith Parent's comments with respect to the defense of such matter.

ARTICLE VII CONDITIONS TO THE MERGER

- 7.1 Conditions to Each Party's Obligations to Effect the Merger. The respective obligations of Parent, Merger Sub and the Company to consummate the Merger are subject to the satisfaction or waiver (where permissible pursuant to applicable Law) prior to the Effective Time of each of the following conditions:
- (a) *Requisite Stockholder Approval*. The Company's receipt of the Requisite Stockholder Approval at the Company Stockholder Meeting.
- (b) Competition Approvals. The waiting periods (and any extensions thereof), if any, applicable to the Merger pursuant to the HSR Act (or under any applicable timing agreements or commitments entered into with or made to the FTC or the DOJ to extend any waiting period or not close the transactions contemplated hereby) and the other Laws set forth in Section 7.1(b) of the Company Disclosure Letter will have expired or otherwise been terminated, or all requisite clearances, consents, and approvals pursuant thereto will have been obtained in each case, without the imposition, individually or in the aggregate, of a Burdensome Condition.
- (c) Other Regulatory Approvals. The waiting periods (and any extensions thereof), if any, applicable to the Merger pursuant to any of the Laws set forth in Section 7.1(c) of the Company Disclosure Letter will have expired or otherwise been terminated, or all requisite clearances, consents, and approvals pursuant thereto will have been obtained in each case, without the imposition, individually or in the aggregate, of a Burdensome Condition.
- (d) *No Prohibitive Laws or Injunctions*. No temporary restraining order, preliminary or permanent injunction or other judgment or order issued by any court of competent jurisdiction or other legal or regulatory restraint or prohibition preventing the consummation of the Merger will be in effect, nor will any action have been taken by any Governmental Authority of competent jurisdiction, and no statute, rule, regulation or order will have been enacted, entered, enforced or deemed applicable to the Merger, that in each case (i) prohibits, makes illegal, or enjoins (or seeks to prohibit, make illegal or enjoin) the consummation of the Merger or (ii) imposes or seeks to impose a Burdensome Condition.
- 7.2 Conditions to the Obligations of Parent and Merger Sub. The obligations of Parent and Merger Sub to consummate the Merger will be subject to the satisfaction or waiver (where permissible pursuant to applicable Law) prior to the Effective Time of each of the following conditions, any of which may be waived exclusively by Parent:
 - (a) Representations and Warranties.
- (i) Other than the representations and warranties listed in <u>Section 7.2(a)(ii)</u>, <u>Section 7.2(a)(iii)</u> and <u>Section 7.2(a)(iv)</u>, the representations and warranties of the Company set forth

in this Agreement will be true and correct (without giving effect to any materiality or Company Material Adverse Effect qualifications set forth therein) as of the date of this Agreement and as of the Closing Date as if made at and as of the Closing Date (except to the extent that any such representation and warranty expressly speaks as of an earlier date, in which case such representation and warranty will be true and correct as of such earlier date), except for such failures to be true and correct that would not have or reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

- (ii) The representations and warranties set forth in Section 3.1, Section 3.2, Section 3.3, Section 3.4, the second sentence of Section 3.12(a) and Section 3.26 that (A) are not qualified by "material", "materiality" or Company Material Adverse Effect will be true and correct in all material respects as of the date of this Agreement and as of the Closing Date as if made at and as of the Closing Date (except to the extent that any such representation and warranty expressly speaks as of an earlier date, in which case such representation and warranty will be so true and correct as of such earlier date); and (B) that are qualified by "material," "materiality" or Company Material Adverse Effect will be true and correct (without disregarding such "material," "materiality" or Company Material Adverse Effect qualifications) as of the date of this Agreement and as of the Closing Date as if made at and as of the Closing Date (except to the extent that any such representation and warranty expressly speaks as of an earlier date, in which case such representation and warranty will be so true and correct as of such earlier date).
- (iii) The representations and warranties set forth in Section 3.8(b) and Section 3.8(c) will be true and correct in all material respects as of the date of this Agreement and as of the Closing Date as if made at and as of the Closing Date.
- (iv) The representations and warranties set forth in Section 3.7(a), the second sentence of Section 3.7(b), the second sentence of Section 3.7(c) and Section 3.7(d)(i)-(v) will be true and correct as of the date of this Agreement and as of the Closing Date as if made at and as of the Closing Date (except to the extent that any such representation and warranty expressly speaks as of an earlier date, in which case such representation and warranty will be true and correct as of such earlier date), except for such inaccuracies that are *de minimis* in the aggregate (viewed in the context of the Company's total capitalization).
- (b) *Performance of Obligations of the Company*. The Company will have performed and complied in all material respects with all covenants and obligations of this Agreement required to be performed and complied with by it at or prior to the Closing.
- (c) Officer's Certificate. Parent and Merger Sub will have received a certificate of the Company, validly executed for and on behalf of the Company and in its name by a duly authorized executive officer thereof, certifying that the conditions set forth in Section 7.2(a) and Section 7.2(b) have been satisfied.
- (d) *Company Material Adverse Effect*. No Company Material Adverse Effect will have occurred after the date of this Agreement that is continuing.

- 7.3 Conditions to the Company's Obligations to Effect the Merger. The obligations of the Company to consummate the Merger are subject to the satisfaction or waiver (where permissible pursuant to applicable Law) prior to the Effective Time of each of the following conditions, any of which may be waived exclusively by the Company:
- (a) Representations and Warranties. The representations and warranties of Parent and Merger Sub set forth in this Agreement will be true and correct as of the date of this Agreement and as of the Closing Date as if made at and as of the Closing Date (except to the extent that any such representation and warranty expressly speaks as of an earlier date, in which case such representation and warranty will be true and correct as of such earlier date), except for any such failure to be true and correct that would not have or reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect.
- (b) *Performance of Obligations of Parent and Merger Sub*. Parent and Merger Sub will have performed and complied in all material respects with all covenants and obligations of this Agreement required to be performed and complied with by Parent and Merger Sub at or prior to the Closing.
- (c) Officer's Certificate. The Company will have received a certificate of Parent and Merger Sub, validly executed for and on behalf of Parent and Merger Sub and in their respective names by a duly authorized officer thereof, certifying that the conditions set forth in Section 7.3(a) and Section 7.3(b) have been satisfied.

ARTICLE VIII TERMINATION, AMENDMENT AND WAIVER

- 8.1 *Termination*. This Agreement may be validly terminated at any time prior to the Effective Time, whether prior to or after receipt of the Requisite Stockholder Approval (except as provided herein) only as follows (it being understood and agreed that this Agreement may not be terminated for any other reason or on any other basis):
 - (a) by mutual written agreement of Parent and the Company;
- (b) by either Parent or the Company if (i) any permanent injunction or other judgment or order issued by any court of competent jurisdiction or other legal or regulatory restraint or prohibition preventing the consummation of the Merger will be in effect, or any action has been taken by any Governmental Authority of competent jurisdiction, that, in each case, prohibits, makes illegal or enjoins the consummation of the Merger and has become final and non-appealable; or (ii) any statute, rule, regulation or order will have been enacted, entered, enforced or deemed applicable to the Merger that prohibits, makes illegal or enjoins the consummation of the Merger (either of clause (i) or (ii), an "**Injunction**"), except that the right to terminate this Agreement pursuant to this Section 8.1(b) will not be available if the terminating Party's material breach of any provision of this Agreement is the primary cause of the failure of the Merger to be consummated by the Termination Date:

- (c) by either Parent or the Company if the Effective Time has not occurred by 11:59 p.m., Pacific time, on January 18, 2023 (such time and date, the "Initial Termination Date", and the Initial Termination Date, as it may be extended pursuant to this Section 8.1(c), the "Termination Date"), except that (i) if as of the Initial Termination Date all conditions to this Agreement are satisfied (other than those conditions that by their terms are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing) or waived (where permissible pursuant to applicable Law), other than the conditions set forth in Section 7.1(b), Section 7.1(c) or Section 7.1(d) (solely in connection with an Antitrust Law or Foreign Investment Law), then the Termination Date shall automatically be extended to 11:59 p.m., Pacific time, on April 18, 2023, and (ii) if as of 11:59 p.m., Pacific time, on April 18, 2023, all conditions to this Agreement are satisfied (other than those conditions that by their terms are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing) or waived (where permissible pursuant to applicable Law), other than the conditions set forth in Section 7.1(b), Section 7.1(c) or Section 7.1(d) (solely in connection with an Antitrust Law or Foreign Investment Law), then the Termination Date shall automatically be extended to 11:59 p.m., Pacific time, on July 18, 2023, unless, in the case of each of clauses (i) and (ii), Parent and the Company mutually agree prior to such time in writing that the Termination Date will not be so extended, it being understood that the right to terminate this Agreement pursuant to this Section 8.1(c) will not be available if the terminating Party's material breach of any provision of this Agreement is the primary cause of the failure of the Merger to be consummated by the Termination Date;
- (d) by either Parent or the Company if the Company fails to obtain the Requisite Stockholder Approval at the Company Stockholder Meeting (or any adjournment or postponement thereof) at which a vote is taken on the adoption of this Agreement, except that the right to terminate this Agreement pursuant to this Section 8.1(d) will not be available to any Party whose material breach of any provision of this Agreement has been the primary cause of the failure to obtain the Requisite Stockholder Approval at the Company Stockholder Meeting (or any adjournment or postponement thereof);
- (e) by Parent, if the Company has breached or failed to perform in any material respect any of its representations, warranties, covenants or other agreements contained in this Agreement, which breach or failure to perform would (if the Closing were scheduled to occur at such time) result in a failure of a condition set forth in Section 7.2(a) or Section 7.2(b), except that if such breach is capable of being cured by the Termination Date, Parent will not be entitled to terminate this Agreement prior to the delivery by Parent to the Company of written notice of such breach, stating Parent's intention to terminate this Agreement pursuant to this Section 8.1(e) and the basis for such termination, delivered at least 30 days prior to such termination, or, if earlier, the Termination Date, it being understood that Parent will not be entitled to terminate this Agreement (i) if such breach has been cured prior to termination or (ii) if Parent itself is in breach of any provision of this Agreement or has failed to perform or comply with, or if there is any inaccuracy of, any of its representations, warranties, covenants or agreements set forth in this Agreement, and which breach, failure or inaccuracy would result in the failure of the conditions set forth in Section 7.3(a) or Section 7.3(b);

- (f) by Parent, if at any time the Company Board (or a committee thereof) has effected a Company Board Recommendation Change;
- (g) by the Company, if Parent or Merger Sub has breached or failed to perform in any material respect any of its respective representations, warranties, covenants or other agreements contained in this Agreement, which breach or failure to perform would (if the Closing were scheduled to occur at such time) result in a failure of a condition set forth in Section 7.3(a) or Section 7.3(b), except that if such breach is capable of being cured by the Termination Date, the Company will not be entitled to terminate this Agreement prior to the delivery by the Company to Parent of written notice of such breach, stating the Company's intention to terminate this Agreement pursuant to this Section 8.1(g) and the basis for such termination, delivered at least 30 days prior to such termination, or, if earlier, the Termination Date, it being understood that the Company will not be entitled to terminate this Agreement (i) if such breach has been cured prior to termination or (ii) if the Company itself is in breach of any provision of this Agreement or has failed to perform or comply with, or if there is any inaccuracy of, any of its representations, warranties, covenants or agreements set forth in this Agreement, and which breach, failure or inaccuracy would result in the failure of the conditions set forth in Section 7.2(a) or Section 7.2(b); or
- (h) by the Company, at any time prior to receiving the Requisite Stockholder Approval if (i) the Company has received a Superior Proposal; (ii) the Company Board has authorized the Company to enter into an Alternative Acquisition Agreement to consummate the Acquisition Transaction contemplated by that Superior Proposal and the Company pays or causes to be paid to Parent (or its designee) the Company Termination Fee pursuant to Section 8.3(b)(iii); and (iii) the Company has complied with Section 5.3(d)(ii) with respect to such Superior Proposal.
 - 8.2 *Manner and Notice of Termination; Effect of Termination.*
- (a) *Manner of Termination*. The Party terminating this Agreement pursuant to Section 8.1 (other than pursuant to Section 8.1(a)) must deliver prompt written notice thereof to the other Parties setting forth in reasonable detail the provision of Section 8.1 pursuant to which this Agreement is being terminated and the facts and circumstances forming the basis for such termination pursuant to such provision.
- (b) Effect of Termination. Any proper and valid termination of this Agreement pursuant to Section 8.1 will be effective immediately upon the delivery of written notice by the terminating Party to the other Parties. In the event of the termination of this Agreement pursuant to Section 8.1, this Agreement will be of no further force or effect without liability of any Party (or any partner, member, stockholder, director, officer, employee, affiliate, agent or other representative of such Party) to the other Parties, as applicable, except that Section 3.27, Section 4.10, Section 6.12, the reimbursement obligations of Parent set forth in Section 6.16(c), this Section 8.2, Section 8.3 and Article IX will each survive the termination of this Agreement. Notwithstanding the foregoing, nothing in this Agreement will relieve any Party from any liability for any willful breach of this Agreement. For purposes of this Agreement, "willful breach" means a material breach that is a consequence of an act taken by the breaching party, or the failure by the breaching party to take an act it is required to take under this Agreement, in each case with actual knowledge that the taking of,

or the failure to take, such act would, or would be reasonably expected to, cause a breach of this Agreement. In addition to the foregoing, no termination of this Agreement will affect the rights or obligations of any Party pursuant to the Confidentiality Agreement, which rights, obligations and agreements will survive the termination of this Agreement in accordance with their respective terms.

8.3 Fees and Expenses.

(a) *General*. Except as set forth in this <u>Section 8.3</u>, all fees and expenses incurred in connection with this Agreement and the Merger will be paid by the Party incurring such fees and expenses whether or not the Merger is consummated. For the avoidance of doubt, Parent or the Surviving Corporation will be responsible for all fees and expenses of the Paying Agent.

(b) Company Termination Fee.

- Future Transaction. If (A) this Agreement is terminated pursuant to (1) Section 8.1(c), and at the time of such termination, either (x) the Company Stockholder Meeting has not yet been held or (y) the condition in Section 7.1(b), Section 7.1(c) or Section 7.1(d) has not been satisfied and the primary cause of the failure of either such condition to be satisfied was a breach of any provision of this Agreement by the Company, (2) Section 8.1(d) or (3) Section 8.1(e); (B) following the execution and delivery of this Agreement and prior to such termination of this Agreement pursuant to Section 8.1(c), Section 8.1(d) or Section 8.1(e) an Acquisition Proposal has been publicly announced (i) on or prior to the date of the Company Stockholder Meeting, with respect to any termination pursuant to Section 8.1(d) or (ii) on or prior to the date of such termination, with respect to any termination pursuant to Section 8.1(c) or Section 8.1(e); and (C) within one year of such termination of this Agreement pursuant to Section 8.1(c), Section 8.1(d) or Section 8.1(e), either an Acquisition Transaction is consummated or the Company enters into a definitive agreement providing for the consummation of an Acquisition Transaction, then the Company will promptly (and in any event within two Business Days) after the earlier of the (1) entry into such definitive agreement or (2) consummation of such Acquisition Transaction pay to Parent (or its designee) an amount equal to \$2,270,100,000 (the "Company Termination Fee") by wire transfer of immediately available funds to an account or accounts designated in writing by Parent. For purposes of this Section 8.3(b)(i), all references to "15%" in the definition of "Acquisition Transaction" will be deemed to be references to "50%."
- (ii) Company Board Recommendation Change. If this Agreement is terminated pursuant to Section 8.1(f), then the Company will promptly (and in any event within two Business Days) following such termination pay to Parent (or its designee) the Company Termination Fee by wire transfer of immediately available funds to an account or accounts designated in writing by Parent.
- (iii) Superior Proposal. If this Agreement is terminated pursuant to Section 8.1(h), then the Company will concurrently with such termination pay or cause to be paid to Parent the Company Termination Fee by wire transfer of immediately available funds to an account or accounts designated in writing by Parent.

- (c) Parent Termination Fee. If this Agreement is terminated pursuant to (x) Section 8.1(b) due to an Injunction arising from Antitrust Laws or (y) Section 8.1(c) and all conditions to this Agreement are satisfied (other than those conditions that by their terms are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing) or waived (where permissible pursuant to applicable Law), other than the conditions set forth in Section 7.1(b) or Section 7.1(d) (solely in connection with an Antitrust Law), and, in either case of clause (x) or (y), the Company is not then in material breach of any provision of this Agreement (provided that any breach by the Company that is the primary cause of the failure of any condition to this Agreement to be satisfied shall be considered a material breach), then Parent shall promptly pay (or cause to be paid) to the Company (i) if such termination notice is provided prior to January 18, 2023, an amount equal to \$2,000,000,000,000, (ii) if such termination notice is provided after January 18, 2023, and prior to April 18, 2023, an amount equal to \$2,500,000,000,000 (any fee payable pursuant to clause (i), (ii) or (iii), the "Parent Termination Fee") by wire transfer of immediately available funds to an account or accounts designated in writing by Company.
- (d) *Single Payment Only*. The Parties acknowledge and agree that in no event will the Company be required to pay the Company Termination Fee on more than one occasion and in no event will Parent be required to pay the Parent Termination Fee on more than one occasion, whether or not the Company Termination Fee or the Parent Termination Fee may be payable pursuant to more than one provision of this Agreement at the same or at different times and upon the occurrence of different events.
- (e) *Payments; Default.* The Parties acknowledge that the agreements contained in this Section 8.3 are an integral part of the Merger, and that, without these agreements, the Parties would not enter into this Agreement. Accordingly, if a Party fails to promptly pay any amount due pursuant to Section 8.3(b) or Section 8.3(c) and, in order to obtain such payment, the other Party commences a Legal Proceeding that results in a judgment against such Party for the amount set forth in Section 8.3(b) or Section 8.3(c) or any portion thereof, the Party that has failed to make such payment will pay to the other Party its out-of-pocket costs and expenses (including attorneys' fees) in connection with such Legal Proceeding, together with interest on such amount or portion thereof at the annual rate of the prime rate as published in *The Wall Street Journal* in effect on the date that such payment or portion thereof was required to be made through the date that such payment or portion thereof was actually received, or a lesser rate that is the maximum permitted by applicable Law.
- 8.4 Amendment. Subject to applicable Law and subject to the other provisions of this Agreement, this Agreement may be amended by the Parties at any time by execution of an instrument in writing signed on behalf of each of Parent, Merger Sub and the Company (pursuant to authorized action by the Company Board (or a committee thereof)), except that in the event that the Company has received the Requisite Stockholder Approval, no amendment may be made to this Agreement that requires the approval of the Company Stockholders pursuant to the DGCL without such approval.

8.5 Extension; Waiver. At any time and from time to time prior to the Effective Time, any Party may, to the extent legally allowed and except as otherwise set forth herein, (a) extend the time for the performance of any of the obligations or other acts of the other Parties, as applicable; (b) waive any inaccuracies in the representations and warranties made to such Party contained herein or in any document delivered pursuant hereto; and (c) subject to the requirements of applicable Law, waive compliance with any of the agreements or conditions for the benefit of such Party contained herein. Any agreement on the part of a Party to any such extension or waiver will be valid only if set forth in an instrument in writing signed by such Party. Any delay in exercising any right pursuant to this Agreement will not constitute a waiver of such right.

ARTICLE IX GENERAL PROVISIONS

- 9.1 Survival of Representations, Warranties and Covenants. The representations, warranties and covenants of the Company, Parent and Merger Sub contained in this Agreement will terminate at the Effective Time, except for Section 3.27 and Section 4.10 and that any covenants that by their terms survive the Effective Time will survive the Effective Time in accordance with their respective terms.
- 9.2 Notices. All notices and other communications hereunder must be in writing and will be deemed to have been duly delivered and received hereunder (i) four Business Days after being sent by registered or certified mail, return receipt requested, postage prepaid; (ii) one Business Day after being sent for next Business Day delivery, fees prepaid, via a reputable nationwide overnight courier service; (iii) immediately upon delivery by hand; or (iv) at the time sent (if sent before 5:00 p.m., addressee's local time and on the next Business Day if sent after 5:00 p.m., addressee's local time), if sent by email of a .pdf, .tif, .gif, .jpg or similar attachment; provided, that any notice provided by email shall state in such email that it is a notice delivered pursuant to this Section 9.2, in each case to the intended recipient as set forth below:
 - (a) if to Parent or Merger Sub to:

Microsoft Corporation One Microsoft Way Redmond, Washington 98052-6399

Attn: Amy Hood

Keith R. Dolliver

Email: amyhood@microsoft.com keithd@microsoft.com

with a copy (which will not constitute notice) to:

Simpson Thacher & Bartlett LLP 425 Lexington Avenue
New York, New York 10017
Attn: Alan M. Klein

- I, Beowulf Owen, declare and state as follows:
- 1. I make this declaration in support of Plaintiffs' Motion for Preliminary Injunction. I have personal knowledge of the statements made in this declaration, and if called as a witness, I would completely testify about them.
 - 2. I am a resident of Las Cruces, New Mexico.
- 3. I have played video games for many years. I have played and purchased numerous video games on different platforms. I have also purchased several games from Activision Blizzard, including *Call of Duty, Call of Duty: Warzone*, and *Overwatch*.
- 4. I presently play games primarily on Xbox and PC. When I play on PC, I primarily use the Microsoft Windows operating system, and occasionally Linux's Ubuntu operating system. I also own a Nintendo Switch and a Steamdeck (a portable gaming device) although I play on those platforms less frequently than on Xbox and PC.
- 5. I currently subscribe to Game Pass Ultimate, Microsoft's multi-game library subscription service, which includes games for Xbox and Windows.
- 6. I currently play multiplayer games daily, including those mentioned above and others. I rely on videogames to socialize and stay connected with my friends. The ability to play with my friends is very important and a big part of why I enjoy playing video games.
- 7. The availability of games is a major factor that goes into my purchasing decision when considering which gaming platform to purchase. The availability of Activision Blizzard titles such as *Call of Duty* is a major factor when I decide which gaming platform to purchase. I regularly purchase Activision Blizzard titles to play on PC and Xbox.
- 8. While I do play video games on PC using both Windows OS and Linux's Ubuntu, I prefer using Linux's Ubuntu rather than Windows. I use Windows to play games, however, because more games are compatible with Windows. Only a handful of games can be played on Linux, but if more games were available on Linux, I would switch to playing on Linux exclusively.

- Activision Blizzard games, in particular, comprise a large proportion of my ming.
- 10. Of all Activision Blizzard titles, *Call of Duty* games are particularly important to me. If *Call of Duty* was compatible for Linux, I would switch exclusively to Linux to play *Call of Duty* when gaming on PC. Most of my friends with whom I play games with play *Call of Duty*.
- 11. If *Call of Duty* or other Activision Blizzard titles were made exclusive to a platform, I would strongly consider purchasing that platform in order to access *Call of Duty* or Activision Blizzard titles.
- 12. If another competing cloud service or game subscription service (other than Microsoft's GamePass) were to emerge with important gaming content such as Activision Blizzard titles, I would likely subscribe to it.
- 13. If the prices of important gaming content such as Activision Blizzard titles were to increase, I would be harmed as I would need to purchase titles at inflated prices.

I declare under penalty of perjury and the laws of the United States that the foregoing is true and correct, and this Declaration is executed in San Francisco, California, on April 21, 2023.



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I, Dante DeMartini, declare and state as follows:

- I am making this declaration in support of Plaintiffs' Motion for Preliminary Injunction. I have personal knowledge of the statements, and if called as a witness, I would completely testify about them.
 - 2. I am a resident of San Francisco, California.
- 3. I play games primarily on PlayStation and PC, but I have also owned an Xbox in the past. When I play on PC, I use the Microsoft Windows operating system. I have subscribed in the past to PlayStation Plus, PlayStation's multi-game library subscription service. While I do not currently use a cloud-based gaming service, I anticipate doing so in the future.
- 4. I have been an avid gamer for many years and have played and purchased numerous games on different platforms. I have also purchased several games from Activision Blizzard, including *Call of Duty, World of Warcraft, Starcraft II, Overwatch* and *Overwatch 2*, *Diablo III*, and *Hearthstone*.
- 5. Gaming is very important to my life. Gaming is one of the principal ways I keep in touch and stay connected with my friends.
- 6. I currently play several multiplayer games, such as those mentioned above and others, with friends. I sometimes play with friends across different gaming platforms. The ability to play with my friends is very important and a big part of why I enjoy playing video games.
- 7. In the past, one of the biggest factors affecting my decision-making with respect to which gaming platform to purchase is what game titles are available on that platform. What games my friends are playing or anticipate playing also affected my decision-making.
- 8. The availability of games is still one of the biggest factors that affects my decision-making about which platform to purchase.
- 9. The availability of games will affect my future decisions about which gaming platforms to purchase.
- 10. Presently, I primarily use my Windows PC to game. In the past, I used a Mac to play videogames. I stopped using Mac partly because fewer games were available.

DECLARATION OF DANTE DEMARTINI IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

- 11. The availability of Activision Blizzard games in particular is a major factor in deciding which gaming platform to purchase and use. I would consider *Call of Duty* to be the most important game to me because most of my friends play *Call of Duty*. The fact that *Call of Duty* is available on Windows is one of the primary reasons I chose to game on Windows.
- 12. If Activision Blizzard games such as *Call of Duty* were made exclusive to Microsoft platforms, it is unlikely that I would purchase or switch to another gaming platform because I do not want to lose access to Activision Blizzard titles such as *Call of Duty*.
- 13. In the future, if Activision Blizzard games were exclusive to Microsoft gaming platforms, I would likely purchase Microsoft gaming platforms in order to retain access to Activision Blizzard titles. It is unlikely that I would purchase another gaming platform if it did not have Activision Blizzard titles such as *Call of Duty*.
- 14. I play videogames daily, and almost always with my friends. I play Activision Blizzard games frequently, especially *Call of Duty*. Many of my friends that I play games with I do not see regularly. The only way I maintain contact with many of my friends is through videogames and *Call of Duty* specifically.
- 15. If the prices of important gaming content such as Activision Blizzard titles were to increase, I would be harmed as I would need to purchase titles at inflated prices.

I declare under penalty of perjury and the laws of the United States that the foregoing is true and correct. Executed on April 21, 2023.

By:

Dante DeMartini

EXHIBIT K

FILED UNDER SEAL

.....

From: Matt Booty
To: Tim Stuart

Sent: 12/17/2019 9:49:11 PM

Subject: RE: GP ARPU

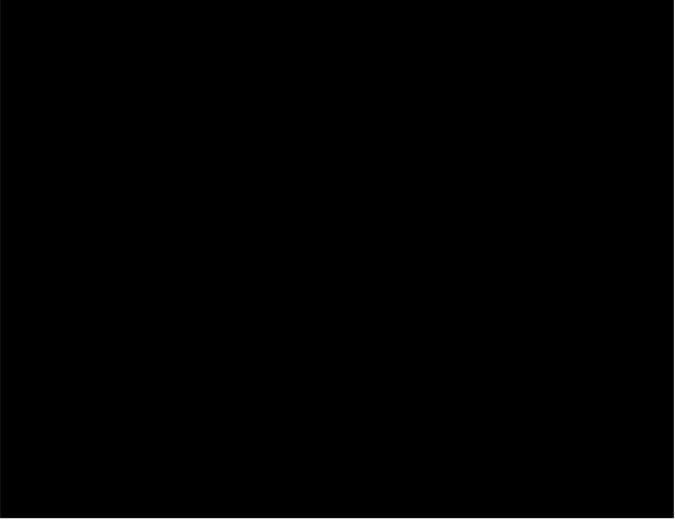


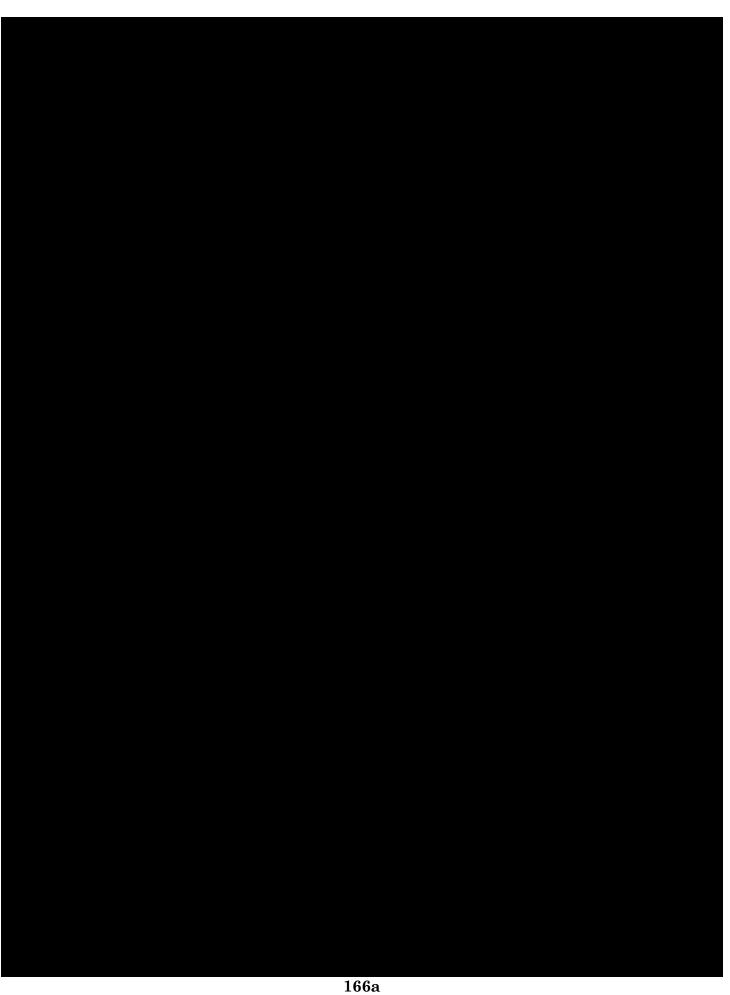
Thanks for sharing.

A lot to digest here. Will read it in detail.

A different view to the general view below might be that we (Microsoft) are in a very unique position to be able to go spend Sony out of business. If we think that video game content matters in 10 years, we might look back and say, "Totally would have been worth it to lose \$2B or \$3B in 2020 to avoid a situation where Tencent, Google, Amazon or even Sony have become the Disney of games and own most of the valuable content." For example, it is practically impossible for anyone to start a new video streaming service at scale at this point. What content do you base it on? Things like Hulu and CBS All Access will be trivial players in the space. In games, Google is 3 to 4 years away from being able to have a studio up and running. Amazon has shown no ability to execute on game content. Content is the one moat that we have, in terms of a catalog that runs on current devices and capability to create new. Sony is really the only other player who could compete with Game Pass and we have a 2 year and 10M subs lead.

If we reverse course on day and date, it's going to be hard to convince folks that things like Mixer or Xcloud have much of a chance of surviving scrutiny either.





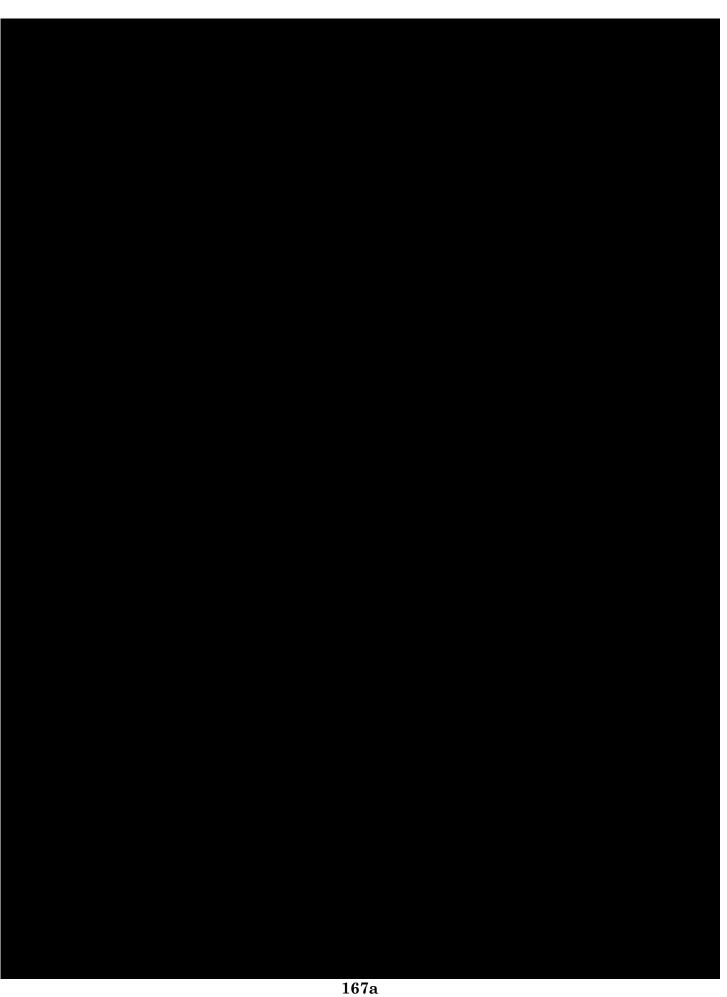


EXHIBIT A

FILED UNDER SEAL



EXPERT REPORT OF PROFESSOR LUÍS CABRAL PH.D.

DeMartini et al. v. Microsoft Corporation

case number 3:22-cv-08991

in the U.S. District Court for the Northern District of California

APRIL 20, 2023 FIDERES PARTNERS LLP



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Fideres Partners LLP +44(0)20 3397 5160 contact@fideres.com www.fideres.com



1 Qualifications

My name is Luís Cabral. I am an economist specializing in the dynamics of firm competition. I have conducted extensive research, both conceptual and empirical, on firm competition. My research has been applied to industries such as aircraft manufacturing, retail, gasoline, banking, computers, media and entertainment. I have published numerous articles and books on these subjects. My curriculum vitae is attached to this report in Exhibit 1.

I have served as the Paganelli-Bull Professor of Economics and International Business, Stern School of Business, New York University, since 2013. At the Stern School of Business, I served as Chair of the Department of Economics from 2003 to 2006 and again from 2015 to the present. I have been a Professor of Economics at the Stern School of Business, New York University since 2000. I have also held teaching positions at the London Business School, the University of California (Berkeley), Yale, and University of Navarra's IESE Business School.

I have served on numerous national and international panels concerned with economic policy in general and antitrust policy in particular. I was Chief Economic Consultant of the Portuguese Competition Authority from 2002-2007. I was one of 12 members of the Economic Policy Group advising the President of the European Commission from 2005-2010. I am a Research Fellow of London-based Centre for Economic Policy Research. I am a member of the Advisory Board of MaCCI, the Mannheim (Germany) Center for Competition and Innovation. From 2009-2011, I was President of the European Association for Research in Industrial Economics.

I am the author of *Introduction to Industrial Organization*, a textbook translated and adopted by universities in dozens of countries. This text, the second edition of which was published by MIT Press in March 2017, provides a general introduction to the study of market competition. In particular, it includes a discussion of issues such as market power and collusion, both from a conceptual point of view and from the perspective of multiple real-world examples. Leading scholars have widely praised the book, including Harvard's Ariel Pakes (Cabral "has done the field a great service") and Stanford's Matthew Gentzkow (the book "is a rare commodity: an intellectually rigorous textbook that is elegant, concise, and a pleasure to read. Cabral manages to communicate difficult ideas precisely while keeping the focus squarely on issues that matter for the real world").

My professional experience in the areas referenced above, my scholarly work, and my research inform my opinions in this report. My scientific publications in these areas have, for the most part, been externally reviewed for scientific merit by other experts prior to publication as articles or books, and my public service on relevant advisory panels and groups are listed in Exhibit 1.

I have been undertaking research, and publishing books, articles, and reports on network effects, platforms, media and entertainment, firm competition, and mergers since the late 1980s. I have written or edited several peer-reviewed books and peer-reviewed articles on these issues. So I believe it is fair to say that I have deep economic expertise on the economics of oligopoly competition that long predates this litigation. The analysis and opinions found in this report are based on this experience and expertise.

Fideres Partners LLP +44(0)20 3397 5160 contact@fideres.com www.fideres.com

Page I 3



I have been retained by counsel as a source of expert consulting on the economics of oligopoly competition and mergers, in particular in the context of the video-game industry. My compensation for time spent on this matter is \$900 per hour. This compensation does not depend on the opinions and conclusions I reach or the outcome of this lawsuit. My analysis of this matter is continuing, and I reserve the right to supplement and revise my opinions as additional information becomes available to me.

2 Instructions

Counsel have asked me to address the following questions:

- According to economic analysis, what are the relevant markets affected by the acquisition of Activision by Microsoft?
- According to economic analysis, is it likely that the above-mentioned acquisition will have an anti-competitive effect in the above-mentioned markets?

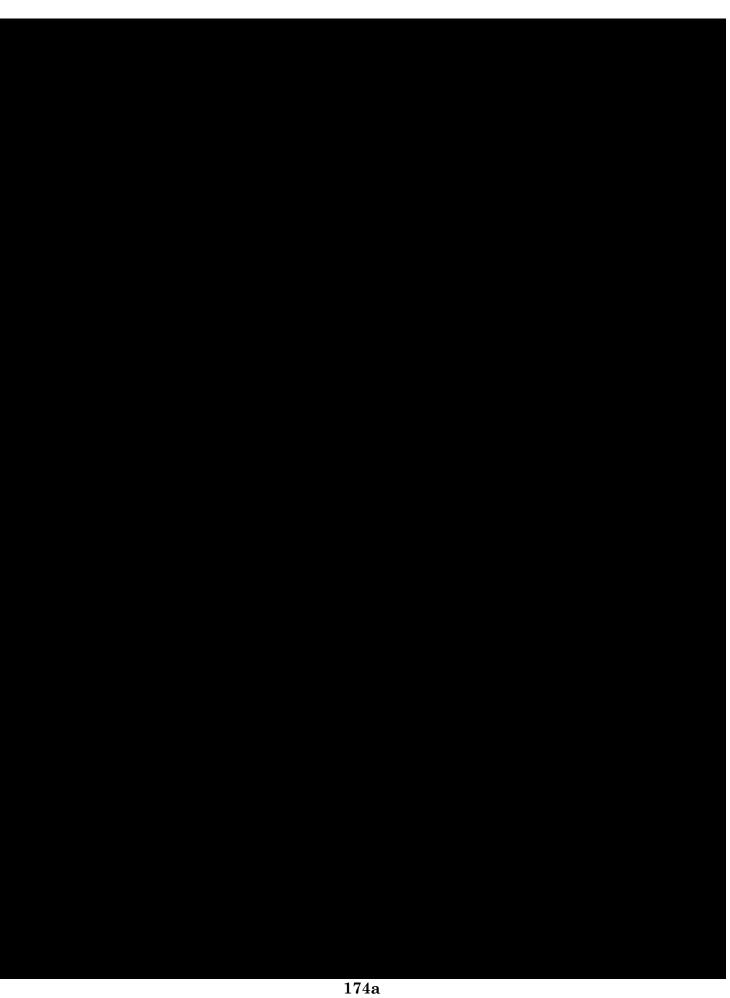
3 Summary and Conclusions

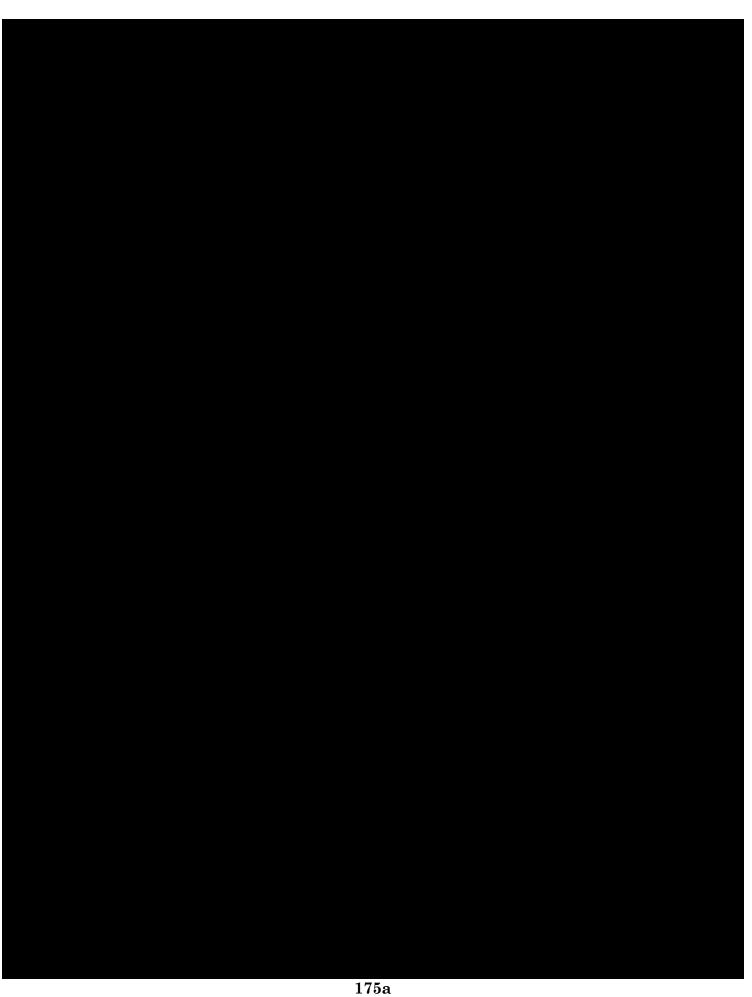
It is my opinion that, for the purposes of the Microsoft/Activision merger, there are five relevant markets: AAA video games; multi-game content library subscriptions; high-performance consoles; computer operating systems for use in high-performance PC gaming; and cloud-gaming.

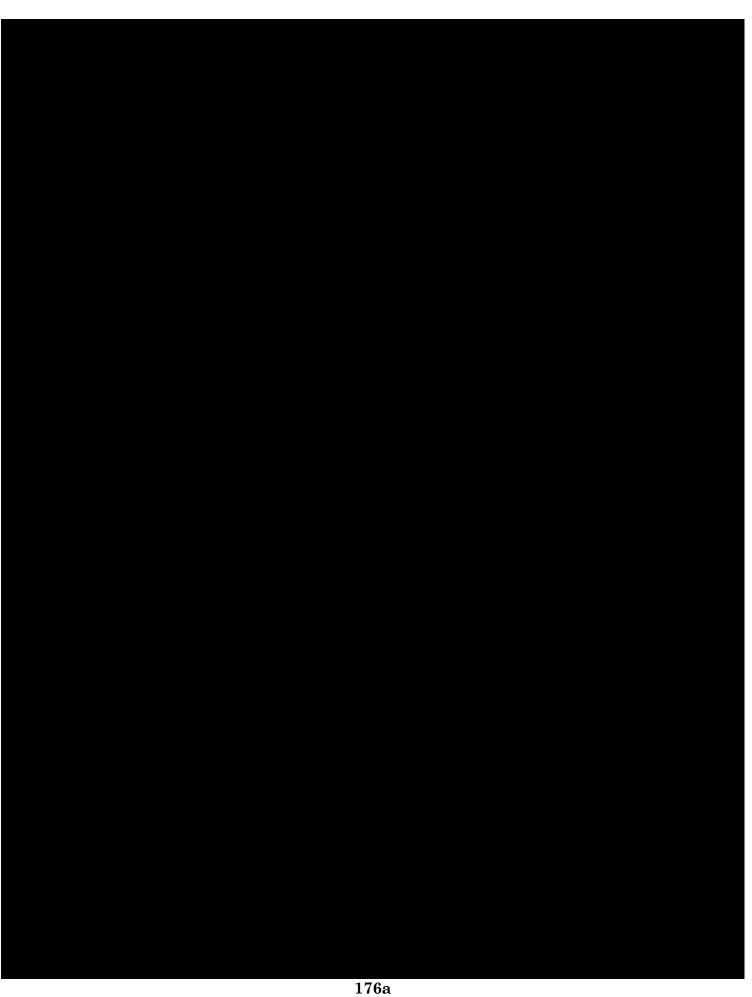
It is also my opinion that the Microsoft/Activision merger likely will result in significant lessening of competition in these markets. There will be an upward pressure on the price of AAA games. Deficient access by third-parties to essential content owned by the merged entity will adversely affect competition in the subscription, console and cloud-gaming markets, in a way that will tilt the playfield in favor of Microsoft. Finally, over time there will likely be a slowdown in the production of new games as well as the improvement of existing ones.

Finally, it is my opinion that all of the above effects will likely have a significant negative effect on consumer welfare in terms of higher prices, lower quality, lower variety, and lower innovation. Some of these effects (e.g., upward pressure on prices and the tilting in the subscription market) will take place from day one of the merger, some will increase over time.

