MERGER ANTITRUST LAW

Unit 13: Microsoft/Activision

Class 25

Professor Dale Collins
Georgetown University Law Center
Fall 2025

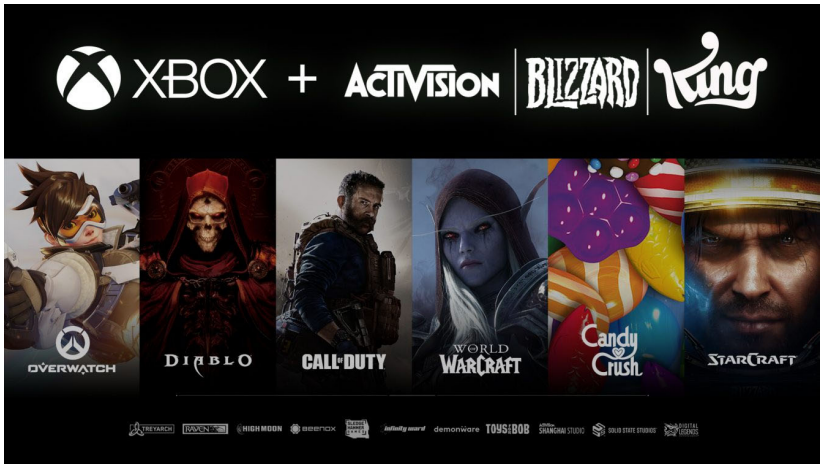
Table of Contents

Microsoft

Microsoft to acquire Activision Blizzard to bring the joy and community of gaming to everyone, across every device

January 18, 2022 | Microsoft News Center

Legendary games, immersive interactive entertainment and publishing expertise accelerate growth in Microsoft's Gaming business across mobile, PC, console and cloud.



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REDMOND, Wash. and Santa Monica, Calif. – Jan. 18, 2022 – With three billion people actively playing games today, and fueled by a new generation steeped in the joys of interactive entertainment, gaming is now the largest and fastest-growing form of entertainment. Today, Microsoft Corp. (Nasdaq: MSFT) announced plans to acquire Activision Blizzard Inc. (Nasdaq: ATVI), a leader in game development and interactive entertainment content publisher. This acquisition will accelerate the growth in Microsoft's gaming business across mobile, PC, console and cloud and will provide building blocks for the metaverse.

Microsoft will acquire Activision Blizzard for $95.00 per share, in an all-cash transaction valued at $68.7 billion, inclusive of Activision Blizzard's net cash. When the transaction closes, Microsoft will become the world's third-largest gaming company by revenue, behind Tencent and Sony. The planned acquisition includes iconic franchises from the Activision, Blizzard and King studios like "Warcraft," "Diablo," "Overwatch," "Call of Duty" and "Candy Crush," in addition to global eSports activities through Major League Gaming. The company has studios around the world with nearly 10,000 employees.

Bobby Kotick will continue to serve as CEO of Activision Blizzard, and he and his team will maintain their focus on driving efforts to further strengthen the company's culture and accelerate business growth. Once the deal closes, the Activision Blizzard business will report to Phil Spencer, CEO, Microsoft Gaming.

"Gaming is the most dynamic and exciting category in entertainment across all platforms today and will play a key role in the development of metaverse platforms," said Satya Nadella, chairman and CEO, Microsoft. "We're investing deeply in world-class content, community and the cloud to usher in a new era of gaming that puts players and creators first and makes gaming safe, inclusive and accessible to all."

"Players everywhere love Activision Blizzard games, and we believe the creative teams have their best work in front of them," said Phil Spencer, CEO, Microsoft Gaming. "Together we will build a future where people can play the games they want, virtually anywhere they want."

"For more than 30 years our incredibly talented teams have created some of the most successful games," said Bobby Kotick, CEO, Activision Blizzard. "The combination of Activision Blizzard's world-class talent and extraordinary franchises with Microsoft's technology, distribution, access to talent, ambitious vision and shared commitment to gaming and inclusion will help ensure our continued success in an increasingly competitive industry."