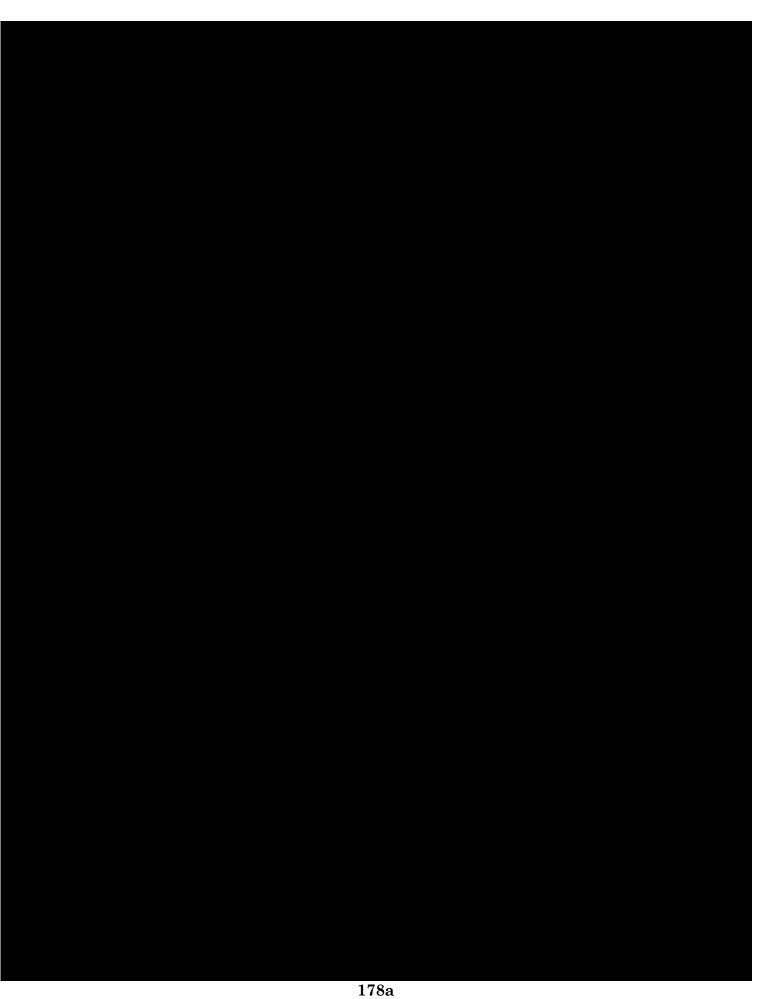


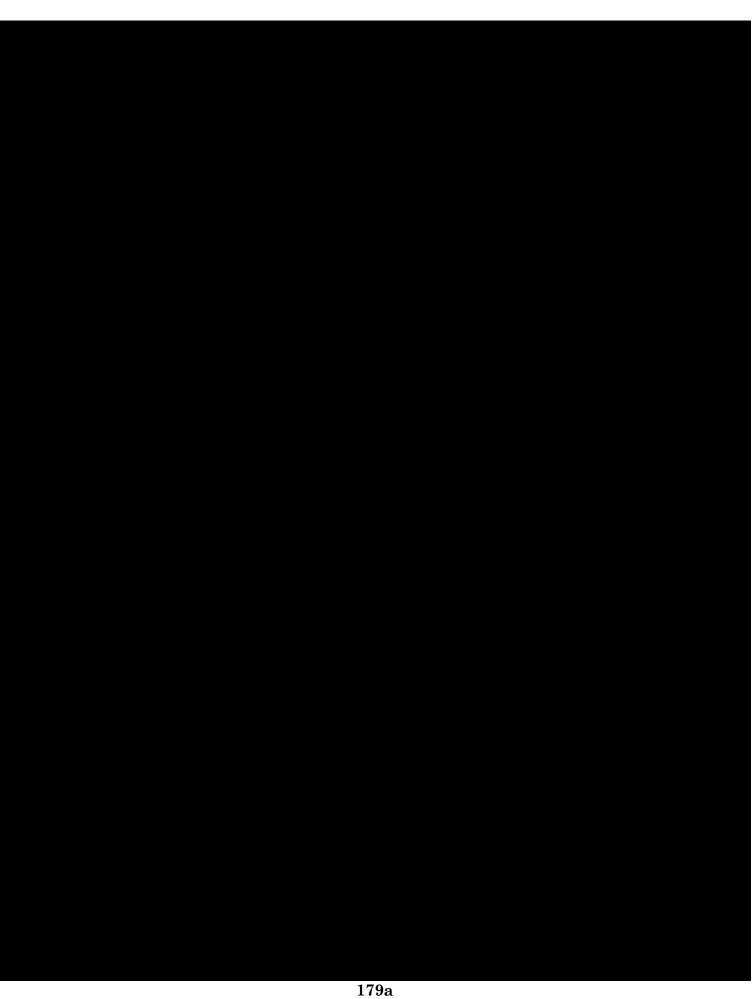


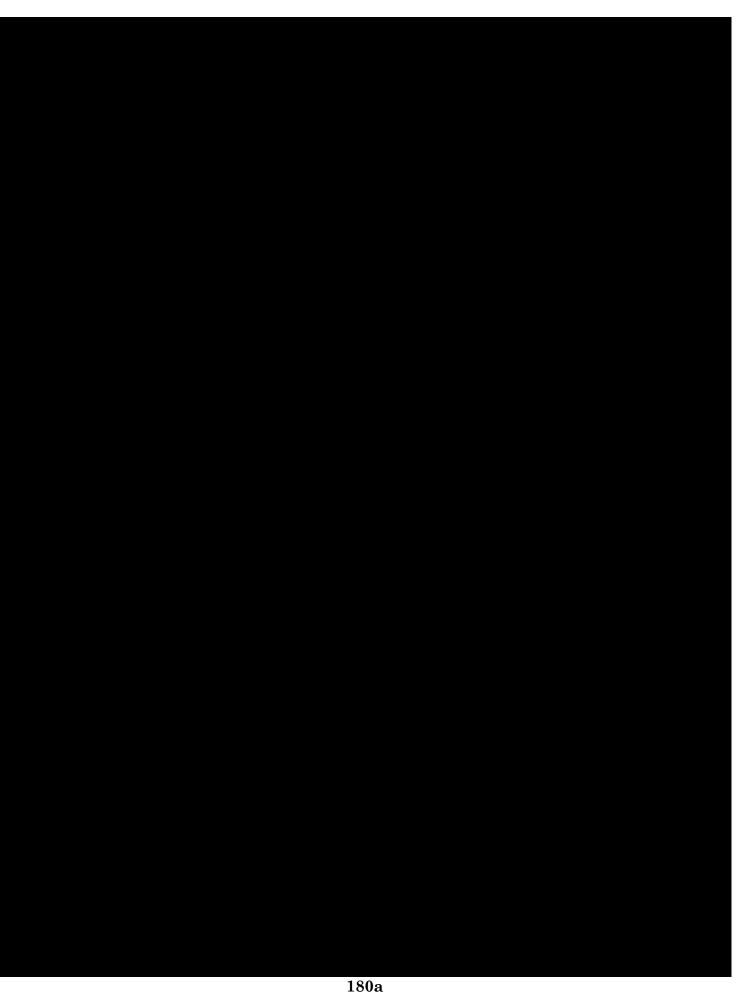


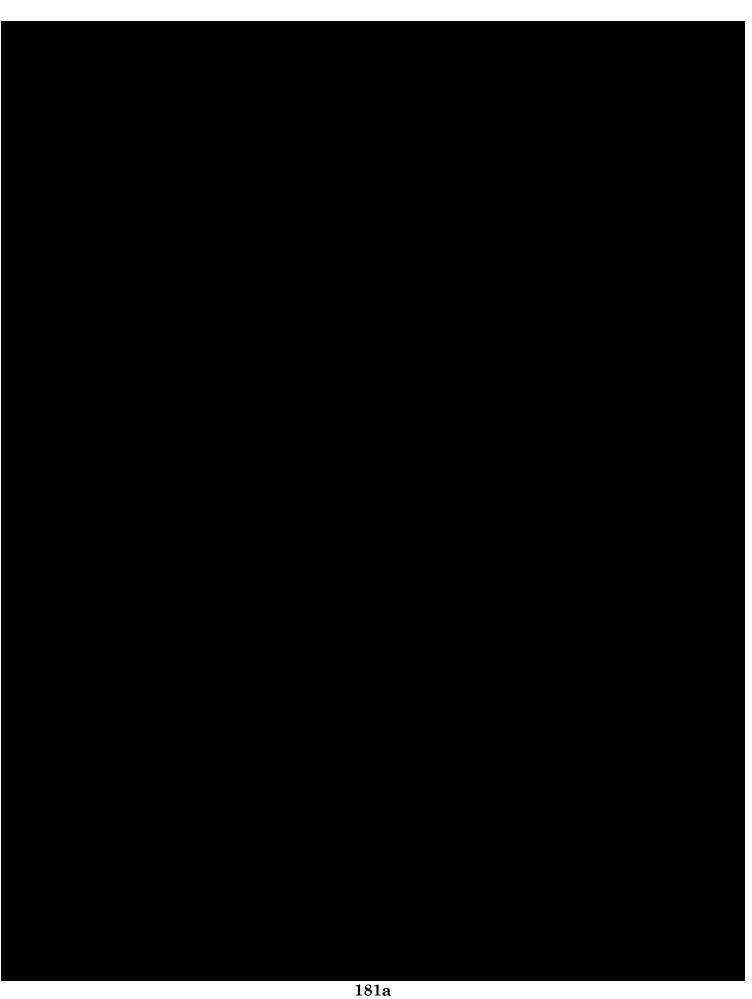


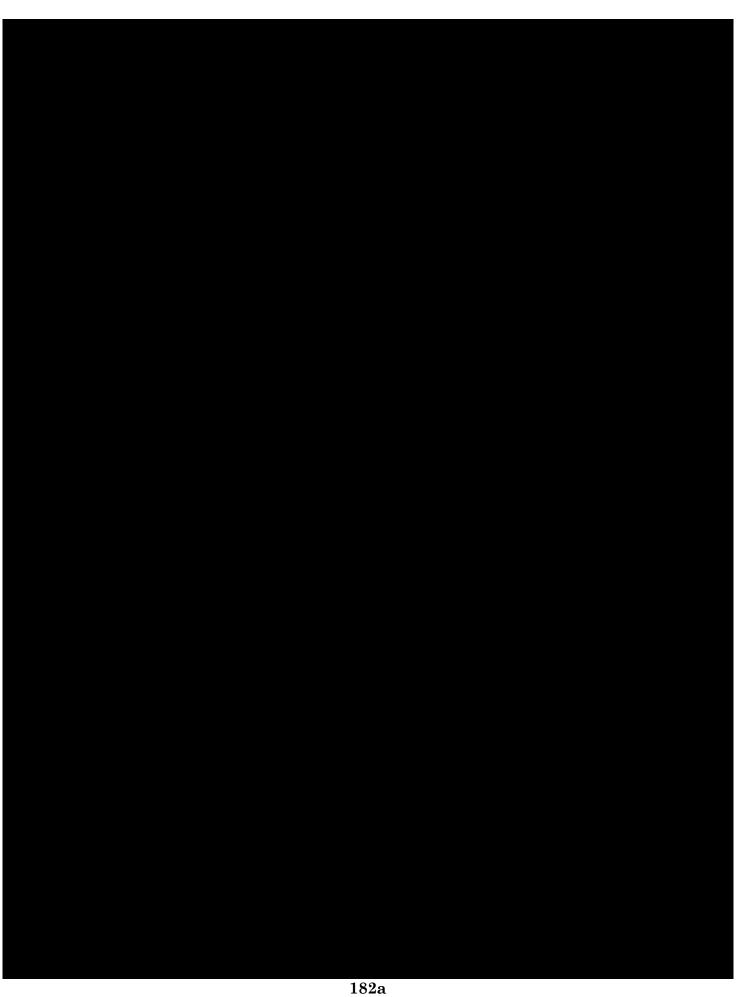








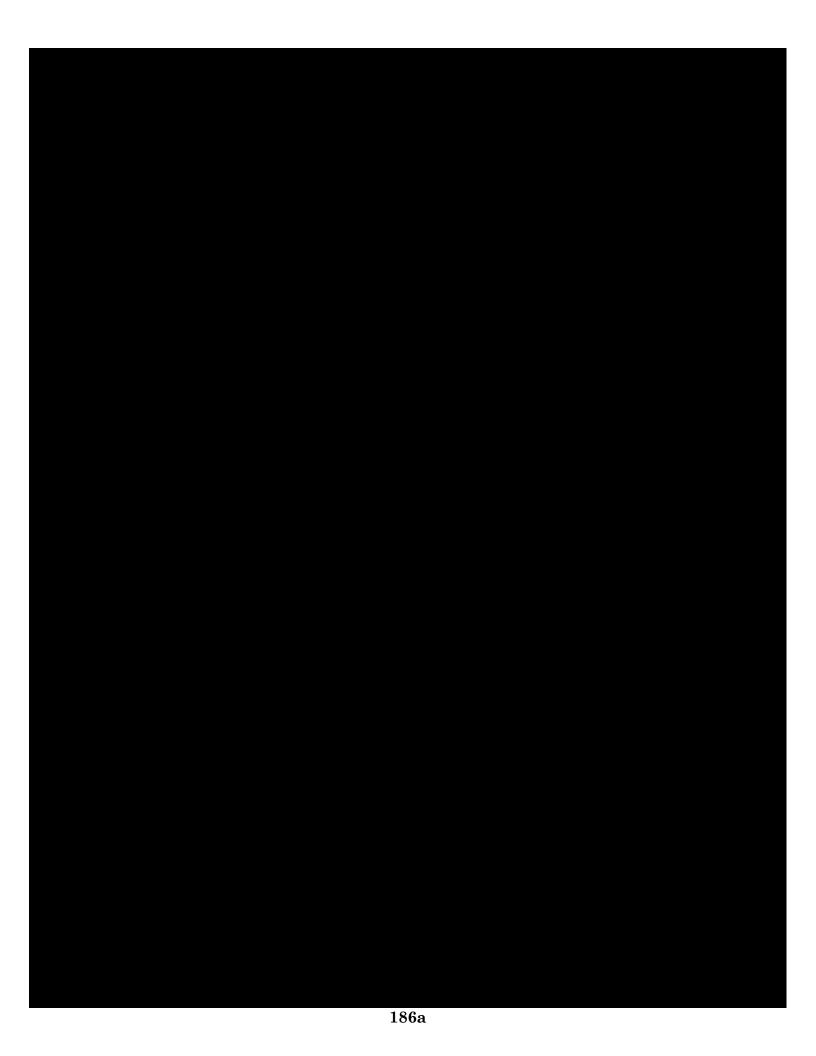


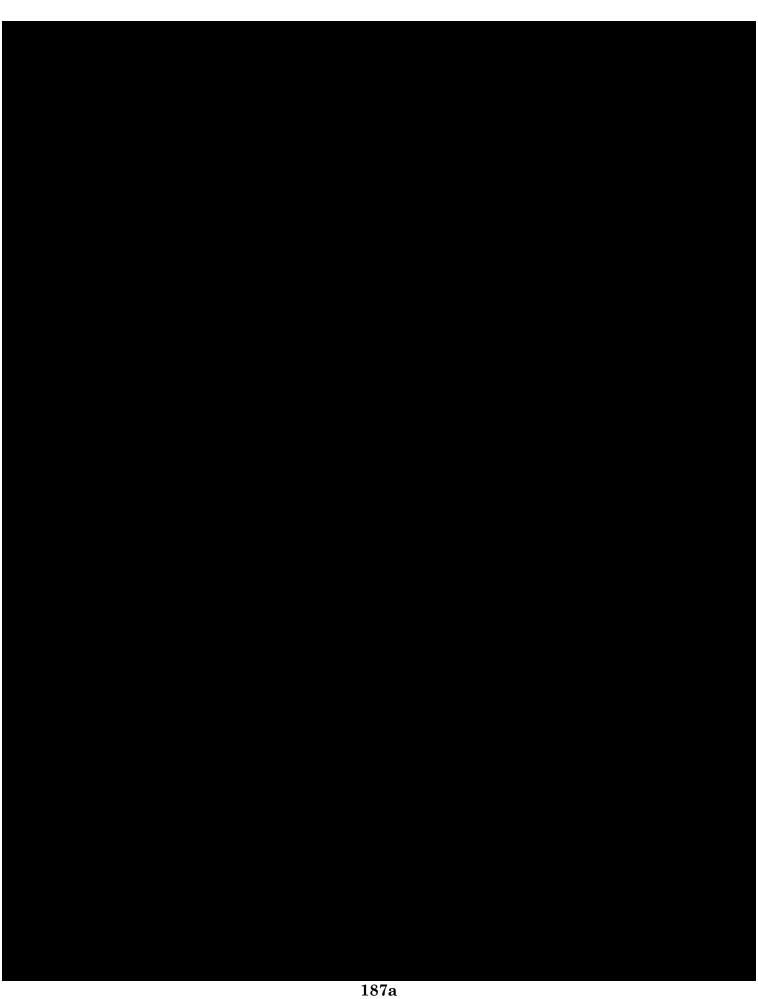


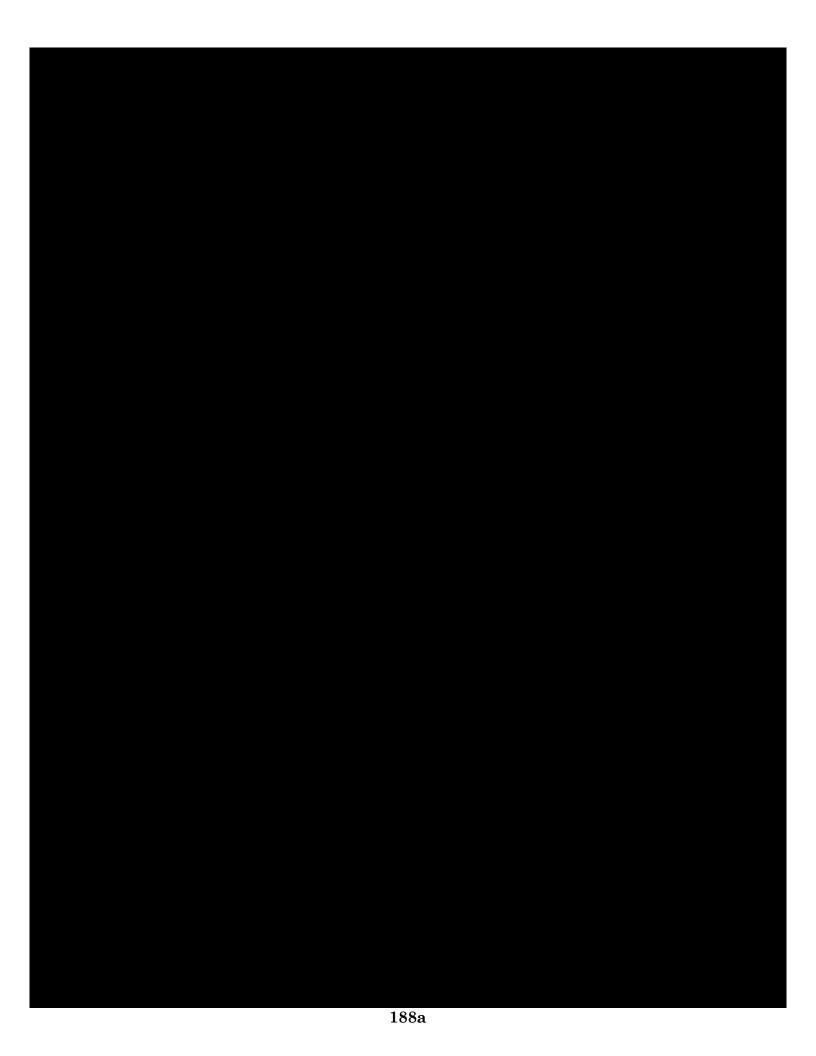


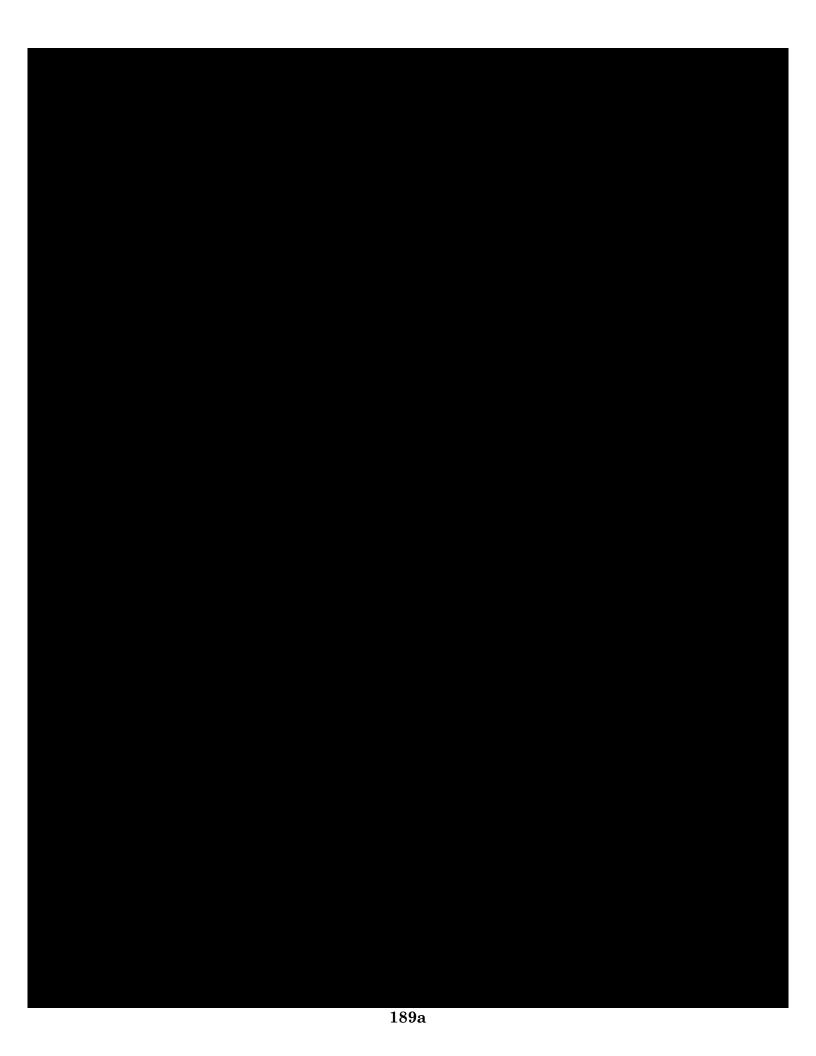


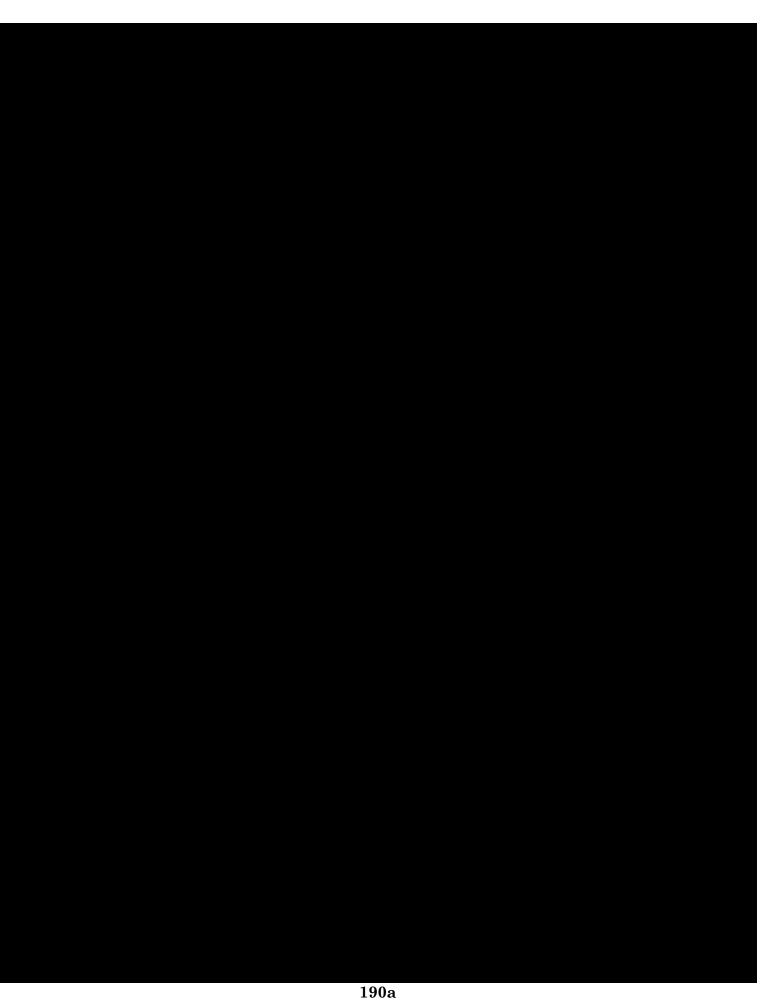


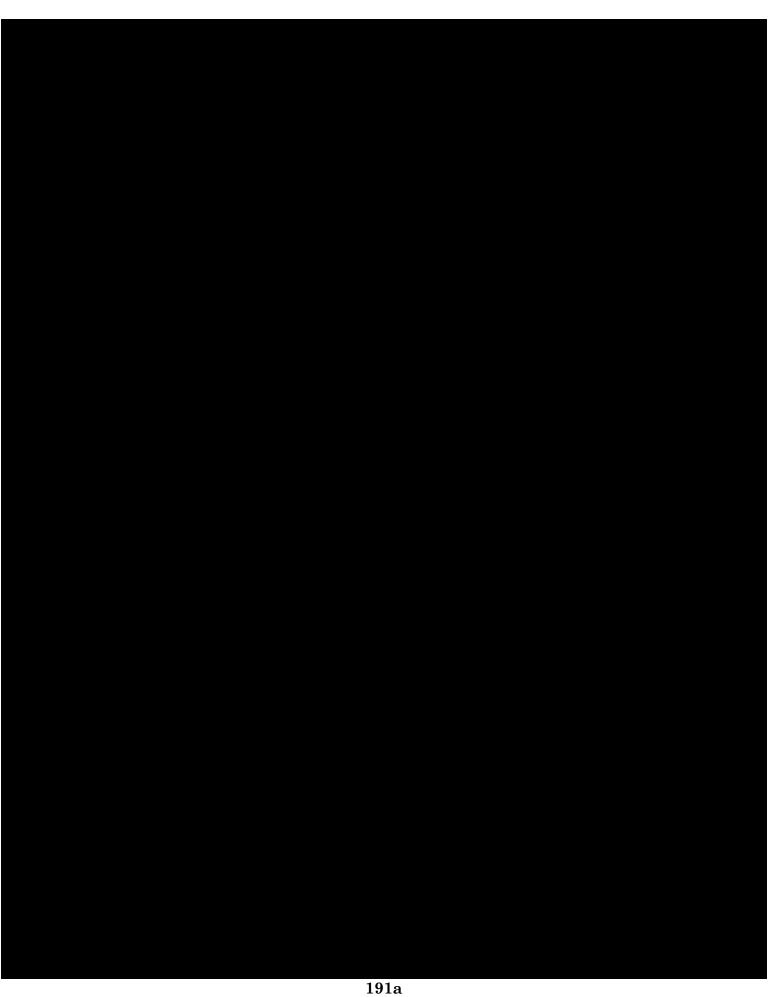


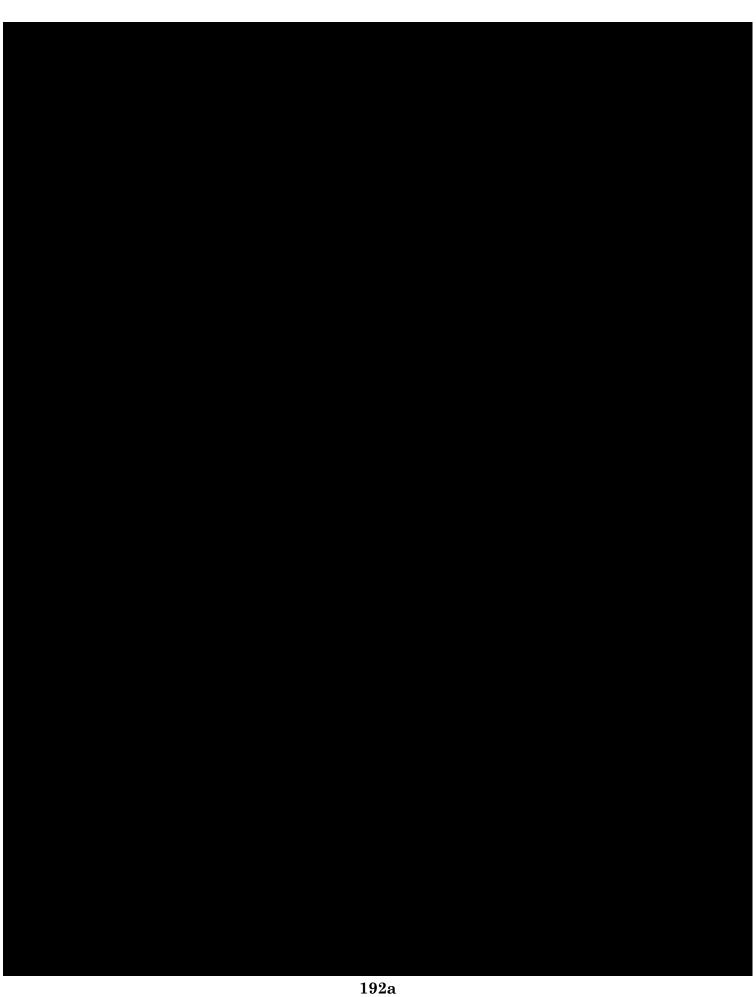


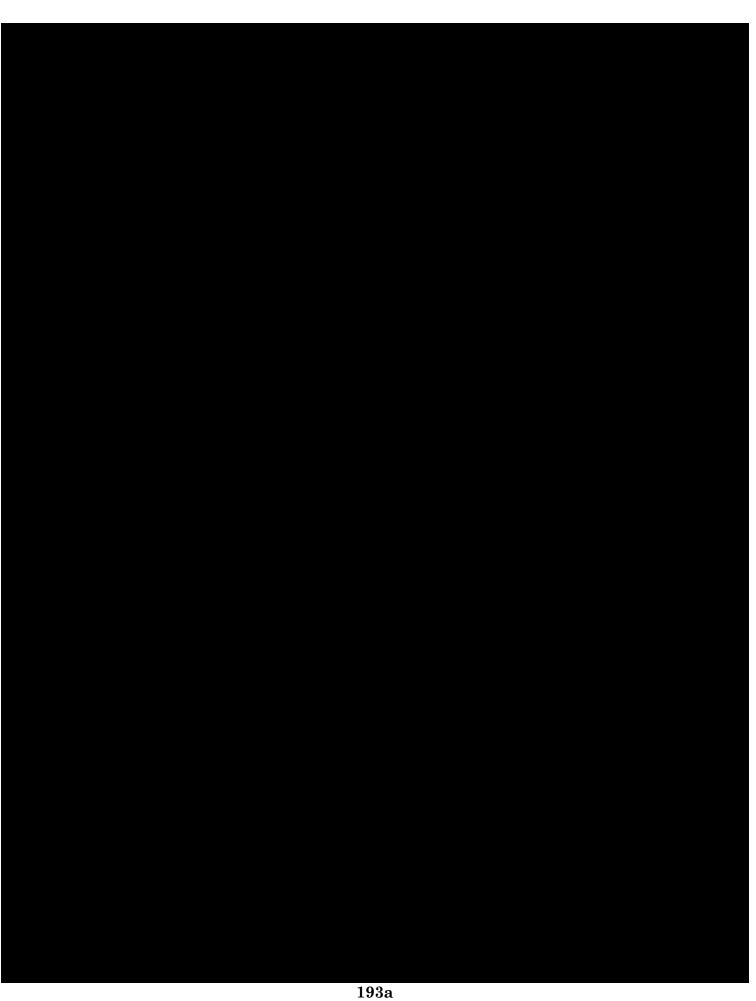


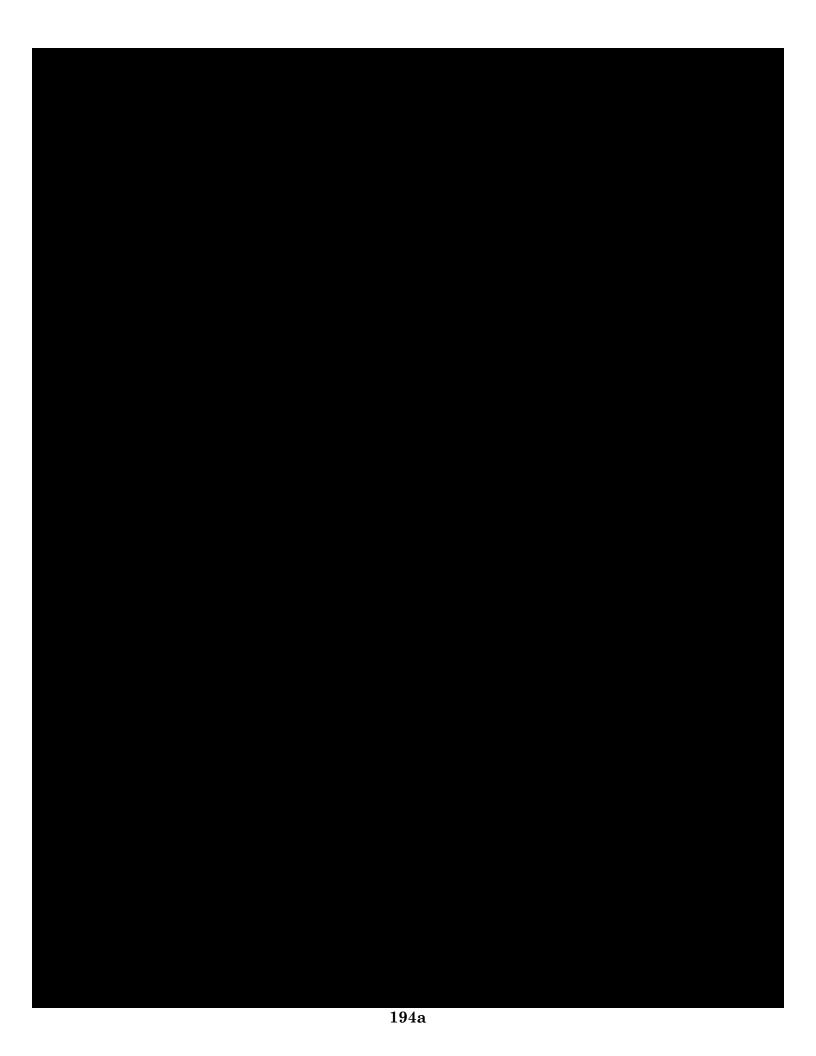


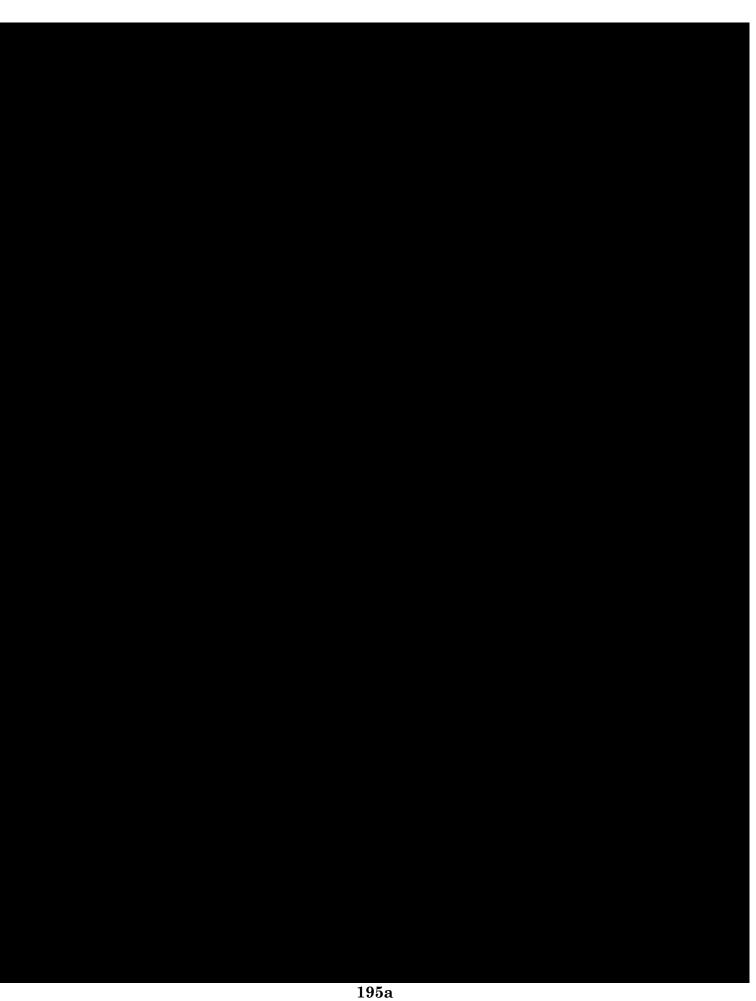


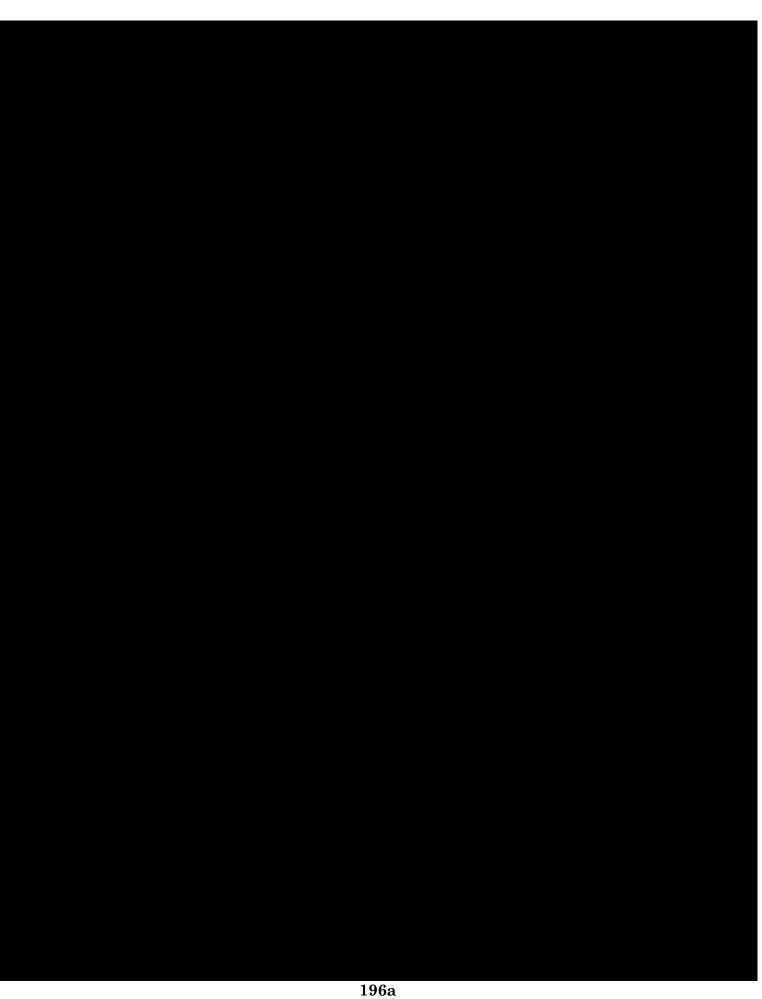














6.6 Summary

I described a number of anticompetitive effects that economic theory predicts will result from the merger. I now summarize these effects by placing them in a chronological account.

The day the merger is consummated, the upward pressure on the price of AAA games will begin to be felt. This does not necessarily mean that prices will be raised on day one, rather that the incentive for Microsoft/Activision to do so will then be present. This is one of the central ideas about mergers, namely "horizontal" mergers: they internalize the externality of competition. The moment Microsoft and Activision are owned by the same entity, the incentive to increase the prices of their AAA games increases. When the price of *Call of Duty*, for example, increases, then some of the gamers switch to alternative games, including games owned by Microsoft. Before the merger, the loss in demand for *Call of Duty* stopped Activision from increasing its price. After the merger, internalizing the fact that some of the demand diversion will stay within the firm (in the form of demand for a different game), that loss of revenue no longer stops the combined entity from increasing price, knowing that the cost-benefit analysis shifts in the direction of higher prices.

Also from day one, the Microsoft/Activision merger will change gamers' expectations regarding the future of the AAA gaming segment. Consumer expectations play a very important role due to





strong network effects: consumers want to be where other consumers are. Even if Microsoft/Activision were to honor to the letter their commitments regarding rival access to critical content (which is a big if), the Microsoft/Activision bundle of games will gain an advantage over rival bundles due to Microsoft's privileged access to essential content such as *Call of Duty*. While the subscription market is not at present very large, its contours are being shaped now, and the merger will contribute to Microsoft establishing a dominant position in this market, to the detriment of consumers.

Over time, the above developments will be complemented by other effects detrimental to consumers. As new versions of existing franchises are released, it will become clear that Microsoft's commitments are ill-defined, among other things because they are expressed in vague language: there are many ways in which, in practice, other firms do not have the same access to critical content as Microsoft itself has. This deficient access to content will lead gamers away from the PlayStation, even when the consumer value created by the latter is greater than the Xbox.

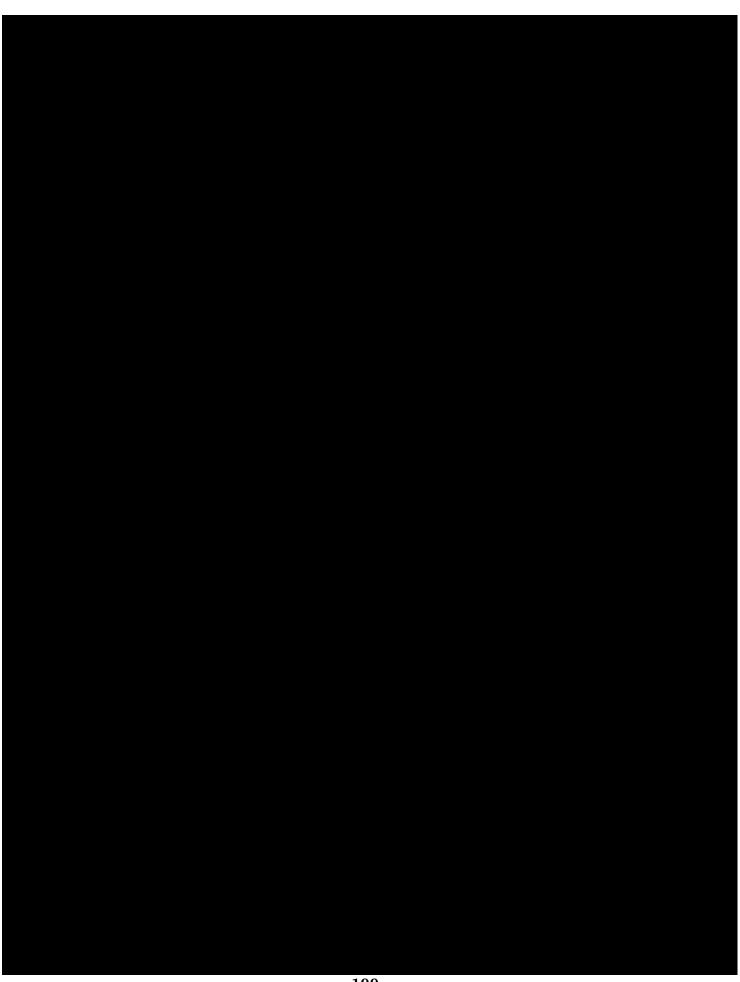
Lack of equal access to essential content will also drive consumers to Microsoft in the subscription market and in the in-cloud gaming market, thereby cementing Microsoft's dominance in these markets.

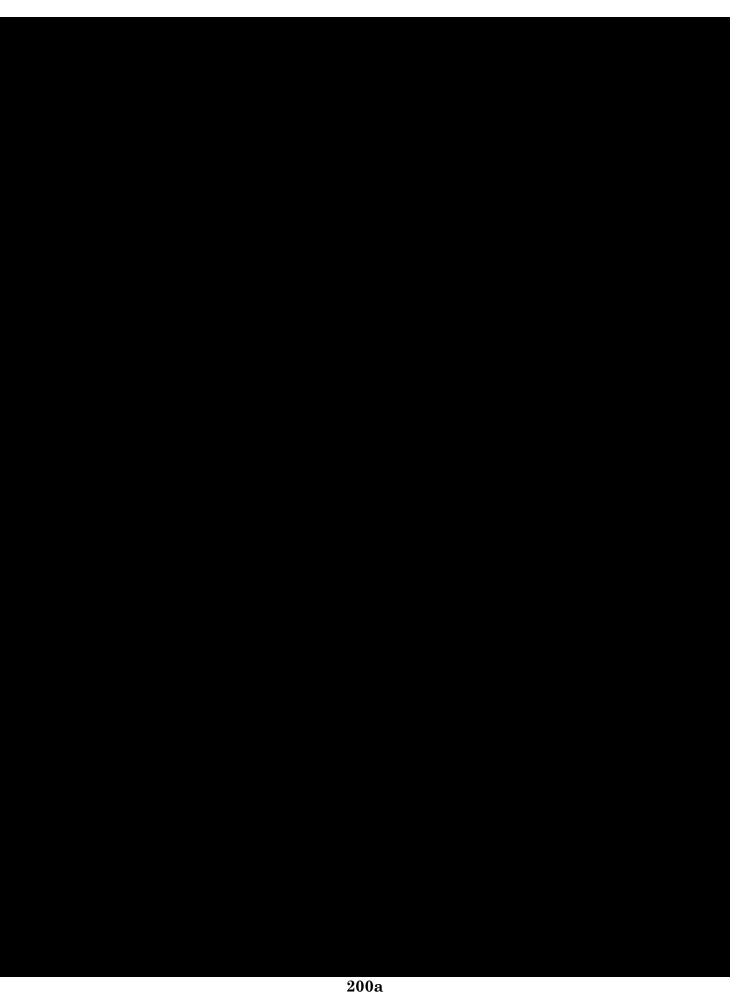
Finally, over time we will likely observe a slower pace of product improvement, for two reasons. First, Microsoft/Activision will improve their franchises at a slower pace than they would absent the merger: one of the incentives for product improvement is to capture demand from rival offerings. To the extent that rival offerings are now part of the same entity, such incentive disappears the day the merger is consummated. Lower investment levels will be observed soon after the merger, whereas the effects of this lower investment will be felt over time. Second, the profit prospects of a third-party developer are worsened as a result of the merger. This implies that, over time, gamers are less likely to enjoy the benefits of newly developed content than they would absent the merger.

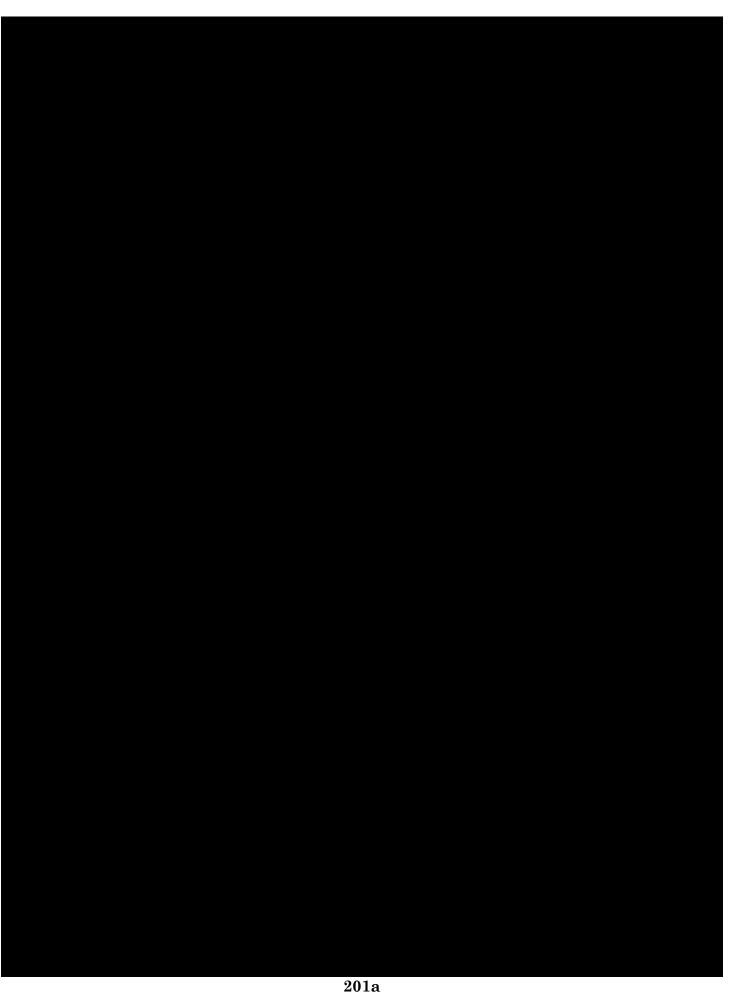
All in all, the Microsoft/Activision merger will likely lead to a further consolidation of Microsoft's power in the videogame ecosystem, which will likely result in higher prices, lower quality, less output, and lower innovation.

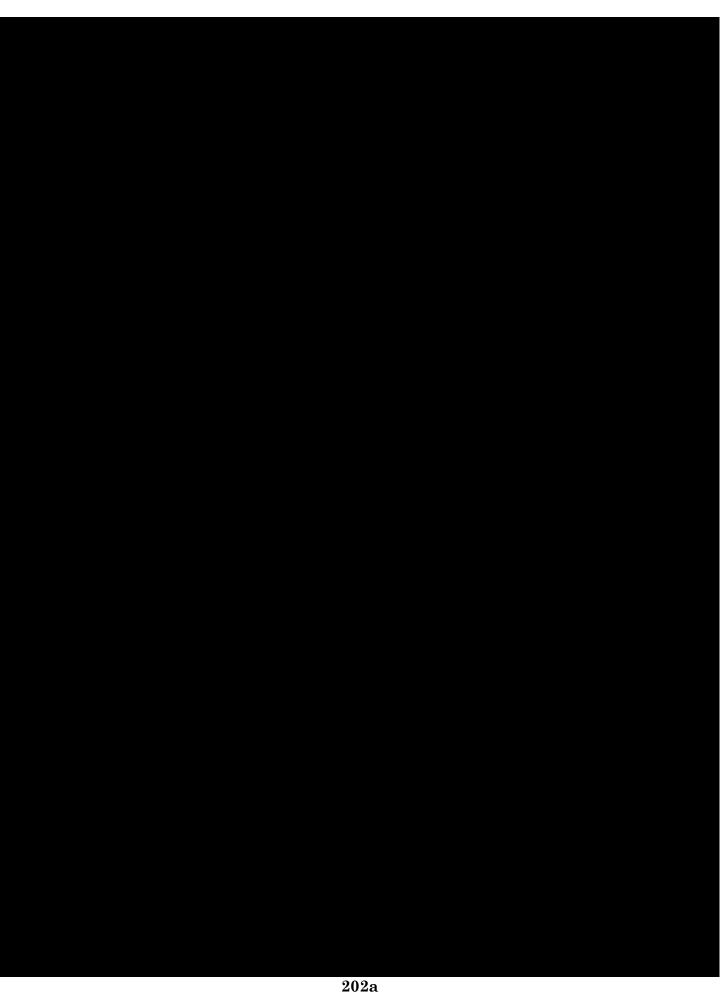
Dated: April 21, 2023

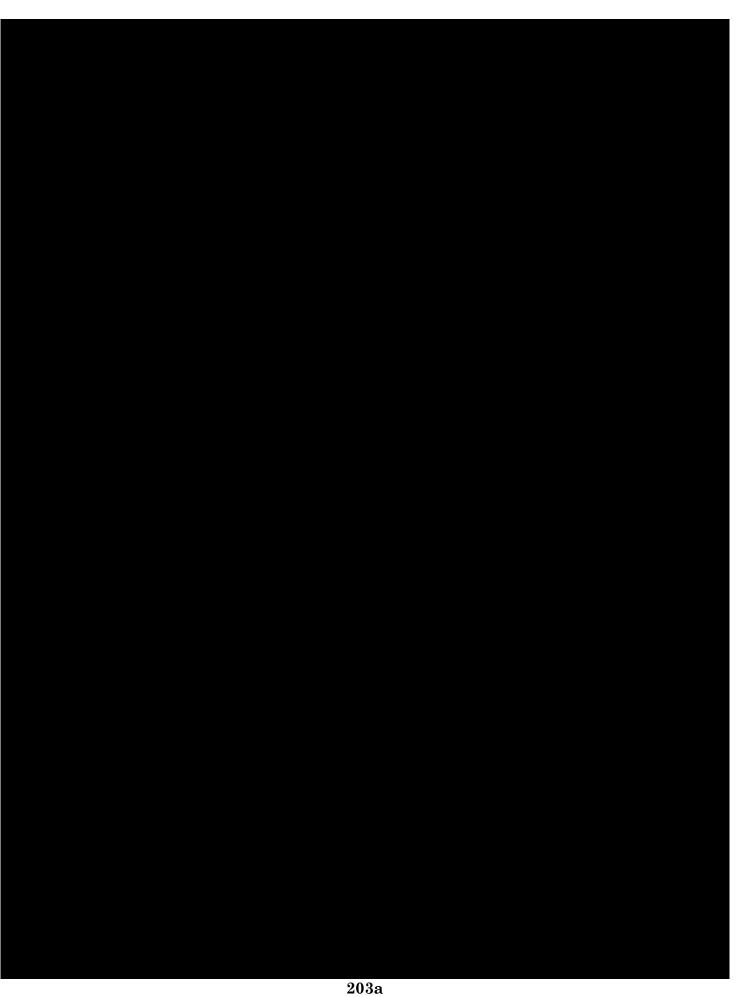
Luis Cabral, Ph.D.

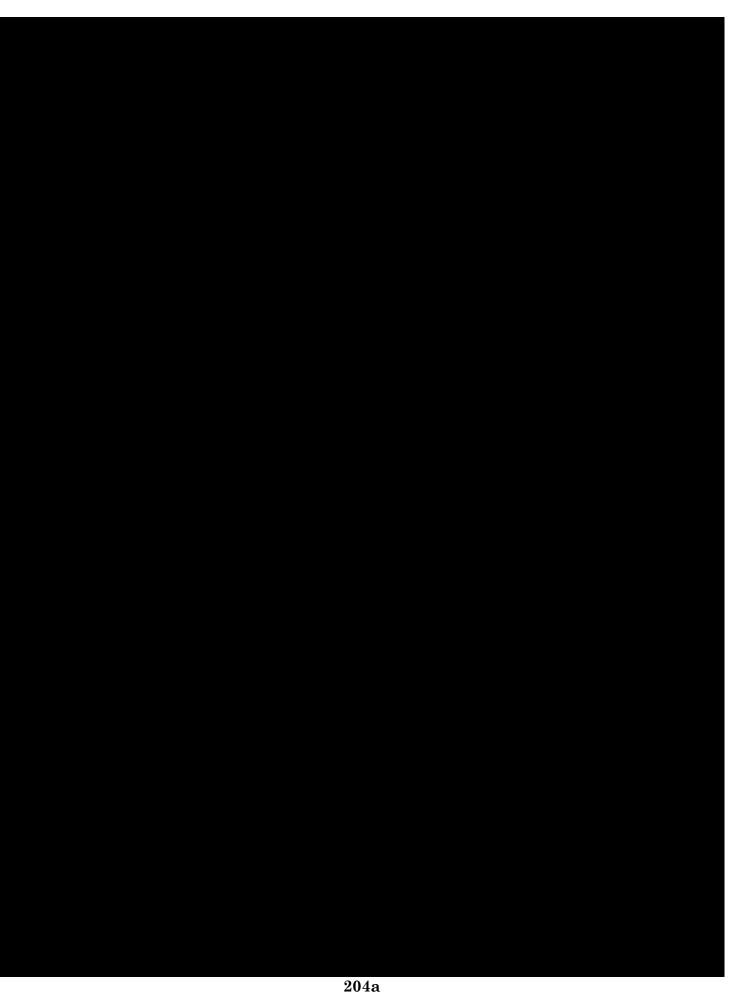


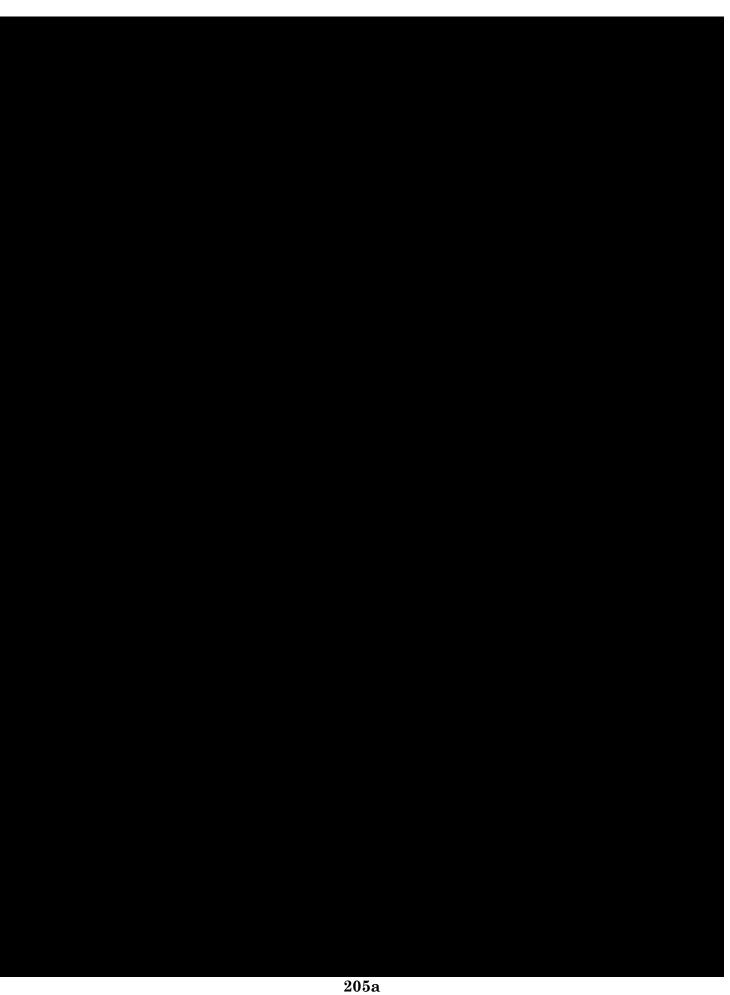




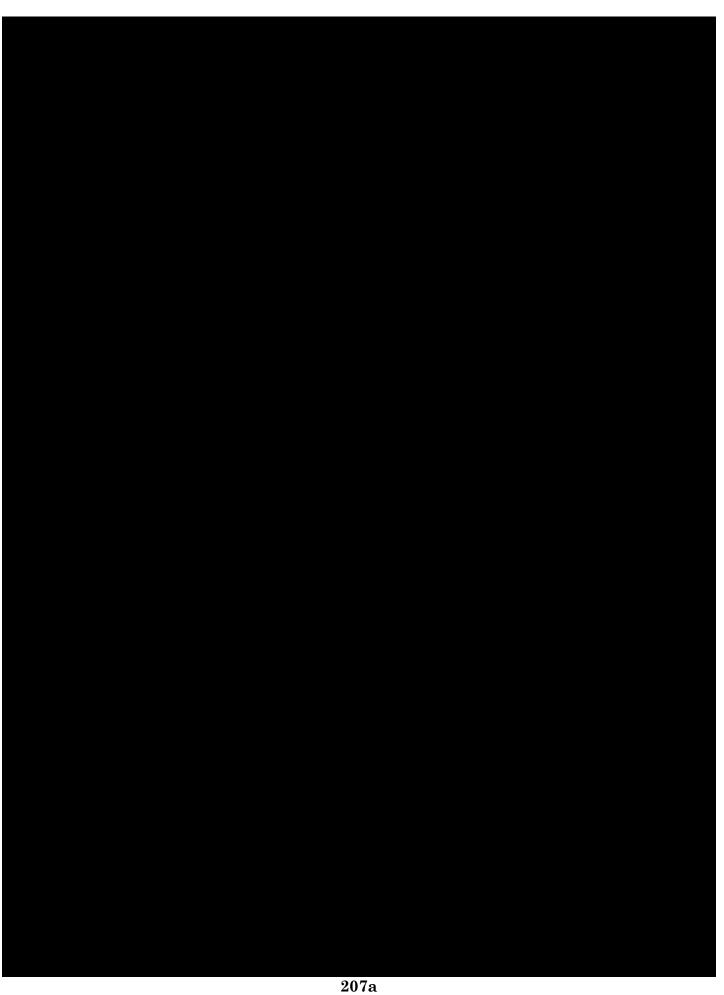


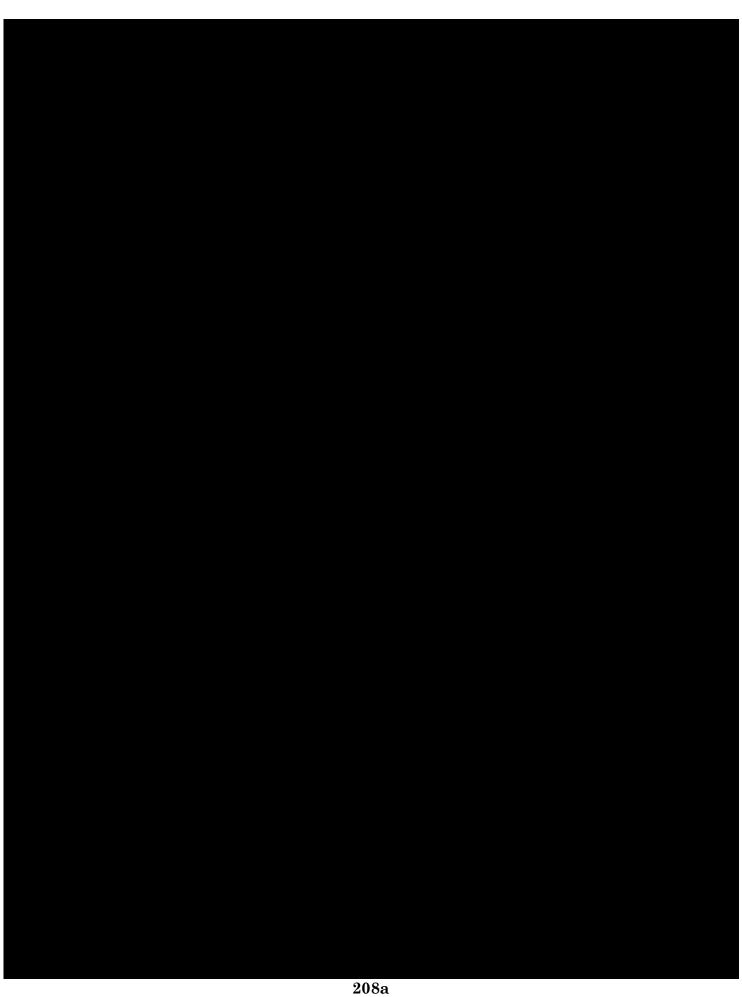


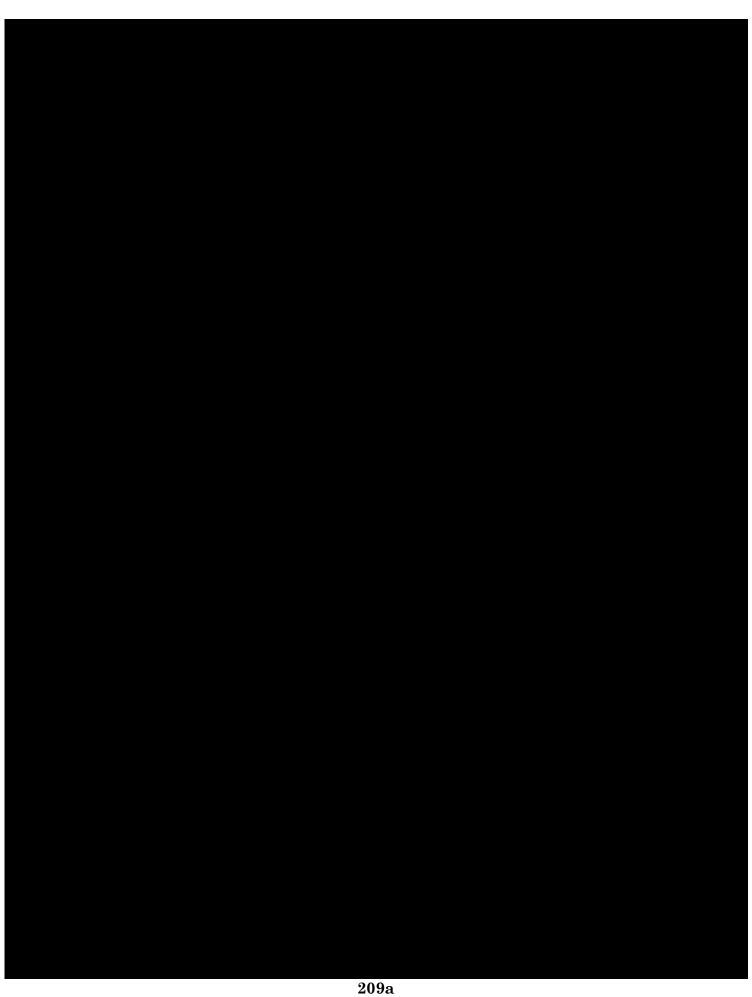




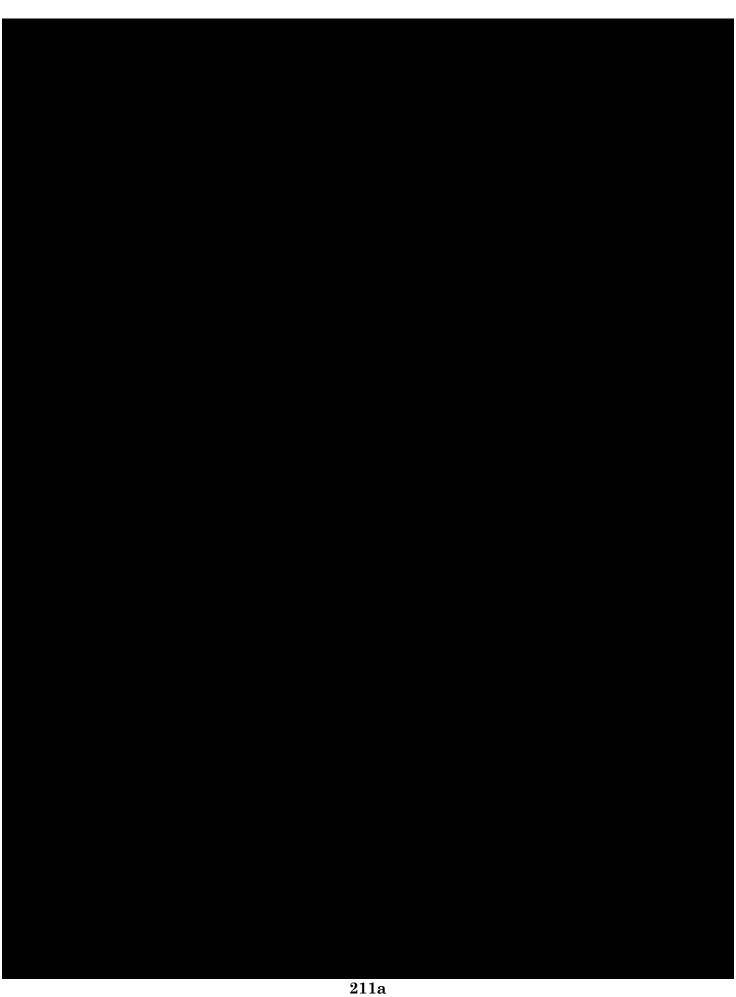


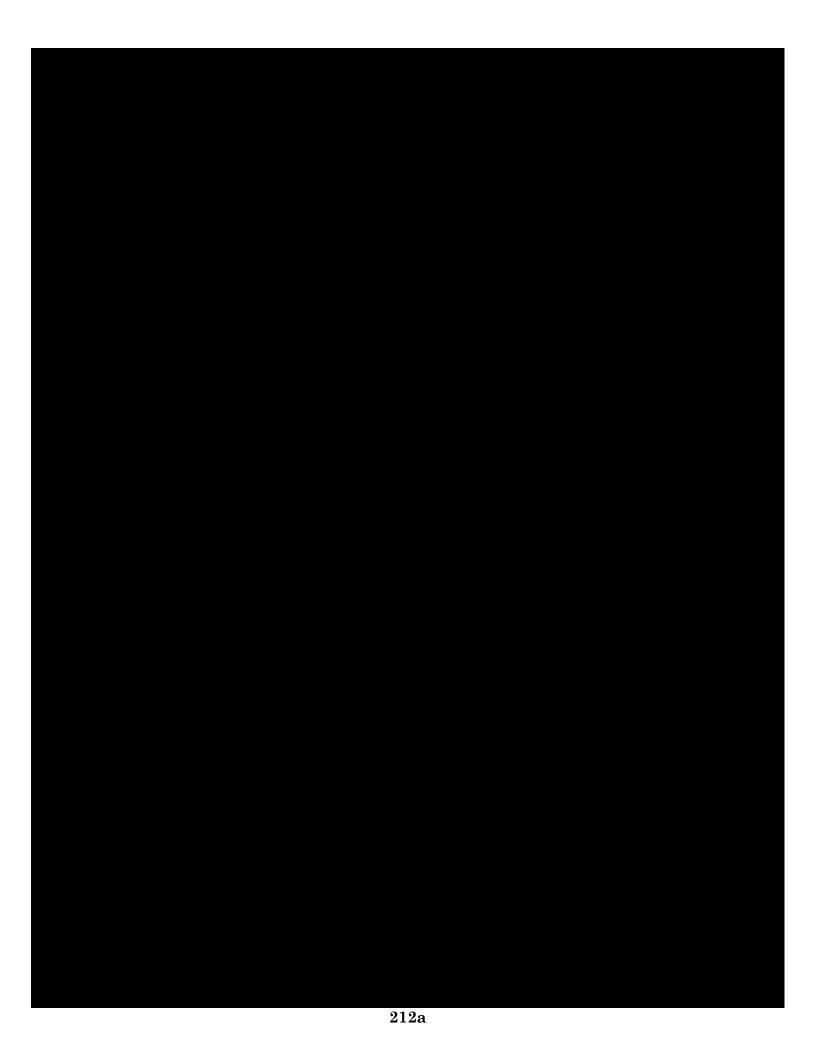


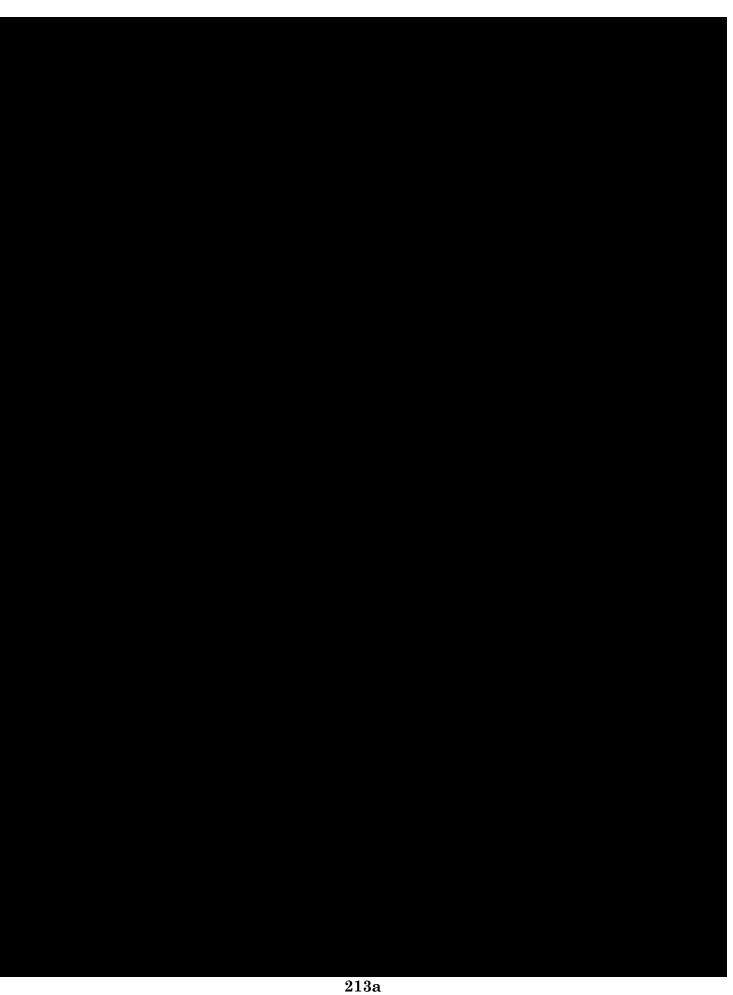












UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

MICROSOFT CORPORATION, et al.,
Defendants.

Case No. 23-cv-02880-JSC

PRELIMINARY INJUNCTION OPINION

REDACTED VERSION

In December 2022, the FTC initiated an administrative action to block Microsoft's proposed acquisition of Activision—publisher of the first-person shooter video-game franchise *Call of Duty*, among other popular video games. The gist of the FTC's complaint is *Call of Duty* is so popular, and such an important supply for any video game platform, that the combined firm is probably going to foreclose it from its rivals for its own economic benefit to consumers' detriment. Discovery in the administrative action has closed, and trial before an FTC judge is scheduled to commence on August 2, 2023.

Four weeks ago, the FTC filed this action to preliminarily enjoin the merger pending completion of the FTC administrative action. Because the merger has a July 18 termination date, expedited proceedings were commenced. After considering the parties' voluminous pre-and-post hearing writing submissions, and having held a five-day evidentiary hearing, the Court DENIES the motion for preliminary injunction. The FTC has not shown it is likely to succeed on its assertion the combined firm will probably pull *Call of Duty* from Sony PlayStation, or that its ownership of Activision content will substantially lessen competition in the video game library subscription and cloud gaming markets.

BACKGROUND

The video gaming industry represents the fastest growing form of media and entertainment with revenues larger than the film, music, and print industries. The industry consists of several components. The three billion worldwide gamers. The videogame developers who create the games. The videogame publishers who release the games. And the companies that make the devices on which gamers play the games. This action involves a merger between Activision—the developer of the *Call of Duty* video game franchise—and Microsoft—a game developer, publisher, and the manufacturer of the Xbox game console.

A. The Parties

Microsoft made \$198 billion in revenue in 2022. (PX9050-043.¹) Gaming is part of Microsoft's More Personal Computing division. (PX9050-014.) Its gaming business includes Xbox, Xbox Game Pass (a gaming subscription service), and Xbox Cloud Gaming. (PX9050-014.) Microsoft publishes video games through Xbox Game Studios, comprising 23 game development studios, including nine studios that were included in Microsoft's acquisition of ZeniMax Media Inc., announced in September 2020 and finalized in March 2021. (Dkt. No. 226-2, Lee Decl. at ¶ 14; PX0003 at 086-087 (detailing Microsoft acquisitions of gaming studios); PX1527-002.)

Activision, a publicly traded corporation, earned \$7.5 billion in revenue in 2022. (PX9388-040 (Activision 10-K 2022).) "Activision develops and publishes video games for consoles, PCs and mobile devices. Microsoft often refers to Activision, along with EA [Electronic Arts], Take-Two Interactive Software, Inc., and Ubisoft, as one of the 'Big 4' independent video game publishers." (Dkt. No. 226-2, Lee Decl. at ¶ 19.) "Activision's most successful video game franchise is *Call of Duty*, a first-person shooter video game series playable on video game consoles and PCs. "Activision also produces other popular video games for consoles, including games from the *Diablo*, *Overwatch*, *Crash Bandicoot*, and *Tony Hawk* franchises, as well as video

¹ Exhibit citations are to the exhibit number and the page number associated with the exhibit number. For hearing testimony, the Court has endeavored to include citations to the associated docket number. Other record citations are to material in the Electronic Case File ("ECF") with pinpoint citations to the ECF-generated page numbers at the top of the documents.

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games for other devices, including games from the Candy Crush (for mobile devices) and Warcraft (for PC) franchises." (Dkt. No. 226-2, Lee Decl. at ¶ 21.)

В. The Proposed Merger

On January 18, 2022, Microsoft announced an agreement to acquire Activision for \$68.7 billion—one of the largest, if not the largest, tech industry mergers. The agreement provides, among other things, either party may terminate the merger agreement if the transaction has not closed by July 18, 2023. (PX0083-088.) If the agreement is terminated because it has not closed, Microsoft may have to pay Activision a \$3 billion termination fee. (PX0083-091, Sec. 8(c).) Following the merger, "[Activision Blizzard] will continue as the surviving corporation of the Merger and a Subsidiary of Parent [Microsoft]." (PX00083-024; see also RX5058 (Hood Decl.) at ¶ 6 (discussing Microsoft's plan to maintain Activision as a limited-integration studio).

C. The Video Game Industry

Video gaming generates hundreds of billions of dollars of revenue a year and is projected to grow substantially in the future. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 404:12–16; Dkt. No. 285, 6/28/23 Tr. (Kotick) at 710:16–17 ("[T]he business has evolved to be what's today probably a \$130 billion-a-year industry.").) Gaming grew to record high levels during the global pandemic, with people seeking at-home entertainment options more than ever before. (RX3136; Dkt. No. 285, 6/28/23 Tr. (Bailey) at 789:16–22.)

1. **Gaming Platforms**

Video games are available to play across a wide range of platforms, including mobile, PC, and console. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 404:6-405:3 (discussing RX3166-003); see also Dkt. No. 284, 6/27/23 Tr. (Bailey) at 661:3–23.) Games can be played on general purpose PCs or gaming PCs, but gaming PCs typically have more advanced hardware to allow them to play more computationally demanding games. (PX8001 (Ryan Decl.) at ¶ 15.) Conversely, games played on mobile have lower graphics and are less sophisticated than games played on consoles or gaming PCs. (PX0003-073.) The three primary console makers are Microsoft (Xbox Series X|S), Sony (PlayStation 5), and Nintendo (Switch). (PX1777-008; Dkt. No. 226-2, Lee Decl. at ¶ 13.)

Console Gaming a.

Video game consoles are consumer devices designed for, and whose primary use is, to play video games. (PX8001 (Ryan Decl.) at ¶ 10.)

While consoles were once the predominant form of home gaming, they now represent a smaller share of video game revenue than either mobile or PC. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 127:16-128:1; RX3166-003.)

b. Mobile Gaming

Most gamers today play on mobile devices, which is also the fastest growing segment as the technical capabilities of mobile devices increase. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 127:24–128:1; Dkt. No. 283, 6/23/23 Tr. (Spencer) at 392:5–6, 392:10–12, 404:11, 404:21-22; Dkt. No. 285, 6/28/23 Tr. (Kotick) at 712:1-12, 732:4-20; *id.* at 712:8-9 ("And so today the bulk of games are played on phones"); Dkt. No. 284, 6/27/23 Tr. (Bailey) at 661:6–23; *see also* RX5058 (Hood Decl.) at ¶ 14 ("\$113 billion of the game industry's total revenues of \$210 billion came from mobile gaming in 2020").) Growth in mobile gaming is expected to continue, as microprocessors equivalent to those used in past video game consoles are increasingly becoming more powerful and incorporated into phones. (*See, e.g.*, Dkt. No. 285, 6/28/23 Tr. (Kotick) at 720:7-11 (explaining mobile is "the biggest part of the market").)

c. PC Gaming

After mobile, PC gaming is the next largest source of video game revenue. (Dkt. No. 284, 6/27/23 Tr. (Bailey) at 661:11-12.)

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d. Cross-Platform Play

Games can be single-player or multi-player. Single-player games are normally storydriven, and other characters in the game are computations in the game rather than real people. In multiplayer games, players are matched with other people of similar skill level, and players interact in real time. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 134:5-19.) Gamers can now play certain multiplayer games across platforms. For example, a gamer on PlayStation can now play many games with other gamers playing on another platform, like Nintendo or Xbox or PC. That mode of play is referred to as "cross-platform" gaming or "cross-play." (Dkt. No. 282, 6/22/23 Tr. (Bond) at 135:7-17.) In most multiplayer games, a gamer selects multiplayer game mode, the game matches the gamer with other gamers, and the gamers are then placed in a lobby and either enter the game or are placed in teams. (See Dkt. No. 282, 6/22/23 Tr. (Bond), at 134:5-19; Dkt. No. 284, 6/27/23 Tr. (Bailey) at 669:24-670:4, 672:2-7.) Cross-play makes games more valuable to consumers because they can play the game with friends and access larger lobbies of players. (See, e.g., Dkt. No. 284, 6/27/23 Tr. (Bailey) at 669:22-670:4; Dkt. No. 285, 6/28/23 Tr. (Kotick), at 716:5–8; see also id. at 713:23-714:10 ("[T]he big evolution of the industry has been this transformation to the social experience."), 715:18-24.) Many of the most popular multiplayer titles (e.g., Fortnite, PUBG, Call of Duty, and Minecraft) allow gamers to cross-play between at least PC and console. (See, e.g., Dkt. No. 282, 6/22/23 Tr. (Bond) at 152:18-153:2 (Call of Duty).)

2. Gaming Content

A game publisher brings games to market and sometimes provides funding to the game developer to do so. (PX7014 (Booty Investigational Hearing "IH" Tr. at 28:5-15.) A developer creates the assets for a game, including writing the code and designing the art. (Dkt. No. 282, 6/22/23 Tr. (Booty) at 50:14-19; PX7014 (Booty IH Tr.) at 28:5-15.) First-party content is created

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and developed by a console manufacturer at an in-house studio. (Dkt. No. 282, 6/22/23 Tr.
(Booty) at 50:25-51:2; Dkt. No. 226-2, Lee Decl. at ¶ 15; PX7014 (Booty IH Tr.) at 58:20–59:9.)
Microsoft's first-party content is created at Xbox Game Studios. (PX9050-015; PX0003-016.)
Some of Microsoft's first-party franchises include DOOM, Forza, Gears of War, Halo, Minecraft
and The Elder Scrolls. (PX9252-001.)

Third-party content refers to games independently developed and published by a thirdparty publisher. (Dkt. No. 282, 6/22/23 Tr. (Booty) at 51:6-8; Dkt. No. 226-2, Lee Decl. at ¶ 15; PX8001 (Ryan Decl.) at ¶ 5; PX0003-016.) Occasionally, console manufacturers will publish titles developed by a third-party development studio, known as second-party games. (PX8001 (Ryan Decl.) at ¶ 5; PX7003 (Bond IH Tr.) at 152:2-10; PX0003-016.) Console manufacturers typically negotiate publisher license agreements with game publishers setting the terms for any titles the console manufacturer ships from the publisher. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 420:11-421:2.) For second- or third- party developers, console manufacturers create development kits for those second- or -third- party developers to use to ensure the game will run on the console. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 156:7-17.)

Both consumers and industry participants acknowledge content drives sales.

AAA Content a.

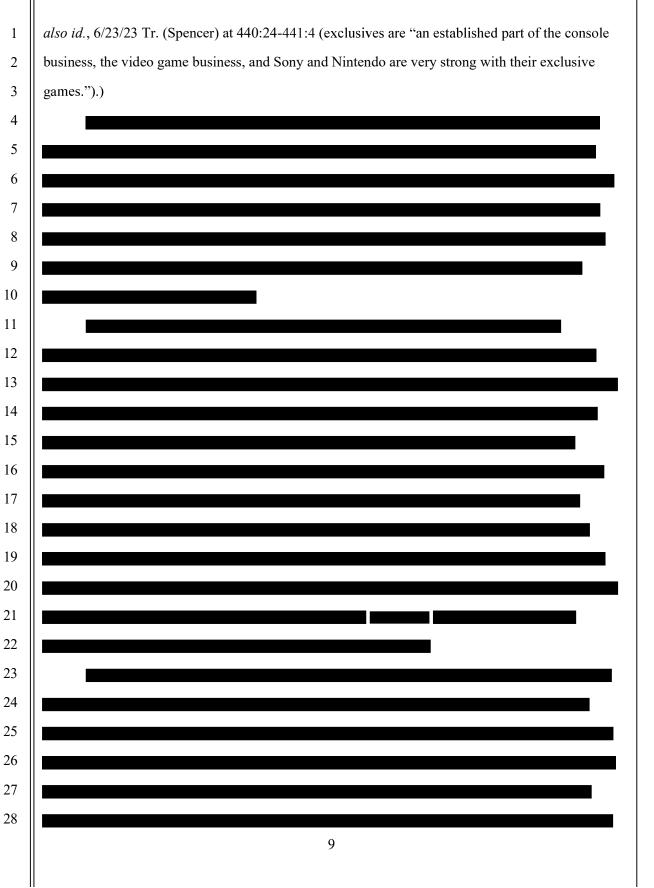
"AAA" content is an industry term and can be synonymous with "a tentpole title, a marquee title, a big blockbuster title" that has a high development budget and high expectations for sales. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 147:20-148:2 ("[AAA] tends to imply a game of a certain size and scope, a certain level of investment put into the game");

b. Exclusive Content

AAA game every single year). (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 43:14-22.)

Each of the three major console companies is also a vertically integrated first-party game developer and publisher. And while each has a collection of platform-exclusive titles, "the Nintendo Switch, the PlayStation, they both have significantly higher number of exclusive games on their platform than Xbox does." (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 346:25–347:2; *see*

AAA title is not guaranteed (though Mr. Kotick admits Activision has the capability to release a



In addition to exclusivity, Sony also uses its market power to extract other preferential
treatment from third-party game developers, including earlier release dates, exclusive marketing
agreements, and exclusive in-game content. (Dkt. No. 282, $6/22/23$ Tr. (Bond) at $162:1-4$, $186:5-4$
8.)
c. Activision Content

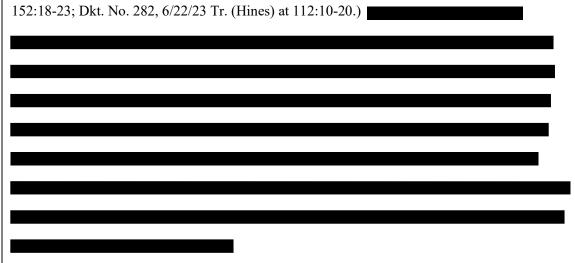
Call of Duty

The Call of Duty games are first-person shooter games based on "military conflict through

history." (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 712:21-713:9; Dkt. No. 282, 6/22/23 Tr. (Bond) at 10

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Call of Duty games have been continuously available on both PlayStation and Xbox consoles since 2003. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 714:12-715:12, 720:1-6.) Activision typically releases a new buy-to-play Call of Duty game every year. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 736:12-18 (Call of Duty released every year); Dkt. No. 282, Tr. (Bond) at 128:23-25 (games cost \$70).)

The latest annual *Call of Duty* titles are playable across platforms via a cross-play feature. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 152:18-153:2.) The introduction of cross-play to *Call of Duty* has significantly improved players' experience; the game's online multiplayer functionality thrives on a large and active player base, and cross-play has increased the number of available players. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 716:5-8 (explaining cross-play "expands the market and also makes you -- let's say you have a group of friends, not everybody's going to have the same device so it gives you the opportunity to be able to play with your friends").).

Activision also develops and publishes free-to-play versions of <i>Call of Duty</i> called <i>Call of</i>
Duty: Warzone—available on PlayStation, Xbox, and Windows PC—and Call of Duty: Mobile
("COD: Mobile")—available on iOS and Android mobile devices—which it monetizes through
optional in-game microtransactions. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 153:3-15; see also Dkt.
No. 285, 6/28/23 Tr. (Kotick) at 720:3-11.) "Half of [the Call of Duty franchise's] monthly active
players play on phones." (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 716:17-21; see also id. at 719:2-6
("[T]he bulk of players [in the Call of Duty franchise] are playing on phones.").) Recently, COD.
Mobile reached 150 million monthly annual users. (Dkt. No. 286, 6/29/23 Tr. (Stuart) at 1033:3-
6.) Cross-play also exists in the free-to-play Call of Duty: Warzone. (See Dkt. No. 285, 6/28/23
Tr. (Kotick) at 719:7-720:2 (noting the free-to-play Warzone is playable on PlayStation, PC, and
Xbox).) Call of Duty: Warzone will be available on mobile this fall, and like the console and PC
versions, it will be available as a multiplayer game across mobile devices. (See Dkt. No. 285,
6/28/23 Tr. (Kotick) at 720:1-10; 721:9-13.)

Call of Duty is not currently available on the Nintendo Switch. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 768:8-13.) It is also not currently available on any cloud gaming services or multigame game subscription libraries upon release. (Dkt. No. 285, 6/28/23, Tr. (Kotick) at 734:2-5, 731:12-14.)

ii. **Other Activision Content**

King's Candy Crush franchise consists of casual, free-to-play puzzle games made for mobile devices. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 725:25-726:6.)

King primarily monetizes Candy Crush through optional in-game microtransactions, and also generates revenue through in-game advertising placements. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 726:24-727:4.)

Blizzard's popular World of Warcraft franchise principally consists of a massivelymultiplayer-online fantasy role-playing game, and related expansions and content released over the course of the past 20 years. (See Dkt. No. 285, 6/28/23 Tr. (Kotick) at 730:1-18.) Blizzard makes World of Warcraft available for PCs on a subscription-based model. (See, e.g., Dkt. No.

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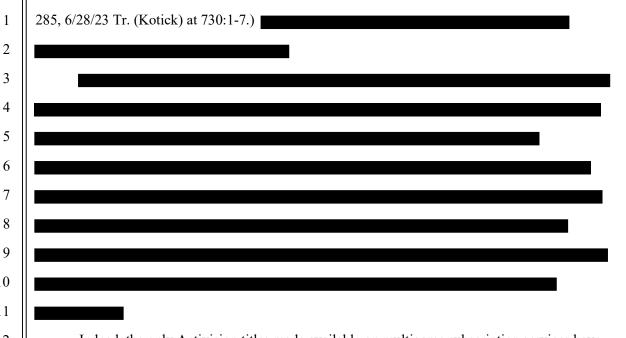
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Indeed, the only Activision titles made available on multigame subscription services have been back-catalog games offered for a limited period of time, often for promotional purposes, rather than new games made available day and date. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 774:9-24; see also Dkt. No. 285, 6/28/23 Tr. (Kotick) at 747:3-10, 750:10-13 (acknowledging occasional placement of "a very old catalog title for a short period of time" on subscription services).)

3. **Access to Gaming Content**

Gamers can access games through a growing variety of payment and distribution models. The diversity of payment and distribution models has increased the accessibility of games and expanded gamer choice. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 392:24-393:10.) Most gamers obtain entitlements to access and play console games via the "buy-to-play" model of purchasing the games in the form of a cartridge, DVD or Blu-Ray disc, or digital download for an upfront price (e.g., \$70) and adding them to their own libraries. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 128:23-25, 138:2-20.)

Multi-Game Content Subscription Services a.

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With multigame subscription offerings, gamers pay a flat monthly fee to access a library of games. In the case of most subscription offerings, subscribers download the games they want to play to their devices (just as they would a buy-to-play game), and then play them using those devices. With some services, gamers can stream games while waiting for the game to download or try out a game before downloading. (Dkt. No. 282, 6/22/23 Tr. (Hines) at 92:23-93:5; Dkt. No. 282, 6/22/23 Tr. (Bond) at 145:12-146:7; see also Dkt. No. 285, 6/28/23 Tr. (Bailey) at 790:21-791:9 (telemetry data show xCloud is "largely [used to] play[] one game they never played before and not playing it ever again," which is "exactly consistent with" gamers using xCloud while the game downloads).)

In 2017, Xbox launched Game Pass, one of the first multigame subscription offerings. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 140:15-23.) Subscribers can access a broad catalog of games for a set monthly fee of \$9.99 (or \$14.99 for the Game Pass Ultimate tier) instead of purchasing the games outright (for \$70 per game). (Dkt. No. 282, 6/22/23 Tr. (Bond) at 137:23-138:1;

To make Game Pass more attractive, Xbox includes all games developed by its studios (first-party games) in Game Pass the day of release ("day-and-date"). (Dkt. No. 286, 6/29/23 Tr. (Stuart) at 1047:6-15; Dkt. No. 282, 6/22/23 Tr. (Bond) at 139:6-7;

Aside from Game Pass, Microsoft also offers Xbox Live Gold, which provides subscribers with access to online, multiplayer games and a limited selection of downloadable games each month among other benefits, such as audio and visual communications and certain discounts. (PX0003-018; Dkt. No. 282, 6/22/23 Tr. (Bond) at 136:18-24.) Xbox Live Gold does not provide subscribers with access to the vast library of games subscribers of Xbox Game Pass for PC or Console and Game Pass Ultimate receive. (PX0003-018.)

Northern District of California

For example, Activision does not allow, and has no plans to allow, its games in
multigame subscription libraries upon release. (See Dkt. No. 285, 6/28/23 Tr. (Kotick), at 731:12
14 ("In our current long-range plan, we don't have any revenues that are being generated from a
multigame subscription service"); Dkt. No. 285, 6/28/23 Tr. (Kotick) at 746:19-21 ("I would say
it's just not something that we do have any plans to do or have ever done "). This
"philosophical aversion" to subscription services arises from concerns that multigame
subscriptions would "degrade the economics" of Activision's buy-to-play business model, are
"inconsistent with the idea of starting out with free-to-play as the way that you build game
universes and franchises," and possibly could lead to substantial cannibalization. (Dkt. No. 285,
6/28/23 Tr. (Kotick) at 729:3-16, 743:22-24; see also id. at 744:8-11 (explaining "cannibalization
would play a role" in a decision not to place games in a multigame subscription).)

Activision only rarely allows even its older back-catalog titles to be included in subscription services for brief periods of time. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 747:3-10, 750:10-13 (acknowledging occasional placement of "a very old catalog title for a short period of time" on subscription services);

Cloud Gaming Subscription Services b.

Cloud gaming (also known as cloud game "streaming") is a potential alternative delivery mechanism to downloading native games for play onto hardware. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 131:20-132:5; PX7060 (Eisler Dep. Tr.) at 29:12-19.) ■

It enables gamers to begin playing a
game in seconds, rather than waiting for games to download or update, and streaming rather than
downloading avoids burdening the storage limits on a gaming device.
(https://support.xbox.com/en-US/help/games-apps/cloud-gaming/playing-console-game-from-
cloud-versus-installing ("You can start playing a game in seconds. There's no waiting for games
to finish installing or updating download times or storage limits aren't a factor."); PX8000
(Eisler Decl.) at ¶ 17.) However, the technology and economics of cloud gaming remain
challenging, particularly for latency-sensitive multiplayer games. Due to those latency issues,
users sometimes experience a stuttering effect or lags in gameplay. (Dkt. No. 282, 6/22/23 Tr.
(Bond) at 145:6-11; Dkt. No. 283, 6/23/23 Tr. (Spencer) at 395:10-16; PX7060 (Eisler Dep. Tr.) at
47:05-47:23.) Cloud gaming is also limited in its ability to replicate controller functions for
console games streamed to mobile devices. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 395:23-396:7;
Dkt. No. 285, 6/28/23 Tr. (Kotick) at 733:15-21.)
In 2020 Migrosoft added aloud gaming to its ten figr multi-game content library

In 2020, Microsoft added cloud gaming to its top-tier multi-game content library subscription service offering, Xbox Game Pass Ultimate. (PX9091 at 001-006.) Xbox Cloud Gaming (also referred to as xCloud) enables Xbox Game Pass Ultimate subscribers to stream certain games, as opposed to downloading games locally, and then to play those games on the device most convenient to them, including consoles, Windows PCs, tablets, and mobile phones. (PX0003 at 018.) Microsoft also offers free access to Xbox Cloud Gaming for Epic Games' Fortnite. (PX0003 at 019.)

As Microsoft Gaming CEO Phil Spencer testified, Microsoft's xCloud strategy is to allow those who want to play Microsoft games on their mobile phones to "have access to those through streaming," allowing Microsoft to "find a significant number of customers given the installed base of people playing games on mobile phones." (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 393:16-

394:6.) However, as a result of technical limitations, a large majority of Xbox Cloud Gaming

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users report relying on the service primarily to play a game while it is being downloaded to play natively on Xbox. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 145:12-146:7; Dkt. No. 283, 6/23/23 Tr. (Spencer) at 394:23-396:7; see also Dkt. No. 285, 6/28/23 Tr. (Bailey) at 790:4-791:9 (telemetry data show xCloud is "largely [used to] play[] one game they never played before and not playing it ever again," which is "exactly consistent with" gamers using xCloud while the game downloads).)

D. **Microsoft's Post-Complaint Agreements**

Two months after the FTC filed its complaint, Xbox and Nintendo entered a ten-year agreement to bring future Call of Duty titles to Switch (and any successor Nintendo consoles) after the merger closes.

		Microsoft

executives have nonetheless committed publicly and under oath in court to continue to sell Call of Duty to Sony. (Dkt. No. 285, 6/28/23 Tr. (Nadella) at 853:9-11 (Q: "Let me ask you here today, Mr. Nadella, will you commit to continuing to ship *Call of Duty* on the Sony PlayStation?" . . . A: "A hundred percent."); Dkt. No. 283, 6/23/23 Tr. (Spencer) at 367:18-24, 368:4-10, 429:21-22, 429:25-430:1 ("my commitment is and my testimony is, to use that word, that we will continue to ship Call of -- future versions of *Call of Duty* on Sony's PlayStation platform").)

PROCEDURAL HISTORY

On February 1, 2022, Microsoft reported the planned merger to the FTC, as required by the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"). The FTC thereafter commenced an 11-month investigation, requiring Microsoft and Activision to produce nearly 3 million documents and sit for 15 investigational hearings. The waiting period under the HSR Act which prevents the parties from closing the transaction was extended by agreement with the FTC until November 21,

2022, and the parties thereafter agreed voluntarily to delay closing until December 12, 2022.

On December 8, 2022, the FTC filed an administrative complaint against the merger, alleging it violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. *See* Part 3 Complaint, In the Matter of Microsoft/Activision, No. 9412 (F.T.C. Dec. 8, 2022). Fact discovery in the FTC administrative proceeding, which included production of nearly 1 million documents and 30 depositions, closed on April 7, 2023, followed by expert discovery. An evidentiary hearing before an administrative law judge (ALJ) is scheduled to begin on August 2, 2023. (Dkt. No. 1, Complaint at ¶ 16.)

Although the Agreement allows either party to terminate the merger agreement if the transaction has not closed by July 18, 2023, and appears to obligate Microsoft to pay Activision a termination fee of \$3 billion, the FTC did not file this action to preliminarily enjoin the merger until June 12, 2023—less than six weeks before the termination date.² (Dkt. Nos. 1, 7; PX0083091, Sec. 8(c).) The Court related this action to a pending private antitrust action seeking to stop the merger. (Dkt. No. 21; *see Demartini et al. v. Microsoft Corp.*, No. 22-08991-JSC.³) The FTC filed an emergency motion for a temporary restraining order (TRO) with their Complaint, arguing Microsoft intended to proceed with the merger as soon as June 16, 2023, and would not stipulate to a TRO unless the FTC filed in the United States District Court for the District of Columbia, rather than the Northern District of California where the FTC indicated it intended to file because this Court was already overseeing the *Demartini* action. (Dkt. No. 12-3 at 10-11.) The Court granted the FTC's motion for a temporary restraining order and set an evidentiary hearing on the preliminary injunction motion to commence the following week. (Dkt. No. 37.) The five-day evidentiary hearing commenced on June 22, 2023 and was completed on June 29, 2023. The action proceeded on an expedited basis given the Agreement's impending

Demartini et al. v. Microsoft Corp., No. 22-08991-JSC. In that action, Microsoft stipulated on the record that the acquisition would not close before May 22, 2023. (Dkt. No. 193 at 87:2-12.)

³ Shortly after the FTC filed its administrative complaint, a group of *Call of Duty* players filed their own action in this Court to stop the merger pursuant to Clayton Act, Sections 7 and 16.

termination date. *See FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984) (ordering expedited proceedings "[b]ecause undue delay could force the parties to abandon the proposed merger").

LEGAL FRAMEWORK

Section 7 of the Clayton Act prohibits mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. "Because § 7 of the Clayton Act bars mergers whose effect 'may be substantially to lessen competition, or to tend to create a monopoly,' 15 U.S.C. § 18, judicial analysis necessarily focuses on 'probabilities, not certainties. This 'requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their incipiency." *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (citations omitted). Thus, "[i]t is well established that a section 7 violation is proven upon a showing of reasonable probability of anticompetitive effect." *Warner*, 742 F.2d at 1160.

Section 7 claims challenging horizonal mergers are generally analyzed under a "burden-shifting framework.' The plaintiff must first establish a prima facie case that a merger is anticompetitive. The burden then shifts to the defendant to rebut the prima facie case." *Saint Alphonsus*, 778 F.3d at 783 (citations omitted). The Ninth Circuit Court of Appeals has not addressed whether this burden shifting framework applies in vertical merger cases such as this. Indeed, "[t]here is a dearth of modern judicial precedent on vertical mergers and a multiplicity of contemporary viewpoints about how they might optimally be adjudicated and enforced.⁴" *United States v. AT&T, Inc.*, 916 F.3d 1029, 1037 (D.C. Cir. 2019). In *AT&T*, the only court of appeals decision addressing a vertical merger in decades, the court found the burden-shifting framework

⁴"[A] dearth of authority that is unsurprising, considering that the Antitrust Division apparently has not tried a vertical merger case to decision in *four* decades!" *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 193–94 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019) (emphasis in original).

applied, but "unlike horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share." *Id.* at 1032. In vertical merger cases, "the government must make a fact-specific showing that the proposed merger is likely to be anticompetitive. Once the prima facie case is established, the burden shifts to the defendant to present evidence that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition, or to sufficiently discredit the evidence underlying the prima facie case." *Id.* (cleaned up).

PRELIMINARY INJUNCTION

Section 13(b) of the Federal Trade Commission Act provides "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . a preliminary injunction may be granted" 15 U.S.C. § 53(b). "In determining whether to grant a preliminary injunction under section 13(b), a court must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities." *Warner*, 742 F.2d at 1160 (citing *FTC v. Simeon Management Corp.*, 532 F.2d 708, 713–14 (9th Cir. 1976)).

To satisfy the first prong, the FTC must "raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Warner*, 742 F.2d at 1162 (citations omitted). In evaluating likelihood of success on the merits, the court must exercise its "independent judgment' and evaluat[e] the FTC's case and evidence on the merits." *See FTC v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2022 WL 16637996, at *5 (N.D. Cal. Nov. 2, 2022). Courts require such a rigorous analysis because "the issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy. This is particularly true in the acquisition and merger context, because, as a result of the short life-span of most tender offers, the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (cleaned up); *see also Warner*, 742 F.2d at 1165 (9th

Cir. 1984) (ordering expedited proceedings "[b]ecause undue delay could force the parties to abandon the proposed merger."). However, the Court does not resolve conflicts in the evidence—the question is simply whether the FTC "has met its burden of showing a likelihood of success on the merits." *Warner*, 742 F.2d at 1164.

The parties sharply dispute in which forum "the Commission's likelihood of ultimate success," 15 U.S.C. § 53(b), should be measured. This question appears not to have been squarely addressed by any court other than in *Meta*, 2022 WL 16637996, at *4-6. In *Meta*, the court held "Section 13(b)'s 'likelihood of ultimate success' inquiry to mean the likelihood of the FTC's success on the merits in the underlying administrative proceedings, as opposed to success following a Commission hearing, the development of an administrative record, and appeal before an unspecified Court of Appeals." *Id.* at *6. The Court is persuaded by the *Meta* court's analysis of this issue and adopts it here—the relevant forum for the question of likelihood of success is before the ALJ in the administrative proceedings.

ANALYSIS

I. RELEVANT MARKET

The first step in analyzing a Section 7 merger challenge is to determine the relevant market. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 619 (1974) (citing *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957)); *see also FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) ("A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition."). The relevant market for antitrust purposes is determined by (1) the relevant product market and (2) the relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

A. Product Market

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id.* at 325. That is, "when one product is a reasonable substitute for the other, it is to be included in the same relevant product market even though the products themselves are not the same. A product is construed to be a 'reasonable substitute' for another when the demand for it

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increases in response to an increase in the price for the other." FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 46 (D.D.C. 1998); see also Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008). The definition of the relevant market is "basically a fact question dependent upon the special characteristics of the industry involved." Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1299 (9th Cir. 1982). The overarching goal of market definition is to "recognize competition where, in fact, competition exists." Brown Shoe, 370 U.S. at 326; see also Cardinal Health, 12 F. Supp. 2d at 46 ("Because the ability of customers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the "relevant market" rests on a determination of available substitutes."). "The FTC bears the burden of proof and persuasion in defining the relevant market." FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 119 (D.D.C. 2004), appeal dismissed, No. 04-5291, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004).

There is "no requirement to use any specific methodology in defining the relevant market." Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., Ltd., 20 F.4th 466, 482 (9th Cir. 2021). "[C]ourts have determined relevant antitrust markets using, for example, only the Brown Shoe factors, or a combination of the Brown Shoe factors and the HMT.5" Meta, 2023 WL 2346238, at *9 (collecting cases). Brown Shoe factors are "practical indicia [such] as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U.S. at 325.

The FTC contends the *Brown Shoe* factors establish four relevant antitrust markets: (1) high performance consoles (Xbox and Sony PlayStation); (2) multigame content library

⁵ The HMT is a common quantitative metric used by parties and courts to determine relevant markets. See U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines ("2010 Merger Guidelines") § 4 (2010); see also United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 51 (D.D.C. 2011) ("An analytical method often used by courts to define a relevant market is to ask hypothetically whether it would be profitable to have a monopoly over a given set of substitutable products. If so, those products may constitute a relevant market."). Defendants insist the HMT does not apply to vertical mergers. The Court need not decide this issue as it accepts, without deciding, the FTC's definition of the relevant markets here.

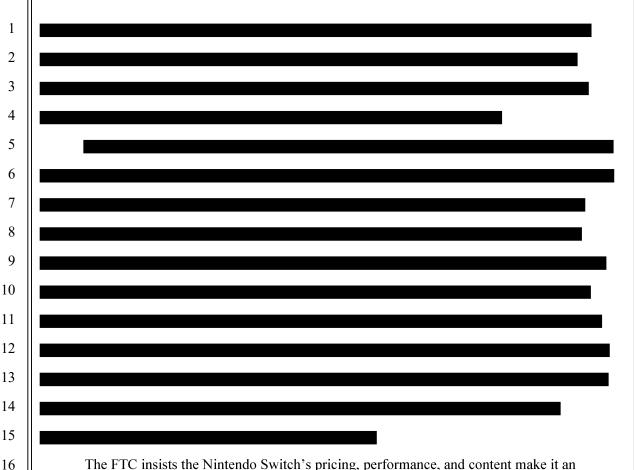
subscription services; (3) cloud gaming; and (4) a combined library subscription services and cloud gaming market.

1. The Console Market

The FTC's primary market is the "high-performance console market" which it defines as Xbox and PlayStation Generation 9 (Gen 9) consoles.

a. The Console Market and Nintendo Switch

The FTC seeks to limit the console market to Gen 9 consoles Xbox X|S and the PlayStation 5, and exclude the Nintendo Switch.



The FTC insists the Nintendo Switch's pricing, performance, and content make it an improper substitute at least for purposes of its preliminary injunction motion. As to pricing, yes, the Xbox Series X and PlayStation 5 are priced the same and a couple of hundred dollars higher than the Switch; however, Xbox set the price of its entry-level Series S to compete with the Switch. (Dkt. No. 286, 6/29/23 Tr. (Stuart) at 1030:5-1031:5 (Q. "And do you look at Switch pricing when you're considering the pricing of Xbox Series S?" A. "Yes." Q. "And is that one of the reasons you set the price where you guys did?" A. "Yes.").)

And, there are functionality differences between the Switch and the PlayStation and Xbox consoles—the Switch is portable, and it has its own screen and less powerful hardware. However, neither the FTC nor its expert consider the extent to which the Switch's differentiated features including its price, portability, and battery are factors the customer balances when deciding which console to purchase. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 436:6-437:4 (describing how Nintendo made "technical decisions to enable an experience that they thought their customers

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would want to have, and it's the best selling console right now in the market. So when I—when people try to tell me it's not competition—competitive, for any number of reasons, I don't believe that because I just look at what's selling.").)

Finally, yes, there are content differences between the Switch and PlayStation, but many of the most popular games on PlayStation and Xbox consoles are also available on the Switch, including Fortnite, Minecraft, Rocket League, Lego Star Wars, Fall Guys, and the FIFA, MLB The Show, and NBA 2K franchises. (Dkt. No. 285, 6/28/23 Tr. (Bailey) at 782:5-783:10; see RX5055-074 (Bailey Report) at ¶ 88.) Although some popular Xbox and PlayStation games are not available on the Switch, many of those titles are platform exclusives

"It doesn't matter whether [Nintendo's] products are fully interchangeable with those of its competitors because perfect fungibility isn't required." Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc., 723 F.3d 1019, 1025 (9th Cir. 2013) (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956)). If this were the requirement, "only physically identical products would be a part of the market." E.I. du Pont, 351 U.S. at 394. "Instead, products must be reasonably interchangeable, such that there is cross-elasticity of demand." Gorlick, 723 F.3d at 1025 (citing Brown Shoe, 370 U.S. at 325). "The goal of market definition here is to define the boundaries of the competition within which foreclosure or disadvantaging of a participant is likely to reduce innovation, delay rivals' entry, and raise price or reduce variety or quality of the ensuing goods. The relevant market will encompass those firms whose presence drives this competition and whose foreclosure or disadvantaging may thwart it." In the Matter of Illumina, Inc. and Grail, Inc., No. 9401, 2023 WL 2823393, at *20 (F.T.C. Mar. 31, 2023).

If the Court was the final decisionmaker on the merits, it would likely find Nintendo Switch part of the relevant market. But it is not. Instead, on a 13(b) preliminary injunction, the FTC need only make a "tenable showing that the relevant market" is Gen 9 consoles. See Warner, 742 F.2d at 1164. Given the plethora of internal industry documents and the acknowledged

differences, the FTC has met its preliminary injunction burden to show the Switch is not included in the relevant market.

b. The Console Market does not include PCs

The FTC insists, and the Court agrees, the console market does not include PCs.

That customers may "cross-shop" between consoles and PCs does not demonstrate "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1040, 1043 (D.C. Cir. 2008).

2. Multigame Content Library Subscription Services and Cloud Gaming Markets

As to the FTC's additional markets of the multigame content library subscription services and cloud gaming, while the Court questions whether—as Defendants posit—these are simply alternative ways of playing console, PC, and mobile games, the Court assumes without deciding they are each their own product market when considered singly or in combination.

B. Geographic Market

The product market, the relevant geographic market must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe*, 370 U.S. at 336. The geographic market encompasses the "area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *FTC v. Cardinal Health, Inc.*, 12 F.Supp.2d 34, 49 (D.D.C. 1998).

1. The Console Market

The FTC, relying largely on Dr. Lee's analysis, insists the relevant market is the United States because (1) game prices and releases vary country-by-country; and (2) gamer preferences

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nd behavior vary cou	untry-by-country and inform market participants' strategic decision.
	Cumulatively, this evidence suggests the relevant market for competition
the United States.	
	rguments in favor of a geographic market beyond the United States are
persuasive.	
The good around	ic market is both the area "in which the seller operates, and to which the

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purchaser can practically turn for supplies." FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 308 (D.D.C. 2020) (emphasis added). While there is no dispute consoles are sold in markets outside the United States, there is no evidence to suggest US consumers seeking to purchase a console would look outside the United States to do so.

Multigame Content Library Subscription Services and Cloud Gaming Markets

The market for multigame content library subscription services and cloud gaming is a closer question; however, the Court will assume without deciding the geographic market is the United States for these markets as well.

II. **EFFECT ON COMPETITION**

Section 7 vests courts with the "uncertain task" of making a prediction about the future. See United States v. Baker Hughes, Inc., 908 F.2d 981, 991 (D.C. Cir. 1990). For this reason, the "allocation of the burdens of proof" assumes particular importance. *Id.* In a horizontal merger case, "the government can establish its prima facie case simply by showing that the merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market," typically "by presenting marketshare statistics," United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 130 (D.D.C. 2022), appeal dismissed, No. 22-5301, 2023 WL 2717667 (D.C. Cir. Mar. 27, 2023) (cleaned up), which "triggers a presumption that the merger will substantially lessen competition," AT&T, 310 F. Supp. 3d at 192 (cleaned up). For a vertical merger, such as the Microsoft/Activision merger, "there is no short-cut way to establish anticompetitive effects, as there is with horizontal mergers." Id. at 192 (cleaned up). This is in part because "many vertical mergers create vertical integration efficiencies between purchasers and sellers." Id. at 193; see also Nat'l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 840 (D.C. Cir. 2006) ("vertical integration creates efficiencies for consumers"); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 755c (online ed. May 2023) ("Vertical integration is ubiquitous in our economy and virtually never poses a threat to competition when undertaken unilaterally and in competitive markets."); Dkt. No. 226-2, Lee Decl. at ¶ 58 ("Unlike in an

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analysis of a horizontal merger, there is no established screen or presumption of harm based on market shares or concentration for the purposes of evaluating the competitive effects of a vertical merger.").

So, with this proposed vertical merger, the outcome "turn[s] on whether, notwithstanding the proposed merger's conceded procompetitive effects, the [g]overnment has met its burden of establishing, through 'case-specific evidence,' that the merger of [Microsoft] and [Activision], at this time and in this remarkably dynamic industry, is likely to substantially lessen competition in the manner it predicts." See AT&T, 916 F.3d at 1037. "Once the prima facie case is established, the burden shifts to the defendant to present evidence that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition, or to sufficiently discredit the evidence underlying the prima facie case. Upon such rebuttal, the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Id.* at 1032 (cleaned up). "In assessing the Government's Section 7 case, the court must engage in a comprehensive inquiry into the 'future competitive conditions in a given market, keeping in mind that the Clayton Act protects competition, rather than any particular competitor." AT&T, 310 F. Supp. 3d at 190 (cleaned up) (citation omitted).

A. The FTC's Theory

"The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition which deprives rivals of a fair opportunity to compete." Brown Shoe, 370 U.S. at 323-24. The FTC insists the combined firm may deprive rivals—primarily Sony—of a fair opportunity to compete in the above-defined markets by foreclosing an essential supply—Call of Duty. In other words, Call of Duty is so popular, and has such a loyal and dedicated following, competition will be substantially lessened in the console, content library subscription, and cloud gaming markets unless Microsoft's rivals have at least equal access to this particular video game.

The FTC argues it can establish this potential anticompetitive effect of the merger through

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two alternative, but overlapping tests. First, by showing the transaction is likely to give the merged firm the ability and incentive to foreclose Call of Duty from its rivals. (Dkt. No. 291-2, FTC's Final Proposed Findings of Fact and Conclusions of Law (FTC's Findings and Conclusions) at p. 180 ¶ 87.) Second, through examining the *Brown Shoe* factors, such as share of the market foreclosed, the nature and purpose of the transaction, barriers to entry, whether the merger will eliminate potential competition by one of the merging parties, and the degree of market power that would be possessed by the merged enterprise as shown by the number and strength of competing suppliers and purchasers. (Id. at ¶ 88 (quoting Brown Shoe, 370 U.S. at 328-34); see Illumina, 2023 WL 2823393, at *32.)

B. **Ability and Incentive to Foreclose**

As a threshold matter, the FTC contends it need only show the transaction is "likely to increase the ability and/or incentive of the merged firm to foreclose rivals." (Dkt. No. 291-2, FTC's Findings and Conclusions at p. 181 ¶ 90.) For support, it cites its own March 2023 decision in Illumina, 2023 WL 2823393, at *33. Illumina reasons:

> [t]o harm competition, a merger need only create or augment either the combined firm's ability or its incentive to harm competition. It need not do both. Requiring a plaintiff to show an increase to both the ability and the incentive to foreclose would per se exempt from the Clayton Act's purview any transaction that involves the acquisition of a monopoly provider of inputs to adjacent markets.

2023 WL 2823393, at *38 (cleaned up) (emphasis added). *Illumina*, however, provides no authority for this proposition, nor could it. Under Section 7, the government must show a "reasonable *probability* of anticompetitive effect." Warner, 742 F.2d at 1160 (emphasis added). If there is no incentive to foreclose, then there is no probability of foreclosure and the alleged concomitant anticompetitive effect. Likewise, if there is no ability, then a party's incentive to foreclose is irrelevant. Indeed, the FTC's expert, Dr. Lee, analyzed the anticompetitive effects of the merger based on ability and incentive. (Dkt. No. 226-2, Lee Decl. at ¶ 87 ("I evaluate whether the Merged Entity would have the ability and economic incentive to foreclose Microsoft's rivals from Activision content in the two Consoles Markets").

The FTC also appears to contend it need only show the combined firm would have a greater ability and incentive to foreclose *Call of Duty* from its rivals than an independent Activision. (Dkt. No. 291-2, FTC's Findings and Conclusions at p. 181 ¶ 90.) This assertion, however, ignores the text of Section 7 which forbids mergers which may "substantially . . . lessen competition." 15 U.S.C. § 18. It is not enough that a merger might lessen competition—the FTC must show the merger will probably *substantially* lessen competition. That the combined firm has more of an incentive than an independent Activision says nothing about whether the combination will "substantially" lessen competition. *See UnitedHealth Grp.*, 630 F. Supp. 3d at 133 ("By requiring that [the defendant] prove that the divestiture would preserve exactly the same level of competition that existed before the merger, the Government's proposed standard would effectively erase the word 'substantially' from Section 7").

Thus, to establish a likelihood of success on its ability and incentive foreclosure theory, the FTC must show the combined firm (1) has the ability to withhold *Call of Duty*, (2) has the incentive to withhold *Call of Duty* from its rivals, and (3) competition would probably be substantially lessened as a result of the withholding.

1. Ability to Foreclose

The Court accepts the combined firm would have the ability to foreclose because it would own the *Call of Duty* franchise.

2. Incentive to Foreclose and the Resulting Lessening of Competition

a. High Performance Console Market

The Court finds the FTC has not shown a likelihood of success on its claim the combined firm would have an incentive to, and thus probably would, foreclose *Call of Duty* from Sony PlayStation.

i. No Incentive to Foreclose *Call of Duty*

First, immediately upon the merger's announcement, Microsoft committed to maintain *Call of Duty* on its existing platforms and even expand its availability. The day after the merger announcement, Microsoft's Satya Nadella and Phil Spencer spoke with Sony CEO Kenichiro Yoshida to emphasize Microsoft's commitment to enter a new agreement to extend Activision's

obligation to ship *Call of Duty* at parity on PlayStation. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 418:16-419:16, 443:18-20; RX2172; Dkt. No. 285, 6/28/23 Tr. (Nadella) at 852:23-853:8.) The next day, Sony PlayStation CEO Jim Ryan wrote his mentor about the proposed merger: "It's not an xbox exclusivity play at all. they're thinking bigger than that, and they have the cash to make moves like this. I've spent a fair bit of time with both Phil and Bobby over the past day. I'm pretty sure we will continue to see COD on PS for many years to come." (RX2064-001.)

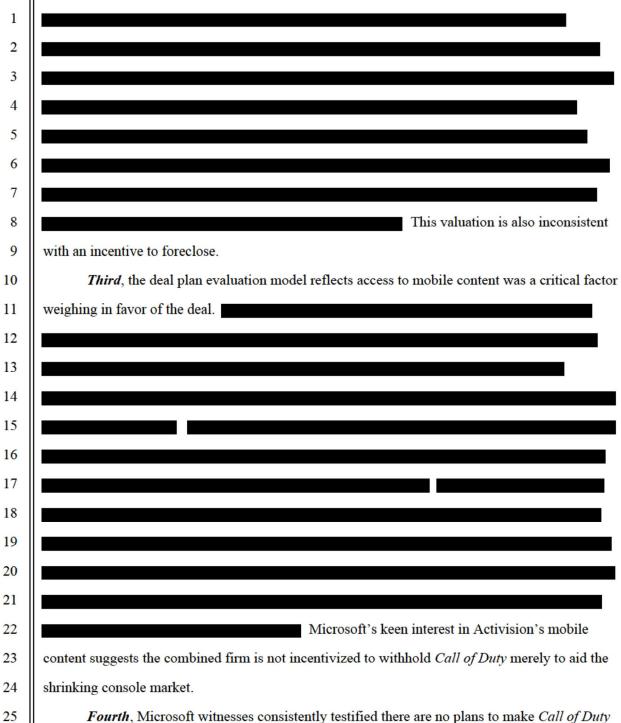
Microsoft also contacted its competitor Valve—the company that runs the leading PC game store, Steam. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 172:18-19, 173:16-19.) Xbox sent Valve a signed letter agreement committing to make *Call of Duty* available on Steam for ten years. (RX1184.) Valve did not sign the deal because they "believe strongly that they should earn the business of their—the developers who put on their platform day in and day out, and so they told us that they had had no need to sign that agreement and that they believed us when we said that we would continue to provide [*Call of Duty*] on Steam." (Dkt. No. 282, 6/22/23 Tr. (Bond) at 175:16-20.)

Microsoft even took steps to expand *Call of Duty* to non-Microsoft platforms. On the day of the merger's announcement, Microsoft called the head of Nintendo North America, Doug Bowser, and Nintendo's lead for partnerships, Steve Singer, to discuss a partnership to bring *Call of Duty* to the Switch. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 167:24-169:18.) Those discussions led to an inked deal to bring *Call of Duty* to the Switch. All of this conduct is inconsistent with an intent to foreclose.

Second, the deal plan evaluation model presented to the Microsoft Board of Directors to justify the Activision purchase price relies on PlayStation sales and other non-Microsoft platforms post-acquisition.

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exclusive to the Xbox. Mr. Nadella testified he would "[a] hundred percent" "commit to continuing to ship *Call of Duty* on the Sony PlayStation." (Dkt. No. 285, 6/28/23 Tr. (Nadella) 853:9-11.) Mr. Spencer testified "my commitment is and my testimony is, to use that word, that

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we will continue to ship Call of -- future versions of Call of Duty on Sony's PlayStation platform." (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 367:18-24, 368:4-10, 429:21-22, 429:25-430:1.)

Fifth, there are no internal documents, emails, or chats contradicting Microsoft's stated intent not to make Call of Duty exclusive to Xbox consoles. Despite the completion of extensive discovery in the FTC administrative proceeding, including production of nearly 1 million documents and 30 depositions, the FTC has not identified a single document which contradicts Microsoft's publicly-stated commitment to make Call of Duty available on PlayStation (and Nintendo Switch). (RX5056 (Carlton Report at ¶ 127.) The public commitment to keep *Call of* Duty multiplatform, and the absence of any documents contradicting those words, strongly suggests the combined firm probably will not withhold Call of Duty from PlayStation.