Mobile is the largest segment in gaming, with nearly 95% of all players globally enjoying games on mobile. Through great teams and great technology, Microsoft and Activision Blizzard will empower players to enjoy the most-immersive franchises, like "Halo" and "Warcraft," virtually anywhere they want. And with games like "Candy Crush," Activision Blizzard´s mobile business represents a significant presence and opportunity for Microsoft in this fast-growing segment.

The acquisition also bolsters Microsoft's Game Pass portfolio with plans to launch Activision Blizzard games into Game Pass, which has reached a new milestone of over 25 million subscribers. With Activision Blizzard's nearly 400 million monthly active players in 190 countries and three billion-dollar franchises, this acquisition will make Game Pass one of the most compelling and diverse lineups of gaming content in the industry. Upon close, Microsoft will have 30 internal game development studios, along with additional publishing and esports production capabilities.

The transaction is subject to customary closing conditions and completion of regulatory review and Activision Blizzard's shareholder approval. The deal is expected to close in fiscal year 2023 and will be accretive to non-GAAP earnings per share upon close. The transaction has been approved by the boards of directors of both Microsoft and Activision Blizzard.

Advisors

Goldman Sachs & Co. LLC is serving as financial advisor to Microsoft and Simpson Thacher & Bartlett LLP is serving as legal counsel. Allen & Company LLC is acting as financial advisor to Activision Blizzard and Skadden, Arps, Slate, Meagher & Flom LLP is serving as legal counsel.

Webcast details

Microsoft Chairman and CEO Satya Nadella; Bobby Kotick, CEO, Activision Blizzard; CEO, Microsoft Gaming, Phil Spencer; and Microsoft Chief Financial Officer Amy Hood will host a webcast for investors and media on Jan. 18, 2022, at 6 a.m. Pacific time/9 a.m. Eastern time regarding this transaction.

- S.: (877) 407-0666 (tel:%28877%29%20407-0666)(no password required)
- International: +1-201-689-8023 (tel:%2B1-201-689-8023)(no password required)
- Webcast: https://aka.ms/MS-Investor-Call (https://nam06.safelinks.protection.outlook.com/?url=https%3A%2F%2Faka.ms%2FMS-Investor-Call&data=04%7C01%7Csglass%40microsoft.com%7Cd7ec6f359abf4764eec408d9d78e5c8a%7C72f988bf86f141af91ab2d7cd011db47%7C1%7C0%7C637777828718048900%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&sdata=Lcu6BKF4X3%2B%2F7g5ZeEed%2BYR6FSj0fjO0f6HNOk5XHII%3D&reserved=0)

There will be a recording of the conference call available shortly after the call until Friday, Jan. 28, 2022, at 5 p.m. Pacific time. To access that recording:

- S.: (877) 660-6853
- International: +1 (201) 612-7415
- Conference ID: 13726291

For more information, please visit the blog post (https://news.xbox.com/en-us/2022/01/18/welcoming-activision-blizzard-to-microsoft-gaming/)from Phil Spencer, CEO, Microsoft Gaming. Related imagery (https://news.microsoft.com/?post_type=features&p=445014) is also available. For broadcast quality b-roll and audio, please contact XboxPress@assemblyinc.com.

Fast facts on gaming

- The $200+ billion gaming industry is the largest and

fastest-growing form of entertainment.

- In 2021 alone, the total number of video game releases was up 64% compared to 2020 and 51% of players in the U.S. reported spending more than 7 hours per week playing across console, PC and mobile.
- 3 billion people globally play games today, which we expect to grow to 4.5 billion by 2030.
- More than 100 million gamers, including over 25 million Xbox Game Pass members, play Xbox games across console, PC, mobile phones and tablets each month.

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About Microsoft
Microsoft (Nasdaq "MSFT" @microsoft) enables digital transformation for the era of an intelligent cloud and an intelligent edge. Its mission is to empower every person and every organization on the planet to achieve more.