Sixth, Call of Duty's cross-platform play is critical to its financial success. (Dkt. No. 286, 6/29/23 Tr. (Stuart) at 1039 ("Q. And is it also profitable for Xbox to continue to have games like Minecraft be multiplatform and cross platform? A. Absolutely. The strength of a game like Minecraft comes from that cross-network play. If you, you know, removed one of those platforms and one of those big user bases, not only – not only would you have a massive brand impact, you would lose a significant revenue stream that you just couldn't make up for."); Dkt. No. 285, 6/28/23 Tr. (Kotick) at 715:18-24 ("Well, if you think about like from a business perspective and from a consumer perspective, one of the most important things is building communities of players, especially now that you have the ability to compete and socialize. And so our view has always been that you want to create your content for as many platforms as possible and build your audiences to be as big as possible.").) Cross-play thus creates an incentive to leave Call of Duty on PlayStation.

Seventh, Microsoft anticipates irreparable reputational harm if it forecloses Call of Duty from PlayStation. Mr. Spencer testified: "[u]s pulling Call of Duty from PlayStation in my view would create irreparable harm to the Xbox brand after me in so many public places, including here, talking about and committing to us not pulling Call of Duty from PlayStation." (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 367:11-15). Activision CEO Bobby Kotick confirmed Microsoft's concerns are not unfounded: "if we were to remove Call of Duty from PlayStation, it would have

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very serious reputational – it would cause reputational damage to the company." (Dkt. No. 285,
6/28/23 Tr. (Kotick), at 725:4-7); see also id. at 715:18-24 ("Well, you would alienate" gamers
"and you would have a revolt if you were to remove the game from one platform."); id. at 727:17-
22 (explaining if a degraded Call of Duty experience were offered on other platforms "you would
have vitriol from gamers that would be well deserved, and that would be very vocal and also
cause reputational damage to the company").) "[I]n assessing [Microsoft's] post-merger
incentives, the Court must consider the financial and reputational costs to [Microsoft] if it were to
breach or water down its firewall policies." See UnitedHealth Grp., 630 F. Supp. 3d 118; see also
AT&T, 916 F.3d at 1040 (D.C. Cir. 2019) ("Turner [Broadcasting] would not be willing to accept
the 'catastrophic' affiliate fee and advertising losses associated with a long-term blackout."). Why
would Microsoft risk that brand reputational harm? Especially since the video game console
market is shrinking—not growing; it is not the future of video gaming. (RX 5055-010.)

Eighth, the FTC has not identified any instance in which an established multiplayer, multiplatform game with cross-play, that is, a game that shares Call of Duty's characteristics, has been withdrawn from millions of gamers and made exclusive. (RX5056 (Carlton Report) at ¶ 15.) To the contrary, Microsoft's 2014 acquisition of Mojang, the developer of the hugely popular Minecraft franchise, exemplifies how a console seller (and Microsoft in particular) behaves when acquiring a hugely popular multiplayer cross-platform game. Minecraft is one of the most successful games of all time, and is Microsoft's largest game by revenue. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 362:24-25; RX5058-005 (Hood Decl.) at ¶ 11.) It includes a popular multiplayer mode and has produced a large community across platforms. (Dkt. No. 282, 6/22/23 Tr. (Booty) 77:23–78:1.) At the time of the Mojang acquisition, *Minecraft* was available on Xbox, PlayStation, and PC. (Id. at 78:2–7.) While Microsoft had the ability to make Minecraft exclusive, it continued to ship *Minecraft* on all those same platforms post-acquisition and made subsequent games in the franchise (e.g., Minecraft: Dungeons and Minecraft: Legends) available for Nintendo consoles and even Sony's subscription service, PlayStation Plus. (Id. at 78:11-79:4; 6/23/2023 (Spencer) at 421:8-423:1; RX3156.) Xbox CFO Tim Stuart explained the decision to ship Minecraft on "all platforms" enabled "its mass, mass, mass market" appeal. (Dkt. No. 286,

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United States District Court Northern District of California 6/29/23 Tr. (Stuart) at 976:13-977:5.) The decision was dictated by the economics and the desire not to break up existing gamer communities. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 365:13-15 ("[I]f we were to acquire something that has found customer love, users, business on another platform, we want to nurture and grow that for the games that we're building"); *id.* at 362:24-363:5 (*Minecraft* "has reached a financial level of success where it's – it's a significant profit driver for us given that it's shipping on all the platforms. So if you can get a game that's at that level of hit and that level of business, the size of the business, our job is to maintain and grow that."); RX1137.)

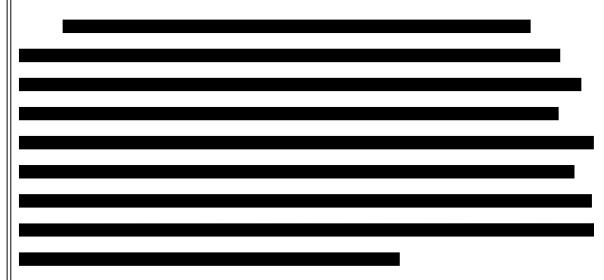
All of the above evidence points to no incentive to foreclose *Call of Duty*—a 20-year multi-platform franchise—from Sony PlayStation.

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The FTC disputes this written offer has any relevance to its <i>prima facie</i> burden. It
contends Microsoft's binding offer is a "proposed remedy" that may not be considered until the
remedy phase, that is, after a Section 7 liability finding. As support, it again relies on its own
2023 <i>Illumina</i> decision. There, relying on <i>E.I. du Pont</i> , 366 U.S. at 334, the Commission held
such agreements are "proposed remedies," and that the defendants bear the burden of proving "the
offered remedy would actually be effective." So, the FTC claims it does not have to account for
any agreements in its <i>prima facie</i> showing. Illumina, Inc. & Grail, Inc., 2023 WL 2823393, at
*49-50. But <i>E.I. du Pont</i> does not support the Commission's holding. It involved a remedy
proposed after a finding of a Section 7 violation. The Court held: "once the Government has
successfully borne the considerable burden of establishing a violation of law, all doubts as to the
remedy are to be resolved in its favor." E.I. du Pont, 366 U.S. at 334. E.I. du Pont says nothing
about whether the merger-challenging plaintiff must address offered and executed agreements
made before any liability trial, let alone liability finding; that is, whether the FTC must address the
circumstances surrounding the merger as they actually exist. The caselaw that directly addresses
the issue contradicts the FTC's position. See AT&T, 916 F.3d at 1041; UnitedHealth Grp., 2022
WL 4365867 at *15-24; FTC v. Arch Coal, Inc., No. 04-00534, Dkt. No. 67 (D.D.C. July 7, 2004)

Next, the FTC insists Microsoft's offer is simply insufficient. In so arguing, it relies exclusively on PlayStation CEO Ryan's testimony. (Dkt. No. 291-2, FTC's Findings of Fact and Conclusions of Law at pp. 159-160 ¶¶ 787-796.) The FTC's heavy reliance on Mr. Ryan's testimony is unpersuasive. Sony opposes the merger; its opposition is understandable. Before the merger Sony paid Activision for exclusive marketing rights that allowed Sony to market *Call of Duty* on PlayStation, but restricted Xbox's ability to do the same. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 162:19-165:8.) After the merger, the combined firm presumably will not agree to such restrictions. Before the merger, a consumer wanting to play a *Call of Duty* console game had to buy a PlayStation or an Xbox. After the merger, consumers can utilize the cloud to play on the device of choice, including, it is intended, on the Nintendo Switch. Perhaps bad for Sony. But good for *Call of Duty* gamers and future gamers.



ii. The FTC's Incentive Evidence is Insufficient

Notwithstanding the overwhelming evidence of the combined firm's lack of incentive to pull *Call of Duty* from PlayStation, the FTC insists it is probable the combined firm will do so because it is in its financial interests.

a. Professor Lee's Opinion

The lynchpin of the FTC's argument is the expert opinion of Professor Robin Lee, an economist. Prof. Lee opines the economic benefits of making *Call of Duty* exclusive to Xbox outweigh the costs. In particular, he concludes removing *Call of Duty* from PlayStation would result in a 5.5% increase in Xbox's share of the Gen 9 console market. (Dkt. No. 226-2, Lee Decl. ¶ 106.)

Prof. Lee's opinion does not dispute the evidence of Microsoft's lack of an economic incentive. His Vertical Foreclosure model depends on two key quantitative inputs: "the customer lifetime value ('LTV') of purchasers of Xbox consoles and the 'Xbox conversion rate." (*Id.* at ¶ 103.) Looking at the conversion rate, Prof. Lee uses projected sales data to calculate the number of expected PlayStation purchasers of *Call of Duty* (2025 version) who would instead choose to play *Call of Duty* 2025 on Xbox consoles if not available on PlayStation. From this number he excludes PlayStation owners (1) who already own an Xbox, or (2) would choose to play *Call of Duty* 2025 on PC if not available on PlayStation. The conversion rate is the fraction of remaining

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purchasers—"affected users"—that would purchase an Xbox console to play Call of Duty 2025 if it was not available on PlayStation. (Dkt. No. 226-2, Lee Decl. at ¶¶ 101, 103, 106.)

Prof. Lee's Vertical Foreclosure model assumes a conversion rate of 20%. (Dkt. No. 284, 6/27/23 Tr. (Lee) at 559:2-14 ("So with that subset of users I'm assuming 20 percent of them would purchase a new Xbox[]."); id. at 560:2-4 (agrees the 20% rate was not computed but instead was just inputted into the model).) So, the 20% figure is not based on evidence—it is an assumed input. Accepting Prof. Lee's LTV of 40%, even lowering the conversion rate just a bit, to say 17.5%, means Prof. Lee's model estimates it would **not** be profitable to withhold *Call of Duty* from PlayStation; that is, the costs in lost PlayStation Call of Duty sales outweigh the benefits of more Xbox console sales. This relationship is reflected in Figure 11 from Prof. Lee's report reproduced below:



Prof. Lee attempts to defend the reasonableness of his 20% assumption by identifying evidence he contends supports his model's output—the 5.5% share shift. In other words, the 20% assumption must be correct because other evidence supports the model's result. In his direct testimony Prof. Lee identified two pieces of support: (1) an internal 2019 Microsoft strategy memo regarding a potential acquisition, and (2) his share model output. (Dkt. No. 226-2 ¶ 106.) Neither supports his 20% conversion rate assumption.

First, the Microsoft memo states in a parenthetical: "an exclusive AAA release accounts for a 2-4% console share shift in the US and a 1-3% shift worldwide." (PX1136-004). Prof. Lee's United States District Court Northern District of California reliance on this memo snippet is misplaced. What—if any—data is behind the statement? Who came up with those figures? How were they measuring share shift? Shift from what console(s) to what console(s)? And, were those numbers addressing a new first-party game being released exclusively? Or was the author discussing taking a long-standing multiplatform cross-play game, like *Call of Duty*, exclusive. Prof. Lee does not know. Further, only the global share shift matters in Prof. Lee's model. The memo snippet, for whatever it is worth, posits a 1% to 3% share shift globally. Prof. Lee testified a 2% share shift would **not** make it economically beneficial to make *Call of Duty* exclusive to Xbox consoles; thus, the slide does not support Prof. Lee's 20% conversion rate input. (Dkt. No. 284, 6/27/23 Tr. (Lee) at 581:1-7.)⁶

Second, Prof. Lee points to his share model. (Dkt. No. 226-2, Lee Decl. at ¶ 106.) He says this model results in an 8.6% share shift; therefore, the more conservative 5.5% share shift output from his Vertical Foreclosure model is reasonable. But the share model output is also flawed. As a preliminary matter, it is based on Gen 8 console data from only the United States, rather than global Gen 9 data. But putting that aside, as Dr. Carlton observed, Prof. Lee's share model "ignores the presence of non-exclusive games in influencing console choice" even though Prof. Lee acknowledges non-exclusive games do influence console choice. (Dkt. No. 294-2, Carlton Decl. at ¶¶ 26-27.) Prof. Lee's reply report's attempt to fix this error fails because he again accords no value to non-exclusive games in consumer choice. (Id. at ¶¶ 29-30.) Further, Dr. Carlton also contends Prof. Lee's share model assumes every lost PlayStation 4 results in an additional Xbox sale, even though consumers may choose a different device to play Call of Duty (PC, mobile, cloud) or to not play Call of Duty on any device at all. (Id. at ¶¶ 32-34.) When Dr. Carlton corrects for this error, Prof. Lee's share model is between 1% and 54% of what Prof. Lee predicts and thus does not support his critical 20% conversion rate. (Id. at ¶ 35.)

because Call of Duty has such high sales compared to other AAA titles, so Call of Duty's share shift will be higher. (Dkt. No.226-2, Lee Decl. at $\P\P$ 32, 104; Dkt. No. 291-2, FTC's Findings and Conclusions at pp. 100-101 \P 499.) That circular assertion, however, relies upon his share model which, discussed next, is flawed.

⁶ Undaunted, Prof. Lee insists even the 2-3% share shift is consistent with his 5.5% estimate

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United States District Court Northern District of California was not.

And what does Prof. Lee say about Dr. Carlton's criticism? Nothing in his direct testimony. (*See* Dkt. No. 262-2, Lee Decl.) At the evidentiary hearing on re-direct? Nothing. (Dkt. No. 284, 6/27/23 Tr. (Lee) at 615:9-651:22.) And when the FTC cross-examined Dr. Carlton on his written direct testimony? Again, nothing. (Dkt. No. 285, 6/28/23 Tr. (Carlton) at 855:6-898:1.) The FTC chose not to challenge, or even address, Dr. Carlton's identification of material flaws in Prof. Lee's share model. The criticism thus stands unscathed—and persuasive. So, the share model does not justify Prof. Lee's reliance on the strategy memo snippet reporting console shares move 1% to 3% globally with exclusive AAA content.

But Prof. Lee's assumption as to what was being measured was wrong. The slide does not support his conversion rate. In any event, before Prof. Lee could persuasively opine the "pivotal" conversion rate is supported by a survey result, he would need to be familiar with the survey and its design. As his testimony showed, he

Dr. Lee's opinion suffers from several additional weaknesses. It fails to consider

Microsoft's agreement with Nintendo and the cloud streaming services to provide ongoing access

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to Call of Duty—all of which will increase access. It also fails to consider Microsoft's offer to Sony. Nor did he consider any reputational harm to Microsoft from pulling Call of Duty from millions of players. Regardless, for the reasons explained, his opinion does not show the combined firm will probably have an economic incentive to withhold Call of Duty from PlayStation. He simply assumed a concession rate for his model that would make exclusivity profitable, but there is no evidence to support that assumption.

ZeniMax

While the FTC asserts Microsoft's 2014 Minecraft acquisition is not relevant to how it will treat Call of Duty, it insists Microsoft's 2021 acquisition of ZeniMax is predictive of how the combined firm will behave. Specifically, although Microsoft's deal valuation shared with the Board of Directors contemplated keeping ZeniMax content multiplatform, it later decided to make two new ZeniMax titles—Starfield and Redfall—exclusive. Agreed this evidence shows Microsoft's deal valuation for the Activision acquisition is not dispositive of the incentive question. But it does not dispute the evidence that Microsoft does not have an incentive to withdraw Call of Duty from PlayStation. Neither Starfield nor Redfall are remotely similar to Call of Duty. Starfield is a role-playing game that has not been released. Redfall is a first-person shooter game that was only released in May 2023.

The question is whether it makes financial sense to wrest *Call of Duty* from PlayStation.

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Effect on Innovation c.

The FTC also insists the merger will decrease innovation because game developers and publishers will not want to work with Microsoft. But the only evidence the FTC identifies is Sony's reluctance to share its intellectual property with Microsoft and provide development kits for its consoles. But this is not merger-specific and it fails to account for all the other developers who might now be incentivized to collaborate with Xbox or one of its studios like Activision or Bethesda. Cf. UnitedHealth Grp., 650 F. Supp. 3d at 151 ("The Government did not call a single rival payer to offer corporate testimony that it would innovate less or compete less aggressively if the proposed merger goes through. Nor did any of the rival payer employees who did testify support the Government's theory.") Protecting Sony's decision to delay collaboration with Microsoft and therefore PlayStation users' access to Microsoft's content is not pro-competitive.

d. **Partial Foreclosure**

Finally, in its reply brief in support of its preliminary injunction motion (but not its original moving papers), and throughout the evidentiary hearing, the FTC alluded to the possibility of partial foreclosure. Partial foreclosure might involve releasing Call of Duty later on PlayStation than Xbox, or having a Call of Duty Christmas character in the Xbox version, but not the PlayStation version. (See Dkt. No. 286, 6/29/23 Tr. (Closing) at 1100:2-4, 1100:17-23.) Or it could be technologically degrading the players' experience on one console versus another. (PX5000-181 (Lee Report) at ¶ 477.)

But the FTC has no expert testimony to support a finding the combined firm would have the incentive to engage in such conduct. Prof. Lee did not engage in any quantitative analysis of partial foreclosure. Anyway, under the FTC's theory, the goals of full and partial foreclosure are the same: move enough PlayStation users to Xbox such that the benefits to the combined firm outweigh the costs. If the FTC has not shown a financial incentive to engage in full foreclosure, then it has not shown a financial incentive to engage in partial foreclosure.

Moreover, Mr. Kotick testified he was unaware of a developer intentionally developing a "subpar game for one platform versus another." (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 728:2–6.) Such conduct would obviously draw "vitriol from gamers that would be well deserved," and

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would "cause reputational damage to the company." (Id. at 727:20-22.) Consistent with that testimony, the record does not include any evidence Microsoft has engaged in such conduct in the past—even with Sony.

The FTC's partial foreclosure theory fails.

In sum, the FTC has not shown a likelihood of success on its theory the merger may substantially lessen competition in the Gen 9 console market because the combined firm will have the ability and incentive to foreclose Call of Duty from PlayStation. While it is possible, Call of Duty's long history as a highly popular, multiplatform cross-play game make that result not probable. The Court has focused on Call of Duty, rather than other Activision AAA content, because the FTC's evidence focused on this one game. While other games, such as Diablo, are certainly popular, the FTC did not offer evidence that if Call of Duty remains multiplatform in the console market, making Diablo or other Activision titles exclusive to Xbox would probably substantially lessen competition in that market.

b. The Remaining Markets

For purposes of the library subscriptions services market and the cloud streaming market, which Dr. Lee refers to collectively as the "Gaming Services Market," the FTC contends the merger will probably have anticompetitive effects because Microsoft would (1) have a greater economic incentive to engage in foreclosure than an independent Activision; and (2) "would likely have the economic incentive to engage in foreclosure." (Dkt. No. 226-2 at ¶¶ 7, 189).

As a threshold matter, the question is not whether Microsoft following the merger is more likely to engage in foreclosure than an independent Activision. The question is whether "the proposed merger is likely to substantially lessen competition, which encompasses a concept of 'reasonable probability.'" AT&T, 916 F.3d at 1032. As Microsoft notes, "a vertically integrated firm's incentives are always more complex in that respect than the standalone incentives of its components. In other words, if this merger could be condemned simply because the combined company would derive some economic benefit from withholding, any vertical merger could be

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condemned on the same ground, despite the indisputable pro-competitive effects of many vertical mergers." (Dkt. No. 292-2, COL at ¶ 152 (emphasis in original).) Accordingly, to prevail on its preliminary injunction motion, the FTC must demonstrate a likelihood of success on its assertion there is a reasonable probability the proposed merger will substantially lessen competition in the library subscription services market and cloud streaming market.

Library Subscription Services Market

The FTC argues Xbox will include Call of Duty in its Game Pass library subscription service, but refuse to include it in rival services. This exclusion, it contends, will lessen competition in that market and make it likely Xbox will increase the Game Pass price. (Dkt. No. 291-2, FTC's Findings and Conclusions at p. 138 ¶¶ 659, 661.)

It is undisputed the combined firm has significant financial incentives to include Call of Duty in Game Pass. (See PX1763-013; PX2138-001.) The Court accepts for preliminary injunction purposes it is likely Call of Duty will be offered exclusively on Game Pass, and not offered on rival subscription services. The countervailing incentives that exist in the console market—longstanding multiplatform availability, cross-play, historically high revenue from games sold—do not apply to the subscription market since Call of Duty is not and never has been offered (in any significant sense) on a multigame library subscription service. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 731:5-7.) But the record does not support a finding of a serious question as to whether Call of Duty Game Pass exclusivity will probably substantially lessen competition in the subscription services market.

First, the merger has the procompetitive effect of expanding access to *Call of Duty*. Adding Call of Duty to Game Pass gives consumers a new, lower cost way to play the game day and date. (RX3166-016.) Further, Dr. Carlton explains how adding Call of Duty, and Activision content in general, will actually lower costs for many game consumers and harm none. (RX5056 (Carlton Report) at ¶¶ 141-142.) Dr. Carlton also opines "the merger can be expected to result in an increased incentive to invest in game development than would occur otherwise" because "adding [Call of Duty] to Game Pass will result in an increase in the number of Game Pass users, [and] that increase gives Microsoft more incentive to invest in other games, not just Activision

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games." (Id .at ¶ 144); see Chi. Pro. Sports Ltd. P'ship v. NBA, 95 F.3d 593, 597 (7th Cir. 1996)
("The core question in antitrust is output."); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222 (11th
Cir. 1991) ("[W]hether an acquisition would yield significant efficiencies is an important
consideration in predicting whether the acquisition would substantially lessen competition.").

Second, the FTC does not identify evidence that disputes these procompetitive effects. Prof. Lee admits "Exclusivity can have both pro and anticompetitive effects." (Dkt. No. 284, 6/27/23 Tr. (Lee) at 603:8; see Dkt. No. 226-2, Lee Decl. at ¶¶ 113, 132.) Yet he did not perform any quantitative analysis to estimate whether adding Call of Duty to Game Pass, and not other subscription services, will injure competition. Will some people subscribe to Game Pass because of Call of Duty? Yes. But there is no analysis of how many, or how it will affect competition with Game Pass competitors such as Amazon, Electronic Arts, Ubisoft and Sony. (Dkt. No. 284, 6/27/23 Tr. (Lee) at 638:11–15 (Lee testifying cloud gaming and content library services are "both relatively nascent and new compared to consoles, and the lack of really good data for these services made it very difficult to perform something that I would view as reliable that's quantitative for those markets."); RX5056 (Carlton Report) at ¶ 138.)

The FTC's primary argument appears to be that even without the merger, Activision will contract to put its content, including Call of Duty, on subscription services. The record evidence is to the contrary. Activision believes it is not in its financial interest to do so because it would cannibalize individual sales. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 744:10-11.) Kotick cannot imagine a subscription service agreeing to the financial terms Activision would require to make it a financial win for Activision. (Id. at 752:17-19, 752:8-11.)

Consistent with Mr. Kotick's testimony, in 2020 Xbox attempted to negotiate placing certain Activision titles on Game Pass. Activision refused. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at **751:1-8.**) **■**

And Activision has no plans to put its

content on a game library subscription service. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 729:3-7, 746:19-21.) The FTC does not offer any explanation, let alone evidence, as to why it would be financially beneficial for Activision to change its long-held stance on subscription services.

In sum, the FTC has not raised serious questions on whether the merger will probably substantially lessen competition in the game library subscription services market.

(ii) Cloud Streaming Market

The FTC has also failed to show a likelihood of success on its claim the merger will probably lessen competition in the cloud gaming market because the combined firm will foreclose Activision's content, including *Call of Duty*, from cloud-gaming competitors. This argument is foreclosed by Microsoft's post-FTC complaint agreements with five cloud-streaming providers. Before the merger, there is no access to Activision's content on cloud-streaming services. After the merger, *several* of Microsoft's cloud-streaming competitors will—for the first time—have access to this content. The merger will enhance, not lessen, competition in the cloud-streaming market.

At trial the FTC argued that the cloud-streaming competitors based outside the United States should not be considered because their servers are likely outside the United States and thus their cloud services are not effective for United States consumers. But the FTC is merely guessing; Microsoft has offered evidence that "Boosteroid (a Ukrainian company) has gaming servers in Pennsylvania, North Carolina, Texas, Illinois, Florida, Washington." (Dkt. No. 292-2, Defendants' Findings of Fact and Conclusions of Law (Defs' Findings and Conclusions) p. 138 ¶ 163.)

The FTC's response, again, is that an independent Activision would agree to put its content on cloud-gaming services. But, again, it offers no quantitative evidence to support this bald

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assertion; Prof. Lee did not model the cloud gaming market. And, the fact is, Activision content is
not currently on any cloud-streaming service. And it is not likely to be available absent the
merger. (See Dkt. No. 285, 6/28/23 Tr. (Kotick) at 731:15-18; id. at 753:13-15.) Activision
previously pulled Call of Duty from GeForce NOW following beta testing. (Id. at 754:1-5.) And
it has not been on a cloud-streaming service since. The FTC has not shown it is likely an
independent Activision would do what Microsoft has agreed to do by contract See Tenneco, Inc. v
FTC, 689 F.2d 346, 354 (2d Cir. 1982) (rejecting the FTC's "unsupported speculation" "Tenneco
would have entered the market absent its acquisition of Monroe"); Fruehauf Corp. v. FTC,
603 F.2d 345, 355 (2d Cir. 1979) (rejecting the FTC's theory of anticompetitive effects as "based
on speculation rather than fact").

Finally, the FTC argues the cloud-streaming agreements are irrelevant to its prima facie showing as they are mere "proposed remedies." The Court's analysis as to the Sony proposal, infra at Section II.B.2.a.i, applies equally to the cloud-streaming agreements. Indeed, it has even more force here where the competitor—Nvidia and others—have actually entered into the agreements. The Court cannot ignore this factual reality. The combined firm will probably not have an incentive to breach these agreements and make Activision content exclusive to xCloud.

3. FTC's Brown Shoe Foreclosure Theory

Alternatively, the FTC argues that it has established a likelihood of success on its theory that under "the Brown Shoe functional liability factors," the proposed merger's "very nature and purpose" is anticompetitive, there is a "trend toward concentration in the industry," and the merger would "increase entry barriers in the Relevant Markets." (Dkt. No. 291-2, FTC's Findings and Conclusions at pp. 181-182 ¶¶ 95-99 (citing *Brown Shoe*, 370 U.S. 294 at 329–30.) As an initial matter, the FTC made no reference to this theory in its opening statement or closing argument. Nor is it discussed by Dr. Lee's expert report; he addressed only Microsoft's ability and incentive to foreclose.

As to the theory's merits, the FTC does not make any new arguments not considered above. The FTC maintains the "[p]roposed Acquisition's purpose is to transform an independent, 'platform-agnostic' source of supply into a captive one controlled exclusively by Microsoft," (Id.

at pp. 181-182 ¶ 95), but this would be true in any vertical merger and does not explain why it demonstrates an anticompetitive purpose. Likewise, while the FTC argues Microsoft's "past conduct following similar transactions also demonstrates its likely anticompetitive nature," presumably referring to the ZeniMax acquisition, this ignores the Mojang/*Minecraft* acquisition. (*Id.*) To the extent the FTC relies on a "trend toward further concentration in the industry" (*Id.* at p. 182 \P 96), it fails to explain how this trend is anticompetitive here—Microsoft's investment in game developers and publishers allows for increased innovation in content and Microsoft has prioritized a "content pipeline." (PX1154-001.)

In sum, the FTC has not raised serious questions regarding whether the proposed merger is likely to substantially lessen competition in the console, library subscription services, or cloud gaming markets. As such, the FTC has not demonstrated a likelihood of ultimate success as to its Section 7 claim based on a vertical foreclosure theory.

III. BALANCING OF THE EQUITIES

Because the FTC has not demonstrated a likelihood of ultimate success on the merits, the Court need not proceed to the balance of equities question. *See United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980). The Court finds, however, that even if the FTC had met its burden, the balance of equities do not fall in its favor. The FTC correctly notes private equities, such as the potential skuttling of the merger if it does not close by July 18, "cannot on its own overcome the public equities that favor the FTC." *FTC v. Wilh. Wilheslmsen Holding ASA*, 341 F. Supp. 3d 27, 73-74 (D.D.C. 2018); *see also Warner*, 742 F.2d at 1165 ("When the Commission demonstrates a likelihood of ultimate success, a countershowing of private equities alone does not justify denial of a preliminary injunction").

But the balancing of equities is not a pointless exercise. In *Warner*, for example, the Ninth Circuit observed "public equities may include beneficial economic effects and pro-competitive advantages for consumers." *Id.* at 1165 (cleaned up). Because in that case the record contained "conflicting evidence on the anticompetitive effects of the merger," the Ninth Circuit held it was unclear whether those public equities supported the grant or denial of the preliminary injunction.

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Id. It nonetheless held the public equities outweighed the private because the Commission would be denied effective relief if it ultimately prevailed and ordered divestiture. The court reasoned: "Since the proposed joint venture calls for Polygram to dismantle its distribution operations, it would be exceedingly difficult for Polygram to revive the operations to comply with a divestiture order." Id.

Here, at best "the record contains conflicting evidence on the anticompetitive effects of the merger"; thus, the FTC cannot point to beneficial economic effects as a public equity. *Id.* Moreover, the administrative trial before the ALJ commences on August 2, in just a few weeks. By pre-existing contract, Call of Duty will remain on PlayStation through the end of 2024. There will be no foreclosure of Call of Duty pending the ALJ's decision. Gamers will be able to play just as they always have.

The FTC insists the difficulty in ordering post-acquisition divestiture is the public equity that prevails. (Dkt. No. 291-2, FTC's Findings and Conclusions at p. 194-195 ¶ 153.) But it does not cite anything specific about this merger to support that assertion. It is a vertical acquisition. Microsoft and Activision will act as parent and subsidiary. There is no planned dismantling of operations, as in Warner. What exactly about the merger would make it difficult to order an effective divestiture? The FTC does not say. Its argument, at bottom, is the equities always weigh in favor of a preliminary injunction. But that argument ignores the law. So, the balance of equities is a separate, independent reason the FTC's motion must be denied.

CONCLUSION

Microsoft's acquisition of Activision has been described as the largest in tech history. It deserves scrutiny. That scrutiny has paid off: Microsoft has committed in writing, in public, and in court to keep Call of Duty on PlayStation for 10 years on parity with Xbox. It made an agreement with Nintendo to bring Call of Duty to Switch. And it entered several agreements to for the first time bring Activision's content to several cloud gaming services.

This Court's responsibility in this case is narrow. It is to decide if, notwithstanding these current circumstances, the merger should be halted—perhaps even terminated—pending resolution of the FTC administrative action. For the reasons explained, the Court finds the FTC has not

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shown a likelihood it will prevail on its claim this particular vertical merger in this specific

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industry may substantially lessen competition. To the contrary, the record evidence points to more consumer access to *Call of Duty* and other Activision content. The motion for a preliminary injunction is therefore DENIED.

This Opinion constitutes the findings of fact and conclusions of law required by Federal

Rule of Civil Procedure 52. Given the compressed time the Court had to issue a written opinion in light of the impending termination date, there will likely be errors in the citations. And, for the same reason, the Opinion does not address every argument the FTC makes in its 196-page post-trial submission, nor cite every piece of evidence supporting the Court's findings. Because the decision on the FTC's request for a preliminary injunction "effectively terminate[s] the litigation and constitute[s] a final order," this case is DISMISSED. *See FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 165 n.2 (3d Cir. 2022). The Court MODIFIES its temporary restraining order such that the temporary restraining order will dissolve at 11:59 p.m. on July 14, 2023 unless the FTC obtains a stay pending appeal from the Ninth Circuit Court of Appeals.

This Opinion is filed under seal. At the same time it is filed, the Court will file a redacted version under seal. In an abundance of caution, it is overly redacted. The parties shall meet and confer with the non-parties, and on or before July 18, 2023, submit a new proposed redacted version of this Opinion.

IT IS SO ORDERED.

Dated: July 10, 2023

Acqueline Statt Orly
Acqueline Scott Corley

U.S. District Court California Northern District (San Francisco) CIVIL DOCKET FOR CASE #: 3:22-cv-08991-JSC

Demartini et al v. Microsoft Corporation Assigned to: Judge Jacqueline Scott Corley Relate Case Cases: 3:23-mc-80087-JSC

3:23-cv-02880-JSC

Case in other court: for the Ninth Circuit, 23-15846

Cause: 15:1 Antitrust Litigation

Plaintiff

Dante Demartini

Date Filed: 12/20/2022 Jury Demand: Plaintiff

Nature of Suit: 410 Anti-Trust Jurisdiction: Federal Question

represented by Joseph M Alioto, Sr

Alioto Law Firm One Sansome Street, 35th Floor San Francisco, CA 94104 (415) 434-8900 Fax: (415) 434-9200 Email: jmalioto@aliotolaw.com

LEAD ATTORNEY ATTORNEY TO BE NOTICED

Joseph Michelangelo Alioto, Jr

Alioto Legal 100 Pine Street Suite 1250 San Francisco, CA 94111 415-398-3800 Email: joseph@aliotolegal.com LEAD ATTORNEY ATTORNEY TO BE NOTICED

Lingel Hart Winters

Law Offices of Lingel H. Winters 388 Market Street, Suite 900 San Francisco, CA 94111 (415) 398-2941 Fax: (415) 393-9887 Email: sawmill2@aol.com LEAD ATTORNEY ATTORNEY TO BE NOTICED

Cadio R. Zirpoli

Joseph Saveri Law Firm, LLP 601 California St Ste 1000 San Francisco, CA 94108 415-500-6800

Fax: 415-395-9940

Email: czirpoli@saverilawfirm.com ATTORNEY TO BE NOTICED

David H. Seidel

Joseph Saveri Law Firm, Inc. 601 California, Suite 1000 San Francisco, CA 94108 (415) 500-6800 Email: dseidel@saverilawfirm.com ATTORNEY TO BE NOTICED

Elissa Amlin Buchanan

Joseph Saveri Law Firm 601 California St. San Francisco, CA 94108 United Sta 415-596-5436 Email: eabuchanan@saverilawfirm.com ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

Joseph Saveri Law Firm, Inc. 601 California Ste 1000 San Francisco, CA 94108 415-500-6800 Email: kmcmahon@saverilawfirm.com ATTORNEY TO BE NOTICED

Lawrence Genaro Papale

Law Offices of Lawrence G. Papale The Cornerstone Building 1308 Main Street, Suite 117 St. Helena, CA 94574 707-963-1704 Email: lgpapale@papalelaw.com *ATTORNEY TO BE NOTICED*

Steven Noel Williams

Joseph Saveri Law Firm, LLP 601 California Street, Suite 1000 San Francisco, CA 94108 (415) 500-6800 Fax: (415) 395-9940 Email: swilliams@saverilawfirm.com ATTORNEY TO BE NOTICED

Tatiana V Wallace

Alioto Law Firm One Sansome Street, 35th Floor San Francisco, CA 94104 Email: twallace@aliotolaw.com ATTORNEY TO BE NOTICED

Joseph R. Saveri

Joseph Saveri Law Firm, LLP 601 California Street, Suite 1000 San Francisco, CA 94108 (415) 500-6800 Fax: (415) 395-9940 Email: jsaveri@saverilawfirm.com ATTORNEY TO BE NOTICED

Plaintiff

Curtis Burns, Jr.

represented by Lingel Hart Winters

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cadio R. Zirpoli

(See above for address)

ATTORNEY TO BE NOTICED

David H. Seidel

(See above for address)

ATTORNEY TO BE NOTICED

Elissa Amlin Buchanan

(See above for address)

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

ATTORNEY TO BE NOTICED

Tatiana V Wallace

(See above for address) *ATTORNEY TO BE NOTICED*

Joseph R. Saveri

(See above for address)

ATTORNEY TO BE NOTICED

Plaintiff

Nicholas Elden

represented by Joseph M Alioto, Sr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Lingel Hart Winters

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cadio R. Zirpoli

(See above for address)

ATTORNEY TO BE NOTICED

David H. Seidel

(See above for address)

ATTORNEY TO BE NOTICED

Elissa Amlin Buchanan

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

ATTORNEY TO BE NOTICED

Tatiana V Wallace

(See above for address)

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

ATTORNEY TO BE NOTICED

Plaintiff

Jessie Galvan

represented by Joseph M Alioto, Sr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph Michelangelo Alioto, Jr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Lingel Hart Winters

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cadio R. Zirpoli

(See above for address)

ATTORNEY TO BE NOTICED

David H. Seidel

(See above for address)

ATTORNEY TO BE NOTICED

Elissa Amlin Buchanan

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

ATTORNEY TO BE NOTICED

Tatiana V Wallace

(See above for address)

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

ATTORNEY TO BE NOTICED

Plaintiff

Christopher Joseph Giddings-Lafaye

represented by Joseph M Alioto, Sr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph Michelangelo Alioto, Jr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Lingel Hart Winters

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cadio R. Zirpoli

(See above for address)

ATTORNEY TO BE NOTICED

David H. Seidel

(See above for address)
ATTORNEY TO BE NOTICED

Elissa Amlin Buchanan

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address) *ATTORNEY TO BE NOTICED*

Steven Noel Williams

(See above for address)

ATTORNEY TO BE NOTICED

Tatiana V Wallace

(See above for address)

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

ATTORNEY TO BE NOTICED

Plaintiff

Steve Herrera

represented by Joseph M Alioto, Sr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph Michelangelo Alioto, Jr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Lingel Hart Winters

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cadio R. Zirpoli

(See above for address)

ATTORNEY TO BE NOTICED

David H. Seidel

(See above for address)
ATTORNEY TO BE NOTICED

Elissa Amlin Buchanan

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

ATTORNEY TO BE NOTICED

Tatiana V Wallace

(See above for address)

ATTORNEY TO BE NOTICED

Joseph R. Saveri

Plaintiff

Hunter Joseph Jakupko

represented by Joseph M Alioto, Sr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph Michelangelo Alioto , Jr (See above for address)

LEAD ATTORNEY ATTORNEY TO BE NOTICED

Lingel Hart Winters

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cadio R. Zirpoli

(See above for address)

ATTORNEY TO BE NOTICED

David H. Seidel

(See above for address)

ATTORNEY TO BE NOTICED

Elissa Amlin Buchanan

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)
ATTORNEY TO BE NOTICED

Tatiana V Wallace

(See above for address)

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

ATTORNEY TO BE NOTICED

Plaintiff

Daniel Dermot Alfred Loftus

represented by Joseph M Alioto, Sr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph Michelangelo Alioto, Jr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Lingel Hart Winters

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cadio R. Zirpoli

(See above for address)

ATTORNEY TO BE NOTICED

David H. Seidel

(See above for address)

ATTORNEY TO BE NOTICED

Elissa Amlin Buchanan

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

ATTORNEY TO BE NOTICED

Tatiana V Wallace

(See above for address)

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

ATTORNEY TO BE NOTICED

Plaintiff

Beowulf Edward Owen

represented by Joseph M Alioto, Sr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph Michelangelo Alioto, Jr

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Lingel Hart Winters

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cadio R. Zirpoli

(See above for address)

ATTORNEY TO BE NOTICED

David H. Seidel

(See above for address)

ATTORNEY TO BE NOTICED

Elissa Amlin Buchanan

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

ATTORNEY TO BE NOTICED

Tatiana V Wallace

(See above for address)

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

ATTORNEY TO BE NOTICED

Plaintiff

Ivan Calvo-Prez

represented by Lingel Hart Winters

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cadio R. Zirpoli

(See above for address)

ATTORNEY TO BE NOTICED

David H. Seidel

(See above for address)

ATTORNEY TO BE NOTICED

Elissa Amlin Buchanan

(See above for address)

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

ATTORNEY TO BE NOTICED

Tatiana V Wallace

(See above for address)

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

ATTORNEY TO BE NOTICED

V.

Defendant

Microsoft Corporation

represented by Beth A. Wilkinson

WILKINSON STEKLOFF LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
202-847-4010
Fax: 202-847-4005
Email: bwilkinson@wilkinsonstekloff.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Rakesh Kilaru

Wilkinson Stekloff LLP 2001 M Street NW, 10th Floor Washington, DC 20036 (202) 847-4046 Fax: (202) 847-4005 Email: rkilaru@wilkinsonstekloff.com *LEAD ATTORNEY PRO HAC VICE ATTORNEY TO BE NOTICED*

Valarie Cecile Williams

Alston & Bird

560 Mission Street
Suite 2100
San Francisco, CA 94105
415-243-1000
Fax: 415-243-1001
Email: valarie.williams@alston.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Anastasia McLetchie Pastan

Wilkinson Stekloff LLP 2001 M Street NW 10 FL Washington, DC 20036 202-804-4239 Fax: 202-847-4005

Email: apastan@wilkinsonstekloff.com

PRO HAC VICE

ATTORNEY TO BE NOTICED

Anthony Patrick Ferrara

Wilkinson Stekloff LLP 2001 M Street, N.W. Ste 10th Floor Washington, DC 20036 202-847-4024 Email: aferrara@wilkinsonstekloff.com PRO HAC VICE

ATTORNEY TO BE NOTICED

Brian Parker Miller

Alston & Bird LLP 1201 W Peachtree St Atlanta, GA 30309 404-881-4970 Email: parker.miller@alston.com PRO HAC VICE ATTORNEY TO BE NOTICED

Drew Kenneth Cypher

Weil, Gotshal & Manges LLP
District of Columbia
2001 M Street, NW
Suite 600
Washington
Washington, DC 20036
202-682-7000
Fax: 202-857-0940
Email: drew.cypher@weil.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Grace Lee Hill

Wilkinson Stekloff LLP 2001 M Street, N.W. Ste 10th Floor Washington, DC 20036 202-847-4044 Email: ghill@wilkinsonstekloff.com PRO HAC VICE ATTORNEY TO BE NOTICED

Jennifer Pavelec

Wilkinson Stekloff LLP 2001 M Street NW 10th Floor Washington, DC 20036 202-991-5276 Email: jpavelec@wilkinsonstekloff.com

277a

PRO HAC VICE ATTORNEY TO BE NOTICED

Kieran Gavin Gostin

WILKINSON STEKLOFF LLP 2001 M St NW 10th Floor Washington, DC 20036 202-847-4031

Fax: 202-847-4005

Email: kgostin@wilkinsonstekloff.com

PRO HAC VICE

ATTORNEY TO BE NOTICED

Michael Moiseyev

Weil, Gotshal & Manges 2001 M Street NW Suite 600 Washington, DC 20036 202-682-7235 Email: michael.moiseyev@weil.com PRO HAC VICE ATTORNEY TO BE NOTICED

Robert Niles-Weed

Weil Gotshal & Manges LLP 767 Fifth Avenue New York, NY 10153 212-310-8000 Email: robert.niles-weed@weil.com PRO HAC VICE ATTORNEY TO BE NOTICED

Tania L. Rice

Alston & Bird LLP
Alston & Bird LLP
560 Mission Street
Suite 2100
San Francisco, CA 94105-____
415-243-1000
Fax: 415-243-1001
Email: tania.rice@alston.com
ATTORNEY TO BE NOTICED

Miscellaneous

Sony Interactive Entertainment LLC

represented by Carl Lawrence Malm

Cleary Gottlieb Steen and Hamilton LLP 2112 Pennsylvania Avenue, NW Suite 1000 Washington, DC 20037 (202) 974-1500 Fax: (202) 974-1999

Email: lmalm@cgsh.com PRO HAC VICE

PRO

ATTORNEY TO BE NOTICED

Ye Eun Chun

Cleary Gottlieb Steen & Hamilton LLP 1841 Page Mill Road Palo Alto, CA 94304-1254 650-815-4111 Email: chchun@cgsh.com ATTORNEY TO BE NOTICED

Zachary G. Tschida

Cleary Gottlieb Steen & Hamilton LLP 1841 Page Mill Road Palo Alto, CA 94304 650-815-4113 Fax: 650-815-4199

Email: ztschida@cgsh.com ATTORNEY TO BE NOTICED

Miscellaneous

Activision Blizzard, Inc.

represented by Caroline W Van Ness

SKADDEN ARPS SLATE MEAGHER and FLOM LLP 525 University Avenue Suite 1400 Palo Alto, CA 94301

(650) 470-4500 Fax: (650) 470.4570

Email: caroline.vanness@skadden.com

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Miscellaneous

FTC

represented by James Harris Weingarten

Federal Trade Commission 400 7th Street SW Washington, DC 20024 202-326-3570 Email: jweingarten@ftc.gov

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/20/2022	1	COMPLAINT against All Defendants (Filing fee \$ 402, receipt number ACANDC-17837872.). Filed bySteve Herrera, Nicholas Elden, Hunter Joseph Jakupko, Beowulf Edward Owen, Curtis Burns, Jr, Daniel Dermot Alfred Loftus, Dante Demartini, Jessie Galvan, Ivan Calvo-Prez, Christopher Joseph Giddings-Lafaye. (Attachments: # 1 Civil Cover Sheet)(Saveri, Joseph) (Filed on 12/20/2022) (Entered: 12/20/2022)
12/20/2022	2	Proposed Summons. (Saveri, Joseph) (Filed on 12/20/2022) (Entered: 12/20/2022)
12/20/2022	3	Case assigned to Magistrate Judge Joseph C. Spero.

		Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit <i>E-Filing A New Civil Case</i> at http://cand.uscourts.gov/ecf/caseopening. Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges. Upon receipt, the summons will be issued and returned electronically. A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 1/3/2023. (jrs, COURT STAFF) (Filed on 12/20/2022) (Entered: 12/20/2022)
12/20/2022	4	MOTION for Preliminary Injunction filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. Motion Hearing set for 1/26/2023 09:00 AM before Judge ABC. Responses due by 1/3/2023. Replies due by 1/10/2023. (Attachments: # 1 Declaration of David Seidel, # 2 Exhibit A & B to Seidel Declaration, # 3 Declaration of Dante Demartini, # 4 Declaration of Curtis Burns Jr., # 5 Declaration of Nicholas Elden, # 6 Declaration of Jessie Galvan, # 7 Declaration of Christopher Joseph Giddings-Lafaye, # 8 Declaration of Steve Herrera, # 9 Declaration of Hunter Joseph Jakupko, # 10 Declaration of Daniel Dermot Alfred Loftus, # 11 Declaration of Beowulf Edward Owen, # 12 Declaration of Ivan Calvo-Prez, # 13 Proposed Order)(Saveri, Joseph) (Filed on 12/20/2022) (Entered: 12/20/2022)
12/20/2022	<u>5</u>	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen (Saveri, Joseph) (Filed on 12/20/2022) (Entered: 12/20/2022)
12/20/2022	6	CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because either (1) a party has not consented to the jurisdiction of a Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned. ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT
		MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED. This is a text only docket entry; there is no document associated with this notice. (klh,
12/21/2022	7	COURT STAFF) (Filed on 12/20/2022) (Entered: 12/20/2022) Summons Issued as to Microsoft Corporation. (jml, COURT STAFF) (Filed on 12/21/2022) (Entered: 12/21/2022)
12/21/2022	8	Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 3/17/2023. Initial Case Management Conference set for 3/24/2023 02:00 PM in San Francisco, Courtroom F, 15th Floor. (jml, COURT STAFF) (Filed on 12/21/2022) (Entered: 12/21/2022)
12/21/2022	9	ORDER REASSIGNING CASE. Case reassigned using a proportionate, random, and blind system pursuant to General Order No. 44 to Judge Vince Chhabria for all further proceedings. Magistrate Judge Joseph C. Spero no longer assigned to case, Notice: The assigned judge participates in the Cameras in the Courtroom Pilot Project. See General Order No. 65 and http://cand.uscourts.gov/cameras. Signed by

		Clerk on 12/21/2022. (Attachments: # 1 Notice of Eligibility for Video Recording) (mbc, COURT STAFF) (Filed on 12/21/2022) (Entered: 12/21/2022)
12/22/2022	10	REASSIGNED CASE - NOTICE OF NEW HEARING DATE: You are notified that the Court has scheduled an Initial Case Management Conference before Judge Vince Chhabria upon reassignment. For a copy of Judge Chhabria's Standing Order and other information, please refer to the Court's website at www.cand.uscourts.gov. All pending motions will be taken off-calendar and must be re-noticed by the moving party for a new hearing according to Judge Chhabria's available dates, which are listed on his webpage under the section "Scheduling Notes." The new hearing date must be at least five weeks from the date the motion was filed and at least three weeks from the date the re-notice is filed. The due date for any opposition or reply papers not yet filed shall be calculated in accordance with Civil Local Rule 7-3.
		Case Management Statement due by 3/15/2023. Initial Case Management Conference set for 3/22/2023, 01:00 PM, via Videoconference Only. This proceeding will be held via a Zoom webinar.
		Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/vc
		Court A ppearances: Advanced notice is required of counsel or parties who wish to be identified by the court as making an appearance or will be participating in the argument at the hearing. A list of names and emails must be sent to the CRD at vccrd@cand.uscourts.gov no later than Thursday, March 16, 2023, at 10 a.m.
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/ .
		(This is a text-only entry generated by the court. There is no document associated with this entry.)(knm, COURT STAFF) (Filed on 12/22/2022) (Entered: 12/22/2022)
12/23/2022	11	SUMMONS Returned Executed by Steve Herrera, Nicholas Elden, Hunter Joseph Jakupko, Beowulf Edward Owen, Curtis Burns, Jr, Daniel Dermot Alfred Loftus, Dante Demartini, Jessie Galvan, Ivan Calvo-Prez, Christopher Joseph Giddings-Lafaye. Microsoft Corporation served on 12/21/2022, answer due 1/11/2023. (Saveri, Joseph) (Filed on 12/23/2022) (Entered: 12/23/2022)
12/23/2022	12	Renotice motion hearing re <u>4</u> MOTION for Preliminary Injunction filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) <u>4</u>) (Saveri, Joseph) (Filed on 12/23/2022) (Entered: 12/23/2022)
12/23/2022	13	Certificate of Interested Entities by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen (Saveri, Joseph) (Filed on 12/23/2022) (Entered: 12/23/2022)
12/27/2022		Set Deadlines as to <u>4</u> MOTION for Preliminary Injunction . Motion Hearing set for 2/2/2023, 01:00 PM, in San Francisco, Courtroom 04, 17th Floor before Judge Vince Chhabria.

		(knm, COURT STAFF) (Filed on 12/27/2022) (Entered: 12/27/2022)
12/30/2022	14	MOTION for leave to appear in Pro Hac Vice <i>for attorney Rakesh N. Kilaru</i> (Filing fee \$ 317, receipt number ACANDC-17861464.) filed by Microsoft Corporation. (Kilaru, Rakesh) (Filed on 12/30/2022) (Entered: 12/30/2022)
12/30/2022	<u>15</u>	MOTION for leave to appear in Pro Hac Vice <i>for attorney Anastasia M. Pastan</i> (Filing fee \$ 317, receipt number ACANDC-17861487.) filed by Microsoft Corporation. (Pastan, Anastasia) (Filed on 12/30/2022) (Entered: 12/30/2022)
12/30/2022	16	STIPULATION WITH PROPOSED ORDER FOR EXTENSION OF TIME PURSUANT TO LOCAL RULE 6-2 filed by Microsoft Corporation, Dante DeMartini, Curtis Burns Jr., Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen, and Ivan Calvo-Perez. (Attachments: # 1 Declaration of Rakesh N. Kilaru ISO Stipulation)(Rice, Tania) (Filed on 12/30/2022) Modified on 1/3/2023 (jml, COURT STAFF). (Entered: 12/30/2022)
01/04/2023	17	ORDER OF RECUSAL. Signed by Judge Vince Chhabria on 1/4/2023. (knm, COURT STAFF) (Filed on 1/4/2023) (Entered: 01/04/2023)
01/05/2023	18	ORDER REASSIGNING CASE. Case reassigned using a proportionate, random, and blind system pursuant to General Order No. 44 to Judge Jacqueline Scott Corley for all further proceedings. Judge Vince Chhabria no longer assigned to case Notice: The assigned judge participates in the Cameras in the Courtroom Pilot Project. See General Order No. 65 and http://cand.uscourts.gov/cameras Signed by Clerk on 1/5/2023. (Attachments: # 1 Notice of Eligibility for Video Recording)(as, COURT STAFF) (Filed on 1/5/2023) (Entered: 01/05/2023)
01/05/2023	<u>19</u>	CLERK'S NOTICE RESETTING MOTION HEARING DATE. Set/Reset Deadlines as to <u>4</u> MOTION for Preliminary Injunction .
		Responses due by 1/20/2023. Replies due by 1/26/2023.
		Motion Hearing reset for 2/16/2023 at 10:00 a.m. in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley.
		(ahm, COURT STAFF) (Filed on 1/5/2023) (Entered: 01/05/2023)
01/05/2023	20	CLERK'S NOTICE SETTING ZOOM HEARING. The Initial Case Management Conference is reset for 3/23/2023 at 1:30 p.m. before Judge Jacqueline Scott Corley will be held via a Zoom webinar. Joint Case Management Statement is due by 3/16/2023.
		Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/jsc
		Court Appearances: Adv anced notice is required of counsel or parties who wish to be identified by the court as making an appearance or will be participating in the argument a the hearing. A list of names must be sent to the CRD at jsccrd@cand.uscourts.gov no later than noon on 3/22/2023.
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/ .