About Activision Blizzard

Our mission, to connect and engage the world through epic entertainment has never been more important. Through communities rooted in our video game franchises we enable hundreds of millions of people to experience joy, thrill and achievement. We enable social connections through the lens of fun, and we foster purpose and meaning through competitive gaming. Video games, unlike any other social or entertainment media, have the ability to break down barriers that can inhibit tolerance and understanding. Celebrating differences is at the core of our culture and ensures we can create games for players of diverse backgrounds in the 190 countries our games are played.

As a member of the Fortune 500 and as a component company of the S&P 500, we have an extraordinary track record of delivering superior shareholder returns for over 30 years. Our sustained success has enabled the company to support corporate social responsibility initiatives that are directly tied to our franchises. As an example, our Call of Duty Endowment has helped find employment for over 90,000 veterans.

Learn more information about Activision Blizzard and how we connect and engage the world through epic entertainment on the company´s website, www.activisionblizzard.com

Forward-looking statements

This presentation contains certain forward-looking statements within the meaning of the "safe harbor" provisions of the United States Private Securities Litigation Reform Act of 1995 with respect to the proposed transaction and business combination between Microsoft and Activision Blizzard, including statements regarding the benefits of the transaction, the anticipated timing of the transaction and the products and markets of each company. These forward-looking statements generally are identified by the words "believe," "project," "predicts," "budget," "forecast," "continue," "expect," "anticipate," "estimate," "intend," "strategy," "future," "opportunity," "plan," "may," "could," "should," "will," "would," "will be," "will continue," "will likely result," and similar expressions (or the negative versions of such words or expressions). Forward-looking statements are predictions, projections and other statements about future events that are based on current expectations and assumptions and, as a result, are subject to risks and uncertainties. Many factors could cause actual future events to differ materially from the forward-looking statements in this presentation, including but not limited to: (i) the risk that the transaction may not be completed in a timely manner or at all, which may adversely affect Activision Blizzard's business and the price of the common stock of Activision Blizzard, (ii) the failure to satisfy the conditions to the consummation of the transaction, including the adoption of the merger agreement by the stockholders of Activision Blizzard and the receipt of certain governmental and regulatory approvals, (iii) the occurrence of any event, change or other circumstance that could give rise to the termination of the merger agreement, (iv) the effect of the announcement or pendency of the transaction on Activision Blizzard's business relationships, operating results, and business generally, (v) risks that the proposed transaction disrupts current plans and operations of Activision Blizzard or Microsoft and potential difficulties in Activision Blizzard employee retention as a result of the transaction, (vi) risks related to diverting management's attention from Activision Blizzard's ongoing business operations, (vii) the outcome of any legal proceedings that may be instituted against Microsoft or against Activision Blizzard related to the merger agreement or the transaction, (viii) the ability of Microsoft to successfully integrate Activision Blizzard's operations, product lines, and technology, and (ix) the ability of Microsoft to implement its plans, forecasts, and other expectations with respect to Activision Blizzard's business after the completion

of the proposed merger and realize additional opportunities for growth and innovation. In addition, please refer to the documents that Microsoft and Activision Blizzard file with the SEC on Forms 10-K, 10-Q and 8-K. These filings identify and address other important risks and uncertainties that could cause events and results to differ materially from those contained in the forward-looking statements set forth in this press release. Forward-looking statements speak only as of the date they are made. Readers are cautioned not to put undue reliance on forward-looking statements, and Microsoft and Activision Blizzard assume no obligation and do not intend to update or revise these forward-looking statements, whether as a result of new information, future events, or otherwise.

Additional information and where to find it

In connection with the transaction, Activision Blizzard, Inc. will file relevant materials with the SEC, including a proxy statement on Schedule 14A. Promptly after filing its definitive proxy statement with the SEC, Activision Blizzard will mail the definitive proxy statement and a proxy card to each stockholder entitled to vote at the special meeting relating to the transaction. INVESTORS AND SECURITY HOLDERS OF ACTIVISION BLIZZARD ARE URGED TO READ THESE MATERIALS (INCLUDING ANY AMENDMENTS OR SUPPLEMENTS THERETO) AND ANY OTHER RELEVANT DOCUMENTS IN CONNECTION WITH THE TRANSACTION THAT ACTIVISION BLIZZARD WILL FILE WITH THE SEC WHEN THEY BECOME AVAILABLE BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT ACTIVISION BLIZZARD AND THE TRANSACTION. The definitive proxy statement, the preliminary proxy statement and other relevant materials in connection with the transaction (when they become available), and any other documents filed by Activision Blizzard with the SEC, may be obtained free of charge at the SEC's website (http://www.sec.gov) or at the Activision Blizzard website (https://investor.activision.com) or by writing to Activision Blizzard, Investor Relations, 3100 Ocean Park Boulevard, Santa Monica, California, 90405.