		(This is a text-only entry generated by t he court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Filed on 1/5/2023) (Entered: 01/05/2023)
01/05/2023	21	NOTICE of Appearance by Valarie Cecile Williams (Williams, Valarie) (Filed on 1/5/2023) (Entered: 01/05/2023)
01/06/2023	22	ORDER by Judge Jacqueline Scott Corley granting 14 Motion for Pro Hac Vice as to Rakesh N. Kilaru. (ahm, COURT STAFF) (Filed on 1/6/2023) (Entered: 01/06/2023)
01/06/2023	23	ORDER by Judge Jacqueline Scott Corley granting 15 Motion for Pro Hac Vice as to Anastasia M. Pastan. (ahm, COURT STAFF) (Filed on 1/6/2023) (Entered: 01/06/2023)
01/09/2023	24	MOTION for leave to appear in Pro Hac Vice <i>for Attorney Jennifer Pavelec</i> (Filing fee \$ 317, receipt number BCANDC-17882549.) filed by Microsoft Corporation. (Pavelec, Jennifer) (Filed on 1/9/2023) (Entered: 01/09/2023)
01/10/2023	<u>25</u>	ORDER by Judge Jacqueline Scott Corley granting 24 Motion for Pro Hac Vice as to Jennifer Pavelec. (ahm, COURT STAFF) (Filed on 1/10/2023) (Entered: 01/10/2023)
01/11/2023	<u>26</u>	MOTION to Stay <i>Case</i> filed by Microsoft Corporation. Motion Hearing set for 2/16/2023 10:00 AM in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley. Responses due by 1/25/2023. Replies due by 2/1/2023. (Attachments: # 1 Declaration Rakesh Kilaru ISO of Motion to Stay Proceedings, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H)(Kilaru, Rakesh) (Filed on 1/11/2023) (Entered: 01/11/2023)
01/11/2023	27	ADMINISTRATIVE MOTION to Expediate Briefing re 26 MOTION to Stay <i>Case</i> filed by Microsoft Corporation. Responses due by 1/17/2023. (Attachments: # 1 Declaration of Rakesh N. Kilaru ISO Motion to Expedite Briefing)(Kilaru, Rakesh) (Filed on 1/11/2023) (Entered: 01/11/2023)
01/12/2023	28	ORDER RE: MICROSOFT'S MOTION TO STAY. Signed by Judge Jacqueline Scott Corley on 1/12/2023. (ahm, COURT STAFF) (Filed on 1/12/2023) (Entered: 01/12/2023)
01/12/2023		Set/Reset Deadlines as to 26 MOTION to Stay Case.
		Responses due by 1/17/2023.
		Motion Hearing set for 1/19/2023 at 10:00 a.m. in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley.
		(ahm, COURT STAFF) (Filed on 1/12/2023) (Entered: 01/12/2023)
01/14/2023	<u>29</u>	ERRATA re 26 MOTION to Stay <i>Case</i> by Microsoft Corporation. (Kilaru, Rakesh) (Filed on 1/14/2023) (Entered: 01/14/2023)
01/17/2023	30	OPPOSITION/RESPONSE (re <u>26</u> MOTION to Stay <i>Case</i>) filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 1/17/2023) (Entered: 01/17/2023)
01/19/2023	31	TRANSCRIPT ORDER for proceedings held on 1/19/2023 before Judge Jacqueline Scott Corley by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie

		Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen, for Court Reporter not listed - San Francisco. (Saveri, Joseph) (Filed on 1/19/2023) (Entered: 01/19/2023)
01/19/2023	32	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Motion Hearing held on 1/19/2023 on 26 Defendant's Motion to Stay. The Court will issue an Order with all the deadlines discussed this date. (Liberty Recording Time: 10:01-10:23)
		Attorneys for Plaintiff: Joseph Alioto/Tatiana Wallace/Joseph Saveri/Steven Williams/David Seidel Attorneys for Defendant: Anastasia Pastan/Valerie Williams/Jennifer Pavelec
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Date Filed: 1/19/2023) Modified on 1/20/2023: Matter transcribed by Marla Knox. (rjd, COURT STAFF). Modified on 3/16/2023 (ahm, COURT STAFF). (Entered: 01/19/2023)
01/19/2023	33	ORDER FOLLLOWING JANUARY 19, 2023 HEARING. Signed by Judge Jacqueline Scott Corley on 1/19/2023. (ahm, COURT STAFF) (Filed on 1/19/2023) (Entered: 01/19/2023)
01/19/2023		Set Deadlines/Hearings: Joint Status Report due by 1/31/2023.
		The Status Conference set for 2/2/2023 at 1:30 p.m. before Judge Jacqueline Scott Corley will be held via a Zoom webinar.
		Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/jsc
		Court Appearances: Advanced notice is required of counsel or parties who wish to be i dentified by the court as making an appearance or will be participating in the argument at the hearing. A list of names must be sent to the CRD at jsccrd@cand.uscourts.gov no later than noon on 2/1/2023.
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/ .
		(ahm, COURT STAFF) (Filed on 1/19/2023) (Entered: 01/19/2023)
01/19/2023	34	TRANSCRIPT ORDER for proceedings held on 01/19/2023 before Judge Jacqueline Scott Corley by Microsoft Corporation, for Court Reporter not listed - San Francisco. (Pastan, Anastasia) (Filed on 1/19/2023) (Entered: 01/19/2023)
01/19/2023	35	TRANSCRIPT ORDER for proceedings held on 01/19/2023 before Judge Jacqueline Scott Corley for Court Reporter not listed - San Francisco. (rjd, COURT STAFF) (Filed on 1/19/2023) (Entered: 01/19/2023)
01/20/2023	36	TRANSCRIPT ORDER for proceedings held on 01/19/2023 before Judge Jacqueline Scott Corley for Court Reporter not listed - San Francisco. (rjd, COURT STAFF) (Filed on 1/20/2023) (Entered: 01/20/2023)

01/23/2023	37	NOTICE of Appearance by Lawrence Genaro Papale (Papale, Lawrence) (Filed on 1/23/2023) (Entered: 01/23/2023)
01/23/2023	38	TRANSCRIPT ORDER for proceedings held on 01/19/2023 before Judge Jacqueline Scott Corley for Court Reporter Marla Knox. (rjd, COURT STAFF) (Filed on 1/23/2023) (Entered: 01/23/2023)
01/24/2023	39	Transcript of Digitally Recorded Proceedings held on January 19, 2023, before Judge Jacqueline S. Corley. Transcribed by Court Reporter, Marla F. Knox, RPR, CRR, RMR, telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 34 Transcript Order) Release of Transcript Restriction set for 4/24/2023. (Related documents(s) 34) (mfk, COURT STAFF) (Filed on 1/24/2023) (Entered: 01/24/2023)
01/25/2023	40	ASSOCIATION of Counsel <i>Lingel H. Winters</i> by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Alioto, Joseph) (Filed on 1/25/2023) (Entered: 01/25/2023)
01/25/2023	41	STIPULATION for Extension of Time to Respond to Complaint filed by Microsoft Corporation, all plaintiffs. (Williams, Valarie) (Filed on 1/25/2023) Modified on 1/26/2023 (cjl, COURT STAFF). (Entered: 01/25/2023)
01/31/2023	42	MOTION to Dismiss filed by Microsoft Corporation. Motion Hearing set for 3/9/2023 10:00 AM in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley. Responses due by 2/14/2023. Replies due by 2/21/2023. (Attachments: # 1 Proposed Order)(Williams, Valarie) (Filed on 1/31/2023) (Entered: 01/31/2023)
01/31/2023	43	Certificate of Interested Entities by Microsoft Corporation identifying Other Affiliate Activision Blizzard, Inc. for Microsoft Corporation. (Williams, Valarie) (Filed on 1/31/2023) (Entered: 01/31/2023)
01/31/2023	44	MOTION for Protective Order filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. Motion Hearing set for 3/9/2023 10:00 AM in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley. Responses due by 2/14/2023. Replies due by 2/21/2023. (Attachments: # 1 Declaration of Joseph R. Saveri, # 2 Exhibit A, # 3 Exhibit B, # 4 Proposed Order)(Saveri, Joseph) (Filed on 1/31/2023) (Entered: 01/31/2023)
01/31/2023	45	JOINT CASE MANAGEMENT STATEMENT filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 1/31/2023) (Entered: 01/31/2023)
02/02/2023	46	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-17953327.) filed by Microsoft Corporation. (Miller, Brian) (Filed on 2/2/2023) (Entered: 02/02/2023)
02/02/2023	47	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Status Conference held and recorded by Zoom videoconference on 2/2/2023. The Court will issue an order with all the deadlines discussed this date. The initial case management conference set for 3/23/2023 is vacated. Status Conference is set for 3/16/2023 at 10:00 a.m., to follow the hearing on Defendants' Motion to Dismiss, in

		San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley. Updated status statement is due by 3/14/2023. (Digital Recording Time: 1:39-2:01)
		Attorneys for Plaintiffs: Joseph Alioto Sr./Joseph Saveri /David Seidel Attorneys for Defendant: Valerie Williams/Parker Miller
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Date Filed: 2/2/2023) Modified on 2/4/2023: Matter transcribed by Peggy Schuerger (AdHoc Reporting). (rjd, COURT STAFF). Modified on 3/16/2023 (ahm, COURT STAFF). (Entered: 02/03/2023)
02/03/2023	48	ORDER FOLLOWING FEBRUARY 2, 2023 STATUS CONFERENCE. Signed by Judge Jacqueline Scott Corley on 2/3/2023. (ahm, COURT STAFF) (Filed on 2/3/2023) (Entered: 02/03/2023)
02/03/2023		Set/Reset Deadlines as to <u>42</u> MOTION to Dismiss .
		Motion Hearing is reset for 3/16/2023 at 10:00 a.m. in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley.
		(ahm, COURT STAFF) (Filed on 2/3/2023) (Entered: 02/03/2023)
02/03/2023		Set/Reset Deadlines as to <u>4</u> MOTION for Preliminary Injunction .
		Motion Hearing is reset for 4/12/2023 at 1:00 p.m. in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley.
		(ahm, COURT STAFF) (Filed on 2/3/2023) (Entered: 02/03/2023)
02/03/2023	49	CLERK'S NOTICE SETTING ZOOM HEARING. The Pre-Hearing Conference set for 4/5/2023 at 3:00 p.m. before Judge Jacqueline Scott Corley will be held via a Zoom webinar.
		Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/jsc
		Court Appearances: Advanced notice is required of counsel or parties who wish to be identified by the court as making an appearance or will be participating in the argument at the hearing. A list of names must be sent to the CRD at jsccrd@cand.uscourts.gov no later than noon on 4/4/2023.
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/ .
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ah m, COURT STAFF) (Filed on 2/3/2023) (Entered: 02/03/2023)
02/03/2023	<u>50</u>	ORDER by Judge Jacqueline Scott Corley granting <u>46</u> Motion for Pro Hac Vice as to Parker Miller. (ahm, COURT STAFF) (Filed on 2/3/2023) (Entered: 02/03/2023)

02/03/2023	<u>51</u>	TRANSCRIPT ORDER for proceedings held on 2/2/2023 before Judge Jacqueline Scott Corley by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen, for Court Reporter not listed - San Francisco. (Saveri, Joseph) (Filed on 2/3/2023) (Entered: 02/03/2023)
02/03/2023	<u>52</u>	Proposed Protective Order by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Exhibit A - Proposed Protective Order, # 2 Exhibit B - Proposed Protective Order (Redline))(Saveri, Joseph) (Filed on 2/3/2023) Modified on 2/6/2023 (jml, COURT STAFF). (Entered: 02/03/2023)
02/03/2023	<u>53</u>	Brief <i>iso Proposed Protective Order</i> filed byMicrosoft Corporation. (Attachments: # 1 Proposed Protective Order)(Williams, Valarie) (Filed on 2/3/2023) (Entered: 02/03/2023)
02/04/2023	54	Transcript of Proceedings held on 02/02/2023, before Judge Jacqueline Scott Corley. Court Reporter/Transcriber Peggy Schuerger/Ad Hoc Reporting, telephone number (619) 228-3774/adhocreporting@aol.com. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 51 Transcript Order,) Redaction Request due 2/27/2023. Redacted Transcript Deadline set for 3/7/2023. Release of Transcript Restriction set for 5/5/2023. (Related documents(s) 51) (Schuerger, Peggy) (Filed on 2/4/2023) (Entered: 02/04/2023)
02/06/2023	<u>55</u>	ORDER RE: PROTECTIVE ORDER DISPUTE (Dkt. Nos. 44, 52, 53). Signed by Judge Jacqueline Scott Corley on February 6, 2023. (jsclc2, COURT STAFF) (Filed on 2/6/2023) (Entered: 02/06/2023)
02/06/2023	<u>56</u>	TRANSCRIPT ORDER for proceedings held on 02/02/2023 before Judge Jacqueline Scott Corley for Court Reporter not listed - San Francisco. (rjd, COURT STAFF) (Filed on 2/6/2023) (Entered: 02/06/2023)
02/06/2023	<u>57</u>	STIPULATION WITH PROPOSED ORDER <i>re Briefing Schedule</i> filed by Microsoft Corporation, Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus and Beowulf Edward Owen. (Williams, Valarie) (Filed on 2/6/2023) Modified on 2/7/2023 (jml, COURT STAFF). (Entered: 02/06/2023)
02/07/2023	<u>58</u>	ORDER by Judge Jacqueline Scott Corley granting <u>57</u> Stipulation re Briefing Schedule. (ahm, COURT STAFF) (Filed on 2/7/2023) (Entered: 02/07/2023)
02/07/2023		Set/Reset Deadlines as to <u>4</u> MOTION for Preliminary Injunction .
		Responses due by 3/2/2023. Replies due by 3/23/2023.
		(ahm, COURT STAFF) (Filed on 2/7/2023) (Entered: 02/07/2023)
02/07/2023		Set/Reset Deadlines as to <u>42</u> MOTION to Dismiss .
		Responses due by 2/17/2023. Replies due by 2/24/2023.
		(ahm, COURT STAFF) (Filed on 2/7/2023) (Entered: 02/07/2023)
02/07/2023	<u>59</u>	STIPULATION WITH PROPOSED ORDER <i>re Protective Order</i> filed by Microsoft Corporation, Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie

		Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus and Beowulf Edward Owen. (Williams, Valarie) (Filed on 2/7/2023) Modified on 2/8/2023 (jml, COURT STAFF). (Entered: 02/07/2023)
02/07/2023	<u>60</u>	PROTECTIVE ORDER. Signed by Judge Jacqueline Scott Corley on 2/7/2023. (ahm, COURT STAFF) (Filed on 2/7/2023) (Entered: 02/07/2023)
02/17/2023	61	OPPOSITION/RESPONSE (re 42 MOTION to Dismiss) filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 2/17/2023) (Entered: 02/17/2023)
02/24/2023	<u>62</u>	REPLY (re <u>42</u> MOTION to Dismiss) filed by Microsoft Corporation. (Williams, Valarie) (Filed on 2/24/2023) (Entered: 02/24/2023)
03/02/2023	63	Administrative Motion to File Under Seal filed by Microsoft Corporation. (Attachments: # 1 Declaration of Cindy Randall in Support of Motion to Seal, # 2 Declaration of Valarie Williams in Support of Motion to Seal, # 3 Proposed Order, # 4 Unredacted version of Opposition to Motion for Preliminary Injunction, # 5 Unredacted version of Exhibit A to Kilaru Declaration, # 6 Unredacted version of Exhibit B to Kilaru Declaration, # 7 Unredacted version of Exhibit C to Kilaru Declaration, # 8 Unredacted version of Exhibit D to Kilaru Declaration, # 9 Unredacted version of Exhibit E to Kilaru Declaration, # 10 Unredacted version of Exhibit F to Kilaru Declaration, # 11 Unredacted version of Exhibit G to Kilaru Declaration, # 12 Unredacted version of Exhibit H to Kilaru Declaration, # 13 Unredacted version of Exhibit I to Kilaru Declaration, # 14 Unredacted version of Exhibit J to Kilaru Declaration, # 15 Unredacted version of Exhibit K to Kilaru Declaration, # 16 Unredacted version of Exhibit L to Kilaru Declaration, # 17 Unredacted version of Exhibit M to Kilaru Declaration, # 18 Unredacted version of Exhibit D to Williams Declaration)(Williams, Valarie) (Filed on 3/2/2023) (Entered: 03/02/2023)
03/02/2023	64	OPPOSITION/RESPONSE (re 4 MOTION for Preliminary Injunction) filed byMicrosoft Corporation. (Attachments: #1 Declaration of Rakesh Kilaru, #2 Exhibit A to Kilaru declaration, #3 Exhibit B to Kilaru declaration, #4 Exhibit C to Kilaru declaration, #5 Exhibit D to Kilaru declaration, #6 Exhibit E to Kilaru declaration, #7 Exhibit F to Kilaru declaration, #8 Exhibit G to Kilaru declaration, #9 Exhibit H to Kilaru declaration, #10 Exhibit I to Kilaru declaration, #11 Exhibit J to Kilaru declaration, #12 Exhibit K to Kilaru declaration, #13 Exhibit L to Kilaru declaration, #14 Exhibit M to Kilaru declaration, #15 Declaration of Valarie Williams, #16 Exhibit A to Williams declaration, #17 Exhibit B to Williams declaration, #18 Exhibit C to Williams declaration, #19 Exhibit D to Williams declaration, #20 Exhibit E to Williams declaration, #21 Exhibit F to Williams declaration, #22 Exhibit G to Williams declaration, #23 Exhibit H to Williams declaration, #24 Exhibit K to Williams declaration, #25 Exhibit L to Williams declaration, #26 Exhibit M to Williams declaration, #27 Exhibit N to Williams declaration, #30 Exhibit O to Williams declaration, #31 Exhibit P to Williams declaration, #32 Exhibit Q to Williams declaration, #33 Exhibit R to Williams declaration, #34 Exhibit S to Williams declaration, #35 Exhibit T to Williams declaration, #36 Exhibit U to Williams declaration, #37 Exhibit V to Williams declaration, #38 Exhibit W to Williams declaration, (Williams, Valarie) (Filed on 3/2/2023) (Entered: 03/02/2023)
03/02/2023	<u>65</u>	CERTIFICATE OF SERVICE by Microsoft Corporation re <u>63</u> Administrative Motion to File Under Seal (Rice, Tania) (Filed on 3/2/2023) (Entered: 03/02/2023)
03/06/2023	66	OPPOSITION/RESPONSE (re 63 Administrative Motion to File Under Seal) filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel 288a

		Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Proposed Order) (Saveri, Joseph) (Filed on 3/6/2023) (Entered: 03/06/2023)
03/09/2023	<u>67</u>	TRANSCRIPT ORDER for proceedings held on 2/2/23 before Judge Jacqueline Scott Corley by Microsoft Corporation, for Court Reporter not listed - San Francisco. (Rice, Tania) (Filed on 3/9/2023) (Entered: 03/09/2023)
03/14/2023	68	JOINT CASE MANAGEMENT STATEMENT filed by Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen anmd Microsoft Corporation. (Saveri, Joseph) (Filed on 3/14/2023) Modified on 3/15/2023 (jml, COURT STAFF). (Entered: 03/14/2023)
03/15/2023	<u>69</u>	NOTICE of Appearance <i>for Plaintiffs</i> by Kathleen Jordan McMahon (McMahon, Kathleen) (Filed on 3/15/2023) Modified on 3/16/2023 (jml, COURT STAFF). (Entered: 03/15/2023)
03/15/2023	70	STIPULATION WITH PROPOSED ORDER <i>re Amended Protective Order</i> filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen and Microsoft Corporation. (Attachments: # 1 Exhibit A - Redline of Proposed Amended Protective Order, # 2 Proposed Order (Proposed Amended Protective Order))(Saveri, Joseph) (Filed on 3/15/2023) Modified on 3/16/2023 (jml, COURT STAFF). (Entered: 03/15/2023)
03/16/2023	71	Amended Protective Order. Signed by Judge Jacqueline Scott Corley on 3/16/2023. (ahm, COURT STAFF) (Filed on 3/16/2023) (Entered: 03/16/2023)
03/16/2023	72	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Status Conference and Motion Hearing held on 3/16/2023 re 42 Defendant's Motion to Dismiss. The Court heard arguments and took the motion under submission. In the meantime, Plaintiffs are granted leave to file an amended complaint. The April 5, 2023 hearing and the April 13, 2023 motion hearing on Plaintiffs' Motion for Preliminary Injunction are vacated. (Liberty Recording Time 10:14-12:17, transcribed by Dipti Patel of Liberty Transcribers).
		Attorneys for Plaintiffs: David Seidel/Joseph Alioto Sr./Joseph Saveri/Steven Williams/Cadio Zirpoli/Lingel Winters/Kathleen McMahon Attorneys for Defendant: Valerie Williams/Parker Miller/Tania Rice
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Date Filed: 3/16/2023) Modified to add transcriber on 3/17/2023 (notewarel, COURT STAFF). (Entered: 03/17/2023)
03/17/2023	73	TRANSCRIPT ORDER for proceedings held on March 16, 2023 before Judge Jacqueline Scott Corley by Dante Demartini, for Court Reporter not listed - San Francisco. (Saveri, Joseph) (Filed on 3/17/2023) (Entered: 03/17/2023)
03/20/2023	74	ORDER by Judge Jacqueline Scott Corley granting 42 Motion to Dismiss. Status Report due by 4/7/2023. Status Conference set for 4/12/2023 at 1:30 p.m. in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley.
		(ahm, COURT STAFF) (Filed on 3/20/2023) (Entered: 03/20/2023)
03/20/2023	75	CLERK'S NOTICE SETTING INFORMAL DISCOVERY HEARING BY ZOOM. Please take notice an Informal Discovery Hearing is set for 3/29/2023 at 11:30 a.m.

		before Judge Jacqueline Scott Corley by a Zoom webinar.
		Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/jsc
		Court Appearances: Advanced notice is required of counsel or parties who wish to be identified by the court as making an appearance or will be participating in the argument at the hearing. A list of names must be sent to the CRD at jsccrd@cand.uscourts.gov no later than noon on 3/28/2023.
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/.
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Filed on 3/20/2023) (Entered: 03/20/2023)
03/20/2023	77	TRANSCRIPT ORDER for proceedings held on 3/16/2023 before Judge Jacqueline Scott Corley for Court Reporter not listed - San Francisco. (knm, COURT STAFF) (Filed on 3/20/2023) (Entered: 03/21/2023)
03/21/2023	<u>76</u>	TRANSCRIPT ORDER for proceedings held on 3/16/23 before Judge Jacqueline Scott Corley by Microsoft Corporation, for Court Reporter not listed - San Francisco. (Rice, Tania) (Filed on 3/21/2023) (Entered: 03/21/2023)
03/21/2023	<u>78</u>	TRANSCRIPT ORDER for proceedings held on 3/16/2023 before Judge Jacqueline Scott Corley by Thompson Reuters, for Court Reporter not listed - San Francisco. (knm, COURT STAFF) (Filed on 3/21/2023) (Entered: 03/22/2023)
03/29/2023	79	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Informal Discovery Hearing held by Zoom videoconference on 3/29/2023. The Court related miscellaneous action (23-mc-80087) to this action (22-cv-8991). By close of business on 4/3/2023, the parties are to notify the Court if Activision Blizzard, Inc.'s Motion to Quash Third-Party Subpoenas (Dkt. No. 1 in 23-mc-80087) is resolved. (Court Reporter: Belle Ball)(Time 00:08)
		Attorneys for Plaintiffs: Joseph Alioto/Steven Williams/David Seidel/Kathleen McMahon Attorney for Microsoft: Valerie Williams Attorneys for Activision Blizzard Inc.: Steven Sunshine/Caroline Van Ness
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Date Filed: 3/29/2023) (Entered: 03/29/2023)
04/04/2023	80	CLERK'S NOTICE REGARDING DISCOVERY DISPUTE. The Court was informed by Plaintiffs and Activision that the discovery dispute has been resolved.
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Filed on 4/4/2023) (Entered: 04/04/2023)

04/07/2023	S1 JOINT STATUS REPORT by Dante Demartini and Microsoft Corporation. (Seidel, David) (Filed on 4/7/2023) Modified on 4/10/2023 (jml, COURT STAFF). (Entered: 04/07/2023)
04/10/2023	***MOTION RE-FILED AT DOCKET ENTRY 88 *** Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Declaration E. Buchanan, # 2 Proposed Order, # 3 Supplement)(Saveri, Joseph) (Filed on 4/10/2023) Modified on 4/12/2023 (cjl, COURT STAFF). (Entered: 04/10/2023)
04/10/2023	***MOTION RE-FILED AT DOCKET ENTRY 89 *** Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Declaration E. Buchanan, # 2 Proposed Order, # 3 Supplement)(Saveri, Joseph) (Filed on 4/10/2023) Modified on 4/12/2023 (cjl, COURT STAFF). (Entered: 04/10/2023)
04/10/2023	AMENDED COMPLAINT against All Plaintiffs. Filed bySteve Herrera, Nicholas Elden, Hunter Joseph Jakupko, Beowulf Edward Owen, Curtis Burns, Jr, Daniel Dermot Alfred Loftus, Dante Demartini, Jessie Galvan, Ivan Calvo-Prez, Christopher Joseph Giddings-Lafaye. (Saveri, Joseph) (Filed on 4/10/2023) (Entered: 04/10/2023)
04/11/2023	***EXHIBIT RE-FILED AS ATTACHMENT TO DOCKET ENTRIES 88 & 89 *** Exhibit to Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>Redline Complaint Attachment to ECF</i> 82 and ECF 83 filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 4/11/2023) Modified on 4/12/2023 (cjl, COURT STAFF). (Entered: 04/11/2023)
04/11/2023	CERTIFICATE OF SERVICE by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen re 82 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 85 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed Redline Complaint Attachment to ECF 82 and ECF 83 (Saveri, Joseph) (Filed on 4/11/2023) (Entered: 04/11/2023)
04/11/2023	CERTIFICATE OF SERVICE by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen re 83 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 85 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed Redline Complaint Attachment to ECF 82 and ECF 83 (Saveri, Joseph) (Filed on 4/11/2023) (Entered: 04/11/2023)
04/11/2023	Electronic filing error. Incorrect event used. [err101] The correct event is Exhibit. The correct event can be found at: Civil Events > Motions and Related Filings > Other Supporting Documents > Exhibits. Additionally, No title Page. Exhibits e-filed separately and not as an attachment, require a title page. Please refer to Civil Local Rules 3-4 re first page requirement. Please re-file in its entirety. Re: 85 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>Redline Complaint Attachment to ECF</i> 82 and ECF 83 filed by Christopher Joseph Giddings-Lafaye, Dante

		Demartini, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Curtis Burns, Jr., Jessie Galvan, Steve Herrera, Nicholas Elden, Ivan Calvo-Prez, Beowulf Edward Owen (jml, COURT STAFF) (Filed on 4/11/2023) (Entered: 04/11/2023)
04/11/2023	88	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Declaration of Elissa Buchanan, # 2 Proposed Order, # 3 Amended Complaint, # 4 Redline Version of Amended Complaint)(Saveri, Joseph) (Filed on 4/11/2023) (Entered: 04/11/2023)
04/11/2023	89	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Declaration of Elissa Buchanan, # 2 Proposed Order, # 3 Amended Complaint, # 4 Redline Version of Amended Complaint)(Saveri, Joseph) (Filed on 4/11/2023) (Entered: 04/11/2023)
04/11/2023	90	EXHIBITS re <u>84</u> Amended Complaint, (Redline Version of Amended Complaint) filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) <u>84</u>) (Saveri, Joseph) (Filed on 4/11/2023) (Entered: 04/11/2023)
04/11/2023	91	CERTIFICATE OF SERVICE by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen re 89 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 88 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed (Saveri, Joseph) (Filed on 4/11/2023) (Entered: 04/11/2023)
04/11/2023	92	CERTIFICATE OF SERVICE by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen re 89 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed (Saveri, Joseph) (Filed on 4/11/2023) (Entered: 04/11/2023)
04/12/2023		***DISREGARD***
		Electronic filing error. Incorrect PDF attached. The PDF contains only a caption page. [err201] Re: 90 Exhibits filed by Christopher Joseph Giddings-Lafaye, Dante Demartini, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Curtis Burns, Jr., Jessie Galvan, Steve Herrera, Nicholas Elden, Ivan Calvo-Prez, Beowulf Edward Owen. (cjl, COURT STAFF) (Filed on 4/12/2023) Modified on 4/17/2023 (jml, COURT STAFF). (Entered: 04/12/2023)
04/12/2023	93	TRANSCRIPT ORDER for proceedings held on 04/12/2023 before Judge Jacqueline Scott Corley by Microsoft Corporation, for Court Reporter not listed - San Francisco. (Rice, Tania) (Filed on 4/12/2023) (Entered: 04/12/2023)
04/12/2023	94	TRANSCRIPT ORDER for proceedings held on 4/12/2023 before Judge Jacqueline Scott Corley by Microsoft Corporation, for Court Reporter not listed - San Francisco. (Pastan, Anastasia) (Filed on 4/12/2023) (Entered: 04/12/2023)
04/12/2023	95	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Status Conference held on 4/12/2023. Court set briefing schedules on the renewed motion

		for preliminary injunction and the motion to dismiss. Court will issue an Order.
		Status Conference set for 4/27/2023 01:00 PM in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley.
		Digital Recording Time: Liberty Recording Time: 1:37-2:05. Proceedings Transcribed by Dipti Patel (Liberty Transcripts) dbpatel1180@gmail.com. Attorney for Plaintiff: Joe Alioto, Cadio Zirpoli, David Seidel, Kathleen McMahon, Steve Williams and Lingel Winters. Attorney for Defendant: Valerie Williams, Parker Miller, Tania Rice.
		(This is a text-only entry generated by the court. There is no document associated with this entry.) (klh, COURT STAFF) (Date Filed: 4/12/2023) Modified on 4/17/2023 (knm, COURT STAFF). (Entered: 04/12/2023)
04/12/2023	<u>96</u>	TRANSCRIPT ORDER for proceedings held on April 12, 2023 before Judge Jacqueline Scott Corley by Dante Demartini, for Court Reporter not listed - San Francisco. (Seidel, David) (Filed on 4/12/2023) (Entered: 04/12/2023)
04/13/2023	<u>97</u>	ORDER SETTING BRIEFING SCHEDULES ON PLAINTIFFS RENEWED MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANTS MOTION TO DISMISS
		Motion to Dismiss due by 4/19/2023. Opposition/Response to Motion to Dismiss due by 4/28/2023. Reply to Motion to Dismiss due by 5/3/2023.
		Renewed Motion for Preliminary Injunction due by 4/21/2023. Opposition/Responses to Renewed Motion for Preliminary Injunction due by 5/5/2023. Replies to Renewed Motion for Preliminary Injunction due by 5/8/2023.
		Status Report due by 4/25/2023. Status Conference set for 4/27/2023 01:00 PM in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley.
		Motion Hearing on Renewed Motion for Preliminary Injunction and Motion to Dismiss set for 5/12/2023 10:00 AM in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley. Signed by Judge Jacqueline Scott Corley on 4/13/2023. (klh, COURT STAFF) (Filed on 4/13/2023) (Entered: 04/13/2023)
04/13/2023	98	Transcript of Proceedings held on 3/16/23, before Judge Jacqueline Scott Corley. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, telephone number (847) 848-4907. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 77 Transcript Order, 73 Transcript Order, 76 Transcript Order, 78 Transcript Order) Redaction Request due 5/4/2023. Redacted Transcript Deadline set for 5/15/2023. Release of Transcript Restriction set for 7/12/2023. (Related documents(s) 77, 73, 76, 78) (Patel, Dipti) (Filed on 4/13/2023) (Entered: 04/13/2023)
04/14/2023	<u>99</u>	NOTICE of Appearance by Ye Eun Chun (Chun, Ye Eun) (Filed on 4/14/2023) (Entered: 04/14/2023)

04/14/2023	100	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18172235.) filed by Sony Interactive Entertainment LLC. (Malm, Carl) (Filed on 4/14/2023) (Entered: 04/14/2023)
04/14/2023	101	Declaration of Caroline Van Ness in Support of 71 Order on Stipulation <i>re Stipulated Protective Order</i> filed byActivision Blizzard, Inc (Attachments: # 1 Exhibit A)(Related document(s) 71) (Van Ness, Caroline) (Filed on 4/14/2023) (Entered: 04/14/2023)
04/14/2023	102	MOTION for leave to appear in Pro Hac Vice <i>for attorney Beth Wilkinson</i> (Filing fee \$ 317, receipt number ACANDC-18175049.) filed by Microsoft Corporation. (Wilkinson, Beth) (Filed on 4/14/2023) (Entered: 04/14/2023)
04/14/2023	103	Order. Signed 4/14/2023 by Judge Jacqueline Scott Corley granting 100 Motion for Pro Hac Vice for Carl Malm.(klh, COURT STAFF) (Filed on 4/14/2023) (Entered: 04/14/2023)
04/14/2023	104	MOTION for leave to appear in Pro Hac Vice <i>for attorney Kieran Gostin</i> (Filing fee \$ 317, receipt number ACANDC-18175089.) filed by Microsoft Corporation. (Gostin, Kieran) (Filed on 4/14/2023) (Entered: 04/14/2023)
04/17/2023	105	ORDER by Judge Jacqueline Scott Corley granting <u>102</u> Motion for Pro Hac Vice as to Beth Wilkinson. (ahm, COURT STAFF) (Filed on 4/17/2023) (Entered: 04/17/2023)
04/17/2023	106	ORDER by Judge Jacqueline Scott Corley granting <u>104</u> Motion for Pro Hac Vice as to Kieran Gostin. (ahm, COURT STAFF) (Filed on 4/17/2023) (Entered: 04/17/2023)
04/17/2023	107	CLERK'S NOTICE REGARDING COURTESY COPIES. The parties shall provide chambers copies of all the briefing discussed in dkt. no. <u>97</u> .
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Filed on 4/17/2023) (Entered: 04/17/2023)
04/17/2023	108	MOTION for leave to appear in Pro Hac Vice <i>for attorney Grace L. Hill</i> (Filing fee \$ 317, receipt number ACANDC-18177690.) filed by Microsoft Corporation. (Hill, Grace) (Filed on 4/17/2023) (Entered: 04/17/2023)
04/17/2023	109	MOTION for leave to appear in Pro Hac Vice <i>for attorney Anthony P. Ferrara</i> (Filing fee \$ 317, receipt number ACANDC-18177717.) filed by Microsoft Corporation. (Ferrara, Anthony) (Filed on 4/17/2023) (Entered: 04/17/2023)
04/17/2023	110	ORDER by Judge Jacqueline Scott Corley granting <u>108</u> Motion for Pro Hac Vice as to Grace L. Hill. (ahm, COURT STAFF) (Filed on 4/17/2023) (Entered: 04/17/2023)
04/17/2023	111	ORDER by Judge Jacqueline Scott Corley granting <u>109</u> Motion for Pro Hac Vice as to Anthony P. Ferrara. (ahm, COURT STAFF) (Filed on 4/17/2023) (Entered: 04/17/2023)
04/17/2023	112	TRANSCRIPT ORDER for proceedings held on 4/12/2023, before Judge Jacqueline Scott Corley for Court Reporter not listed - San Francisco, filed by FTC. (knm, COURT STAFF) (Filed on 4/17/2023) (Entered: 04/17/2023)
04/17/2023	113	Statement re 89 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Sony Interactive Entertainment LLC. (Attachments: # 1 Declaration of Christian Svensson in Support)(Malm, Carl) (Filed on 4/17/2023) (Entered: 04/17/2023)

04/17/2023	114	Statement re <u>88</u> Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Microsoft Corporation. (Attachments: # <u>1</u> Declaration of Sandra Pailca)(Williams, Valarie) (Filed on 4/17/2023) (Entered: 04/17/2023)
04/18/2023	115	TRANSCRIPT ORDER for proceedings held on 3/16/2023 before Judge Jacqueline Scott Corley for Court Reporter not listed - San Francisco, requested by G. Valentine. (knm, COURT STAFF) (Filed on 4/18/2023) (Entered: 04/18/2023)
04/18/2023	116	TRANSCRIPT ORDER for proceedings held on 3/29/2023 before Judge Jacqueline Scott Corley for Court Reporter Belle Ball, requested by G. Valentine. (knm, COURT STAFF) (Filed on 4/18/2023) (Entered: 04/18/2023)
04/18/2023	117	TRANSCRIPT ORDER for proceedings held on 4/12/2023 before Judge Jacqueline Scott Corley for Court Reporter not listed - San Francisco, requested by G. Valentine. (knm, COURT STAFF) (Filed on 4/18/2023) (Entered: 04/18/2023)
04/19/2023	118	Transcript of Proceedings held on 4/12/23, before Judge Jacqueline Scott Corley. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, telephone number (847) 848-4907. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 96 Transcript Order, 117 Transcript Order, 112 Transcript Order, 94 Transcript Order, 93 Transcript Order) Redaction Request due 5/10/2023. Redacted Transcript Deadline set for 5/22/2023. Release of Transcript Restriction set for 7/18/2023. (Related documents(s) 96 , 117 , 112 , 94 , 93) (Patel, Dipti) (Filed on 4/19/2023) (Entered: 04/19/2023)
04/19/2023	119	Administrative Motion to File Under Seal filed by Microsoft Corporation. (Attachments: # 1 Declaration of Cynthia Randall ISO Motion to Seal, # 2 Certificate/Proof of Service, # 3 Proposed Order, # 4 Unredacted version of Exhibit A to Kilaru Declaration, # 5 Unredacted version of Exhibit B to Kilaru Declaration, # 6 Unredacted version of Exhibit C to Kilaru Declaration, # 7 Unredacted version of Exhibit D to Kilaru Declaration, # 8 Unredacted version of Exhibit E to Kilaru Declaration)(Rice, Tania) (Filed on 4/19/2023) (Entered: 04/19/2023)
04/19/2023	120	MOTION to Dismiss <i>First Amended Complaint</i> filed by Microsoft Corporation. Motion Hearing set for 5/12/2023 10:00 AM in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley. Responses due by 5/3/2023. Replies due by 5/10/2023. (Attachments: # 1 Declaration of Rakesh Kilaru ISO Motion to Dismiss, # 2 Exhibit A to Kilaru declaration, # 3 Exhibit B to Kilaru declaration, # 4 Exhibit C to Kilaru declaration, # 5 Exhibit D to Kilaru declaration, # 6 Exhibit E to Kilaru declaration, # 7 Proposed Order)(Williams, Valarie) (Filed on 4/19/2023) (Entered: 04/19/2023)
04/20/2023		Set/Reset Deadlines as to 120 MOTION to Dismiss First Amended Complaint.
		Responses due by 4/28/2023. Replies due by 5/3/2023.
		(ahm, COURT STAFF) (Filed on 4/20/2023) (Entered: 04/20/2023)
04/20/2023	121	STIPULATION WITH PROPOSED ORDER <i>TO EXTEND TIME TO FILE MOTION FOR PRELIMINARY INJUNCTION</i> filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen and Microsoft Corporation. (Saveri, Joseph) (Filed on 4/20/2023) Modified on 4/20/2023 (jml, COURT STAFF). (Entered: 04/20/2023)

04/20/2023	122	STIPULATION WITH PROPOSED ORDER <i>LEAVE TO FILE OVERSIZED MOTION FOR PRELIMINARY INJUNCTION</i> filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen and Microsoft Corporation. (Saveri, Joseph) (Filed on 4/20/2023) Modified on 4/21/2023 (jml, COURT STAFF). (Entered: 04/20/2023)
04/21/2023	123	ORDER by Judge Jacqueline Scott Corley granting <u>121</u> Stipulation to Extend Time to File Motion for Preliminary Injunction to April 24, 2023. (ahm, COURT STAFF) (Filed on 4/21/2023) (Entered: 04/21/2023)
04/21/2023	124	ORDER by Judge Jacqueline Scott Corley granting 122 Stipulation for Leave to File Oversized Motion for Preliminary Injunction. (ahm, COURT STAFF) (Filed on 4/21/2023) (Entered: 04/21/2023)
04/21/2023	125	ADMINISTRATIVE MOTION TO SHORTEN BRIEFING SCHEDULE FOR MOTION TO COMPEL DEPOSITIONS OF (1) ROBERT A. KOTICK AND (2) ACTIVISION, MOTION to Shorten Time filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. Responses due by 4/28/2023. (Attachments: # 1 Declaration Kathleen J. McMahon, # 2 Proposed Order)(Williams, Steven) (Filed on 4/21/2023) (Entered: 04/21/2023)
04/21/2023	126	MOTION to Compel <i>DEPOSITIONS OF (1) ROBERT A. KOTICK AND (2) ACTIVISION</i> filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. Motion Hearing set for 6/1/2023 10:00 AM in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley. Responses due by 4/28/2023. (Attachments: # 1 Declaration Steven N. Williams, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9)(Williams, Steven) (Filed on 4/21/2023) Modified on 6/28/2023 (ahm, COURT STAFF). (Entered: 04/21/2023)
04/24/2023	127	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18198282.) filed by Microsoft Corporation. (Attachments: # 1 Certificate of Good Standing)(Moiseyev, Michael) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	128	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18198307.) filed by Microsoft Corporation. (Attachments: # 1 Certificate of Good Standing)(Niles-Weed, Robert) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	129	ORDER by Judge Jacqueline Scott Corley granting 127 Motion for Pro Hac Vice as to Michael Moiseyev. (ahm, COURT STAFF) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	130	ORDER by Judge Jacqueline Scott Corley granting <u>128</u> Motion for Pro Hac Vice as to Robert Niles-Weed. (ahm, COURT STAFF) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	131	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18200107.) filed by Microsoft Corporation. (Attachments: # 1 Certificate of Good Standing)(Cypher, Drew) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	132	ORDER by Judge Jacqueline Scott Corley granting 131 Motion for Pro Hac Vice as to Drew Cypher. (ahm, COURT STAFF) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	133	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie

		Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Declaration of Elissa Buchanan, # 2 Proposed Order, # 3 Motion for Preliminary Injunction, # 4 Exhibit A, # 5 Exhibit I, # 6 Exhibit J, # 7 Exhibit K, # 8 Exhibit M, # 9 Exhibit Q, # 10 Exhibit R, # 11 Exhibit S, # 12 Exhibit T, # 13 Exhibit U, # 14 Exhibit W, # 15 Exhibit X, # 16 Exhibit Y, # 17 Exhibit CC)(Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	134	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Declaration of Elissa Buchanan, # 2 Proposed Order, # 3 Motion for Preliminary Injunction, # 4 Exhibit A, # 5 Exhibit B, # 6 Exhibit C, # 7 Exhibit D, # 8 Exhibit E, # 9 Exhibit F, # 10 Exhibit G, # 11 Exhibit L)(Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	135	MOTION for Preliminary Injunction <i>and Order to Show Cause</i> filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. Motion Hearing set for 5/12/2023 10:00 AM in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley. Responses due by 5/5/2023. Replies due by 5/8/2023. (Attachments: # 1 Proposed Order)(Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	136	Declaration of Curtis Burns, Jr. in Support of <u>135</u> MOTION for Preliminary Injunction and Order to Show Cause filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) <u>135</u>) (Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	137	Declaration of Dante DeMartini in Support of 135 MOTION for Preliminary Injunction and Order to Show Cause filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) 135) (Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	138	Declaration of Jessie Galvan in Support of 135 MOTION for Preliminary Injunction and Order to Show Cause filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) 135) (Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	139	Declaration of Hunter Jakupko in Support of 135 MOTION for Preliminary Injunction and Order to Show Cause filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) 135) (Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	140	Declaration of Daniel Loftus in Support of 135 MOTION for Preliminary Injunction and Order to Show Cause filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) 135) (Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	141	Declaration of Beowulf Owen in Support of 135 MOTION for Preliminary Injunction and Order to Show Cause filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera,
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		Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) 135) (Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	142	Declaration of David H. Seidel in Support of 135 MOTION for Preliminary Injunction and Order to Show Cause filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V, # 23 Exhibit W, # 24 Exhibit X, # 25 Exhibit Y, # 26 Exhibit Z, # 27 Exhibit AA, # 28 Exhibit BB, # 29 Exhibit CC)(Related document(s) 135) (Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	143	CERTIFICATE OF SERVICE by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen re 133 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed (Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023	144	CERTIFICATE OF SERVICE by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen re 134 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed (Saveri, Joseph) (Filed on 4/24/2023) (Entered: 04/24/2023)
04/24/2023		Electronic filing error. Case number is missing. Please re-file in its entirety. Re: 139 Declaration in Support, filed by Christopher Joseph Giddings-Lafaye, Dante Demartini, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Curtis Burns, Jr., Jessie Galvan, Steve Herrera, Nicholas Elden, Ivan Calvo-Prez, Beowulf Edward Owen, 136 Declaration in Support, filed by Christopher Joseph Giddings-Lafaye, Dante Demartini, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Curtis Burns, Jr., Jessie Galvan, Steve Herrera, Nicholas Elden, Ivan Calvo-Prez, Beowulf Edward Owen, 141 Declaration in Support, filed by Christopher Joseph Giddings-Lafaye, Dante Demartini, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Curtis Burns, Jr., Jessie Galvan, Steve Herrera, Nicholas Elden, Ivan Calvo-Prez, Beowulf Edward Owen, 138 Declaration in Support, filed by Christopher Joseph Giddings-Lafaye, Dante Demartini, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Curtis Burns, Jr., Jessie Galvan, Steve Herrera, Nicholas Elden, Ivan Calvo-Prez, Beowulf Edward Owen, 137 Declaration in Support, filed by Christopher Joseph Giddings-Lafaye, Dante Demartini, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Curtis Burns, Jr., Jessie Galvan, Steve Herrera, Nicholas Elden, Ivan Calvo-Prez, Beowulf Edward Owen (jml, COURT STAFF) (Filed on 4/24/2023) (Entered: 04/25/2023)
04/25/2023	145	Declaration of Curtis Burns, Jr. in Support of 135 MOTION for Preliminary Injunction and Order to Show Cause [CORRECTED] filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) 135) (Saveri, Joseph) (Filed on 4/25/2023) (Entered: 04/25/2023)
04/25/2023	146	Declaration of Dante DeMartini [CORRECTED] filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 4/25/2023) (Entered: 04/25/2023)

04/25/2023	147	Declaration of Jessie Galvan in Support of 135 MOTION for Preliminary Injunction and Order to Show Cause [CORRECTED] filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) 135) (Saveri, Joseph) (Filed on 4/25/2023) (Entered: 04/25/2023)
04/25/2023	148	Declaration of Hunter Jakupko in Support of 135 MOTION for Preliminary Injunction and Order to Show Cause [CORRECTED] filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) 135) (Saveri, Joseph) (Filed on 4/25/2023) (Entered: 04/25/2023)
04/25/2023	149	Declaration of Beowulf Owen in Support of 135 MOTION for Preliminary Injunction and Order to Show Cause [CORRECTED] filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) 135) (Saveri, Joseph) (Filed on 4/25/2023) (Entered: 04/25/2023)
04/25/2023	150	OPPOSITION/RESPONSE (re 125 ADMINISTRATIVE MOTION TO SHORTEN BRIEFING SCHEDULE FOR MOTION TO COMPEL DEPOSITIONS OF (1) ROBERT A. KOTICK AND (2) ACTIVISION MOTION to Shorten Time) filed by Activision Blizzard, Inc (Attachments: # 1 Declaration of Julia K. York, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 4/25/2023) (Entered: 04/25/2023)
04/25/2023	151	JOINT CASE MANAGEMENT STATEMENT filed by Microsoft Corporation, Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus and Beowulf Edward Owen. (Williams, Valarie) (Filed on 4/25/2023) Modified on 4/26/2023 (jml, COURT STAFF). (Entered: 04/25/2023)
04/27/2023	152	ORDER RE PLAINTIFFS' ADMINISTRATIVE MOTION TO SHORTEN BRIEFING SCHEDULE FOR PLAINTIFFS' MOTION TO COMPEL. Signed by Judge Jacqueline Scott Corley on 4/27/2023. (ahm, COURT STAFF) (Filed on 4/27/2023) (Entered: 04/27/2023)
04/27/2023	153	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Status Conference held on 4/27/2023. The Court will see the parties on May 12, 2023 on the pending motions (Dkt. Nos. 120 & 135). (Liberty Recording Time: 1:00-1:10) Proceedings Transcribed by Dipti Patel (Liberty Transcripts) dbpatel1180@gmail.com.
		Attorneys for Plaintiffs: Joseph Alioto/Steven Williams/Joseph Saveri/Kathleen McMahon/Lingel Winters/Cadio R. Zirpoli Attorneys for Microsoft: Valerie Williams/Parker Miller/Tania Rice/Beth Wilkinson
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Date Filed: 4/27/2023) Modified on 4/28/2023 (ahm, COURT STAFF). Modified on 5/3/2023 (knm, COURT STAFF). (Entered: 04/27/2023)
04/28/2023	154	Transcript of Proceedings held on 3/29/23, before Judge Jacqueline Scott Corley. Court Reporter Belle Ball, CSR, telephone number (415)373-2529, belle_ball@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be

		purchased through the Court Reporter until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 116 Transcript Order) Redaction Request due 5/19/2023. Redacted Transcript Deadline set for 5/30/2023. Release of Transcript Restriction set for 7/27/2023. (Related documents(s) 116) (Ball, Belle) (Filed on 4/28/2023) (Entered: 04/28/2023)
04/28/2023	155	OPPOSITION/RESPONSE (re 120 MOTION to Dismiss <i>First Amended Complaint</i>) filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 4/28/2023) (Entered: 04/28/2023)
05/01/2023	<u>156</u>	TRANSCRIPT ORDER for proceedings held on 4/27/2023 before Judge Jacqueline Scott Corley for Court Reporter not listed - San Francisco, by G. Valentine. (knm, COURT STAFF) (Filed on 5/1/2023) (Entered: 05/01/2023)
05/01/2023	157	TRANSCRIPT ORDER for proceedings held on 4/27/2023 before Judge Jacqueline Scott Corley by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen, for Court Reporter not listed - San Francisco. (Williams, Steven) (Filed on 5/1/2023) (Entered: 05/01/2023)
05/01/2023	<u>158</u>	Statement re 133 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Microsoft Corporation. (Attachments: # 1 Declaration of Cynthia Randall)(Williams, Valarie) (Filed on 5/1/2023) (Entered: 05/01/2023)
05/03/2023	<u>159</u>	REPLY (re 120 MOTION to Dismiss <i>First Amended Complaint</i>) filed by Microsoft Corporation. (Williams, Valarie) (Filed on 5/3/2023) (Entered: 05/03/2023)
05/05/2023	160	Non-Party Activision Blizzard, Inc.'s Opposition To 126 Plaintiffs' Motion To Compel Depositions of (1) Robert A. Kotick and (2) Activision filed by Activision Blizzard, Inc. (Attachments: # 1 Declaration of Julia K. York and Exhibit A, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 5/5/2023) Modified on 5/8/2023 (cjl, COURT STAFF). (Entered: 05/05/2023)
05/05/2023	161	Administrative Motion to File Under Seal <i>Portions of Opposition to Motion for Preliminary Injunction</i> filed by Microsoft Corporation. (Attachments: # 1 Declaration of Cindy Randall ISO Motion to Seal, # 2 Proposed Order, # 3 Unredacted version of Opposition to Motion for Preliminary Injunction, # 4 Unredacted version of Exhibit C to Kilaru Declaration, # 5 Unredacted version of Exhibit D to Kilaru Declaration, # 6 Unredacted version of Exhibit E to Kilaru Declaration, # 7 Unredacted version of Declaration of Tim Stuart, # 8 Unredacted version of Exhibit B to Stuart Declaration, # 9 Unredacted version of Exhibit C to Stuart Declaration, # 10 Certificate/Proof of Service) (Williams, Valarie) (Filed on 5/5/2023) (Entered: 05/05/2023)
05/05/2023	162	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Microsoft Corporation. (Attachments: # 1 Declaration of Valarie Williams ISO Motion to Consider Whether Another Partys Material Should Be Sealed, # 2 Unredacted version of Opposition to Motion for Preliminary Injunction, # 3 Unredacted version of Exhibit B to Kilaru Declaration, # 4 Unredacted version of Exhibit F to Kilaru Declaration, # 5 Unredacted version of Exhibit G to Kilaru Declaration, # 6 Certificate/Proof of Service)(Williams, Valarie) (Filed on 5/5/2023) (Entered: 05/05/2023)
05/05/2023	163	OPPOSITION/RESPONSE (re 135 MOTION for Preliminary Injunction and Order to Show Cause) filed by Microsoft Corporation. (Attachments: # 1 Declaration of Rakesh

		Kilaru ISO Opposition, # 2 Exhibit A to Kilaru declaration, # 3 Exhibit B to Kilaru declaration, # 4 Exhibit C to Kilaru declaration, # 5 Exhibit D to Kilaru declaration, # 6 Exhibit E to Kilaru declaration, # 7 Exhibit F to Kilaru declaration, # 8 Exhibit G to Kilaru declaration, # 9 Declaration of Tim Stuart ISO Opposition, # 10 Exhibit A to Stuart declaration, # 11 Exhibit B to Stuart declaration, # 12 Exhibit C to Stuart declaration) (Williams, Valarie) (Filed on 5/5/2023) (Entered: 05/05/2023)
05/05/2023	164	PLAINTIFFS RESPONSE TO 158 DEFENDANT MICROSOFT CORPORATIONS STATEMENT IN RESPONSE TO 133 PLAINTIFFS ADMINISTRATIVE MOTION TO CONSIDER WHETHER ANOTHER PARTYS MATERIAL SHOULD BE SEALED by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 5/5/2023) Modified on 5/8/2023 (cjl, COURT STAFF). (Entered: 05/05/2023)
05/08/2023	165	Unopposed MOTION for Leave to File Out of Time filed by Sony Interactive Entertainment LLC. Responses due by 5/12/2023. (Attachments: # 1 Proposed Order) (Malm, Carl) (Filed on 5/8/2023) Modified on 5/8/2023 (cjl, COURT STAFF). (Entered: 05/08/2023)
05/08/2023	166	TRANSCRIPT ORDER for proceedings held on 04/27/2023 before Judge Jacqueline Scott Corley by Microsoft Corporation, for Court Reporter not listed - San Francisco. (Rice, Tania) (Filed on 5/8/2023) (Entered: 05/08/2023)
05/08/2023	167	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Declaration of Elissa A. Buchanan, # 2 Proposed Order, # 3 REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE)(Saveri, Joseph) (Filed on 5/8/2023) (Entered: 05/08/2023)
05/08/2023	168	REPLY (re 135 MOTION for Preliminary Injunction <i>and Order to Show Cause</i>) filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 5/8/2023) (Entered: 05/08/2023)
05/08/2023	169	Declaration of Dante DeMartini in Support of <u>168</u> Reply to Opposition/Response, filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) <u>168</u>) (Saveri, Joseph) (Filed on 5/8/2023) (Entered: 05/08/2023)
05/08/2023	170	Declaration of Beowulf Owen in Support of <u>168</u> Reply to Opposition/Response, filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Related document(s) <u>168</u>) (Saveri, Joseph) (Filed on 5/8/2023) (Entered: 05/08/2023)
05/08/2023	171	Declaration of David H. Seidel in Support of <u>168</u> Reply to Opposition/Response, filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B)(Related document(s) <u>168</u>) (Saveri, Joseph) (Filed on 5/8/2023) (Entered: 05/08/2023)

05/08/2023	172	CERTIFICATE OF SERVICE by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen re 167 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed (Saveri, Joseph) (Filed on 5/8/2023) (Entered: 05/08/2023)
05/09/2023	173	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Declaration of Elissa A. Buchanan, # 2 Proposed Order, # 3 CORRECTED REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE) (Saveri, Joseph) (Filed on 5/9/2023) (Entered: 05/09/2023)
05/09/2023	174	ERRATA re 168 Reply to Opposition/Response, by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Attachment A - CORRECTED REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE) (Saveri, Joseph) (Filed on 5/9/2023) (Entered: 05/09/2023)
05/09/2023	175	CERTIFICATE OF SERVICE by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen re 173 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed (Saveri, Joseph) (Filed on 5/9/2023) (Entered: 05/09/2023)
05/09/2023	176	Statement re 161 Administrative Motion to File Under Seal <i>Portions of Opposition to Motion for Preliminary Injunction</i> by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 5/9/2023) (Entered: 05/09/2023)
05/10/2023	177	ORDER by Judge Jacqueline Scott Corley granting <u>165</u> Administrative Motion for Leave to File Out of Time. (ahm, COURT STAFF) (Filed on 5/10/2023) (Entered: 05/10/2023)
05/10/2023	<u>178</u>	NOTICE of Appearance by Zachary G. Tschida (Tschida, Zachary) (Filed on 5/10/2023) (Entered: 05/10/2023)
05/11/2023	179	Statement re 134 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Sony Interactive Entertainment LLC. (Attachments: # 1 Declaration of Christian Svensson in Support)(Malm, Carl) (Filed on 5/11/2023) (Entered: 05/11/2023)
05/12/2023	180	Statement re <u>173</u> Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Microsoft Corporation. (Attachments: # <u>1</u> Declaration of Cynthia Randall)(Williams, Valarie) (Filed on 5/12/2023) (Entered: 05/12/2023)
05/12/2023	181	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Motion Hearing held on 5/12/2023 re 120 Defendant's Motion to Dismiss and 135 Plaintiffs' Motion for Preliminary Injunction. The motions were argued, submitted, and taken under submission. (Court Reporter: Cathy Taylor by Zoom)(Time 1:43)
		Attorneys for Plaintiffs: Joseph Alioto/David Siedel/Joseph Saveri/Kathleen McMahon/Lingel Winters/Cadio R. Zirpoli

		Attorneys for Microsoft: Valerie Williams/Parker Miller/Tania Rice/Beth Wilkinson/Robert Poole
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Date Filed: 5/12/2023) (Entered: 05/12/2023)
05/12/2023	182	REPLY (re 126 MOTION to Compel <i>DEPOSITIONS OF (1) ROBERT A. KOTICK AND (2) ACTIVISION</i>) filed byCurtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Williams, Steven) (Filed on 5/12/2023) (Entered: 05/12/2023)
05/12/2023	183	Statement re 162 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Activision Blizzard, Inc (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 5/12/2023) (Entered: 05/12/2023)
05/16/2023	184	RESPONSE re 180 Statement, by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 5/16/2023) (Entered: 05/16/2023)
05/17/2023	185	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Declaration of Elissa A. Buchanan, # 2 Proposed Order, # 3 Joint Letter Brief, # 4 Ex. 1 to the Declaration of Steven N. Williams)(Williams, Steven) (Filed on 5/17/2023) (Entered: 05/17/2023)
05/17/2023	186	Joint Discovery Letter Brief filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Attachments: # 1 Declaration of Steven N. Williams, # 2 Declaration of Valarie Williams, # 3 Declaration of Cynthia Randall)(Williams, Steven) (Filed on 5/17/2023) (Entered: 05/17/2023)
05/17/2023	187	CERTIFICATE OF SERVICE by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen re 185 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed (Williams, Steven) (Filed on 5/17/2023) (Entered: 05/17/2023)
05/19/2023	188	Statement <i>of Recent Decision</i> by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Alioto, Joseph) (Filed on 5/19/2023) (Entered: 05/19/2023)
05/19/2023	189	ORDER by Judge Jacqueline Scott Corley denying 135 Motion for Preliminary Injunction. (ahm, COURT STAFF) (Filed on 5/19/2023) (Entered: 05/19/2023)
05/22/2023	190	Transcript of Proceedings held on 4/27/23, before Judge Jacqueline Scott Corley. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, telephone number (847) 848-4907. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After

		that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 166 Transcript Order, 156 Transcript Order, 157 Transcript Order,) Redaction Request due 6/12/2023. Redacted Transcript Deadline set for 6/22/2023. Release of Transcript Restriction set for 8/21/2023. (Related documents(s) 166, 156, 157) (Patel, Dipti) (Filed on 5/22/2023) (Entered: 05/22/2023)
05/22/2023	191	Transcript of Proceedings held on 3/16/23, before Judge Jacqueline Scott Corley. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, telephone number (847) 848-4907. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 77 Transcript Order, 73 Transcript Order, 76 Transcript Order, 78 Transcript Order) Redaction Request due 6/12/2023. Redacted Transcript Deadline set for 6/22/2023. Release of Transcript Restriction set for 8/21/2023. (Related documents(s) 77, 73, 76, 78) (Patel, Dipti) (Filed on 5/22/2023) (Entered: 05/22/2023)
05/23/2023	192	TRANSCRIPT ORDER for proceedings held on 5/12/2023 before Judge Jacqueline Scott Corley by Activision Blizzard, Inc., for Court Reporter Cathy Jill Taylor. (Van Ness, Caroline) (Filed on 5/23/2023) (Entered: 05/23/2023)
05/23/2023	193	Transcript of Proceedings held on 5-12-2023, before Judge Jacqueline Scott Corley. Court Reporter/Transcriber Cathy J. Taylor, RMR, CRR, CRC, telephone number 602-322-7249; cathy_taylor@azd.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Redaction Request due 6/13/2023. Redacted Transcript Deadline set for 6/23/2023. Release of Transcript Restriction set for 8/21/2023. (Taylor, Catherine) (Filed on 5/23/2023) (Entered: 05/23/2023)
05/23/2023	194	STIPULATION WITH PROPOSED ORDER for June 1, 2023 Hearing to Proceed by Videoconference filed by Activision Blizzard, Inc., Dante Demartini, Curtis Burns, Jr., Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen, and Ivan Calvo-Prez. (Attachments: # 1 Proposed Order)(Van Ness, Caroline) (Filed on 5/23/2023) Modified on 5/23/2023 (jml, COURT STAFF). (Entered: 05/23/2023)
05/23/2023		Electronic filing error. In the future please be sure to add all parties you represent when filing documents. Corrected by Clerk's Office. No further action is necessary. Corrected by Clerk's Office. No further action is necessary. Re: 194 STIPULATION WITH PROPOSED ORDER filed by Christopher Joseph Giddings-Lafaye, Dante Demartini, Hunter Joseph Jakupko, Activision Blizzard, Inc., Daniel Dermot Alfred Loftus, Curtis Burns, Jr., Jessie Galvan, Steve Herrera, Nicholas Elden, Ivan Calvo-Prez, Beowulf Edward Owen (jml, COURT STAFF) (Filed on 5/23/2023) (Entered: 05/23/2023)
05/23/2023	195	ORDER by Judge Jacqueline Scott Corley granting as modified 194 Stipulation for June 1, 2023 Hearing to Proceed by Videoconference. (ahm, COURT STAFF) (Filed on 5/23/2023) Modified on 5/23/2023 (ahm, COURT STAFF). (Entered: 05/23/2023)
05/23/2023	196	CLERK'S NOTICE SETTING ZOOM HEARING. The hearing on Plaintiffs' Motion to Compel Depositions of (1) Robert A. Kotick and (2) Activision set for 6/1/2023 will commence at 9:00 a.m. by a Zoom videoconference.

		Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/jsc
		Court Appearances: Advanced notice is required of counsel or parties who wish to be identified by the court as making an appearance or will be participating in the argument at the hearing. A list of names must be sent to the CRD at jsccrd@cand.uscourts.gov no later than noon on 5/31/2023.
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/.
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Filed on 5/23/2023) (Entered: 05/23/2023)
05/24/2023	197	TRANSCRIPT ORDER for proceedings held on 5/12/2023, before Judge Jacqueline Scott Corley for Court Reporter Cathy Jill Taylor, by L. Carvajal-Donohue. (knm, COURT STAFF) (Filed on 5/24/2023) (Entered: 05/24/2023)
05/24/2023	<u>198</u>	TRANSCRIPT ORDER for proceedings held on 5/12/2023, before Judge Jacqueline Scott Corley for Court Reporter Cathy Jill Taylor, by L. Varoli. (knm, COURT STAFF) (Filed on 5/24/2023) (Entered: 05/24/2023)
05/24/2023	<u>199</u>	Statement re 185 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Microsoft Corporation. (Attachments: # 1 Declaration of Cynthia Randall)(Williams, Valarie) (Filed on 5/24/2023) (Entered: 05/24/2023)
05/26/2023	200	RESPONSE re 199 Statement, by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 5/26/2023) (Entered: 05/26/2023)
05/30/2023	201	CLERK'S NOTICE CHANGING TIME OF HEARING. The hearing on Plaintiffs' Motion to Compel Depositions of (1) Robert A. Kotick and (2) Activision set for 6/1/2023 will commence at <u>9:30 a.m.</u> by a Zoom videoconference.
		Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/jsc
		Court Appearances: Advanced notice is required of counsel or parties who wish to be identified by the court as making an appearance or will be participating in the argument at the hearing. A list of names must be sent to the CRD at jsccrd@cand.uscourts.gov no later than noon on 5/31/2023.
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/.

		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Filed on 5/30/2023) (Entered: 05/30/2023)
06/01/2023	202	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Motion Hearing held and recorded by Zoom videoconference on 6/1/2023 re (126 in 3:22-cv-08991-JSC) Plaintiffs' Motion to Compel Depositions of (1) Robert A. Kotick and (2) Activision. The Court is holding the motion in abeyance and setting a further case management conference for 8/31/2023 at 1:30 p.m. by Zoom videoconference. (Recording Time: 9:31-9:41)
		Attorneys for Plaintiffs: Joseph Alioto/Steven Williams/Kathleen McMahon Attorney for Microsoft: Valerie Williams Attorneys for Activision: Steven Sunshine/Julia York
		For transcript requests please see: https://cand.uscourts.gov/about/clerks-office/transcripts-court-reporters/
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Date Filed: 6/1/2023) Modified on 6/1/2023 (ahm, COURT STAFF). Proceedings transcribed by Peggy Schuerger of Ad Hoc Reporting (adhocreporting@aol.com)(bns, COURT STAFF). (Entered: 06/01/2023)
06/01/2023	203	CLERKS NOTICE PROVIDING ZOOM ACCESS INFORMATION. The Further Case Management Conference set for 8/31/2023 at 1:30 p.m. before Judge Jacqueline Scott Corley by a Zoom webinar.
		Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/jsc
		Court Appearances: Advanced notice is required of counsel or parties who wish to be identified by the court as making an appearance or will be participating in the argument a the hearing. A list of names must be sent to the CRD at jsccrd@cand.uscourts.gov no later than noon on 8/30/2023.
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/.
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Filed on 6/1/2023) (Entered: 06/01/2023)
06/01/2023	204	TRANSCRIPT ORDER for proceedings held on 6/01/2023 before Judge Jacqueline Scot Corley by Activision Blizzard, Inc., for Court Reporter not listed - San Francisco. (Van Ness, Caroline) (Filed on 6/1/2023) (Entered: 06/01/2023)
06/02/2023	205	TRANSCRIPT ORDER for proceedings held on 6/1/2023 before Judge Jacqueline Scott Corley by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, 306a

		Daniel Dermot Alfred Loftus, Beowulf Edward Owen, for Court Reporter not listed - San Francisco. (Williams, Steven) (Filed on 6/2/2023) (Entered: 06/02/2023)
06/02/2023	206	TRANSCRIPT ORDER for proceedings held on 05/12/2023 before Judge Jacqueline Scott Corley by Microsoft Corporation, for Court Reporter Cathy Jill Taylor. (Rice, Tania) (Filed on 6/2/2023) (Entered: 06/02/2023)
06/02/2023	207	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. Appeal of Order on Motion for Preliminary Injunction 189 (Appeal fee of \$505 receipt number ACANDC-18327313 paid.) (Attachments: # 1 Representation Statement)(Saveri, Joseph) (Filed on 6/2/2023) (Entered: 06/02/2023)
06/05/2023	208	Transcript of Proceedings held on 06/01/2023, before Judge Jacqueline Scott Corley. Court Reporter/Transcriber Peggy Schuerger/Ad Hoc Reporting, telephone number (619) 228-3774/adhocreporting@aol.com. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 204 Transcript Order) Redaction Request due 6/26/2023. Redacted Transcript Deadline set for 7/6/2023. Release of Transcript Restriction set for 9/5/2023. (Related documents(s) 204) (Schuerger, Peggy) (Filed on 6/5/2023) (Entered: 06/05/2023)
06/06/2023	209	TRANSCRIPT ORDER for proceedings held on 6/1/23 before Judge Jacqueline Scott Corley by FTC, for Court Reporter not listed - San Francisco. (Weingarten, James) (Filed on 6/6/2023) (Entered: 06/06/2023)
06/06/2023	210	TRANSCRIPT ORDER for proceedings held on 5/12/2023 before Judge Jacqueline Scott Corley by FTC, for Court Reporter Cathy Jill Taylor. (Weingarten, James) (Filed on 6/6/2023) (Entered: 06/06/2023)
06/06/2023	211	TRANSCRIPT ORDER for proceedings held on 05/12/2023 before Judge Jacqueline Scott Corley by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen, for Court Reporter Cathy Jill Taylor. (Seidel, David) (Filed on 6/6/2023) (Entered: 06/06/2023)
06/07/2023	212	USCA Case Number 23-15846 for the Ninth Circuit for <u>207</u> Notice of Appeal to the Ninth Circuit, filed by Christopher Joseph Giddings-Lafaye, Dante Demartini, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Curtis Burns, Jr., Jessie Galvan, Steve Herrera, Nicholas Elden, Ivan Calvo-Prez, Beowulf Edward Owen. (jml, COURT STAFF) (Filed on 6/7/2023) Modified on 6/12/2023 (jml, COURT STAFF). (Entered: 06/07/2023)
06/07/2023	213	TRANSCRIPT ORDER for proceedings held on 6/1/23 before Judge Jacqueline Scott Corley by Microsoft Corporation, for Court Reporter not listed - San Francisco. (Rice, Tania) (Filed on 6/7/2023) (Entered: 06/07/2023)
06/09/2023	214	Transcript Designation Form for proceedings held on 3/16/23, 4/12/23, 5/12/23, 6/1/23 before Judge Jacqueline Scott Corley, (Saveri, Joseph) (Filed on 6/9/2023) (Entered: 06/09/2023)
06/13/2023	215	Judicial Referral for Purpose of Determining Relationship of Cases re 23-2880. Signed by Judge Vince Chhabria on 6/13/2023. (vclc1, COURT STAFF) (Filed on 6/13/2023) (Entered: 06/13/2023)

06/13/2023	216	ORDER RELATING CASE. Signed by Judge Jacqueline Scott Corley on 6/13/2023. 23-cv-2880 is related to 22-cv-8991. (ahm, COURT STAFF) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/14/2023	217	TRANSCRIPT ORDER for proceedings held on 5/12/2023, before Judge Jacqueline Scott Corley for Court Reporter Cathy Jill Taylor, ordered by David Littlejohn. (knm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	218	TRANSCRIPT ORDER for proceedings held on 3/16/2023, 4/12/2023, and 4/27/2023, before Judge Jacqueline Scott Corley for Court Reporter not listed - San Francisco, ordered by Linda Varoli. (knm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	219	TRANSCRIPT ORDER for proceedings held on 3/29/2023, before Judge Jacqueline Scott Corley for Court Reporter Belle Ball, ordered by Linda Varoli. (knm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	220	TRANSCRIPT ORDER for proceedings held on 6/1/2023, before Judge Jacqueline Scott Corley for Court Reporter not listed - San Francisco, ordered by Linda Varoli. (knm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	221	TRANSCRIPT ORDER for proceedings held on 5/12/2023, before Judge Jacqueline Scott Corley for Court Reporter Cathy Jill Taylor, ordered by Joel Grosberg. (knm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/15/2023	222	TRANSCRIPT ORDER for proceedings held on 5/12/2023, before Judge Jacqueline Scott Corley for Court Reporter Cathy Jill Taylor, ordered by Nick Rodelli. (knm, COURT STAFF) (Filed on 6/15/2023) (Entered: 06/15/2023)
06/19/2023	223	Ex Parte Application for Order Shortening Time to Hear Motion for Limited Joinder Pursuant to Rule 20 FRCP filed by Dante Demartini. (Attachments: # 1 Proposed Order Proposed Order, # 2 Exhibit Rule 20 Motion for Joinder)(Papale, Lawrence) (Filed on 6/19/2023) (Entered: 06/19/2023)
06/21/2023	224	ORDER DENYING MOTION FOR LIMITED JOINDER <u>223</u> . Signed by Judge Jacqueline Scott Corley on June 21, 2023. (ahm, COURT STAFF) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/22/2023	225	USCA Case Number 23-70113 for the Ninth Circuit (jml, COURT STAFF) (Filed on 6/22/2023) (Entered: 06/23/2023)
06/26/2023	226	ORDER RE MOTIONS TO SEAL AND DISCOVERY DISPUTE. Signed by Judge Jacqueline Scott Corley on June 26, 2023. (ahm, COURT STAFF) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/27/2023	227	ORDER of USCA as to <u>225</u> USCA Case Number 23-70113. (cjl, COURT STAFF) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	228	ORDER by Judge Jacqueline Scott Corley granting in part and denying in part 120 Motion to Dismiss First Amended Complaint. (ahm, COURT STAFF) (Filed on 6/27/2023) (Entered: 06/27/2023)
07/14/2023	229	STIPULATION WITH PROPOSED ORDER <i>TO EXTEND TIME TO FILE SECOND AMENDED COMPLAINT</i> filed by Curtis Burns, Jr, Ivan Calvo-Prez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Joseph Giddings-Lafaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Dermot Alfred Loftus, Beowulf Edward Owen. (Saveri, Joseph) (Filed on 7/14/2023) (Entered: 07/14/2023)



U.S. District Court California Northern District (San Francisco) CIVIL DOCKET FOR CASE #: 3:23-cv-02880-JSC

Federal Trade Commission v. Microsoft Corporation et al

Assigned to: Judge Jacqueline Scott Corley Relate Case Case: 3:22-cv-08991-JSC

Case in other court: 23-15992

Cause: 15:0053 Federal Trade Commission Act

Date Filed: 06/12/2023 Jury Demand: None

Nature of Suit: 410 Anti-Trust

Jurisdiction: U.S. Government Plaintiff

Plaintiff

Federal Trade Commission

represented by James Harris Weingarten

Federal Trade Commission 400 7th Street SW Washington, DC 20024 202-326-3570 Email: jweingarten@ftc.gov LEAD ATTORNEY PRO HAC VICE ATTORNEY TO BE NOTICED

Amanda Leigh Butler

Federal Trade Commission Bureau of Competition 600 Pennsylvania Avenue NW Washington, DC 20580 202-326-2251 Email: abutler2@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Cem Akleman

Federal Trade Commission Bureau of Competition 400 7th Street SW Washington, DC 20024 202-326-2397 Email: cakleman@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

David Morris

Federal Trade Commission 600 Pennsylvania Ave, NW Washington, DC 20580 202-326-3156 Email: dmorris1@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Edmund Saw

Federal Trade Commission 600 Pennsylvania Ave, NW Washington, DC 20580 202-326-2174 Email: esaw@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Erika Ruth Wodinsky

Federal Trade Commission Western Region 901 Market St., Suite 570 San Francisco, CA 94103 415-848-5190 Fax: 415-848-5184 Email: ewodinsky@ftc.gov

Ethan Gurwitz

Federal Trade Commission 4 University Rd Cambridge, MA 02138 774-239-1943 Email: egurwitz@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

ATTORNEY TO BE NOTICED

J. Alexander Ansaldo

Federal Trade Commission 600 Pennsylvania Avenue, N.W. Washington, DC 20580 202-326-3695 Email: jansaldo@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

James Abell

Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580 202-326-2289 Email: jabell@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

James Gossmann

Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580 202-326-3064 Email: jgossmann@ftc.gov PRO HAC VICE

ATTORNEY TO BE NOTICED

Jennifer Fleury

Federal Trade Commission 600 Pennsylvania Ave NW Washington, DC 20580 202-326-3805 Email: jfleury@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Kassandra DiPietro

Federal Trade Commission 600 Pennsylvania Ave, NW Washington, DC 20580 202-326-3772 Email: kdipietro@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Maria Cirincione

Federal Trade Commission 400 7th St SW Washington, DC 20024 202-326-3486 Email: mcirincione@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Meredith Levert

Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580 202-326-2881 Email: mlevert@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Merrick Pastore

Federal Trade Commission 600 Pennsylvania Ave, NW Washington, DC 20580 202-326-2244 Email: mpastore@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Michael Blevins

Federal Trade Commission 600 Pennsylvania Ave, NW Washington, DC 20580 202-326-2153 Email: mblevins@ftc.gov PRO HAC VICE

312a

Michael Anthony Franchak

Federal Trade Commission 400 7th Street, SW Washington, DC 20024 202-326-3406 Email: mfranchak@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Nicole Callan

Federal Trade Commission 600 Pennsylvania Ave, NW Washington, DC 20580 202-326-2234 Email: ncallan@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Peggy Femenella

Federal Trade Commission 400 7th St SW Washington, DC 20024 202-326-3086 Email: pbayer@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

Stephen Santulli

Federal Trade Commission Bureau of Competition 400 7th Street SW Ste 7534 Washington, DC 20024 202-326-3408 Email: ssantulli@ftc.gov PRO HAC VICE ATTORNEY TO BE NOTICED

V.

Defendant

Microsoft Corporation

represented by Bambo Obaro

Weil, Gotshal & Manges 201 Redwood Shores Parkway Redwood Shores, CA 94065 (650) 802-3083 Fax: (650) 802-3100 Email: bambo.obaro@weil.com LEAD ATTORNEY PRO HAC VICE ATTORNEY TO BE NOTICED

Aaron Haviland

Sidley Austin LLP 1501 K Street N.W. Washington, DC 20005 202-736-8064 Email: ahaviland@sidley.com PRO HAC VICE ATTORNEY TO BE NOTICED

Alysha Bohanon

Wilkinson Stekloff LLP 2001 M Street NW, 10th Floor Washington, DC 20036 202-847-4029 Email: abohanon@wilkinsonstekloff.com PRO HAC VICE ATTORNEY TO BE NOTICED

Anastasia McLetchie Pastan

Wilkinson Stekloff LLP 2001 M Street NW, 10th Floor Washington, DC 20036 202-804-4239 Fax: 202-847-4005 Email: apastan@wilkinsonstekloff.com PRO HAC VICE ATTORNEY TO BE NOTICED

Beth A. Wilkinson

WILKINSON STEKLOFF LLP 2001 M Street NW, 10th Floor Washington, DC 20036 202-847-4010 Fax: 202-847-4005 Email: bwilkinson@wilkinsonstekloff.com PRO HAC VICE ATTORNEY TO BE NOTICED

C. Frederick Beckner, III

Sidley Austin LLP 1501 K Street, N.W. Washington, DC 20005 202-736-8874 Email: rbeckner@sidley.com PRO HAC VICE ATTORNEY TO BE NOTICED

Daniel John Hay

Sidley Austin LLP 1501 K Street NW Washington, DC 20005 202-736-8084

Fax: 202-736-8711

Email: dhay@sidley.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Grace Lee Hill

Wilkinson Stekloff LLP 2001 M Street, N.W., 10th Floor Washington, DC 20036 202-847-4044 Email: ghill@wilkinsonstekloff.com PRO HAC VICE ATTORNEY TO BE NOTICED

James M. Rosenthal

WILKINSON STEKLOFF LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
202-847-4011
Fax: 202-847-4005
Email: jrosenthal@wilkinsonstekloff.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jennifer Pavelec

Wilkinson Stekloff LLP 2001 M Street NW, 10th Floor Washington, DC 20036 202-991-5276 Email: jpavelec@wilkinsonstekloff.com PRO HAC VICE ATTORNEY TO BE NOTICED

Jonathan E. Nuechterlein

Sidley Austin LLP 1501 K Street N.W. Washington, DC 20005 202-736-8000 Email: jnuechterlein@sidley.com PRO HAC VICE ATTORNEY TO BE NOTICED

Kieran Gavin Gostin

WILKINSON STEKLOFF LLP 2001 M Street, NW, 10th Floor Washington, DC 20036 202-847-4031 Fax: 202-847-4005 Email: kgostin@wilkinsonstekloff.com PRO HAC VICE ATTORNEY TO BE NOTICED

Lucas Croslow

Sidley Austin LLP 1501 K Street, NW Washington, DC 20005 202-736-8643 Email: lcroslow@sidley.com PRO HAC VICE ATTORNEY TO BE NOTICED

Manuel Valle

Sidley Austin LLP 1501 K Street, N.W. Washington, DC 20005 269-275-0607 Email: manuel.valle@sidley.com PRO HAC VICE ATTORNEY TO BE NOTICED

Megan A. Granger

Weil, Gotshal & Manges LLP 2001 M Street, NW, Suite 600 Washington, DC 20036 202-682-7000 Fax: 202-857-0940 Email: megan.granger@weil.com PRO HAC VICE ATTORNEY TO BE NOTICED

Michael Moiseyev

Weil, Gotshal & Manges 2001 M Street NW, Suite 600 Washington, DC 20036 202-682-7235 Email: michael.moiseyev@weil.com PRO HAC VICE ATTORNEY TO BE NOTICED

Rakesh Kilaru

Wilkinson Stekloff LLP 2001 M Street NW, 10th Floor Washington, DC 20036 (202) 847-4046 Fax: (202) 847-4005 Email: rkilaru@wilkinsonstekloff.com PRO HAC VICE ATTORNEY TO BE NOTICED

Sarah Elizabeth Neuman

WILKINSON STEKLOFF LLP 2001 M Street NW, 10th Floor Washington, DC 20036 202-804-4238 Fax: 202-847-4005

Email: sneuman@wilkinsonstekloff.com PRO HAC VICE ATTORNEY TO BE NOTICED

William R Levi

Sidley Austin LLP 1501 K Street, N.W. Washington, DC 20005 202-736-8756

Fax: 202-736-8711

Email: william.levi@sidley.com

PRO HAC VICE

ATTORNEY TO BE NOTICED

Defendant

Activision Blizzard, Inc.

represented by Caroline W Van Ness

SKADDEN ARPS SLATE MEAGHER and

FLOM LLP

525 University Avenue, Suite 1400

Palo Alto, CA 94301 (650) 470-4500

Fax: (650) 470.4570

Email: caroline.vanness@skadden.com

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Jack Patrick DiCanio

Skadden Arps Slate Meagher & Flom LLP 525 University Avenue

Palo Alto, CA 94301

650-470-4500 Fax: 650-470-4570

Email: jdicanio@skadden.com

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven C. Sunshine

Skadden Arps Slate Meagher and Flom LLP

1440 New York Ave., NW

Washington, DC 20005

202-371-7860

Fax: 202-661-0560

Email: Steven.Sunshine@skadden.com

LEAD ATTORNEY PRO HAC VICE

ATTORNEY TO BE NOTICED

Beth A. Wilkinson

(See above for address)

PRO HAC VICE

ATTORNEY TO BE NOTICED

Bradley James Pierson

Skadden, Arps, Slate, Meagher & Flom LLP One Manhattan West New York, NY 10001 212-735-3000

Email: bradley.pierson@skadden.com

PRO HAC VICE ATTORNEY TO BE NOTICED

Evan R Kreiner

Skadden Arps Slate Meagher & Flom LLP Four Times Square
New York, NY 10036
212-735-2491
Email: evan.kreiner@skadden.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jessica Watters

Skadden, Arps, Slate, Meagher & Flom LLP 1440 New York Avenue NW Washington, DC 20005 202-371-7093 Email: jessica.watters@skadden.com *PRO HAC VICE ATTORNEY TO BE NOTICED*

Julia K. York

Skadden Arps Slate Meagher & Flom LLP 1440 New York Avenue Washington, DC 20005 212-735-3000 Email: julia.york@skadden.com *PRO HAC VICE ATTORNEY TO BE NOTICED*

Maria Raptis

Skadden, Arps, Slate, Meagher & Flom LLP One Manhattan West New York, NY 10001-8602 212-735-2425 Email: maria.raptis@skadden.com PRO HAC VICE ATTORNEY TO BE NOTICED

Matthew M. Martino, I

Skadden, Arps, Slate, Meagher & Flom LLP One Manhattan West New York, NY 10001-8602 212-735-3000 Email: matthew.martino@skadden.com PRO HAC VICE ATTORNEY TO BE NOTICED

Michael Joseph Sheerin

Skadden, Arps, Slate, Meagher & Flom LLP 1 Manhattan West New York, NY 10001 212-735-3583

Email: michael.sheerin@skadden.com

PRO HAC VICE ATTORNEY TO BE NOTICED

3rd party defendant

Amazon.com, Inc.

represented by Leigh Oliver

Clifford Chance US LLP
2001 K Street NW, 9th Floor
Washington, DC 20006
301-806-7887
Email: leigh.oliver@cliffordchance.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jeffrey Michael Davidson

Covington & Burling LLP Salesforce Tower 415 Mission Street, Suite 5400 San Francisco, CA 94105 (415) 591-6000 Fax: (415) 591-6091 Email: jdavidson@cov.com ATTORNEY TO BE NOTICED

Miscellaneous

Dante Demartini

represented by David H. Seidel

Joseph Saveri Law Firm, Inc. 601 California, Suite 1000 San Francisco, CA 94108 (415) 500-6800 Email: dseidel@saverilawfirm.com *LEAD ATTORNEY ATTORNEY TO BE NOTICED*

Joseph R. Saveri

Joseph Saveri Law Firm, LLP 601 California Street, Suite 1000 San Francisco, CA 94108 (415) 500-6800 Fax: (415) 395-9940 Email: jsaveri@saverilawfirm.com LEAD ATTORNEY ATTORNEY TO BE NOTICED

Steven Noel Williams

Joseph Saveri Law Firm, LLP 601 California Street, Suite 1000 San Francisco, CA 94108 (415) 500-6800 Fax: (415) 395-9940 Email: swilliams@saverilawfirm.com LEAD ATTORNEY ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

Alioto Law Firm
One Sansome Street, 35th Floor
San Francisco, CA 94104
(415) 434-8900
Fax: (415) 434-9200
Email: jmalioto@aliotolaw.com
ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

Joseph Saveri Law Firm, Inc. 601 California Ste 1000 San Francisco, CA 94108 415-500-6800 Email: kmcmahon@saverilawfirm.com ATTORNEY TO BE NOTICED

Miscellaneous

Curtis Burns, Jr.

represented by David H. Seidel

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Miscellaneous

Nicholas Elden

represented by David H. Seidel

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Miscellaneous

Jessie Galvan

represented by David H. Seidel

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)
ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Miscellaneous

Christopher Giddings- LaFaye

represented by David H. Seidel

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Miscellaneous

Steve Herrera

represented by David H. Seidel

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)
ATTORNEY TO BE NOTICED

Miscellaneous

Hunter Joseph Jakupko

represented by David H. Seidel

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)
ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Miscellaneous

Daniel Loftus

represented by **David H. Seidel**

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Miscellaneous

Beowulf Edward Owen

represented by David H. Seidel

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Miscellaneous

Ivan Calvo-Perez

represented by David H. Seidel

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph R. Saveri

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Noel Williams

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph M Alioto, Sr

(See above for address)

ATTORNEY TO BE NOTICED

Kathleen Jordan McMahon

(See above for address)

ATTORNEY TO BE NOTICED

Miscellaneous

Sony Interactive Entertainment LLC

represented by Carl Lawrence Malm

Cleary Gottlieb Steen and Hamilton LLP 2112 Pennsylvania Avenue, NW Suite 1000
Washington, DC 20037
(202) 974-1500
Fax: (202) 974-1999
Email: lmalm@cgsh.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elsbeth Bennett

Cleary Gottlieb Steen & Hamilton LLP 2112 Pennsylvania Ave., NW, Suite 1000 Washington, DC 20037 202-974-1911 Email: ebennett@cgsh.com *PRO HAC VICE ATTORNEY TO BE NOTICED*

Zachary G. Tschida

Cleary Gottlieb Steen & Hamilton LLP 1841 Page Mill Road Palo Alto, CA 94304 650-815-4113 Fax: 650-815-4199 Email: ztschida@cgsh.com ATTORNEY TO BE NOTICED

Miscellaneous

Nintendo of America Inc.

represented by Steven Edward Swaney

Venable LLP 101 California Street, Suite 3800 San Francisco, CA 94111

415-653-3722

Fax: 415-653-3755

Email: seswaney@venable.com

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Benjamin P Argyle

Venable LLP 151 W. 42nd Street Ste 49th Floor New York, NY 10036 212-307-5500 Email: bpargyle@venable.com ATTORNEY TO BE NOTICED

Leonard L. Gordon

Venable LLP 151 West 42nd Street New York, NY 10036 (212) 370-6252 Email: llgordon@venable.com PRO HAC VICE ATTORNEY TO BE NOTICED

Miscellaneous

NVIDIA Corporation

represented by Michael Domenic Bonanno

Quinn Emanuel Urquhart & Sullivan, LLP 1300 I Street NW, Suite 900 Washington, DC 20005 (202) 538-8225 Fax: (202) 538-8100 Email: mikebonanno@quinnemanuel.com *PRO HAC VICE*ATTORNEY TO BE NOTICED

Ognjen Zivojnovic

Quinn Emanuel Urquhart Sullivan LLP 50 California Street 22nd Floor San Francisco, CA 94111 United Sta 415-875-6600 Fax: 415-875-6700 Email: ogizivojnovic@quinnemanuel.com ATTORNEY TO BE NOTICED

Miscellaneous

Google LLC

represented by **Dylan Ian Ballard**

Vinson & Elkins 555 Mission Street Suite 2000 San Francisco, CA 94105 415-979-6955 Email: dballard@yelaw.com

ATTORNEY TO BE NOTICED

Evan Miller

Vinson & Elkins 2200 Pennsylvania Avenue NW Suite 500 West Washington, DC 20037 202-639-6605 Email: emiller@velaw.com PRO HAC VICE ATTORNEY TO BE NOTICED

Miscellaneous

Valve Corporation

represented by Meeghan Tirtasaputra

Fox Rothschild LLP Litigation 10250 Constellation Boulevard Suite 900 Los Angeles, CA 90067 323-919-6480 Email: mtirtasanutra@fovrothschil

Email: mtirtasaputra@foxrothschild.com ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/12/2023	1	COMPLAINT For a Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act against Activision Blizzard, Inc., Microsoft Corporation. Filed by Federal Trade Commission. (Attachments: # 1 Civil Cover Sheet) (Weingarten, James) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	2	Proposed Summons. (Weingarten, James) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	<u>3</u>	Proposed Summons. (Weingarten, James) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	4	Case assigned to Magistrate Judge Sallie Kim. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit <i>E-Filing A New Civil Case</i> at http://cand.uscourts.gov/ecf/caseopening. Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges. Upon receipt, the summons will be issued and returned electronically. A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 6/26/2023. (as, COURT STAFF) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	<u>5</u>	Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 9/4/2023. Initial Case Management Conference set for 9/11/2023 at 1:30 PM in San Francisco, Courtroom C, 15th Floor. (wsn, COURT STAFF) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	<u>6</u>	Summons Issued as to Activision Blizzard, Inc., Microsoft Corporation. (wsn, COURT STAFF) (Filed on 6/12/2023) (Entered: 06/12/2023)

06/12/2023	7	Emergency MOTION for Temporary Restraining Order <i>Pursuant to Federal Trade Commission Act Section 13(b)</i> filed by Federal Trade Commission. (Weingarten, James) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	8	CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because either (1) a party has not consented to the jurisdiction of a Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned.
		ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED.
		This is a text only docket entry; there is no document associated with this notice. (mkl, COURT STAFF) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	9	ORDER REASSIGNING CASE. Case reassigned using a proportionate, random, and blind system pursuant to General Order No. 44 to Judge Vince Chhabria for all further proceedings. Magistrate Judge Sallie Kim no longer assigned to case, Notice: The assigned judge participates in the Cameras in the Courtroom Pilot Project. See General Order No. 65 and http://cand.uscourts.gov/cameras Signed by Clerk on 6/12/23. (Attachments: # 1 Notice of Eligibility for Video Recording)(as, COURT STAFF) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	10	Declaration of Jennifer Fleury in Support of 7 Emergency MOTION for Temporary Restraining Order <i>Pursuant to Federal Trade Commission Act Section 13(b)</i> filed by Federal Trade Commission. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V, # 23 Exhibit W, # 24 Exhibit X, # 25 Exhibit Y, # 26 Exhibit Z, # 27 Exhibit AA, # 28 Exhibit AB, # 29 Exhibit AC, # 30 Exhibit AD, # 31 Proposed Order)(Related document(s) 7) (Weingarten, James) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	11	Administrative Motion to File Under Seal <i>Plaintiff's Complaint for a Temporary Restraining Order</i> filed by Federal Trade Commission. (Attachments: # 1 Exhibit, # 2 Proposed Order)(Weingarten, James) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	12	Administrative Motion to File Under Seal <i>Plaintiff's Emergency Motion for a Temporary Restraining Order</i> filed by Federal Trade Commission. (Attachments: # 1 Declaration, # 2 Proposed Order, # 3 Unredacted Notice of Motion and Emergency Motion for Temporary Restraining Order Pursuant to FTC Act Section 13(b), # 4 Exhibit A, # 5 Exhibit AA, # 6 Exhibit AB, # 7 Exhibit AC, # 8 Exhibit I, # 9 Exhibit J, # 10 Exhibit K, # 11 Exhibit M, # 12 Exhibit N, # 13 Exhibit O, # 14 Exhibit P, # 15 Exhibit Q, # 16 Exhibit R, # 17 Exhibit S, # 18 Exhibit T, # 19 Exhibit U, # 20 Exhibit V, # 21 Exhibit Y, # 22 Exhibit Z, # 23 Exhibit AD, # 24 Exhibit B, # 25 Exhibit C)(Weingarten, James) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	<u>13</u>	CERTIFICATE OF SERVICE by Federal Trade Commission (Weingarten, James) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	14	NOTICE of Appearance by Bambo Obaro (Obaro, Bambo) (Filed on 6/12/2023) (Entered: 06/12/2023)

06/12/2023	15	MOTION for leave to appear in Pro Hac Vice <i>Beth Wilkinson</i> (Filing fee \$ 317, receipt number ACANDC-18353074.) filed by Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	<u>16</u>	MOTION for leave to appear in Pro Hac Vice <i>Rakesh Kilaru</i> (Filing fee \$ 317, receipt number ACANDC-18353079.) filed by Microsoft Corporation. (Kilaru, Rakesh) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	17	MOTION for leave to appear in Pro Hac Vice <i>Kieran Gostin</i> (Filing fee \$ 317, receipt number ACANDC-18353092.) filed by Microsoft Corporation. (Gostin, Kieran) (Filed or 6/12/2023) (Entered: 06/12/2023)
06/12/2023	<u>18</u>	MOTION for leave to appear in Pro Hac Vice <i>Grace Hill</i> (Filing fee \$ 317, receipt number ACANDC-18353103.) filed by Microsoft Corporation. (Hill, Grace) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/12/2023	<u>19</u>	MOTION for leave to appear in Pro Hac Vice <i>Anastasia Pastan</i> (Filing fee \$ 317, receipt number ACANDC-18353114.) filed by Microsoft Corporation. (Pastan, Anastasia) (Filed on 6/12/2023) (Entered: 06/12/2023)
06/13/2023	<u>20</u>	REFERRAL FOR PURPOSE OF DETERMINING RELATIONSHIP. Signed by Judge Vince Chhabria on 6/13/2023. (vclc1, COURT STAFF) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	21	ORDER RELATING CASE. Signed by Judge Jacqueline Scott Corley on 6/13/2023. 23-cv-2880 is related to 22-cv-8991. (ahm, COURT STAFF) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	22	ORDER REASSIGNING CASE. Case reassigned to Judge Jacqueline Scott Corley for all further proceedings. Judge Vince Chhabria no longer assigned to case, Notice: The assigned judge participates in the Cameras in the Courtroom Pilot Project. See General Order No. 65 and http://cand.uscourts.gov/cameras Signed by Clerk on 6/13/2023. (Attachments: # 1 Notice of Eligibility for Video Recording)(ark COURT STAFF) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	<u>23</u>	EXHIBITS re 10 Declaration in Support - <i>Exhibit D</i> filed by Federal Trade Commission. (Related document(s) 10) (Fleury, Jennifer) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	24	EXHIBITS re $\underline{10}$ Declaration in Support - <i>Exhibit L</i> filed by Federal Trade Commission. (Related document(s) $\underline{10}$) (Fleury, Jennifer) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	<u>25</u>	NOTICE of Appearance by Jack Patrick DiCanio (DiCanio, Jack) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	<u>26</u>	NOTICE of Appearance by Caroline W Van Ness (Van Ness, Caroline) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	27	EXHIBITS re 10 Declaration in Support - <i>Exhibit W</i> filed by Federal Trade Commission. (Related document(s) 10) (Fleury, Jennifer) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	28	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18354883.) filed by Activision Blizzard, Inc (Attachments: # 1 Certificate of Good Standing)(Sunshine, Steven) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	28 29	ACANDC-18354883.) filed by Activision Blizzard, Inc (Attachments: # 1 Certificate of

		Good Standing)(York, Julia) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	31	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18355113.) filed by Activision Blizzard, Inc (Attachments: # 1 Certificate of Good Standing)(Martino, Matthew) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	32	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18355197.) filed by Activision Blizzard, Inc (Attachments: # 1 Certificate of Good Standing)(Kreiner, Evan) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	33	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18355801.) filed by Activision Blizzard, Inc (Attachments: # 1 Certificate of Good Standing)(Sheerin, Michael) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	34	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>CORRECTION OF DOCKET #11</i> filed by Federal Trade Commission. (Weingarten, James) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	35	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>CORRECTION OF DOCKET #12</i> filed by Federal Trade Commission. (Attachments: # 1 Declaration Corrected Dkt. #12-1)(Weingarten, James) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	36	MOTION for leave to appear in Pro Hac Vice <i>Megan Granger</i> (Filing fee \$ 317, receipt number ACANDC-18356381.) filed by Microsoft Corporation. (Attachments: # 1 Certificate of Good Standing - Megan Granger)(Granger, Megan) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/13/2023	37	ORDER RE: TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION 7. Signed by Edward J. Davila on June 13, 2023. Evidentiary Hearing set for June 22, 2023 & June 23, 2023 at 9:00 a.m. in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley. (ahm, COURT STAFF) (Filed on 6/13/2023) (Entered: 06/13/2023)
06/14/2023	38	MOTION for leave to appear in Pro Hac Vice <i>Michael Moiseyev</i> (Filing fee \$ 317, receipt number ACANDC-18358382.) filed by Microsoft Corporation. (Attachments: # 1 Certificate of Good Standing - Michael Moiseyev)(Moiseyev, Michael) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	39	ORDER by Judge Jacqueline Scott Corley granting 15 Motion for Pro Hac Vice as to Beth Wilkinson. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	40	ORDER by Judge Jacqueline Scott Corley granting 16 Motion for Pro Hac Vice as to Rakesh Kilaru. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	41	ORDER by Judge Jacqueline Scott Corley granting 17 Motion for Pro Hac Vice as to Kieran Gostin. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	42	ORDER by Judge Jacqueline Scott Corley granting 18 Motion for Pro Hac Vice as to Grace Hill. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	43	ORDER by Judge Jacqueline Scott Corley granting 19 Motion for Pro Hac Vice as to Anastasia Pastan. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	44	ORDER by Judge Jacqueline Scott Corley granting 28 Motion for Pro Hac Vice as to Steven Sunshine. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered:

		06/14/2023)
06/14/2023	45	ORDER by Judge Jacqueline Scott Corley granting 30 Motion for Pro Hac Vice as to Julia York. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	46	ORDER by Judge Jacqueline Scott Corley granting 31 Motion for Pro Hac Vice as to Matthew Martino. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	47	ORDER by Judge Jacqueline Scott Corley granting 32 Motion for Pro Hac Vice as to Evan Kreiner. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	48	ORDER by Judge Jacqueline Scott Corley granting 33 Motion for Pro Hac Vice as to Michael Sheerin. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	49	ORDER by Judge Jacqueline Scott Corley granting 36 Motion for Pro Hac Vice as to Megan Granger. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	50	ORDER by Judge Jacqueline Scott Corley granting 38 Motion for Pro Hac Vice as to Michael Moiseyev. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>51</u>	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18358735.) filed by Activision Blizzard, Inc (Attachments: # 1 Certificate of Good Standing)(Raptis, Maria) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>52</u>	FED. R. CIV. P. 7.1 CORPORATE DISCLOSURE STATEMENT AND CIV. L.R. 3-15 CERTIFICATION OF CONFLICTS AND INTERESTED ENTITIES OR PERSONS filed by Activision Blizzard, Inc. (Van Ness, Caroline) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	53	RULE 3-15 CERTIFICATION OF INTERESTED ENTITITES OR PERSONS [Civil L.R. 3-15] filed by Microsoft Corporation (Wilkinson, Beth) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>54</u>	CORPORATE DISCLOSURE STATEMENT OF DEFENDANT MICROSOFT CORP. [Fed. R. Civ. P. 7.1] filed by Microsoft Corporation (Wilkinson, Beth) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	55	Clerks Notice re Evidentiary Hearing Deadline for Daily Transcript and/or Realtime Reporting:
		The deadline to request daily transcripts or Realtime reporting for counsel during the evidentiary hearing is 6/15/2023, by 10 a.m., see General Order 23.
		More details regarding daily transcripts or Realtime during trial/evidentiary hearings are available on the Transcripts/Court Reporters webpage (see section III) at https://www.cand.uscourts.gov/about/clerks-office/transcripts-court-reporters/
		Contact Court Reporter Supervisor Kristen Melen with questions at kristen_melen@cand.uscourts.gov by the deadline above.
		(knm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>56</u>	MOTION to Expedite <i>Case Management Conference</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/14/2023) (Entered: 06/14/2023)

06/14/2023	<u>57</u>	ORDER by Judge Jacqueline Scott Corley granting <u>51</u> Motion for Pro Hac Vice as to Maria Raptis. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>58</u>	NOTICE of Appearance by Edmund Saw (Saw, Edmund) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>59</u>	NOTICE of Appearance by Nicole Callan (Callan, Nicole) (Filed on 6/14/2023) (Entered 06/14/2023)
06/14/2023	<u>60</u>	NOTICE of Appearance by Merrick Pastore (Pastore, Merrick) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	61	NOTICE of Appearance by Amanda Leigh Butler (Butler, Amanda) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>62</u>	MOTION for leave to appear in Pro Hac Vice <i>for Attorney Sarah E. Neuman</i> (Filing fee \$ 317, receipt number ACANDC-18360233.) filed by Microsoft Corporation. (Neuman, Sarah) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>63</u>	NOTICE of Appearance by Michael Anthony Franchak (Franchak, Michael) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	64	NOTICE of Appearance by David Morris (Morris, David) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>65</u>	NOTICE of Appearance by Stephen Santulli (Santulli, Stephen) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>66</u>	MOTION for leave to appear in Pro Hac Vice <i>for Attorney Jenna Pavelec</i> (Filing fee \$ 317, receipt number ACANDC-18360254.) filed by Microsoft Corporation. (Pavelec, Jennifer) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>67</u>	NOTICE of Appearance by Ethan Gurwitz (Gurwitz, Ethan) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>68</u>	MOTION for leave to appear in Pro Hac Vice <i>for Attorney Alysha Bohanon</i> (Filing fee \$ 317, receipt number ACANDC-18360275.) filed by Microsoft Corporation. (Bohanon, Alysha) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>69</u>	NOTICE of Appearance by Michael Blevins (Blevins, Michael) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	70	NOTICE of Appearance by J. Alexander Ansaldo (Ansaldo, J.) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	71	NOTICE of Appearance by Maria Cirincione (Cirincione, Maria) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	72	NOTICE of Appearance by Kassandra DiPietro (DiPietro, Kassandra) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	73	NOTICE OF INTENT TO OPPOSE DEFENDANTS' MOTION FOR EXPEDITED CASE MANAGEMENT CONFERENCE filed by Federal Trade Commission re 56 MOTION to Expedite <i>Case Management Conference</i> (Attachments: # 1 Declaration, # 2 Exhibit, # 3 Exhibit)(Weingarten, James) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	74	TRANSCRIPT ORDER for Future Trial with Daily Transcripts by Federal Trade Commission. (Weingarten, James) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>75</u>	Administrative Motion to File Under Seal Exhibits A and B to Plaintiff's Notice of Intent to Oppose Defendants' Motion for Expedited Case Management Conference filed by

		Federal Trade Commission. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Proposed Order) (Weingarten, James) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	76	ORDER RE: EVIDENTIARY HEARING ON PRELIMINARY INJUNCTION MOTION. Signed by Judge Jacqueline Scott Corley on 6/14/2023.
		Pre-evidentiary hearing/Status Conference set for 6/21/2023 at 2:00 p.m. in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley.
		Evidentiary Hearing reset for 6/22/2023, 6/23/2023, 6/27/2023, and 6/29/2023 at 8:30 a.m. in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley.
		Evidentiary Hearing set for 6/28/2023 at 1:30 p.m. in San Francisco, Courtroom 08, 19th Floor before Judge Jacqueline Scott Corley.
		Please note that the hearings will <u>not</u> be broadcast by Zoom or AT&T Teleconference.
		(ahm, COURT STAFF) (Filed on 6/14/2023) Modified on 6/14/2023 (ahm, COURT STAFF). (Entered: 06/14/2023)
06/14/2023	77	ORDER by Judge Jacqueline Scott Corley granting <u>62</u> Motion for Pro Hac Vice as to Sarah E. Neuman. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	<u>78</u>	ORDER by Judge Jacqueline Scott Corley granting 66 Motion for Pro Hac Vice as to Jenna Pavelec. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	79	ORDER by Judge Jacqueline Scott Corley granting <u>68</u> Motion for Pro Hac Vice as to Alysha Bohanon. (ahm, COURT STAFF) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	80	TRANSCRIPT ORDER for Future Trial with Daily Transcripts by Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/14/2023	81	TRANSCRIPT ORDER for Future Trial with Daily Transcripts by Activision Blizzard, Inc (Van Ness, Caroline) (Filed on 6/14/2023) (Entered: 06/14/2023)
06/15/2023	82	NOTICE of Appearance by Erika Ruth Wodinsky <i>on behalf of Federal Trade Commission</i> (Wodinsky, Erika) (Filed on 6/15/2023) (Entered: 06/15/2023)
06/15/2023	83	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Jennifer Rie. (knm, COURT STAFF) (Filed on 6/15/2023) (Entered: 06/15/2023)
06/15/2023	84	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Robert Greebel. (knm, COURT STAFF) (Filed on 6/15/2023) (Entered: 06/15/2023)
06/15/2023	<u>85</u>	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Alexandra Wilts. (knm, COURT STAFF) (Filed on 6/15/2023) (Entered: 06/15/2023)
06/15/2023	86	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Tom Belles. (knm, COURT STAFF) (Filed on 6/15/2023) (Entered: 06/15/2023)
06/15/2023	87	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Nick Rodelli (knm, COURT STAFF) (Filed on 6/15/2023) (Entered: 06/15/2023)
06/15/2023	88	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18366796.) filed by Activision Blizzard, Inc (Attachments: # 1 Certificate of Good Standing)(Watters, Jessica) (Filed on 6/15/2023) (Entered: 06/15/2023)

89	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18367591.) filed by Activision Blizzard, Inc (Attachments: # 1 Certificate of Good Standing)(Pierson, Bradley) (Filed on 6/16/2023) (Entered: 06/16/2023)
90	ORDER by Judge Jacqueline Scott Corley granting <u>88</u> Motion for Pro Hac Vice as to Jessica Watters. (ahm, COURT STAFF) (Filed on 6/16/2023) (Entered: 06/16/2023)
91	ORDER by Judge Jacqueline Scott Corley granting <u>89</u> Motion for Pro Hac Vice as to Bradley J. Pierson. (ahm, COURT STAFF) (Filed on 6/16/2023) (Entered: 06/16/2023)
92	MOTION for leave to appear in Pro Hac Vice <i>of Jonathan E. Nuechterlein</i> (Filing fee \$ 317, receipt number ACANDC-18367903.) filed by Microsoft Corporation. (Nuechterlein, Jonathan) (Filed on 6/16/2023) (Entered: 06/16/2023)
93	NOTICE of Appearance by Joseph R. Saveri <i>in the related matter, Demartini et al v. Microsoft Corporation</i> (Saveri, Joseph) (Filed on 6/16/2023) (Entered: 06/16/2023)
94	MOTION for leave to appear in Pro Hac Vice <i>of C. Frederick Beckner III</i> (Filing fee \$ 317, receipt number ACANDC-18368039.) filed by Microsoft Corporation. (Beckner, C.) (Filed on 6/16/2023) (Entered: 06/16/2023)
95	NOTICE of Appearance by Steven Noel Williams <i>in the related matter, Demartini et al v. Microsoft Corporation</i> (Williams, Steven) (Filed on 6/16/2023) (Entered: 06/16/2023)
96	NOTICE of Appearance by David H. Seidel <i>in the related matter, Demartini et al v. Microsoft Corporation</i> (Seidel, David) (Filed on 6/16/2023) (Entered: 06/16/2023)
97	MOTION for leave to appear in Pro Hac Vice <i>of William R. Levi</i> (Filing fee \$ 317, receipt number ACANDC-18368082.) filed by Microsoft Corporation. (Levi, William) (Filed on 6/16/2023) (Entered: 06/16/2023)
98	MOTION for leave to appear in Pro Hac Vice <i>of Daniel J. Hay</i> (Filing fee \$ 317, receipt number ACANDC-18368110.) filed by Microsoft Corporation. (Hay, Daniel) (Filed on 6/16/2023) (Entered: 06/16/2023)
99	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Julia Kleinbrodt. (knm, COURT STAFF) (Filed on 6/16/2023) (Entered: 06/16/2023)
100	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Aram Sethian. (knm, COURT STAFF) (Filed on 6/16/2023) (Entered: 06/16/2023)
101	TRANSCRIPT ORDER for Future Trial with Daily Transcripts by Curtis Burns, Jr, Ivan Calvo-Perez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Giddings-LaFaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Loftus, Beowulf Edward Owen. (Seidel, David) (Filed on 6/16/2023) (Entered: 06/16/2023)
102	ORDER by Judge Jacqueline Scott Corley granting 94 Motion for Pro Hac Vice as to C. Frederick Beckner III. (ahm, COURT STAFF) (Filed on 6/16/2023) (Entered: 06/16/2023)
103	ORDER by Judge Jacqueline Scott Corley granting <u>92</u> Motion for Pro Hac Vice as to Jonathan E. Nuechterlein. (ahm, COURT STAFF) (Filed on 6/16/2023) (Entered: 06/16/2023)
104	ORDER by Judge Jacqueline Scott Corley granting <u>97</u> Motion for Pro Hac Vice as to William R. Levi. (ahm, COURT STAFF) (Filed on 6/16/2023) (Entered: 06/16/2023)
	90 91 92 93 94 95 96 97 98 99 100 101

06/16/2023	105	ORDER by Judge Jacqueline Scott Corley granting <u>98</u> Motion for Pro Hac Vice as to Daniel J. Hay. (ahm, COURT STAFF) (Filed on 6/16/2023) (Entered: 06/16/2023)
06/16/2023	106	Administrative Motion to File Under Seal <i>Opposition to Motion for Preliminary Injunction</i> filed by Microsoft Corporation. (Attachments: # 1 Proposed Order, # 2 Declaration, # 3 Exhibit)(Wilkinson, Beth) (Filed on 6/16/2023) (Entered: 06/16/2023)
06/16/2023	107	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>Opposition to Motion for Preliminary Injunction</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Proposed Order)(Wilkinson, Beth) (Filed on 6/16/2023) (Entered: 06/16/2023)
06/16/2023	108	OPPOSITION/RESPONSE (re 12 Administrative Motion to File Under Seal <i>Plaintiff's Emergency Motion for a Temporary Restraining Order</i>) filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Declaration, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit, # 20 Exhibit, # 21 Exhibit, # 22 Exhibit, # 23 Exhibit, # 24 Exhibit, # 25 Exhibit, # 26 Exhibit, # 27 Exhibit, # 28 Exhibit, # 29 Exhibit, # 30 Exhibit, # 31 Exhibit, # 32 Exhibit, # 33 Exhibit, # 34 Exhibit, # 35 Exhibit, # 36 Exhibit, # 37 Exhibit, # 38 Exhibit, # 39 Exhibit, # 40 Exhibit, # 41 Exhibit, # 42 Exhibit, # 43 Exhibit, # 44 Exhibit, # 45 Exhibit, # 46 Exhibit, # 47 Exhibit, # 48 Exhibit, # 49 Exhibit, # 50 Exhibit, # 51 Exhibit, # 52 Exhibit, # 53 Exhibit, # 54 Exhibit, # 55 Exhibit, # 56 Exhibit, # 57 Exhibit, # 58 Exhibit, # 59 Exhibit, # 60 Exhibit, # 61 Exhibit, # 62 Exhibit, # 63 Exhibit, # 64 Exhibit, # 65 Exhibit, # 66 Exhibit)(Wilkinson, Beth) (Filed on 6/16/2023) (Entered: 06/17/2023)
06/17/2023	109	Administrative Motion to File Under Seal <i>Opposition to Motion for Preliminary Injunction</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Proposed Order, # 2 Declaration, # 3 Exhibit A, # 4 Exhibit B, # 5 Exhibit 2, # 6 Exhibit 3, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 11, # 11 Exhibit 12, # 12 Exhibit 15, # 13 Exhibit 24, # 14 Exhibit 25, # 15 Exhibit 27, # 16 Exhibit 28, # 17 Exhibit 29, # 18 Exhibit 30, # 19 Exhibit 31, # 20 Exhibit 32, # 21 Exhibit 33, # 22 Exhibit 34, # 23 Exhibit 37, # 24 Exhibit 38, # 25 Exhibit 39, # 26 Exhibit 40, # 27 Exhibit 41, # 28 Exhibit 42, # 29 Exhibit 43, # 30 Exhibit 44, # 31 Exhibit 48, # 32 Exhibit 53, # 33 Exhibit 54, # 34 Exhibit 55, # 35 Exhibit 58, # 36 Exhibit 60, # 37 Exhibit 63, # 38 Exhibit 68, # 39 Exhibit 69, # 40 Exhibit 70, # 41 Exhibit 71, # 42 Exhibit 72)(Wilkinson, Beth) (Filed on 6/17/2023) (Entered: 06/17/2023)
06/17/2023	110	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>Opposition to Motion for Preliminary Injunction</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Proposed Order, # 2 Declaration, # 3 Exhibit, # 4 Exhibit 1, # 5 Exhibit 10, # 6 Exhibit 13, # 7 Exhibit 14, # 8 Exhibit 17, # 9 Exhibit 18, # 10 Exhibit 19, # 11 Exhibit 20, # 12 Exhibit 21, # 13 Exhibit 22, # 14 Exhibit 23, # 15 Exhibit 46, # 16 Exhibit 47, # 17 Exhibit 57)(Wilkinson, Beth) (Filed on 6/17/2023) (Entered: 06/17/2023)
06/17/2023	111	OPPOSITION/RESPONSE (re 12 Administrative Motion to File Under Seal <i>Plaintiff's Emergency Motion for a Temporary Restraining Order</i>) filed byActivision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Declaration, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 28, # 27 Exhibit 29, # 28 Exhibit 30, # 29 Exhibit 32, # 30 Exhibit 34, # 31 Exhibit 35, # 32 Exhibit 36, # 33 Exhibit 37, # 34 Exhibit 38, # 35

06/20/2023	123	ORDER by Judge Jacqueline Scott Corley granting 114 Motion for Pro Hac Vice as to James Rosenthal. (ahm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	122	MOTION for Clarification re 76 Order on Motion to Expedite filed by Sony Interactive Entertainment LLC. Responses due by 7/5/2023. Replies due by 7/12/2023. (Attachments: # 1 Proposed Order)(Bennett, Elsbeth) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	121	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Frank Lamancusa. (knm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	120	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18372310.) filed by Sony Interactive Entertainment LLC. (Bennett, Elsbeth) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	119	MOTION for leave to appear in Pro Hac Vice <i>of Aaron P. Haviland</i> (Filing fee \$ 317, receipt number ACANDC-18372332.) filed by Microsoft Corporation. (Haviland, Aaron) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	118	MOTION for leave to appear in Pro Hac Vice <i>of J. Manuel Valle</i> (Filing fee \$ 317, receipt number ACANDC-18372278.) filed by Microsoft Corporation. (Valle, Manuel) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	117	NOTICE of Appearance by Zachary G. Tschida (Tschida, Zachary) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	<u>116</u>	MOTION for leave to appear in Pro Hac Vice <i>of Lucas Croslow</i> (Filing fee \$ 317, receipt number ACANDC-18372236.) filed by Microsoft Corporation. (Croslow, Lucas) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/19/2023	115	OPPOSITION/RESPONSE (re 112 MOTION for Protective Order) filed byActivision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Proposed Order, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Wilkinson, Beth) (Filed on 6/19/2023) (Entered: 06/19/2023)
06/18/2023	114	MOTION for leave to appear in Pro Hac Vice <i>for Attorney James Rosenthal</i> (Filing fee \$ 317, receipt number ACANDC-18371272.) filed by Microsoft Corporation. (Rosenthal, James) (Filed on 6/18/2023) (Entered: 06/18/2023)
06/17/2023	113	MOTION to Remove Incorrectly Filed Document filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Proposed Order)(Wilkinson, Beth) (Filed on 6/17/2023) (Entered: 06/17/2023)
06/17/2023	112	MOTION for Protective Order filed by Federal Trade Commission. Responses due by 7/3/2023. Replies due by 7/10/2023. (Attachments: # 1 Proposed Order Text of Proposed Order, # 2 Exhibit A, # 3 Exhibit B)(Saw, Edmund) (Filed on 6/17/2023) (Entered: 06/17/2023)
		Exhibit 39, # 36 Exhibit 40, # 37 Exhibit 41, # 38 Exhibit 42, # 39 Exhibit 43, # 40 Exhibit 44, # 41 Exhibit 45, # 42 Exhibit 46, # 43 Exhibit 47, # 44 Exhibit 48, # 45 Exhibit 49, # 46 Exhibit 50, # 47 Exhibit 51, # 48 Exhibit 53, # 49 Exhibit 54, # 50 Exhibit 55, # 51 Exhibit 56, # 52 Exhibit 57, # 53 Exhibit 58, # 54 Exhibit 59, # 55 Exhibit 60, # 56 Exhibit 61, # 57 Exhibit 62, # 58 Exhibit 63, # 59 Exhibit 64, # 60 Exhibit 65, # 61 Exhibit 66, # 62 Exhibit 67, # 63 Exhibit 68, # 64 Exhibit 69, # 65 Exhibit 70, # 66 Exhibit 71, # 67 Exhibit 72)(Wilkinson, Beth) (Filed on 6/17/2023) (Entered: 06/17/2023)

06/20/2023	124	ORDER by Judge Jacqueline Scott Corley granting 116 Motion for Pro Hac Vice as to Lucas Croslow. (ahm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	125	ORDER by Judge Jacqueline Scott Corley granting 118 Motion for Pro Hac Vice as to J. Manuel Valle. (ahm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	126	ORDER by Judge Jacqueline Scott Corley granting 119 Motion for Pro Hac Vice as to Aaron P. Haviland. (ahm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	127	ORDER by Judge Jacqueline Scott Corley granting <u>120</u> Motion for Pro Hac Vice as to Elsbeth Bennett. (ahm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	128	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Federal Trade Commission. (Attachments: # 1 Proposed Order, # 2 Exhibit A (Unredacted Version))(Fleury, Jennifer) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	129	JOINT STATEMENT REGARDING EVIDENCE FOR PRE-HEARING CONFERENCE by Federal Trade Commission. (Attachments: # 1 Exhibit A (Redacted Version))(Fleury, Jennifer) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	130	CLERK'S NOTICE PROVIDING ZOOM ACCESS INFORMATION. For the upcoming evidentiary hearing, there is limited capacity in Courtroom 8, but there is overflow seating in the Federal Bar Association Media Center, 1st Floor Lobby, North East corner, 450 Golden Gate Ave. San Francisco.
		In addition, there is a remote public audio feed available via Zoom:
		https://cand-uscourts.zoomgov.com/j/1613661817? pwd=Z0tnSzBvKzJMN25SRFB3M1B6dFBadz09
		Webinar ID: 161 366 1817 Password: 924619
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Filed on 6/20/2023) Modified on 6/20/2023 (ahm, COURT STAFF). (Entered: 06/20/2023)
06/20/2023	131	Brief re 108 Opposition/Response to Motion - Federal Trade Commission's Reply to Defendants' Opposition to Preliminary Injunction Motion filed by Federal Trade Commission. (Attachments: # 1 Exhibit Index)(Related document(s) 108) (Weingarten, James) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	132	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Federal Trade Commission. (Attachments: # 1 Proposed Order, # 2 Under Seal Reply Brief)(Weingarten, James) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	133	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Gregory Heltzer. (knm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023)

06/20/2023	134	STATEMENT IN SUPPORT OF SEALING CERTAIN CONFIDENTIAL BUSINESS MATERIAL re 35 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>CORRECTION OF DOCKET #12</i> , 34 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>CORRECTION OF DOCKET #11</i> by Sony Interactive Entertainment LLC. (Attachments: # 1 Declaration of Christian Svensson in Support, # 2 Exhibit 2 - Proposed Redactions to Document Filed Under Seal at ECF No. 10-17, # 3 Exhibit 3 - Proposed Redactions of Document Filed Under Seal at ECF No. 10-20)(Bennett, Elsbeth) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	135	NOTICE by Activision Blizzard, Inc. re <i>Notice of Lodging [Proposed] Order Permitting Microsoft Corporation And Activision Blizzard, Inc. To Bring Outside Equipment Into Courthouse For Hearing</i> (Attachments: # 1 Proposed Order)(Van Ness, Caroline) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	136	NON-PARTY NINTENDO OF AMERICA INC. UNOPPOSED MOTION FOR ORDER CHANGING TIME filed by Nintendo of America Inc (Attachments: # 1 Declaration of Leonard L. Gordon ISO Motion, # 2 Proposed Order)(Swaney, Steven) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	137	NOTICE by Activision Blizzard, Inc., Microsoft Corporation - <i>Notice of Filing of Defendants' Redacted Exhibit List</i> (Attachments: # 1 Exhibit A - Defendants' Exhibit List (Redacted))(Wilkinson, Beth) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	138	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Exhibit A - Defendants' Exhibit List (Sealed, Unredacted Version), # 2 Proposed Order)(Wilkinson, Beth) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2022	120	
06/20/2023	139	ORDER granting as modified 135 Microsoft Corporation And Activision Blizzard, Inc.'s Request to Bring Outside Equipment Into Courthouse For Hearing. Signed by Judge Jacqueline Scott Corley on 6/20/2023. (ahm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	139	Inc.'s Request to Bring Outside Equipment Into Courthouse For Hearing. Signed by Judge Jacqueline Scott Corley on 6/20/2023. (ahm, COURT STAFF) (Filed on
		Inc.'s Request to Bring Outside Equipment Into Courthouse For Hearing. Signed by Judge Jacqueline Scott Corley on 6/20/2023. (ahm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023) MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18376666.) filed by Sony Interactive Entertainment LLC. (Malm, Carl) (Filed
06/20/2023	140	Inc.'s Request to Bring Outside Equipment Into Courthouse For Hearing. Signed by Judge Jacqueline Scott Corley on 6/20/2023. (ahm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023) MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18376666.) filed by Sony Interactive Entertainment LLC. (Malm, Carl) (Filed on 6/20/2023) (Entered: 06/20/2023) Statement re 112 MOTION for Protective Order /Statement in Support of Plaintiff's Motion for Protective Order by Sony Interactive Entertainment LLC. (Malm, Carl) (Filed
06/20/2023	140	Inc.'s Request to Bring Outside Equipment Into Courthouse For Hearing. Signed by Judge Jacqueline Scott Corley on 6/20/2023. (ahm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023) MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18376666.) filed by Sony Interactive Entertainment LLC. (Malm, Carl) (Filed on 6/20/2023) (Entered: 06/20/2023) Statement re 112 MOTION for Protective Order /Statement in Support of Plaintiff's Motion for Protective Order by Sony Interactive Entertainment LLC. (Malm, Carl) (Filed on 6/20/2023) (Entered: 06/20/2023) NOTICE of Appearance by Ognjen Zivojnovic for Non-Party NVIDIA Corporation
06/20/2023	140 141 142	Inc.'s Request to Bring Outside Equipment Into Courthouse For Hearing. Signed by Judge Jacqueline Scott Corley on 6/20/2023. (ahm, COURT STAFF) (Filed on 6/20/2023) (Entered: 06/20/2023) MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18376666.) filed by Sony Interactive Entertainment LLC. (Malm, Carl) (Filed on 6/20/2023) (Entered: 06/20/2023) Statement re 112 MOTION for Protective Order /Statement in Support of Plaintiff's Motion for Protective Order by Sony Interactive Entertainment LLC. (Malm, Carl) (Filed on 6/20/2023) (Entered: 06/20/2023) NOTICE of Appearance by Ognjen Zivojnovic for Non-Party NVIDIA Corporation (Zivojnovic, Ognjen) (Filed on 6/20/2023) (Entered: 06/20/2023)

06/20/2023	146	Statement re 34 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>CORRECTION OF DOCKET #11</i> by Activision Blizzard, Inc (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	147	Statement re 35 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>CORRECTION OF DOCKET #12</i> by Activision Blizzard, Inc (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	148	ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits filed by Activision Blizzard, Inc Responses due by 6/26/2023. (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	149	TRANSCRIPT ORDER for Future Trial with Daily Transcripts by Federal Trade Commission. (Weingarten, James) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/20/2023	150	ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits Pursuant to Civil L.R. 7-11 and 79-5 filed by Microsoft Corporation. Responses due by 6/26/2023. (Attachments: # 1 Declaration Of Leigh Ann Lucero, # 2 Proposed Order) (Wilkinson, Beth) (Filed on 6/20/2023) (Entered: 06/20/2023)
06/21/2023	151	Statement re 34 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed - <i>CORRECTION OF DOCKET #11</i> by Microsoft Corporation. (Attachments: # 1 Proposed Order)(Wilkinson, Beth) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	152	Statement re 35 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>CORRECTION OF DOCKET #12</i> by Microsoft Corporation. (Attachments: # 1 Proposed Order)(Wilkinson, Beth) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	153	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Linda Varoli. (knm, COURT STAFF) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	154	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Nick Wetzler. (knm, COURT STAFF) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	155	Statement re 128 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 138 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed Non-Party Google LLC's Statement in support of Sealing Certain Confidential Business Materials in Parties' Preliminary Injunction Hearing Exhibits by Google LLC. (Attachments: # 1 Declaration of Scott Gerwin)(Ballard, Dylan) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	156	Statement re 112 MOTION for Protective Order NON-PARTY NINTENDO OF AMERICA INC. STATEMENT IN SUPPORT OF PLAINTIFFS MOTION FOR PROTECTIVE ORDER by Nintendo of America Inc (Swaney, Steven) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	157	NOTICE of Appearance by Joseph M Alioto, Sr <i>In the related matter, Demartini et al.v. Microsoft Corporation</i> (Alioto, Joseph) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	<u>158</u>	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Noelle Wills. (knm, COURT STAFF) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	159	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18378894.) filed by Google LLC. (Miller, Evan) (Filed on 6/21/2023)

	+	(Entered: 06/21/2023)
06/21/2023	160	OPPOSITION/RESPONSE (re 148 ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits, 150 ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits Pursuant to Civil L.R. 7-11 and 79-5) filed byCurtis Burns, Jr, Ivan Calvo-Perez, Dante Demartini, Nicholas Elden, Jessie Galvan, Christopher Giddings- LaFaye, Steve Herrera, Hunter Joseph Jakupko, Daniel Loftus, Beowulf Edward Owen. (Seidel, David) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	161	Statement re 128 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 138 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by NVIDIA Corporation. (Attachments: # 1 Declaration of Aashish Patel, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Proposed Order)(Zivojnovic, Ognjen) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	<u>162</u>	ORDER by Judge Jacqueline Scott Corley granting 159 Motion for Pro Hac Vice as to Evan Miller. (ahm, COURT STAFF) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	<u>163</u>	ORDER by Judge Jacqueline Scott Corley granting 140 Motion for Pro Hac Vice as to Carl Malm. (ahm, COURT STAFF) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	<u>164</u>	Statement re 112 MOTION for Protective Order Non-Party Google LLC's Statement in support of Plaintiff's Motion for Protective Order by Google LLC. (Ballard, Dylan) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	<u>165</u>	NOTICE of Appearance by Meeghan Tirtasaputra (Tirtasaputra, Meeghan) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	166	Declaration of Christopher Schenck in Support of <u>128</u> Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed byValve Corporation. (Related document(s) <u>128</u>) (Tirtasaputra, Meeghan) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	167	NOTICE of Appearance by Kathleen Jordan McMahon in the related matter, Demartini et al v. Microsoft Corporation (McMahon, Kathleen) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	168	Statement NON-PARTY NINTENDO OF AMERICA INC. STATEMENT PURSUANT TO LOCAL RULE 79-5(f) AS TO WHY ITS CONFIDENTIAL INFORMATION SHOULD BE FILED UNDER SEAL by Nintendo of America Inc (Attachments: # 1 Proposed Order, # 2 Declaration of Steven Singer ISO Nintendo America Inc Statement)(Swaney, Steven) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	169	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Status Conference held on 6/21/2023. The Court will issue an order to confirm the matters discussed this date. (Court Reporter: Marla Knox by Zoom)(Time 00:34)
		Attorneys for Plaintiff FTC: James Weingarten/Jenny Fleury/Peggy Femenella/Jim Abell/Cem Akleman/Nicole Callan
		Attorneys for Defendant Microsoft: Beth Wilkinson/Rakesh Kilaru/ Kieran Gostin/Grace Hill/Sarah Neuman
		Attorneys for Defendant Activision Blizzard: Steven Sunshine/Caroline Van Ness/Julia York
		(This is a text-only entry generated by the court. There is no document associated with this entry.)

		(ahm, COURT STAFF) (Date Filed: 6/21/2023) (Entered: 06/21/2023)
06/21/2023	170	ORDER FOLLOWING JUNE 21, 2023 STATUS CONFERENCE. Signed by Judge Jacqueline Scott Corley on June 21, 2023.(ahm, COURT STAFF) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	171	CLERK'S NOTICE REGARDING ZOOM & AUDIO FEED INFORMATION. For the upcoming evidentiary hearing (June 22 to June 29), there is limited capacity in Courtroom 8, but there is overflow seating in the Federal Bar Association Media Center, 1st Floor Lobby, North East corner, 450 Golden Gate Ave, San Francisco.
		In addition, there is a remote public audio feed available via Zoom:
		Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/jsc
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/.
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	172	ADMINISTRATIVE MOTION Seeking in Camera Treatment <i>of Certain Exhibits</i> filed by Sony Interactive Entertainment LLC. Responses due by 6/26/2023. (Attachments: # 1 Declaration of Christian Svensson, # 2 Proposed Order)(Bennett, Elsbeth) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	173	Amended ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits Pursuant to Civil LR 7-11 and 79-5 filed by Activision Blizzard, Inc Responses due by 6/26/2023. (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order) (Van Ness, Caroline) (Filed on 6/21/2023) (Entered: 06/21/2023)
06/21/2023	174	Statement of Witnesses and Evidence for June 22, 2023, Pursuant to Court Order (ECF NO. 170) by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/21/2023) (Entered: 06/22/2023)
06/22/2023	<u>175</u>	Proposed Findings of Fact by Federal Trade Commission <i>REDACTED VERSION</i> . (Weingarten, James) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	176	Statement <i>of Witnesses and Evidence for June 22, 2023, Pursuant to Court Order (ECF NO. 170)</i> by Federal Trade Commission. (Weingarten, James) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	177	Proposed Findings of Fact by Activision Blizzard, Inc., Microsoft Corporation <i>REDACTED VERSION</i> . (Wilkinson, Beth) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	178	Administrative Motion to File Under Seal <i>Portions of Defendants' Proposed Findings of Fact and Conclusions of Law</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Exhibit A - Declaration, # 2 Exhibit B - Unredacted Proposed Findings of Fact, # 3 Proposed Order)(Wilkinson, Beth) (Filed on 6/22/2023) (Entered: 06/22/2023)

06/22/2023	188	MOTION for Extension of Time to File NON-PARTY NINTENDO OF AMERICA INC. UNOPPOSED MOTION FOR ORDER CHANGING TIME filed by Nintendo of America Inc (Attachments: # 1 Declaration OF BENJAMIN P. ARGYLE IN SUPPORT OF 341a
06/22/2023	187	ORDER RE: SUBMISSION OF ADMITTED EXHIBITS. Signed by Judge Jacqueline Scott Corley on 6/22/2023. (ahm, COURT STAFF) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	<u>186</u>	NOTICE of Appearance by Jeffrey Michael Davidson (Davidson, Jeffrey) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	185	Statement - Defendants' First Amended Statement of Witnesses and Evidence For June 22, 2023, Pursuant To Court Order (ECF NO. 170) by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	184	***Filed in Error - Pls. Refer to Docket 185 *** - Administrative Motion to File Under Seal Defendant's First Amended Statement of Witnesses and Evidence For June 22, 2023 Pursuant To Court Order (ECF NO. 170) filed by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/22/2023) Modified on 6/22/2023 (tn, COURT STAFF). (Entered: 06/22/2023)
		Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/ . (ahm, COURT STAFF) (Filed on 6/22/2023) (Entered: 06/22/2023)
		General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.
		Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/jsc
06/22/2023		The Evidentiary Hearing set for June 28, 2023 before Judge Jacqueline Scott Corley is advanced to 8:30 a.m. in Courtroom 8 in San Francisco.
06/22/2023	183	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Federal Trade Commission. (Attachments: # 1 Exhibit A (Unredacted Version), # 2 Proposed Order)(Fleury, Jennifer) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	182	Exhibit List by Federal Trade Commission (Attachments: # 1 Exhibit A (Redacted Version))(Fleury, Jennifer) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	181	TRIAL BRIEF <i>PLAINTIFF FEDERAL TRADE COMMISSIONS BENCH BRIEF REGARDING DEFENDANTS PROFFERED TESTIMONY REGARDING MICROSOFTS AGREEMENTS</i> by Federal Trade Commission. (Attachments: # 1 Exhibit A (Redacted Version), # 2 Declaration of James Abell)(Weingarten, James) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	180	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Federal Trade Commission. (Attachments: # 1 Proposed Order, # 2 PLAINTIFF'S BENCH BRIEF REGARDING DEFENDANTS PROFFERED TESTIMONY (Unredacted Version), # 3 Exhibit A (Unredacted Version))(Weingarten, James) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	179	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Proposed Order)(Wilkinson, Beth) (Filed on 6/22/2023) (Entered: 06/22/2023)

		NON-PARTY NINTENDO OF AMERICA INC. UNOPPOSED MOTION FOR ORDER CHANGING TIME, # 2 Proposed Order)(Swaney, Steven) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	189	Amended ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits Pursuant to Civil L.R. 7-11 and 79-5 filed by Microsoft Corporation. Responses due by 6/26/2023. (Attachments: # 1 Declaration, # 2 Proposed Order)(Wilkinson, Beth) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	190	ORDER by Judge Jacqueline Scott Corley granting 188 Motion for Extension of Time to File extension for NOA to file its Civil L.R. 79-5(f) statement and/or declaration related toDefendants' Memorandum of Law in Opposition to Motion for Preliminary Injunction. (ahm, COURT STAFF) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	<u>191</u>	MOTION for leave to appear in Pro Hac Vice for Leonard Gordon on behalf of Non-party Nintendo of America, Inc. (Filing fee \$ 317, receipt number ACANDC-18385448.) filed by Nintendo of America Inc (Gordon, Leonard) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	192	Statement of Witnesses and Evidence For June 23, 2023, Pursuant To Court Order (ECF NO. 170) by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	<u>193</u>	Statement of Witnesses and Evidence For June 23, 2023, Pursuant To Court Order (ECF NO. 170) by Federal Trade Commission. (Weingarten, James) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	194	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18385774.) filed by Amazon.com, Inc (Oliver, Leigh) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	195	Second ADMINISTRATIVE MOTION For Sealing and In Camera Treatment filed by Sony Interactive Entertainment LLC. Responses due by 6/27/2023. (Attachments: # 1 Exhibit 1 - Declaration of Christian Svensson, # 2 Proposed Order)(Bennett, Elsbeth) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	<u>196</u>	TRANSCRIPT ORDER for Future Trial with Daily Transcripts by Federal Trade Commission. (Weingarten, James) (Filed on 6/22/2023) (Entered: 06/22/2023)
06/22/2023	209	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Evidentiary Hearing (Day 1) held on 6/22/2023. (Court Reporter: Marla Knox) (Time 6:03) (Attachments: # 1 Trial Log)(ahm, COURT STAFF) (Date Filed: 6/22/2023) (Entered: 06/24/2023)
06/23/2023	197	Second ADMINISTRATIVE MOTION Seeking In Camera Treatment Of Certain Exhibits Pursuant To Civil L.R. 7-11 And 79-5 re 173 Amended ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits Pursuant to Civil LR 7-11 and 79-5, 76 Order on Motion to Expedite,,, filed by Activision Blizzard, Inc Responses due by 6/27/2023. (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order) (Van Ness, Caroline) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	<u>198</u>	Exhibit List <i>PLAINTIFF'S FIRST SUPPLEMENT TO ITS EXHIBIT LIST</i> by Federal Trade Commission (Attachments: # 1 Exhibit A (Redacted Version))(Fleury, Jennifer) (Filed on 6/23/2023) (Entered: 06/23/2023)
	199	ADMINISTRATIVE MOTION Seeking in Camera Treatment of Certain Exhibits

		6/27/2023. (Attachments: # <u>1</u> Proposed Order)(Wilkinson, Beth) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	200	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Federal Trade Commission. (Attachments: # 1 Exhibit A (Unredacted Version), # 2 Proposed Order)(Fleury, Jennifer) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	201	ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits Pursuant to Civil L.R. 7-11 and 79-5 filed by Microsoft Corporation. Responses due by 6/27/2023. (Wilkinson, Beth) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	202	TRANSCRIPT ORDER for proceedings held on 6/22, 6/23, 6/27, 6/28 before Judge Jacqueline Scott Corley by Marketwatch for Court Reporter Marla Knox. (notewarel, COURT STAFF) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	203	ORDER by Judge Jacqueline Scott Corley granting 191 Motion for Pro Hac Vice as to Leonard Gordon. (ahm, COURT STAFF) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	204	ORDER by Judge Jacqueline Scott Corley granting 194 Motion for Pro Hac Vice as to Leigh Oliver. (ahm, COURT STAFF) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	205	Third ADMINISTRATIVE MOTION For Seeking In Camera Treatment of Certain Exhibits Pursuant To Civil L.R. 7-11 And 79-5 filed by Activision Blizzard, Inc Responses due by 6/27/2023. (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	206	MOTION for leave to appear in Pro Hac Vice for Benjamin Argyle on behalf of Non-Party Nintendo of America, Inc. (Filing fee \$ 317, receipt number ACANDC-18388333.) filed by Nintendo of America Inc (Argyle, Benjamin) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	207	MOTION for Extension of Time to File <i>Certain Statements in Support of Sealing Under Civil Local Rule 79-5(f)</i> filed by Sony Interactive Entertainment LLC. (Attachments: # 1 Declaration - Carl Lawrence Malm, # 2 Proposed Order)(Malm, Carl) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	208	ORDER by Judge Jacqueline Scott Corley granting 206 Motion for Pro Hac Vice as to Benjamin Argyle. (ahm, COURT STAFF) (Filed on 6/23/2023) (Entered: 06/23/2023)
06/23/2023	210	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Evidentiary Hearing (Day 2) held on 6/23/2023. (Court Reporter: Marla Knox) (Time 7:15) (Attachments: # 1 Trial Log)(ahm, COURT STAFF) (Date Filed: 6/23/2023) (Entered: 06/24/2023)
06/25/2023	211	NOTICE by Activision Blizzard, Inc., Microsoft Corporation re 75 Administrative Motion to File Under Seal <i>Exhibits A and B to Plaintiff's Notice of Intent to Oppose Defendants' Motion for Expedited Case Management Conference - Defendants' Notice of Non-Opposition</i> (Wilkinson, Beth) (Filed on 6/25/2023) (Entered: 06/25/2023)
06/26/2023	212	Exhibit List <i>PLAINTIFF'S SECOND SUPPLEMENT TO ITS EXHIBIT LIST</i> by Federal Trade Commission (Attachments: # <u>1</u> Exhibit A (Redacted Version))(Fleury, Jennifer) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	213	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Federal Trade Commission. (Attachments: # 1 Exhibit A (Unredacted Version), # 2 Proposed Order)(Fleury, Jennifer) (Filed on 6/26/2023) (Entered: 06/26/2023)

06/26/2023	214	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-18391622.) filed by NVIDIA Corporation. (Bonanno, Michael) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	215	MOTION to Appear by Telephone filed by NVIDIA Corporation. (Attachments: # 1 Proposed Order for Motion to Appear Telephonically)(Zivojnovic, Ognjen) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	216	TRANSCRIPT ORDER for proceedings held on 6/23/34 before Judge Jacqueline Scott Corley for RockcreekDC for Court Reporter Marla Knox. (notewarel, COURT STAFF) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	217	Statement <i>in Support of Sealing Regarding the Direct Testimony of Robin S. Lee, PhD</i> by NVIDIA Corporation. (Attachments: # 1 Declaration in Support, # 2 Proposed Order re: Sealing)(Zivojnovic, Ognjen) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	218	ORDER by Judge Jacqueline Scott Corley granting 215 NVIDIA's Motion to Appear by Telephone. Counsel shall email their telephone number to the courtroom deputy at jsccrd@cand.uscourts.gov.
		(This is a text-only entry generated by the court. There is no document associated with this entry.)
		(ahm, COURT STAFF) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	219	Statement re 76 Order on Motion to Expedite - NON-PARTY NINTENDO OF AMERICA INC. STATEMENT PURSUANT TO LOCAL RULE 79-5(f) AS TO WHY PX7059 AND PX7065 SHOULD REMAIN UNDER SEAL by Nintendo of America Inc (Attachments: # 1 Proposed Order)(Swaney, Steven) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	220	Statement NON-PARTY NINTENDO OF AMERICA INC. STATEMENT PURSUANT TO LOCAL RULE 79-5(f) AS TO WHY ANY PORTIONS OF VIDEORECORDED TESTIMONY FROM PX7065 SHOULD BE KEPT UNDER SEAL AND IN CAMERA by Nintendo of America Inc (Attachments: # 1 Proposed Order)(Swaney, Steven) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	221	Statement NON-PARTY NINTENDO OF AMERICA INC. STATEMENT PURSUANT TO LOCAL RULE 79-5(f) AS TO WHY PX3224 SHOULD REMAIN UNDER SEAL by Nintendo of America Inc (Attachments: # 1 Proposed Order)(Swaney, Steven) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	222	Statement of Witnesses and Evidence for June 27, 2023, Pursuant to Court Order (ECF NO. 170) by Federal Trade Commission. (Weingarten, James) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	223	Statement of Witnesses and Evidence For June 27, 2023, Pursuant To Court Order (ECF NO. 170) by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	224	REDACTION of the Direct Testimony of Dr. Robin S. Lee by Federal Trade Commission. (Weingarten, James) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	225	ADMINISTRATIVE MOTION Seeking In Camera Treatment of Exhibit Pursuant to Civil L.R. 7-11 and 79-5 filed by Microsoft Corporation. Responses due by 6/27/2023. (Attachments: # 1 Proposed Order)(Wilkinson, Beth) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	226	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Federal Trade Commission. (Attachments: # 1 Proposed Order, # 2 344a

		UNREDACTED Version of the Direct Testimony of Dr. Robin S. Lee)(Fleury, Jennifer) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	227	Third ADMINISTRATIVE MOTION For Sealing and In Camera Treatment filed by Sony Interactive Entertainment LLC. Responses due by 6/30/2023. (Attachments: # 1 Exhibit 1 - Declaration of Christian Svensson, # 2 Proposed Order)(Bennett, Elsbeth) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/26/2023	228	JOINT STIPULATION AND [PROPOSED] ORDER filed by Federal Trade Commission. (Weingarten, James) (Filed on 6/26/2023) (Entered: 06/26/2023)
06/27/2023	229	Statement re 222 Statement of Witnesses and Evidence For June 27, 2023, Pursuant To Court Order (ECF NO. 170) - CORRECTED by Federal Trade Commission. (Weingarten, James) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	230	Fourth ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits Pursuant to Civil L.R. 7-11 and 79-5 filed by Activision Blizzard, Inc Responses due by 7/3/2023. (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	231	Statement re 223 Statement of Witnesses and Evidence For June 27, 2023, Pursuant To Court Order (ECF NO. 170) AMENDED by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	232	ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits Pursuant to Civil L.R. 7-11 and 79-5 filed by Microsoft Corporation. Responses due by 6/30/2023. (Attachments: # 1 Proposed Order)(Wilkinson, Beth) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	233	Joint ADMINISTRATIVE MOTION Regarding In Camera Treatment of Certain Exhibits Pursuant to Civil L.R. 7-11 and 79-5 - <i>Omnibus Motion</i> filed by Activision Blizzard, Inc., Microsoft Corporation. Responses due by 6/30/2023. (Attachments: # 1 Proposed Order) (Wilkinson, Beth) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	234	Statement re 132 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 183 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by NVIDIA Corporation. (Attachments: # 1 Declaration in Support, # 2 Proposed Order re: Sealing)(Zivojnovic, Ognjen) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	235	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Brian Lomdardi. (knm, COURT STAFF) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	236	ORDER by Judge Jacqueline Scott Corley granting 214 Motion for Pro Hac Vice as to Michael Bonanno. (ahm, COURT STAFF) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	237	Fourth ADMINISTRATIVE MOTION Seeking in Camera Treatment filed by Sony Interactive Entertainment LLC. Responses due by 7/3/2023. (Attachments: # 1 Declaration of Christian Svensson, # 2 Proposed Order)(Bennett, Elsbeth) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	238	Statement re 111 Opposition/Response to Motion - NON-PARTY NINTENDO OF AMERICA INC. STATEMENT PURSUANT TO LOCAL RULE 79-5(f) AS TO WHY ITS CONFIDENTIAL INFORMATION IN DKT. NOS. 111 AND 111-43 (DEFENDANTS MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION) SHOULD BE FILED UNDER SEAL by Nintendo of America Inc

		(Attachments: # 1 Proposed Order)(Swaney, Steven) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	239	Statement re 131 Brief, NON-PARTY NINTENDO OF AMERICA INC. STATEMENT PURSUANT TO LOCAL RULE 79-5(f) AS TO WHY ITS CONFIDENTIAL INFORMATION IN DKT. NO. 131 (PLAINTIFFS REPLY TO DEFENDANTS OPPOSITION TO PRELIMINARY INJUNCTION MOTION) SHOULD BE FILED UNDER SEAL by Nintendo of America Inc (Attachments: # 1 Proposed Order)(Swaney, Steven) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	240	Declaration of Andrew Watts in Support of 128 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Amazon.com, Inc (Attachments: # 1 Proposed Order)(Related document(s) 128) (Oliver, Leigh) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	241	Statement <i>of Witnesses and Evidence For June 28, 2023, Pursuant To Court Order (ECF NO. 170)</i> by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	242	Statement of Witnesses and Evidence For June 28, 2023, Pursuant To Court Order (ECF NO. 170) by Federal Trade Commission. (Weingarten, James) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	243	Statement re 132 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Activision Blizzard, Inc (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	244	Statement re 128 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 183 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 213 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 200 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Activision Blizzard, Inc (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	245	Statement re 128 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 183 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 213 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 200 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Microsoft Corporation. (Attachments: # 1 Declaration of Alysha Bohanon, # 2 Proposed Order)(Wilkinson, Beth) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	246	Statement re 131 Brief, 132 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Microsoft Corporation. (Attachments: # 1 Declaration of Alysha Bohanon, # 2 Proposed Order)(Wilkinson, Beth) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	247	REDACTION of the Direct Testimony of Dennis W. Carlton by Microsoft Corporation, Activision Blizzard, Inc (Wilkinson, Beth) (Filed on 6/27/2023) (Entered: 06/27/2023)
06/27/2023	248	Fifth ADMINISTRATIVE MOTION Seeking In Camera Treatment of Certain Exhibits Pursuant to Civil L.R. 7-11 and 79-5 filed by Activision Blizzard, Inc Responses due by 7/3/2023. (Attachments: # 1 Declaration of Page Robinson, # 2 Proposed Order)(Van Ness, Caroline) (Filed on 6/27/2023) (Entered: 06/27/2023)

06/27/2023	252	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Evidentiary Hearing (Day 3) held on 6/27/2023. (Court Reporter: Marla Knox) (Time 6:58) (Attachments: # 1 Trial Log)(ahm, COURT STAFF) (Date Filed: 6/27/2023) (Entered: 06/28/2023)
06/28/2023	249	Statement re <u>242</u> Statement of Witnesses and Evidence For June 28, 2023, Pursuant To Court Order (ECF NO. 170) CORRECTED by Federal Trade Commission. (Weingarten, James) (Filed on 6/28/2023) (Entered: 06/28/2023)
06/28/2023	250	Exhibit List <i>PLAINTIFF'S THIRD SUPPLEMENT TO ITS EXHIBIT LIST</i> by Federal Trade Commission (Attachments: # 1 Exhibit A (Redacted Version))(Fleury, Jennifer) (Filed on 6/28/2023) (Entered: 06/28/2023)
06/28/2023	251	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Federal Trade Commission. (Attachments: # 1 Exhibit A (Unredacted Version), # 2 Proposed Order)(Fleury, Jennifer) (Filed on 6/28/2023) (Entered: 06/28/2023)
06/28/2023	253	REDACTION of the Direct Testimony of Amy Hood by Microsoft Corporation, Activision Blizzard, Inc (Wilkinson, Beth) (Filed on 6/28/2023) (Entered: 06/28/2023)
06/28/2023	254	Administrative Motion to File Under Seal <i>Portions of Declaration of Amy Hood</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Declaration of Alysha Bohanon, # 2 Exhibit Unredacted Version, # 3 Proposed Order)(Wilkinson, Beth) (Filed on 6/28/2023) (Entered: 06/28/2023)
06/28/2023	255	Administrative Motion to File Under Seal <i>Certain Exhibits Cited in Declaration of Amy Hood</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Declaration of Alysha Bohanon, # 2 Proposed Order)(Wilkinson, Beth) (Filed on 6/28/2023) (Entered: 06/28/2023)
06/28/2023	256	Statement of Witnesses and Evidence For June 29, 2023, Pursuant To Court Order (ECF NO. 170) by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/28/2023) (Entered: 06/28/2023)
06/28/2023	<u>257</u>	Statement of Witnesses and Evidence For June 29, 2023, Pursuant To Court Order (ECF NO. 170) by Federal Trade Commission. (Weingarten, James) (Filed on 6/28/2023) (Entered: 06/28/2023)
06/28/2023	264	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Evidentiary Hearing (Day 4) held on 6/28/2023. (Court Reporter: Marla Knox) (Time 7:32) (Attachments: # 1 Trial Log)(ahm, COURT STAFF) (Date Filed: 6/28/2023) (Entered: 06/29/2023)
06/29/2023	258	ANSWER to Complaint (<i>Redacted Version</i>) by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	259	ANSWER to Complaint (<i>Redacted Version</i>) by Microsoft Corporation. (Wilkinson, Beth) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	260	ANSWER to Complaint (<i>Redacted Version</i>) - <i>CORRECTION OF DOCKET</i> # <u>258</u> , <u>259</u> byMicrosoft Corporation. (Wilkinson, Beth) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	261	Administrative Motion to File Under Seal <i>Certain Exhibits pursuant to Civil L.R. 7-11 and 79-5</i> filed by Microsoft Corporation. (Attachments: # 1 Declaration, # 2 Proposed Order)(Bohanon, Alysha) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	262	Exhibit List <i>PLAINTIFF'S FOURTH SUPPLEMENT TO ITS EXHIBIT LIST</i> by Federal Trade Commission (Attachments: # 1 Exhibit A (Redacted))(Fleury, Jennifer) (Filed on 6/29/2023) (Entered: 06/29/2023)

06/29/2023	263	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Federal Trade Commission. (Attachments: # 1 Exhibit A (Unredacted Version), # 2 Proposed Order)(Fleury, Jennifer) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	265	Letter from Canadian Competition Bureau dated June 28, 2023. (ahm, COURT STAFF) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	266	MOTION for Protective Order <i>NON-PARTY NINTENDO OF AMERICA INC. MOTION FOR A PROTECTIVE ORDER RE DKT. NO. 175 (PLAINTIFFS PROPOSED PRETRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW)</i> filed by Nintendo of America Inc Responses due by 7/13/2023. Replies due by 7/20/2023. (Attachments: # 1 Proposed Order)(Swaney, Steven) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	267	MOTION for Protective Order NON-PARTY NINTENDO OF AMERICA INC. MOTION FOR A PROTECTIVE ORDER RE DKT. NO. 181 (BENCH BRIEF REGARDING DEFENDANTS PROFFERED TESTIMONY REGARDING MICROSOFTS AGREEMENTS) filed by Nintendo of America Inc Responses due by 7/13/2023. Replies due by 7/20/2023. (Attachments: # 1 Proposed Order)(Swaney, Steven) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	268	MOTION for Protective Order NON-PARTY NINTENDO OF AMERICA INC. MOTION FOR A PROTECTIVE ORDER RE DKT. NO. 177 (DEFENDANTS PROPOSED PRETRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW) filed by Nintendo of America Inc Responses due by 7/13/2023. Replies due by 7/20/2023. (Attachments: # 1 Proposed Order)(Swaney, Steven) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	269	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Russell Bittmann. (knm, COURT STAFF) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	270	TRANSCRIPT ORDER for Future Trial with Daily Transcripts, ordered by Steven Lane. (knm, COURT STAFF) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	271	Statement re 110 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>Opposition to Motion for Preliminary Injunction</i> , 179 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 132 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>Statement in Support of Sealing Certain Confidential Business Material</i> by Sony Interactive Entertainment LLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F - Declaration of Christian Svensson, # 7 Exhibit G - Proposed Order)(Bennett, Elsbeth) (Filed on 6/29/2023) (Entered: 06/29/2023)
06/29/2023	272	Minute Entry for proceedings held before Judge Jacqueline Scott Corley: Evidentiary Hearing (Day 5) held and completed on 6/29/2023. (Court Reporter: Marla Knox)(Time 5:51) (Attachments: # 1 Trial Log)(ahm, COURT STAFF) (Date Filed: 6/29/2023) (Entered: 06/30/2023)
06/30/2023	273	ANSWER to Complaint filed by Activision Blizzard, Inc (Van Ness, Caroline) (Filed on 6/30/2023) (Entered: 06/30/2023)
06/30/2023	274	Administrative Motion to File Under Seal <i>Portions of Its Answer and Defenses</i> filed by Activision Blizzard, Inc (Attachments: # 1 Exhibit A (Unredacted Answer), # 2 Exhibit B (Redacted Answer), # 3 Declaration of Page Robinson, # 4 Proposed Order)(Van Ness, Caroline) (Filed on 6/30/2023) (Entered: 06/30/2023)
06/30/2023	275	Sealed Transcript of Evidentiary Hearing Proceedings held on June 22, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, Telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59

		and Judicial Conference policy, any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (mfk, COURT STAFF) (Filed on 6/30/2023) (Entered: 06/30/2023)
06/30/2023	276	Transcript of Proceedings held on June 21, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 74 Transcript Order - Future Trial with Daily Transcripts, 80 Transcript Order - Future Trial with Daily Transcripts, 81 Transcript Order - Future Trial with Daily Transcript Restriction set for 9/28/2023. (Related documents(s) 74, 80, 81) (mfk, COURT STAFF) (Filed on 6/30/2023) (Entered: 06/30/2023)
06/30/2023	277	Sealed Transcript of Evidentiary Hearing Proceedings held on June 23, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, Telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (mfk, COURT STAFF) (Filed on 6/30/2023) (Entered: 06/30/2023)
06/30/2023	278	Sealed Transcript of Evidentiary Hearing Proceedings held on June 27, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, Telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (mfk, COURT STAFF) (Filed on 6/30/2023) (Entered: 06/30/2023)
06/30/2023	279	Sealed Transcript of Evidentiary Hearing Proceedings held on June 28, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, Telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (mfk, COURT STAFF) (Filed on 6/30/2023) (Entered: 06/30/2023)
06/30/2023	280	Sealed Transcript of Evidentiary Hearing Proceedings held on June 29, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, Telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy,any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (mfk, COURT STAFF) (Filed on 6/30/2023) (Entered: 06/30/2023)
06/30/2023	281	Master Index of Transcripts of Evidentiary Hearing Proceedings held on June 22, 2023 to June 29, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 74 Transcript Order - Future Trial with Daily Transcripts, 80 Transcript Order - Future Trial with Daily Transcripts) Release of
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		Transcript Restriction set for 9/28/2023. (Related documents(s) $\underline{74}$, $\underline{80}$, $\underline{81}$) (mfk, COURT STAFF) (Filed on 6/30/2023) (Entered: 06/30/2023)	
06/30/2023	282	Transcript of Evidentiary Hearing Proceedings, Volume 1, held on June 22, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 74 Transcript Order - Future Trial with Daily Transcripts, 80 Transcript Order - Future Trial with Daily Transcripts, 81 Transcript Order - Future Trial with Daily Transcript Restriction set for 9/28/2023. (Related documents(s) 74, 80, 81) (mfk, COURT STAFF) (Filed on 6/30/2023) (Entered: 06/30/2023)	
07/02/2023	283	Transcript of Evidentiary Hearing Proceedings, Volume 2, held on June 23, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 74 Transcript Order - Future Trial with Daily Transcripts, 80 Transcript Order - Future Trial with Daily Transcripts, 81 Transcript Order - Future Trial with Daily Transcript Restriction set for 10/2/2023. (Related documents(s) 74, 80, 81) (mfk, COURT STAFF) (Filed on 7/2/2023) (Entered: 07/02/2023)	
07/02/2023	284	Transcript of Evidentiary Hearing Proceedings, Volume 3, held on June 27, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 5 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 74 Transcript Order - Future Trial with Daily Transcripts, 80 Transcript Order - Future Trial with Daily Transcripts, 81 Transcript Order - Future Trial with Daily Transcripts (Related documents(s) 74, 80, 81) (mfk, COURT STAFF) (Filed on 7/2/2023) (Entered: 07/02/2023)	
07/02/2023	285	Transcript of Evidentiary Hearing Proceedings, Volume 4, held on June 28, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 74 Transcript Order - Future Trial with Daily Transcripts, 80 Transcript Order - Future Trial with Daily Transcripts, 81 Transcript Order - Future Trial with Daily Transcript Restriction set for 10/2/2023. (Related documents(s) 74, 80, 81) (mfk, COURT STAFF) (Filed on 7/2/2023) (Entered: 07/02/2023)	

07/02/2023	286	Transcript of Evidentiary Hearing Proceedings, Volume 5, held on June 29, 2023, before Judge Jacqueline S. Corley. Court Reporter, Marla F. Knox, RPR, CRR, RMR, telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 74 Transcript Order - Future Trial with Daily Transcripts, 80 Transcript Order - Future Trial with Daily Transcripts, 81 Transcript Order - Future Trial with Daily Transcript Restriction set for 10/2/2023. (Related documents(s) 74, 80, 81) (mfk, COURT STAFF) (Filed on 7/2/2023) (Entered: 07/02/2023)	
07/03/2023	287	Administrative Motion to File Under Seal <i>Portions of Microsoft's Answer</i> filed by Microsoft Corporation. (Attachments: # 1 Declaration of Alysha Bohanon, # 2 Exhibit Unredacted Version, # 3 Proposed Order)(Wilkinson, Beth) (Filed on 7/3/2023) (Entered 07/03/2023)	
07/03/2023	288	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>In Connection with Microsoft's Answer (Civil L.R. 79-5(f))</i> filed by Microsoft Corporation. (Attachments: # <u>1</u> Proposed Order)(Wilkinson, Beth) (Filed on 7/3/2023) (Entered: 07/03/2023)	
07/03/2023	289	Statement re 180 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed by Microsoft Corporation. (Attachments: # 1 Declaration of Alysha Bohanon, # 2 Proposed Order)(Wilkinson, Beth) (Filed on 7/3/2023) (Entered: 07/03/2023)	
07/03/2023	<u>290</u>	NOTICE by Federal Trade Commission <i>Regarding the Filing of Sealed Materials</i> (Fleury, Jennifer) (Filed on 7/3/2023) (Entered: 07/03/2023)	
07/03/2023	291	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed filed by Federal Trade Commission. (Attachments: # 1 Proposed Order, # 2 UNREDACTED Version of Plaintiff Federal Trade Commission's Final Proposed Findings of Fact and Conclusions of Law)(Fleury, Jennifer) (Filed on 7/3/2023) (Entered: 07/03/2023)	
07/03/2023	292	Administrative Motion to File Under Seal <i>Portions of Defendants'' Final Proposed Findings of Fact and Conclusions of Law</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Exhibit A - Declaration of Alysha Bohanon, # 2 Exhibit B - Unredacted Version of Defendants' Final Proposed Findings of Fact and Conclusions of Law)(Wilkinson, Beth) (Filed on 7/3/2023) (Entered: 07/03/2023)	
07/03/2023	293	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>Re: Portions of Defendants' Final Proposed Findings of Fact and Conclusions of Law</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 7/3/2023) (Entered: 07/03/2023)	
07/03/2023	294	Administrative Motion to File Under Seal <i>Portions of Declaration of Dennis W. Carlton</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Declaration of Alysha Bohanon, # 2 Exhibit - Redacted Version, # 3 Exhibit - Unredacted Version, # 4 Proposed Order)(Wilkinson, Beth) (Filed on 7/3/2023) (Entered: 07/03/2023)	
07/03/2023	295	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed <i>In Connection with the Declaration of Dennis W. Carlton (Civil L.R. 79-5(f))</i> filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Proposed Order) (Wilkinson, Beth) (Filed on 7/3/2023) (Entered: 07/03/2023)	

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07/05/2023	297	Statement re 263 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed, 262 Exhibit List NON-PARTY NINTENDO OF AMERICA INC. STATEMENT PURSUANT TO LOCAL RULE 79-5(f) AS TO WHY PX3218, PX3225, PX3233 AND PX3234 SHOULD REMAIN UNDER SEAL by Nintendo of America Inc (Attachments: # 1 Proposed Order)(Swaney, Steven) (Filed on 7/5/2023) (Entered: 07/05/2023)	
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		Proposed Findings of Fact by Activision Blizzard, Inc., Microsoft Corporation - <i>Defendants' Proposed Post-Trial Findings of Fact and Conclusions of Law (Redacted)</i> . (Wilkinson, Beth) (Filed on 7/12/2023) Modified on 7/12/2023 (tn, COURT STAFF). Modified on 7/13/2023 (ahm, COURT STAFF). (Entered: 07/12/2023)	
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07/13/2023	312	Administrative Motion to Consider Whether Another Party's Material Should Be Sealed in Connection with Defendants' Proposed Post-Trial Findings of Fact and Conclusions of Law (Civil L.R. 79-5(f)) filed by Activision Blizzard, Inc., Microsoft Corporation. (Attachments: # 1 Proposed Order)(Wilkinson, Beth) (Filed on 7/13/2023) (Entered: 07/13/2023)	
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07/13/2023	314	USCA Case Number 23-15992 for 307 Notice of Appeal to the Ninth Circuit filed by Federal Trade Commission. (slh, COURT STAFF) (Filed on 7/13/2023) (Entered: 07/13/2023)	
07/13/2023	315	OPPOSITION/RESPONSE (re 313 MOTION to Stay re 305 Memorandum & Opinion) filed byActivision Blizzard, Inc., Microsoft Corporation. (Wilkinson, Beth) (Filed on 7/13/2023) (Entered: 07/13/2023)	
07/13/2023	316	ORDER of USCA as to 307 Notice of Appeal to the Ninth Circuit No. 23-15992 , filed by Federal Trade Commission. (wsn, COURT STAFF) (Filed on 7/13/2023). (Entered: 07/13/2023)	
07/13/2023	317	ORDER by Judge Jacqueline Scott Corley denying 313 Motion for Injunction Pending Appeal. (ahm, COURT STAFF) (Filed on 7/13/2023) (Entered: 07/13/2023)	

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EXHIBIT H

1	Valarie C. Williams (Bar No. 335347) Tania Rice (Bar No. 294387) Tyler Blake (Bar No. 316623)							
2	Alston & Bird LLP							
3	560 Mission Street, Suite 2100 San Francisco, CA 94105							
4	Telephone: (415) 243-1000 valarie.williams@alston.com							
5	tania.rice@alston.com tyler.blake@alston.com							
6								
7	B. Parker Miller (<i>pro hac vice to be filed</i>) Alston & Bird LLP							
8	1201 West Peachtree Street, Suite 4900 Atlanta, GA 30309							
9	Telephone: (404) 881-7000							
10	parker.miller@alston.com							
11	Rakesh N. Kilaru (<i>pro hac vice</i>) Anastasia M. Pastan (<i>pro hac vice</i>)							
12	Jenna Pavelec (pro hac vice) Wilkinson Stekloff LLP							
13	2001 M Street NW, 10th Floor Washington, DC 20036 Telephone: (202) 847-4000 rkilaru@wilkinsonstekloff.com apastan@wilkinsonstekloff.com							
14								
15								
16	jpavelec@wilkinsonstekloff.com							
17	Counsel for Defendant Microsoft Corporation							
18	UNITED STATES DIS	STRICT COURT						
19	NORTHERN DISTRICT OF CALIFORNIA							
20								
21	DANTE DEMARTINI, et al.,	Case No. 3:22-cv-08991-JSC						
22	Plaintiffs,	DEFENDANT MICROSOFT CORPORATION'S NOTICE OF						
23	v.	MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF						
24	MICROSOFT CORPORATION,							
25	Defendant.	Hon. Jacqueline Scott Corley						
26								
27		Date: March 9, 2023 Time: 10:00 a.m.						
28		Courtroom: 8 – 19th Floor						
	i	MICROSOFT'S MOTION TO DISMISS						

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on March 9, 2023, at 10:00 a.m., or as soon thereafter as the matter may be heard by the Court, located in Courtroom 8 – 19th Floor, 450 Golden Gate Ave., San Francisco, CA 94102, Defendant Microsoft Corporation will and hereby does move the Court, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss this action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Microsoft moves to dismiss the action on the ground that the Court lacks subject matter jurisdiction, because Plaintiffs' claims are unripe and they lack standing. Microsoft also moves to dismiss Plaintiffs' Complaint on the ground that it does not allege sufficient facts to state a plausible claim of anticompetitive harm or harm to Plaintiffs.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, all pleadings and papers on file in this action, and upon such other matters that the Court may rely on or as may be presented to the Court at the time of the hearing.

Dated: January 31, 2023

Respectfully submitted,

By: /s/ Valarie C. Williams

Valarie C. Williams B. Parker Miller Tania Rice Tyler Blake Alston & Bird LLP

Rakesh N. Kilaru Anastasia M. Pastan Jenna Pavelec Wilkinson Stekloff LLP

Counsel for Defendant Microsoft Corporation

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MICROSOFT'S MOTION TO DISMISS Case No. 3:22-cv-08991-JSC

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I. INTRODUCTION

MEMORANDUM OF POINTS AND AUTHORITIES

Microsoft, the third largest manufacturer of gaming consoles and only one of a multitude of companies producing video game content for various platforms, is attempting to acquire Activision Blizzard, a producer of popular video games. Ten individual gamers have brought this case to try to stop that prospective transaction—a transaction they readily admit is under antitrust review around the world and accordingly is subject to change before it closes. Rather than wait for the results of investigations by the Federal Trade Commission, the European Commission, the U.K.'s Competition & Markets Authority, and other worldwide regulators, they contend that they are entitled to access a federal court now, to seek relief for ambiguous, speculative, and theoretical harms. The gamers also seek to leverage their inadequate claims to justify extensive discovery, including immediate depositions of top executives at Microsoft, Activision Blizzard, and other third parties. Finally, they contend that this Court should hold a trial and *permanently* enjoin Microsoft from acquiring Activision Blizzard, under the current deal terms, as soon as possible, without waiting for world regulators to finish their work.

As discussed below, this Complaint should be dismissed because Plaintiffs have failed to state any facts that would support a claim for a violation of antitrust law. Their Complaint is devoid of facts except for a single unsupported "market share" figure that is untethered to any of Plaintiffs' alleged product markets. Additionally, Plaintiffs' claim is unripe and Plaintiffs lack constitutional standing to assert it. Finally, Plaintiffs are not legally entitled to seek the equitable remedy of an injunction when, as here, monetary damages would provide an adequate remedy.

II. ISSUES TO BE DECIDED

Whether Plaintiffs' claim alleging violation of Section 7 of the Clayton Antitrust Act (15 U.S.C. § 18), seeking to prohibit Microsoft's acquisition of Activision Blizzard, should be dismissed because: (1) Plaintiffs have failed to allege a plausible claim of harm to competition, (2) it is unripe, (3) Plaintiffs lack constitutional standing, and/or (4) Plaintiffs are not legally entitled to injunctive relief when monetary remedies are available.

III. FACTUAL BACKGROUND

A. Plaintiffs' Claims

Plaintiffs seek to stop a prospective transaction in which Microsoft would acquire Activision Blizzard. (Compl. ¶ 1.) Plaintiffs allege that both Microsoft and Activision Blizzard develop, publish, and distribute competing video games. (*Id.* ¶¶ 5, 124-129.) Microsoft and Activision Blizzard are two of many companies that develop, publish, and/or distribute video games (Plaintiffs do not allege specifically how many competitors there are). (*Id.* ¶¶ 76, 124-129.) Video games can generally be played on a variety of different platforms, including game consoles, personal computers ("PCs"), mobile devices, and cloud-based systems. (*Id.* ¶¶ 78-122, 286.) Microsoft owns and sells one of the three major game consoles (Xbox) and one of the primary operating systems for PCs (Windows). (*Id.* ¶¶ 7, 87.)

Plaintiffs are ten individuals who play video games and have purchased Activision Blizzard titles, which they play on a variety of platforms—Xbox, PlayStation, and Nintendo Switch consoles, PCs, and/or mobile devices. (*Id.* ¶¶ 23-33.) Eight of the ten Plaintiffs play Activision Blizzard games on more than one platform—usually both a console and their PC. (*Id.*) Plaintiffs assert a claim under Section 7 of the Clayton Antitrust Act, which concerns mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. They allege three theories of relief:

(1) "Horizontal Theory": Plaintiffs allege that Microsoft and Activision Blizzard are horizontal competitors in developing, publishing, and selling video games and that the proposed acquisition may lessen competition in the video game market. (*Id.* ¶¶252-275.) Plaintiffs have alleged ten scattershot product markets that they assert are relevant to their Complaint, but only five in which they allege that Microsoft and Activision Blizzard both compete: video games; console gaming; PC gaming; mobile gaming; and "Triple-A" games. (*Id.* ¶¶130-179.) Plaintiffs have not alleged how many competitors develop, publish, and/or distribute video games in each of these supposed "markets." They allege only a single, unsupported (and vastly incorrect) market share statistic, related to one component of one of the product markets (video games): alleging that Microsoft has an approximate 23.9% market share of some undefined market for game *publishing* and Activision

Blizzard has an approximate 10% market share of game *publishing*. (*Id.* $\P\P$ 269-270.)

- (2) "Vertical Theory": Plaintiffs allege that Microsoft's control of one of the popular video game consoles and computer operating systems and its proposed purchase of Activision Blizzard could allow it to make Activision Blizzard's games exclusive or partially exclusive to Microsoft platforms. Plaintiffs' other five product "markets" could only relate to this theory since Activision Blizzard is not a competitor in these markets: video game subscription services; video game console systems; high-performance video game console systems; computer operating systems; and cloud-based gaming services. (*Id.* ¶ 171-203.) Plaintiffs allege that Microsoft (Xbox) and Sony (PlayStation) "compete vigorously with one another" in the console space. (*Id.* ¶ 292.) But they allege that the prospective acquisition could give Microsoft "the ability to foreclose important inputs to rivals of console gaming by making some or all of Activision Blizzard's important catalog of games, including *Call of Duty*, exclusive... or partially exclusive" to Microsoft platforms. (*Id.* ¶ 290.) Plaintiffs admit, however, that Microsoft has made public promises that it will continue to keep Activision Blizzard's games available on other platforms. (*Id.* ¶ 306.)
- (3) "Labor Market Theory": Plaintiffs allege that the proposed acquisition could lessen competition for labor between video game developers, publishers, and distributors. (*Id.* ¶¶ 276-279.) However, Plaintiffs do not allege a legally proper market, they do not allege that they work in this industry, and they do not allege how they would be harmed by any change in the labor market.

B. Posture of the Underlying Transaction

While Plaintiffs' allegations are taken as true for purposes of Microsoft's motion to dismiss under Rule 12(b)(6), the Court may consider an important additional fact with respect to Microsoft's motion under Rule 12(b)(1): the prospective acquisition has not yet closed and is under review by multiple domestic and foreign regulators. Microsoft is currently working cooperatively with multiple regulators around the world, including the European Commission ("EC") and the United Kingdom's Competition and Markets Authority ("CMA"), to obtain approvals to close the transaction. (*See* Dkt. 26-1 through 26-8.) The FTC has filed a complaint against Microsoft and Activision Blizzard, in which it is has a deadline of April 7 to complete discovery and has a hearing set for August of 2023. (Dkt. 26-6.) The EC and CMA's reviews are currently scheduled to continue through April. (Dkt.

26-7, 26-8.) Microsoft has stated that it is engaging with the regulators, which could lead to remedies that may alter the transaction, such as a provision requiring Microsoft to continue making Activision Blizzard games available on competitors' consoles (which directly relates to Plaintiffs' Vertical Theory). (See Dkt. 26 at 5, 7.)

IV. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must dismiss the plaintiff's complaint if it fails to state a claim for relief. To survive a motion to dismiss, the plaintiff must have alleged facts establishing a plausible claim for relief that exceeds a speculative level. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[L]abels and conclusions" or "naked assertion[s]' devoid of 'further factual enhancement'" do not constitute well-pleaded facts that are entitled to the presumption of truth. *Id*.

Pursuant to Rule 12(b)(1), a court must dismiss an action for lack of subject matter jurisdiction under Article III of the Constitution if the plaintiff's claim is unripe or the plaintiff lacks standing. "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment," and the court "need not presume the truthfulness of the plaintiff's allegations." *Id*.

V. ARGUMENT

A. Plaintiffs Have Not Plausibly Alleged an Appreciable Danger of Anticompetitive Effects

Section 7 of the Clayton Antitrust Act concerns mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Under the Ninth Circuit's burden-shifting framework for claims under Section 7 of the Clayton Act, Plaintiffs "must first establish a prima facie case that a merger is anticompetitive." *DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 (9th Cir. 2018) (quoting *St. Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke's Health Sys.*, 778 F.3d 775, 783 (9th Cir. 2015)). To survive a motion to dismiss, Plaintiffs must also meet the standard of *Twombly* and *Iqbal*: alleging sufficient factual matter to state a plausible

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claim for relief that exceeds a speculative level and does not rely on naked assertions or conclusions. *Id.* "In practical terms, this means adequately alleging facts that an acquisition creates 'an appreciable danger' or 'a reasonable probability' of anticompetitive effects in the relevant market." *Id.*

"[P]roceeding to antitrust discovery can be expensive" and carry "unusually high" costs; the plausibility requirement is important, "lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007). Microsoft and third parties, who are otherwise fully engaged with antitrust regulators around the world, should not be forced to concurrently litigate a parallel case based on the speculative and conclusory allegations in this Complaint. Plaintiffs have not alleged facts establishing the plausibility of an "appreciable danger" or "reasonable probability" of anticompetitive effects. Each of their three theories (Horizonal Theory, Vertical Theory, and Labor Market Theory) fails.

1. Plaintiffs Have Not Alleged Facts Showing that the Proposed Acquisition May Substantially Lessen Competition (Horizontal Theory)

To plead their Horizontal Theory, Plaintiffs must plausibly allege facts showing that Microsoft's post-acquisition market power—its singular ability to raise prices and restrict output in the market—may *substantially* lessen competition. *Netafim Irrigation, Inc. v. Jain Irrigation, Inc.*, No. 1:21-cv-00540-AWI-EPG, 2022 U.S. Dist. LEXIS 126239, at *15-16 (E.D. Cal. July 15, 2022). "[A]llegations of market power must be sufficiently detailed 'to raise a right to relief above the speculative level." *Id.* at *16 (quoting *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 973 (9th Cir. 2008)). Plaintiffs may meet this hurdle by alleging direct evidence of actual injury (such as restricted output or supracompetitive prices) or circumstantial evidence of market share and barriers to market entry. *Id.* at *15. Here, Plaintiffs do not (and cannot) allege direct evidence because the transaction has not yet occurred. To plead circumstantial evidence, Plaintiffs are required to (1) define the relevant market, (2) plead factual allegations showing that "there are significant barriers to entry *and* that existing competitors lack the capacity to increase their output in the short run." *Id.* at *15 (emphasis added) (citing *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 484 (9th Cir.

2021)). Plaintiffs have not done so. To the extent Plaintiffs attempt to rely, as they do in their motion for preliminary injunction, on decades-old cases for the proposition that removing a significant competitor from the relevant market is sufficient to state a Section 7 claim, courts have already rejected those arguments made by these same counsel in other cases. *See Malaney v. UAL Corp.*, No. 3:10-CV-02858, 2010 U.S. Dist. LEXIS 106049, at *25 (N.D. Cal. Sept. 27, 2010) ("[P]laintiffs' proposed approach that any non-trivial acquisition of a significant rival is per se violative of the Clayton Act is wrong."), *aff'd*, 434 F. App'x 620 (9th Cir. 2011).

Plaintiffs do not allege facts establishing market share in any of the Complaint's identified relevant markets. Indeed, Plaintiffs' background allegations describe an overall video game market in which there is dispersed competition at multiple levels: there are numerous game developers (Plaintiffs do not specify how many) that create and develop games (Compl. ¶¶ 76, 124-127); there are "several" publishers (Plaintiffs do not allege how many) who produce the games for distribution (*Id.* ¶ 128); there are various distributors who sell the games (again, Plaintiffs do not allege how many) through digital stores and elsewhere (*Id.* ¶ 129); and there are several ways that consumers can access the games, including through three competitors' console systems, consumers' own computers, and cloud and mobile outlets (*Id.* ¶¶ 78-122).

Plaintiffs' allegations are insufficient to plausibly show that the acquisition would give Microsoft a "dominant share" in any relevant market that would allow it to decrease the quality, innovation, diversity, and output of video games or increase video game prices (as asserted in paragraph 331 of the Complaint). *See Netafim Irrigation*, 2022 U.S. Dist. LEXIS 126239, at *15. Notably, Plaintiffs do not include any factual allegations of the combined market share of Microsoft and Activision Blizzard, the number of competitors remaining post-merger, or any other specific facts to support an ability to increase prices or decrease output in any of the alleged horizontal markets. Rather, Plaintiffs' Complaint is rife with conclusory allegations that Microsoft and Activision Blizzard are two of the "most important" competitors in the video game market with some of the "most iconic and popular" games. (Compl. ¶¶ 255-256, 282). Plaintiffs also summarily allege that "the proposed acquisition may substantially lessen competition" in each of the ten relevant markets, but they provide no factual support. (*Id.* ¶ 223). Such unsupported allegations should be disregarded. *See Twombly*,

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550 U.S. at 564-65 (failure to plead facts showing an antitrust agreement, beyond descriptions of parallel conduct and conclusions of an agreement, warranted dismissal); *Korea Kumho Petrochemical v. Flexsys Am. LP*, No. C07-01057, 2008 U.S. Dist. LEXIS 68559, at *28-29 (N.D. Cal. Mar. 11, 2008) (dismissing complaint alleging that because of the defendant's market dominance there was a dangerous probability of it achieving monopoly power with its actions, for failure to plead concrete factual allegations).

Two of the very few facts alleged by Plaintiffs are that Microsoft has an approximate 23.9% market share of game publishing and Activision Blizzard has an approximate 10% market share of game publishing. (Compl. ¶¶ 269-270.) These unsupported (and incorrect) figures are not tied to Plaintiffs' defined product markets: video games as a whole or submarkets of certain types of video games. They speak, at best, to only one component of video game output. Plaintiffs allege no facts showing how this share of publishing activity would give Microsoft market dominance over either the entire video game market or any of the various alleged submarkets. Nor is it plausible that the development and distribution components would not be significant drivers of market output and pricing. In FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 17 (D.D.C. 2021), the court cautioned that evaluating market power requires looking at the "market definition" and "market share" allegations together. The sufficiency of a plaintiff's market share allegations depends on "how tenuously[]' the market has been defined." Id. There, the court dismissed the FTC's claim of monopoly power, finding that the FTC fell "short of its pleading burden" by "merely alleg[ing] that a defendant firm has somewhere over 60%" of a market share but failing to flesh out the contours of the related market or "exactly what [that] figure is even referring to." Id. at 18, 20; see also Med. Vets, Inc. v. VIP Petcare Holdings, Inc., 811 F. App'x 422, 423 (9th Cir. 2020) (affirming dismissal where the alleged market share figures did "not show power in the *relevant* market"). This Complaint's claim of market power is much more ill-defined than the complaint in Facebook. Not only do Plaintiffs fail to flesh out how their market share allegations relate to dominant market power in any of their defined markets, but the market share allegations are facially disconnected from the defined product markets.

Plaintiffs' Complaint is silent regarding market shares for their defined product markets: video games as a whole, console games, PC games, mobile games, and "Triple-A" games. That fundamental

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failure warrants dismissal of Plaintiffs' claim. See, e.g., Camaisa v. Pharm. Rsch. Assocs., No. 21-cv-00775, 2022 U.S. Dist. LEXIS 50803, at *24-25 (D. Del. Mar. 22, 2022) (dismissing Section 7 claim because plaintiff "has not provided any information about alterations in the market share following the merger, increased concentration of firms in the relevant market, elimination of competitors, or increased barriers to entry following the merger"); EuroTec Vertical Flight Sols., LLC. v. Safran Helicopter Engines S.A.S., No. 3:15-cv-3454, 2019 U.S. Dist. LEXIS 129084, at *7 (N.D. Tex. Aug. 1, 2019) (bare allegation of "market share of over 50 percent" was "conclusory"); Sherwin-Williams Co. v. Dynamic Auto Images, Inc., No. SACV 16-1792, 2017 U.S. Dist. LEXIS 174303, at *16-17 (C.D. Cal. Mar. 10, 2017) (finding a failure to allege market power where allegations that firm "owns over 30% of the market" and maintains "a stranglehold" in the industry were too conclusory).

Separately, Plaintiffs must sufficiently allege barriers to market entry and expansion in each of their product markets. See United States v. Syufy Enters., 903 F.2d 659, 664 (9th Cir. 1990) ("A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors." (emphasis added and citation omitted)). Plaintiffs have not done so. They make conclusory allegations regarding "the largest platforms attract[ing] the most quality content" and consumers being attracted to already-popular gaming ecosystems. (Compl. ¶¶ 231-251.) But these conclusions are belied by the factual allegations. It is implausible that there are few market entrants in the overall video game industry when there were allegedly 1,159 mergers of video game companies in 2021. (Id. ¶ 62.) Additionally, Plaintiffs allege no facts establishing barriers to entry in each of their submarkets of console games, PC games, mobile games, and "Triple-A" games. They do not allege how many competitors are in each submarket and why new competitors cannot make games for each market. Further, any assertion of barriers to entry would be illogical because Plaintiffs allege that the video games are available on multiple consoles, users' own PCs, and other platforms. (See, e.g., Id. ¶¶ 110, 121.) Indeed, eight of the ten Plaintiffs already play video games on more than one of these platforms. (Id. ¶¶ 23-22.) There is no special barrier to making a "console game" or a "PC game" or a "mobile game"—the same games are played on various devices. The "Triple-A" submarket—alleged to be the highest quality and most "anticipated" games—has vaguely-defined

parameters and is legally deficient. Plaintiffs' factually devoid Complaint should be dismissed. *See Med Vets, Inc. v. Vip Petcare Holdings, Inc.*, No. 18-cv-02054-MMC, 2019 U.S. Dist. LEXIS 68099 (N.D. Cal. Apr. 22, 2019) (dismissing claim where the product market description was too vague to determine which products would be included and the allegations of barriers to entry—the requirement of licensing and relationships with manufacturers and retailers—were too conclusory without factual elaboration), *aff'd*, 811 F. App'x 422 (9th Cir. 2020); *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, No. 5:16-cv-06370-EJD, 2017 U.S. Dist. LEXIS 160238, at *25 (N.D. Cal. Sept. 28, 2017) ("Without a better description of the purported entry barriers, the allegations are too conclusory to be entitled to an assumption of truth.").

Finally, Plaintiffs have failed to plead that other competitors in the relevant product markets could not check the alleged anticompetitive consequences (*e.g.*, increased prices or decreased quality) after the merger. This independently warrants dismissal. *See Netafim Irrigation, Inc.*, 2022 U.S. Dist. LEXIS 126239, at *25 (dismissing Section 7 claim because complaint failed to allege "sufficient circumstantial evidence that Defendants possessed market power" because other competitors could increase output in response to a price increase by defendants). For instance, at least four other competitors operate in the identified product markets for video games generally, console games, PC games, and Triple-A games. (*See* Compl. ¶ 76 (identifying Electronic Arts, Take-Two, Ubisoft, and Sony).) The existence of these competitors in the relevant markets means that Microsoft could not "control prices or exclude competitors," and the Complaint contains no facts to suggest otherwise. *Syufy Enters.*, 903 F.2d at 664; *see also Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1441 (9th Cir. 1995) ("Market power cannot be inferred solely from the existence of entry barriers and a dominant market share."). Accordingly, Plaintiffs have failed in several ways to adequately allege facts showing market power necessary to support their Section 7 claim.

2. Plaintiffs Have Not Alleged Facts Showing that Microsoft Is Likely to Exclude Competitors' Platforms (Vertical Theory)

In challenges to vertical mergers, plaintiffs cannot rely on market share statistics as "a short cut" to show anticompetitive harm "because vertical mergers produce no immediate change in the relevant market share." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019). This type

of challenge is rare, difficult, and more complex. See United States v. AT&T Inc., 310 F. Supp. 3d 161, 193-194 (D.D.C. 2018), aff'd, 916 F.3d 1029; Physician Specialty Pharm., LLC v. Prime Therapeutics, LLC, No. 18-cv-1044, 2019 U.S. Dist. LEXIS 159853, at *31 (D. Minn. Aug. 8, 2019). Vertical mergers are often a "means of creating efficiency," not reduction in competition. Alberta Gas Chems., Ltd. v. E. I. Du Pont de Nemours & Co., 826 F.2d 1235, 1244 (3d Cir. 1987) (citations omitted). Plaintiffs must make a fact-specific showing that "the merger will result in a foreclosure of access to sources of supply, a significant increase in concentration in a relevant market, or heightened barriers to entry in either market." Reazin v. Blue Cross & Blue Shield, Inc., 663 F. Supp. 1360, 1489 (D. Kan. 1987); see also AT&T, 916 F.3d at 1032.

Plaintiffs have not adequately pled facts to make a plausible showing that the merger would result in a foreclosure of access, significant increase in concentration, or heightened barriers to entry. They offer a highly speculative theory that Microsoft could change the status quo by making Activision Blizzard games exclusive to Microsoft's operating platforms. However, Plaintiffs admit that the games are currently available "across multiple platforms," including competitors' platforms. (Compl. ¶ 286.) Plaintiffs also admit that Microsoft has promised to keep game content available on competitors' platforms. (Id. ¶ 306.) Plaintiffs have alleged no facts beyond conclusory and speculative assertions that Microsoft could disrupt current market practices—and go back on its word—to stop games from being available across multiple platforms. This speculation should be disregarded under Iqbal, 556 U.S. at 678-79. An allegation that a company might foreclose competitors' access to a product is insufficient to plausibly state a claim; if it were, almost any pleading would survive the pleading stage and proceed to expensive discovery.

In *DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 765 (9th Cir. 2018), the Ninth Circuit dismissed a Section 7 claim based on a speculative theory of post-transaction business practices. There, the plaintiffs alleged that, post-transaction, the new subsidiary would adopt the distribution practices of ABI and follow its lead in dealings with distributors. *Id.* The court called this a "classic speculative conclusion," even if it were bolstered with allegations regarding past acquisitions. *Id.* Similarly, here, Plaintiffs offer only speculation regarding a post-transaction change

in business practices. Their allegations are controverted by more specific facts regarding the continued availability of the games across platforms. Such classic speculation warrants dismissal.

Additionally, Plaintiffs have failed to allege facts establishing how, even if Microsoft intended to foreclose competitors' access, it would cause competitive harm in the alleged product markets. Plaintiffs contend that Activision Blizzard games are some of the top games with "no meaningful substitute." (See Compl. ¶ 284-287.) But Plaintiffs fail to allege any facts to show that these games constitute an essential input for any relevant market. As noted above, the only market shares alleged are in game publishing and are wholly unsupported. Moreover, the Complaint does not allege facts showing that other game developers cannot create meaningful substitutes. Even in its self-serving and ill-defined "Triple-A" product market, Plaintiffs concede that there are other competitors. (See id. ¶ 168.) Accordingly, Plaintiffs have not alleged facts plausibly tying their speculative theory about Microsoft's future behavior to their allegation of antitrust injury. See Crouse-Hinds Co. v. Internorth, Inc., 518 F. Supp. 416, 431 (N.D.N.Y. 1980) ("a plaintiff must make a greater showing than simply that a vertical merger will result in a significant percentage of market foreclosure" and must demonstrate "some probable anticompetitive effect or impact").

3. Plaintiffs Have Not Alleged Facts Showing a Viable Claim Based on Lessened Competition in the Labor Market (Labor Market Theory)

Finally, Plaintiffs append a claim that, because Microsoft and Activision Blizzard both recruit labor, the proposed acquisition would lessen competition in the putative video game labor market. They make only a few brief, conclusory statements in support of this theory. (Compl. ¶¶ 276-279.) They do not allege any factual detail, such as figures or data related to the relevant labor market or the effects that the prospective acquisition would have on it. This conclusory and speculative claim should also be dismissed.

B. Plaintiffs' Claim Is Not Ripe

Plaintiffs ask this court to enjoin Microsoft and Activision Blizzard from consummating a transaction that currently is subject to multiple regulatory reviews and therefore has multiple contingencies—there is no dispute about that. A "case must be ripe—not dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*,

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141 S. Ct. 530, 535 (2021) (quoting *Texas v. U.S.*, 523 U.S. 296, 300 (1998)). Otherwise, the Court lacks jurisdiction and the case must be dismissed. *See Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010). This Complaint, which concerns a prospective future transaction that is under review by multiple government regulators (a process during which the transaction might be modified in a way that directly impacts Plaintiffs' claims), is not ripe.

Courts have dismissed similar antitrust claims seeking to enjoin prospective mergers on For example, in South Austin Coalition Community Council v. SBC ripeness grounds. Communications, Inc., 191 F.3d 842 (7th Cir. 1999), the Seventh Circuit upheld the dismissal of an antitrust lawsuit that sought to enjoin a merger that had not yet closed and was still subject to review by the Federal Communications Commission. The court noted that "[c]ourts often wait for agencies, even when the agencies' views are not legally conclusive—not only because the agencies may have something helpful to say, but also because what the agencies do may shape the litigation." Id. at 844. "Regulatory agencies can raise or lower" the barriers to competition, such as by conditioning their approval on changes that facilitate competitors' entry into the market. Id. at 845. Accordingly, it "is impossible to analyze a potential-competition claim" prior to the completion of that approval process and prior to knowing the final terms of the transaction. Id. Litigation at that premature stage would be an "expensive challenge to a moving target" and "a waste of everyone's time." Id.; see also AT&T Mobility LLC v. Bernardi, No. C 11-03992 CRB, 2011 U.S. Dist. LEXIS 124084, at *35 (N.D. Cal. Oct. 26, 2011) (enjoining arbitration proceedings to challenge a merger as premature, and adopting the Seventh Circuit's reasoning that such challenges are unripe "until all required state and federal approvals have been obtained—for the agencies might insist on changes that would substantially alter the merger's competitive effects").

This action is even more premature. The transaction at issue on appeal in *South Austin* was subject to only one remaining approval. Microsoft is currently working cooperatively with numerous regulators around the world to obtain approvals to close the transaction. (*See* Dkt. 26-1 through 26-8; *see also* Compl. ¶ 275 (acknowledging that Plaintiffs' claims are contingent upon "[i]f Microsoft's acquisition of Activision Blizzard were to be completed").) Microsoft has said publicly that it remains open to remedies by the regulators. (Dkt. 26 at 5, 7.) Specifically, this may include terms requiring

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27 28 Microsoft to continue to make Activision Blizzard games available on competitors' platforms, which directly impacts Plaintiffs' Vertical Theory in this case. For instance, Microsoft has already agreed with Nintendo to offer Call of Duty on Nintendo Switch for ten years. *See* Vlad Savov, *Microsoft Agrees to 10-Year Call of Duty Deal with Nintendo*, Bloomberg, Dec. 6, 2022, https://www.bloomberg.com/news/articles/2022-12-07/microsoft-agrees-10-year-call-of-duty-deal-with-nintendo?leadSource=uverify%20wall; *see also* Reuters, *Microsoft to Bring Call of Duty to Nintendo, Sony on the Spot*, Dec. 7, 2022, https://www.reuters.com/technology/microsoft-makes-10-year-commitment-bring-call-duty-nintendo-tweet-2022-12-07/. Plaintiffs' entire vertical merger theory may be mooted if such terms are required by a regulator or voluntarily incorporated. It is impossible to analyze Plaintiffs' claims at this stage, when the regulatory reviews may change the shape of—or even the necessity for—this litigation.\(^1\) Accordingly, this Court lacks subject matter jurisdiction to decide the dispute and should dismiss it.\(^2\)

Generally, courts evaluate ripeness based on (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Addington*, 606 F.3d at 1179.

¹ In numerous past mergers, regulatory reviews have resulted in modifications to the transaction that resolved any antitrust concerns. See, e.g., Bradt v. T-Mobile US, Inc., No. 19-cv-07752-BLF, 2020 U.S. Dist. LEXIS 44141, at *6–7 (N.D. Cal. Mar. 13, 2020) (denying plaintiffs' motion to enjoin a merger because the DOJ and FCC "investigated the merger and negotiated divestitures to Dish Network Corporation . . . that will enable DISH to become a major competitor in the nationwide mobile wireless services market and thus preserve the competitive structure of the industry"); New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 233 (S.D.N.Y. 2020) ("[T]he FCC and DOJ remedies, and particularly those designed to ensure that DISH becomes an aggressive fourth national [competitor], significantly reduce the concerns and persuasive force of Plaintiff States' market share statistics."); Dehoog v. Anheuser-Busch InBev SA/NV, 899 F.3d 758, 760 (9th Cir. 2018) (affirming dismissal of Section 7 claim because the DOJ conditioned approval of the merger on one defendant "divest[ing] entirely its domestic beer business," so the plaintiffs "could not plausibly allege" the merger "would substantially lessen competition in that market").

² Microsoft appreciates the Court's prior order, in conjunction with Microsoft's earlier motion to stay and a scheduling discussion, that would postpone the schedule for Plaintiffs' preliminary injunction motion based on Microsoft's stipulation that the acquisition will not close before a future date certain. Microsoft has now informed Plaintiffs that it will stipulate that the transaction will not close any earlier than May 1, 2023. While Microsoft agrees that any preliminary injunction motion should not be heard until closer to the transaction's closing, the prior order does not resolve this motion to dismiss, which concerns the Court's constitutional authority to exercise jurisdiction over this complaint as pled. Accordingly, the complaint should be dismissed, irrespective of the parties' attempts to find commonsense scheduling solutions.

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These principles warrant dismissal. The issues are not currently fit for judicial decision because it is premature for the Court to evaluate the transaction as pled when it is subject to change and any potential anticompetitive effects cannot yet be determined. Plaintiffs will not face hardship and will have their day in court (if it remains appropriate and necessary). *See S. Austin Coal. Cmty. Council v. SBC Commc'ns, Inc.*, No. 98 C 3014, 1999 U.S. Dist. LEXIS 949, at *4 (N.D. Ill. Jan. 26, 1999) ("[P]laintiffs can always reinstate their action *after* the appropriate agencies have had the opportunity to review the competitive effects of the merger."), *aff'd*, 191 F.3d 842 (7th Cir. 1999); *see also Bernardi*, 2011 U.S. Dist. LEXIS 124084, at *35–36 (delay of challenge to unconsummated merger "cannot cause any hardship" to the consumers).

Allowing the Plaintiffs to proceed with their premature Complaint has real consequences. Plaintiffs have already indicated that they plan to aggressively seek burdensome discovery. See S. Austin, 191 F.3d at 845 ("Antitrust litigation can be very costly; an expensive challenge to a moving target is worse than pointless."); Twombly, 550 U.S. at 558 (emphasizing that "antitrust discovery can be expensive"). They have told the Court that they intend to take the depositions of executives at the highest levels of Microsoft and Activision Blizzard in February, without waiting for the results of regulatory approvals from abroad or the FTC depositions (which are scheduled to be completed before the deadline of April 7). If the terms of the merger change after the regulatory reviews are complete, Plaintiffs likely will assert the need to re-take depositions to cover the effect of the new terms. Plaintiffs have requested document discovery beyond the 9 million pages provided to the FTC. And they are attempting to set a trial for this case on April 3. Because of the contingencies inherent in the regulatory approval process, no one—including Microsoft—can definitively say by what date the parameters of this transaction will be finalized. These practical issues demonstrate why courts do not exercise jurisdiction over cases that are not ripe for adjudication. Once the final terms of this transaction are known, the Court can give Plaintiffs an opportunity to refile and be heard on a preliminary injunction motion and, if they prevail on that motion, take relevant discovery and litigate the merits at a later trial.

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C. Plaintiffs Lack Standing to Bring Their Claim

The threat of injury to Plaintiffs is hypothetical at this stage and thus they lack Article III standing. Plaintiffs bear the burden of proving, at every stage of this litigation, that they meet standing requirements. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) ("[A]t the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element."). Constitutional standing requires an injury-in-fact that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc.*, 578 U.S. at 339 (citation omitted). Private plaintiffs under the Clayton Antitrust Act must show a threat of injury that is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

1. Plaintiffs Lack Standing Because the Transaction Has Not Been Approved

Courts have dismissed antitrust challenges to prospective mergers on standing grounds where, as here, the merger has not closed and is pending regulatory approval. For example, in *Cassan Enterprises, Inc. v. Avis Budget Group, Inc.*, the plaintiff challenged an acquisition in which the companies announced the proposed transaction and their intent to seek regulatory approval, but the approval process had not yet been completed. No. 10-cv-01934-JCC, (W.D. Wash. Mar. 11, 2011), Dkt. 39, at *2-3, 5. The court found that Plaintiffs could not clear the necessary hurdle of alleging an injury that was "certainly impending," because the FTC was "still reviewing the proposed acquisition" and "aspects of the acquisition may change as a result of the Commission's review." *Id.* at *5. The court dismissed the plaintiff's conjectural claims. *Id.* at *5-6.; *see also SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc.*, No. H-17-127, 2017 U.S. Dist LEXIS 135796, at *10 (S.D. Tex. Aug. 24, 2017) (the plaintiff's "perceived threats of monopolistic behavior are speculative and do not confer standing."), *aff'd in part & modified in part by 754* F. App'x 235 (5th Cir. 2017).

Here, no one can say with certainty what the final transaction will look like. Plaintiffs rely on a chain of speculative inferences to allege that they will be injured, including conjecture about the transaction's final terms and further conjecture about Microsoft's behavior afterward (such as a baseless allegation that Microsoft will foreclose competitors' access to Activision Blizzard video games). Plaintiffs cannot show that their alleged harm is "certainly impending," and their claims must be dismissed.

2. Plaintiffs Lack Standing to Assert a Claim Based on Competition for Labor

Plaintiffs also allege that the acquisition would threaten to "substantially reduce competition in the labor market for video game labor talent." (Compl. ¶ 224.) But none of the Plaintiffs have alleged how reduced competition for employees in the video game industry would constitute a concrete, particularized, and imminent harm to themselves. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). None of the Plaintiffs allege that they work in the video game industry or even plan to seek employment in the video game industry.

D. Plaintiffs Are Not Entitled to Injunctive Relief

Plaintiffs have an adequate remedy at law—monetary damages—and therefore, their claim for injunctive relief must be dismissed. An injunction is "an extraordinary remedy" that "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Norbert v. City & County of San Francisco, 10 F.4th 918, 927 (9th Cir. 2021). A plaintiff must adequately allege four elements before it can proceed with a claim for injunctive relief: (1) that it has suffered (or will imminently suffer) an irreparable harm; (2) that there is no adequate remedy at law; (3) that the balance of the hardships favors the plaintiff; and (4) that an injunction is in the public interest. See Taleff v. Sw. Airlines Co., 828 F. Supp. 2d 1118, 1122 (N.D. Cal. 2011), aff d 554 F. App'x 598 (9th Cir. 2014). These equitable principles apply to Clayton Act claims. Id. at 1122; California v. Am. Stores Co., 495 U.S. 271, 281 (1990) ("[T]he statutory language [of Section 16] indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief." (citation omitted)). Plaintiffs have not pled facts sufficient to allege any harm that cannot be remedied by monetary damages. Therefore, their claim should be dismissed.

Plaintiffs' claims are centered on allegations that Microsoft would be able to increase prices post-acquisition, and that is clearly compensable by monetary damages. *See Taleff*, 828 F. Supp. 2d at 1123 n.7; *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No 3:09-cv-03854-MMC, U.S. Dist. LEXIS 133999, at *3 (N.D. Cal. Oct. 22, 2009) (holding that "injuries resulting from higher prices would appear to be injuries fully compensable by an award of monetary damages."); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201-02 (9th Cir. 1980) (holding

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that "monetary injury is not normally considered irreparable" in Section 16 cases). At best, Plaintiffs could allege, without any supporting facts and contrary to all public information, that Microsoft would restrict access of popular games to certain platforms or subscriptions. Even in this Plaintiff-concocted world, Plaintiffs' harm could be remedied through monetary damages designed to repay any costs associated with accessing exclusive content.

Plaintiffs vague and unsupported claims that "video game quality, innovation, and diversity may decrease" if the transaction closes are speculative and not supported by any facts in the Complaint. (Compl. ¶ 331(e).) And it is implausible that Microsoft is investing almost \$70 billion in a video game developer with the intent or incentive to "degrade video game quality, innovation and diversity." Microsoft would have every incentive to maintain and improve the quality and diversity of Activision Blizzard's games even if, as Plaintiffs speculate, they made some of the games exclusive to Microsoft platforms. In sum, Plaintiffs have not alleged any plausible scenario in which their alleged harm from this transaction would not be compensable by monetary damages. Therefore, their claim for injunctive relief should be dismissed.

VI. CONCLUSION

Dated: January 31, 2023

Microsoft requests that the Court dismiss Plaintiffs' action in its entirety.

Respectfully submitted,

By: /s/ Valarie C. Williams

Valarie C. Williams B. Parker Miller Tania Rice Tyler Blake Alston & Bird LLP

Rakesh N. Kilaru Anastasia M. Pastan Jenna Pavelec Wilkinson Stekloff LLP

Counsel for Defendant Microsoft Corporation

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MICROSOFT'S MOTION TO DISMISS Case No. 3:22-cv-08991-JSC

(86 of 133)

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EXHIBIT G

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1 2 3 4 5 6 7 8 9 10 11 1	Rakesh N. Kilaru (pro hac vice) Anastasia M. Pastan (pro hac vice) Jenna Pavelec (pro hac vice) WILKINSON STEKLOFF LLP 2001 M Street NW, 10th Floor Washington, DC 20036 Telephone: (202) 847-4000 Facsimile: (202) 847-4005 rkilaru@wilkinsonstekloff.com apastan@wilkinsonstekloff.com ipavelec@wilkinsonstekloff.com Valarie C. Williams (Bar No. 335347) Tania Rice (Bar No. 294387) Alston & Bird LLP 5600 Mission Street, Suite 2100 San Francisco, CA 94105 Telephone: (415) 243-1000 Fax: (415) 243-1001 valarie.williams@alston.com tania.rice@alston.com		
12	Counsel for Defendant Microsoft Corp.		
13	UNITED STATES DISTRICT COURT		
14	NORTHERN DISTRICT OF CALIFORNIA		
15	SAN FRANCISCO DIVISION		
16 17 18 19	DANTE DEMARTINI, CURTIS BURNS, JR., NICHOLAS ELDEN, JESSIE GALVAN, CHRISTOPHER JOSEPH GIDDINGS-LAFAYE, STEVE HERRERA, HUNTER JOSEPH JAKUPKO, DANIEL DERMOT ALFRED LOFTUS, BEOWULF EDWARD OWEN, and IVAN CALVO-PEREZ,	Case No. 3:22-cv-08991-JSC DEFENDANT MICROSOFT CORPORATION'S NOTICE OF MOTION AND MOTION TO STAY CASE; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF	
20	Plaintiffs,	Date: February 16, 2023, or sooner if	
21	V.	possible Time: 10:00 a.m.	
22 23	MICROSOFT CORPORATION, a Washington Corporation,	Location: Courtroom 8 – 19 th Floor Judge: Hon. Jacqueline Scott Corley	
23 24	Defendant.		
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	Case No. 3:22-ev-08991-JSC	DEFENDANT MSFT'S MOTION TO STAY CASE	

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

Case No. 3:22-cv-08991-JSC

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on February 16, 2023 at 10:00 a.m. or as soon thereafter as this Motion may be heard in Courtroom 8 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Microsoft Corporation will, and hereby does, move this Court for an order staying all proceedings in this case pending the completion of any regulatory proceedings that would prevent Microsoft and Activision Blizzard King from closing their proposed transaction.

The motion will be made based on this Notice of Motion and Motion, the Memorandum of Points and Authorities herein, the accompanying Declaration of Rakesh Kilaru, all other papers and pleadings on file in this action, and any other written or oral argument or evidence that Microsoft might present to the Court.

REQUESTED RELIEF

Microsoft requests that the Court exercise its discretion to stay all proceedings in this case.

DEFENDANT MSFT'S MOTION TO STAY CASE

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Microsoft respectfully requests that the Court stay this case. Plaintiffs' lawsuit has only one purpose: to enjoin Microsoft's proposed acquisition of Activision Blizzard King. Though Plaintiffs do not mention it, thirteen days before they filed their complaint, the Federal Trade Commission ("FTC") filed an administrative complaint seeking the same relief. *See* Ex. C, Docket in *In re Microsoft/Activision Blizzard*, FTC No. 9412; Ex. A, FTC Complaint (Dec. 8, 2022). Both Plaintiffs and the FTC allege that the proposed acquisition would lessen competition in the video game industry in violation of Section 7 of the Clayton Act. The only practical distinction between the complaints is Plaintiffs are seeking a preliminary injunction, whereas the FTC presently is not.

There is nothing to preliminarily enjoin. For almost a year, Microsoft and Activision have been working cooperatively with regulators around the world, including the FTC, to obtain the necessary approvals to close the transaction. Microsoft and Activision have tried to expedite those processes as much as possible, because the transaction agreement imposes a termination date of July 18, 2023. See Ex. H, Microsoft/Activision Merger Agreement (Jan. 18, 2022), at 84. But many of those regulatory reviews remain ongoing. Among them are the European Commission ("EC"), which will review the transaction until at least April 11, 2023, and the United Kingdom's Competition and Markets Authority ("CMA"), which will be examining the transaction until at least April 26, 2023. The transaction will not close while these and certain other regulatory reviews remain open, and those reviews could result in remedies that would "shape the litigation." South Austin Coal. Cmty. Council v. SBC Commc'ns, Inc., 191 F.3d 842, 844 (7th Cir. 1999) (Easterbrook, J.). Further, the FTC has indicated that it may pursue a preliminary injunction to stop the transaction from closing pending the outcome of its lawsuit.

There is accordingly no reason to litigate this case right now. Microsoft is already litigating the issues presented here in front of the FTC, with the possibility of preliminary injunction proceedings involving the FTC if they become necessary. And Microsoft is at least several months away from being able to close the transaction. Judicial economy thus favors staying this action, to avoid needless and duplicative litigation and the risk of inconsistent rulings on identical issues

of fact and law between this case and the FTC proceeding.

Microsoft accordingly requests that the Court stay these proceedings pending the completion of any regulatory proceedings that would prevent Microsoft and Activision from closing their proposed transaction.

STATEMENT OF ISSUES TO BE DECIDED

Whether to stay all proceedings in this case pending the completion of any regulatory proceedings that would prevent Microsoft and Activision from closing their proposed transaction.

STATEMENT OF FACTS

This case involves a proposed transaction between the third-place manufacturer of gaming consoles and one of many publishers of popular video games. Defendant Microsoft competes in gaming through its Xbox division. Xbox started behind Nintendo and Sony when it began making consoles 20 years ago, and it remains in third place today. Xbox also has next to no presence in mobile gaming, the fastest-growing segment of gaming and the place where 94% of gamers spend their time today. And Xbox and Activision are just two of hundreds of game publishers, who compete by providing different types of games on different platforms at different prices, ranging all the way down to \$0.

On January 18, 2022, Microsoft announced its agreement to acquire Activision Blizzard King ("Activision"). Microsoft's vision for the transaction is simple: Xbox wants to grow its presence in mobile gaming, and three quarters of Activision's gamers and more than a third of its revenues come from mobile offerings. Xbox believes it is good business to make Activision's limited portfolio of popular games more accessible to consumers, by putting them on more platforms and making them more affordable. That includes making *Call of Duty*, one of Activision's most popular games, more broadly available. Microsoft made this public pledge on the day the deal was announced. Since then, Xbox has agreed to provide the game to Nintendo (which does not currently have it) and has offered to continue making the game available to Sony for ten years.

Microsoft and Activision's agreement imposes a termination date of July 18, 2023. *See* Ex. H at 84. Because of that deadline, Microsoft and Activision have been working diligently to

ensure that they have regulatory approval to proceed with the acquisition.

From the moment the deal was announced, Microsoft and Activision have been working cooperatively with regulators around the world to address any competition-related concerns about the transaction. Among others, Microsoft has been engaging with the EC and the CMA to obtain their clearance for the transaction. Both the EC's and CMA's review periods are ongoing and will continue for at least several more months: the EC's current deadline for completing review is April 11, 2023, and the CMA's deadline is April 26, 2023. *See* Ex. F, European Commission Docket Notice (Nov. 18, 2022); Ex. G, Competition & Markets Authority Notice of Extension (Jan. 5, 2023). Microsoft cannot close the transaction while these and certain other foreign regulatory reviews remain open.

The FTC also began reviewing the transaction when it was announced. On December 8, 2022, the FTC filed a complaint against Microsoft and Activision before the agency's Administrative Law Judge, alleging that the proposed acquisition violated federal antitrust laws. See Ex. A, FTC Complaint (Dec. 8, 2022). The FTC is seeking to prohibit Microsoft and Activision from combining their businesses (except as approved by the Commission) or any other relief appropriate to remedy the alleged anticompetitive effects of the acquisition. Trial is currently scheduled for August 2, 2023. See Ex. E, FTC Scheduling Order (Jan. 4, 2023). Given the time constraints on closing the deal, the parties agreed to an expedited discovery timeline, with fact discovery scheduled to close on April 7, 2023. See id. The parties agreed to that schedule to accommodate a possible preliminary injunction proceeding by the FTC. Specifically, if Microsoft obtains the necessary regulatory approvals abroad to close the transaction, expedited discovery will increase the likelihood that any preliminary injunction proceeding can be litigated and resolved by July 18, 2023.

Against that regulatory backdrop, and just weeks after the FTC filed its complaint, Plaintiffs, a group of 10 individual gamers, filed this lawsuit and simultaneously moved for a preliminary injunction to block the proposed transaction. Like the FTC, Plaintiffs allege that the proposed acquisition would lessen competition in various markets within the video game industry in violation of Section 7 of the Clayton Act. And Plaintiffs seek precisely the same relief—to

block the proposed transaction.

ARGUMENT

ANGUMEN

I. This Court should enter a stay of further proceedings in this case.

This Court has the "discretionary power to stay proceedings." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). In determining whether a stay is appropriate, courts consider (i) the "possible damage" that may result if the stay is granted; (ii) the "hardship or inequity" that may result if the stay is denied; and (iii) the "orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id.* at 1110.

Applying those factors, courts in this district "routinely" grant stays "where there are overlapping issues of fact or law" raised in another pending case. *Vance v. Google LLC*, No. 5:20-CV-04696-BLF, 2021 WL 534363, at *3 (N.D. Cal. Feb. 12, 2021); *see*, *e.g.*, *Noble v. JP Morgan Chase Bank*, No. 22-cv-02879-LB, 2022 WL 4229311, at *9 (N.D. Cal. Sept. 13, 2022) (granting a stay where resolution of related claims in state court would "illuminate similar issues" in the federal lawsuit); *Zurich Am. Ins. Co. v. Omnicell, Inc.*, No. 18-CV-05345-LHK, 2019 WL 570760, at *5–6 (N.D. Cal. Feb 12, 2019) (granting a stay after finding that defendant was "prejudiced" by "having to fight a 'two-front war'") (citation omitted); *McElrath v. Uber Techs., Inc.*, No. 16-CV-07241-JSC, 2017 WL 1175591, at *6 (N.D. Cal. Mar. 30, 2017) (granting a stay where the instant case was "in its early stages" and the outcome of the other case would "have a significant impact on this case"). That is true regardless of "whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court." *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979).

Here, all of the relevant factors weigh in favor of granting a stay of this case.

A. Plaintiffs will not be harmed by a stay.

Courts are "generally unwilling to presume delay is harmful without specific supporting evidence." *Aliphcom v. Fitbit, Inc.*, 154 F. Supp. 3d 933, 938 (N.D. Cal. 2015). Here, Plaintiffs cannot provide any evidence of harm from a stay.

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As an initial matter, there is no immediate risk of the transaction closing, because there are several regulatory obstacles to Microsoft completing its proposed acquisition of Activision. The parties cannot close on their deal until they have regulatory approval from foreign regulators including the EC and CMA, and that approval process will take at least several more months. According to their public dockets, the EC's current deadline for completing review is April 11, 2023, and the CMA's deadline is April 26, 2023. *See* Ex. F, EC Docket Notice; Ex. G, CMA Notice of Extension. Given that the parties are meanwhile unable to close the transaction, there is no need to expend court and party resources to temporarily prevent the close of the transaction. *Cf. Cassan Enters., Inc. v. Avis Budget Grp., Inc.*, No. 10-cv-01934-JCC, slip op., at 5 (W.D. Wash. Mar. 11, 2011) ("It is self-evident that Plaintiffs have not suffered any injury from the proposed acquisition: It has not yet taken place.") (emphasis omitted).

Moreover, the FTC's ongoing litigation seeks precisely the same relief that Plaintiffs want—to block Microsoft's proposed acquisition of Activision. *Compare* Ex. A, FTC Complaint, at 23 (seeking a "prohibition against any transaction between Microsoft and Activision that combines their businesses, except as may be approved by the Commission") *with* Plaintiffs' Complaint at 40–41 (seeking to "[p]reliminarily enjoin[] Defendants from consummating the merger" or to "[p]ermanently enjoin[] Defendants from consummating the merger"). Plaintiffs' interests are thus fully represented by the FTC. *Cf. Howard Hess Dental Lab'ys Inc. v. Dentsply dock*factor into its equitable analysis the effect of another injunction on the plaintiff's showing of injury."). The FTC has statutory authority to seek a preliminary injunction or temporary restraining order to block the acquisition. 15 U.S.C. § 53(a), (b). It has not done so yet because there are other approvals currently preventing the parties from closing. At the January 3, 2023 scheduling conference in the FTC matter, the FTC's trial counsel represented to the ALJ that it would pursue a preliminary injunction in federal court at a later date if it becomes necessary. *See* Ex. D, Transcript of FTC Initial Prehearing Scheduling Conference (Jan. 3, 2023), at 8:7–9.

The EC, the CMA, and the FTC are investigating the same issues raised by the Plaintiffs' claims, the parties cannot close because of ongoing investigations, and the FTC can try to stop the transaction to the extent there is any risk of the parties closing before that case is resolved.

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27 28 Therefore, there is no risk of harm in staying Plaintiffs' case while those regulatory proceedings are ongoing.

Under these circumstances, a stay of this case would not harm Plaintiffs.

В. Microsoft will suffer hardship if a stay is denied.

By contrast, Microsoft will be harmed if a stay is denied. Absent a stay, Microsoft will be forced to simultaneously litigate similar legal and factual issues before two different judges. That two-front litigation would result in unnecessary duplication of litigation efforts and would create a risk of inconsistent rulings. See Vance, 2021 WL 534363, at *5.

As for duplication, the Plaintiffs' complaint raises many of the same issues as the FTC's complaint, so there is potential for "significant overlap in the discovery in both cases, creating additional expenses" for the parties. Id. at *6; see also Arris Enters. LLC v. Sony Corp., No. 17-CV-02669-BLF, 2017 WL 3283937, at *3 (N.D. Cal. Aug. 1, 2017) (noting that without a stay in one action, the parties may "have to conduct multiple depositions of the same witnesses"). For example, both complaints articulate similar theories about the potential anticompetitive effects of the proposed transaction, including that Xbox would allegedly have the incentive to make popular Activision games, like Call of Duty, exclusive to Xbox (despite Xbox's public pledge to keep existing Activision games on their existing platforms). Given the considerable overlap between the complaints, there would necessarily be duplicative discovery. That unnecessary expense and inefficiency would be avoided if the Court stays this case while the FTC case is ongoing.

As for the risk of inconsistent rulings, both complaints rest on a number of shared threshold questions, the answers to which could lead to different conclusions about the ultimate antitrust claims. For example, both complaints will require a determination of the relevant product markets and of the scope of the relevant geographic market for these claims. If the two tribunals simultaneously consider those questions, there is considerable "potential for inconsistent rulings and resulting confusion." Vance, 2021 WL 534363, at *5 (quotation omitted); see also SST Millennium LLC v. Mission St. Dev. LLC, No. 18-CV-06681-YGR, 2019 WL 2342277, at *5 (N.D. Cal. June 3, 2019) (finding that denying a stay would pose "hardship" to the moving party due to the "possibility of inconsistent and adverse rulings" in the parallel action). And there are many,

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many other overlapping questions between the two cases. For example, both complaints make similar allegations about the anticompetitive effects of the transaction:

- Both complaints allege that the acquisition would give Microsoft the ability and incentive to withhold Activision games, like *Call of Duty*, from other platforms;
- Both complaints allege that the acquisition would give Microsoft the ability and incentive
 to degrade the quality of Activision games, like *Call of Duty*, provided to other platforms;
 and
- Both complaints allege that the acquisition will allow Microsoft to increase its market power in subscription services and cloud gaming.

Those overlapping questions, and others, further amplify the risk that simultaneous proceedings could "produce a number of factually and legally inconsistent rulings." *Aliphcom*, 154 F. Supp. 3d at 939–40.

There is simply no benefit to litigating the same issues twice—particularly where the resolution of the FTC proceeding, which was first filed, could render the other litigation moot. *See Vance*, 2021 WL 534363, at *5. Indeed, courts regularly dismiss private plaintiffs' antitrust claims when the relief sought by the private plaintiffs has already been secured by a government enforcement action. *See*, *e.g.*, *DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 765 (9th Cir. 2018) (affirming district court's dismissal of private plaintiffs' antitrust claims where "the DOJ reached a settlement to 'prevent increased concentration' in the market"); *Edstrom v. Anheuser-Busch InBev SA/NV*, No. C 13-1309 MMC, 2013 WL 5124149 (N.D. Cal. Sept. 13, 2013) (dismissing private plaintiffs' antitrust claims where the merging parties had revised their agreement to avoid the alleged anticompetitive behavior pursuant to a court order in a DOJ enforcement action); *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, No. CIV. 13-2664 ADM/SER, 2014 WL 943224, at *9 (D. Minn. Mar. 11, 2014) (dismissing private plaintiffs' request for injunctive relief where the requested relief "duplicates the FTC Order").

The hardship that would result from denying the stay here thus weighs in favor of granting

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C. A stay will promote the orderly course of justice.

Finally, judicial economy strongly favors a stay of this action. Generally, "[d]uplication of case management tasks by multiple courts is not an economical use of judicial resources." *Vance*, 2021 WL 534363, at *6. When considering whether to grant a stay, courts thus consider the potential for "simplifying or complicating of issues, proof, and questions of law." *Lockyer*, 398 F.3d at 1110 (quotation omitted).

As discussed above, there is considerable overlap between the legal and factual issues presented in this case and the ongoing FTC litigation. Staying this case while the FTC litigation is ongoing would thus simplify the issues in this matter. *See SST Millennium*, 2019 WL 2342277, at *5 ("[G]iven the interdependence and identical nature of plaintiffs' claims against each defendant, resolution of plaintiffs' claims against [the defendant in one action] will simplify issues, proof, and questions of law with respect to the claims" at issue in the other.") (citation and quotation omitted). Although the FTC's rulings are not binding on this court, "the discovery and the rulings can still benefit this case." *Arris Enters. LLC*, 2017 WL 3283937, at *4. By allowing the FTC to "resolve some of these overlapping issues" in the first instance, this Court can avoid inconsistent rulings and the prospect of wasting judicial resources on duplicative efforts. *Vance*, 2021 WL 534363, at *6. Indeed, as the Seventh Circuit has explained, "[c]ourts often wait for agencies, even when the agencies' views are not legally conclusive not only because the agencies may have something helpful to say, but also because what the agencies do may shape the litigation." *South Austin*, 191 F.3d at 844.

The orderly course of justice would therefore be served by entering a stay in this case.

II. CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that the Court grant its motion to stay further proceedings in this case. While the case is stayed, Microsoft will provide the Court with timely updates of any material developments in the ongoing regulatory proceedings. If a stay is entered, Microsoft would be willing to provide timely updates regarding any material developments in the regulatory proceedings that would affect the timing of closing the transaction.

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Dated:	January 11, 2023	
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3		By: /s/ Rakesh N. Kilaru
!		Rakesh N. Kilaru (pro hac vice) Anastasia M. Pastan (pro hac vice)
5		Jenna Pavelec (pro hac vice) WILKINSON STEKLOFF LLP
5		2001 M Street NW, 10th Floor Washington, DC 20036
7		Telephone: (202) 847-4000 Facsimile: (202) 847-4005
3		rkilaru@wilkinsonstekloff.com apastan@wilkinsonstekloff.com
		jpavelec@wilkinsonstekloff.com
		Valarie C. Williams (Bar No. 335347) Tania Rice (Bar No. 294387)
,		Alston & Bird LLP 5600 Mission Street, Suite 2100
2		San Francisco, CA 94105 Telephone: (415) 243-1000
3		Fax: (415) 243-1001 valarie.williams@alston.com
↓ -		tania.rice@alston.com
5		Counsel for Defendant Microsoft Corp.
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1 2 3 4 5 6 7 8	Rakesh N. Kilaru (pro hac vice) Anastasia M. Pastan (pro hac vice) Jenna Pavelec (pro hac vice) WILKINSON STEKLOFF LLP 2001 M Street NW, 10th Floor Washington, DC 20036 Telephone: (202) 847-4000 Facsimile: (202) 847-4005 rkilaru@wilkinsonstekloff.com apastan@wilkinsonstekloff.com ipavelec@wilkinsonstekloff.com Valarie C. Williams (Bar No. 335347) Tania Rice (Bar No. 294387) Alston & Bird LLP	
9	San Francisco, CA 94105	
10	Telephone: (415) 243-1000 Fax: (415) 243-1001	
11	valarie.williams@alston.com tania.rice@alston.com	
12	Counsel for Defendant Microsoft Corp.	
13	UNITED STATES	DISTRICT COURT
14	NORTHERN DISTRI	CT OF CALIFORNIA
15	SAN FRANCIS	SCO DIVISION
16	DANTE DEMARTINI, CURTIS BURNS, JR., NICHOLAS ELDEN, JESSIE GALVAN,	Case No. 3:22-cv-08991-JSC
17 18	CHRISTOPHER JOSEPH GIDDINGS- LAFAYE, STEVE HERRERA, HUNTER JOSEPH JAKUPKO, DANIEL DERMOT	[PROPOSED] ORDER GRANTING DEFENDANT MICROSOFT CORPORATION'S NOTICE OF MOTION
19	ALFRED LOFTUS, BEOWULF EDWARD OWEN, and IVAN CALVO-PEREZ,	AND MOTION TO STAY CASE; MEMORANDUM OF POINTS &
20	Plaintiffs,	AUTHORITIES IN SUPPORT THEREOF
21	v.	Date: February 16, 2023, or sooner if possible
22	MICROSOFT CORPORATION, a	Time: 10:00 a.m. Location: Courtroom 8 – 19 ^h Floor
23	Washington Corporation,	Judge: Hon. Jacqueline Scott Corley
24	Defendant.	
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Case No. 3:22-cv-08991-JSC

[PROPOSED] ORDER

Defendant Microsoft moved to stay all proceedings in this case pending the completion of any regulatory proceedings that would prevent Microsoft and Activision Blizzard King from closing their proposed transaction.

After considering the briefs, the arguments of counsel, and the evidence of record, the Court GRANTS Defendant's Motion to Stay and STAYS the case pending further action from this Court. Defendant SHALL provide timely updates regarding any material developments in the regulatory proceedings that would affect the timing of closing the transaction.

IT IS SO ORDERED.

Date:	_, 2023	

Hon. Jacqueline Scott Corley

UNITED STATES DISTRICT COURT JUDGE

[PROPOSED] ORDER GRANTING MSFT'S MOTION TO STAY