Activision Blizzard and certain of its directors and executive officers and other members of man
solicitation of proxies from Activision Blizzard's stockholders with respect to the transaction. Inf
their ownership of Activision Blizzard's common stock is set forth in Activision Blizzard's proxy s
extent that holdings of Activision Blizzard's securities have changed since the amounts printed i
reflected on Statements of Change in Ownership on Form 4 filed with the SEC. Information rega
in the transaction, by security holdings or otherwise, will be set forth in the proxy statement and

For more information, press only:

Microsoft Media Relations, Assembly Media for Microsoft, XboxPress@assemblyinc.com (mailto

For more information, financial analysts and investors only:

Brett Iversen, General Manager, Investor Relations, (425) 706-4400

Note to editors: For more information, news and perspectives from Microsoft, please visit the M
(http://www.microsoft.com/news). Web links, telephone numbers and titles were correct at time
information, as well as today's 6:00 a.m. Pacific time conference call with investors and analysts,
(http://www.microsoft.com/en-us/investor).

January 18, 2022

Brett Iversen

GM of Investor Relations, Microsoft

Presenters today

Satya Nadella

Chairman & CEO

Microsoft

Bobby Kotick

CEO

Activision Blizzard

Amy Hood

EVP & CFO

Microsoft

Phil Spencer

CEO, Microsoft Gaming

Microsoft

Forward-Looking Statements

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These risks, as well as other risks associated with the proposed transaction, are more fully discussed in the Proxy Statement and the documents on Forms 10-K, 10-Q and 8-K to be filed with the U.S. Securities and Exchange Commission by Activision Blizzard and Microsoft in connection with the proposed transaction. These filings identify and address other important risks and uncertainties that could cause events and results to differ materially from those contained in the forward-looking statements set forth in this presentation. While the list of factors presented here is, and the list of factors presented in the Proxy Statement and the documents on Forms 10-K, 10-Q and 8-K are, considered representative, no such list should be considered to be a complete statement of all potential risks and uncertainties. Unlisted factors may present significant additional obstacles to the realization of forward-looking statements. Consequences of material differences in results as compared with those anticipated in the forward-looking statements could include, among other things, business disruption, operational problems, financial loss, legal liability to third parties and similar risks, any of which could have a material adverse effect on Microsoft's and Activision Blizzard's financial condition, results of operations, or liquidity. Forward-looking statements speak only as of the date they are made. Readers are cautioned not to put undue reliance on forward-looking statements, and Microsoft and Activision Blizzard assume no obligation and do not intend to update or revise these forward-looking statements, whether as a result of new information, future events, or otherwise.

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Activision Blizzard and certain of its directors and executive officers and other members of management and employees may be deemed to be participants in the solicitation of proxies from Activision Blizzard's stockholders with respect to the transaction. Information about Activision Blizzard's directors and executive officers and their ownership of Activision Blizzard's common stock is set forth in Activision Blizzard's proxy statement on Schedule 14A filed with the SEC on April 30, 2021 as amended on May 3, 2021. To the extent that holdings of Activision Blizzard's securities have changed since the amounts printed in Activision Blizzard's proxy statement, such changes have been or will be reflected on Statements of Change in Ownership on Form 4 filed with the SEC. Information regarding the identity of the participants, and their direct or indirect interests in the transaction, by security holdings or otherwise, will be set forth in the proxy statement and other materials to be filed with SEC in connection with the transaction.

Satya Nadella

Chairman & CEO, Microsoft

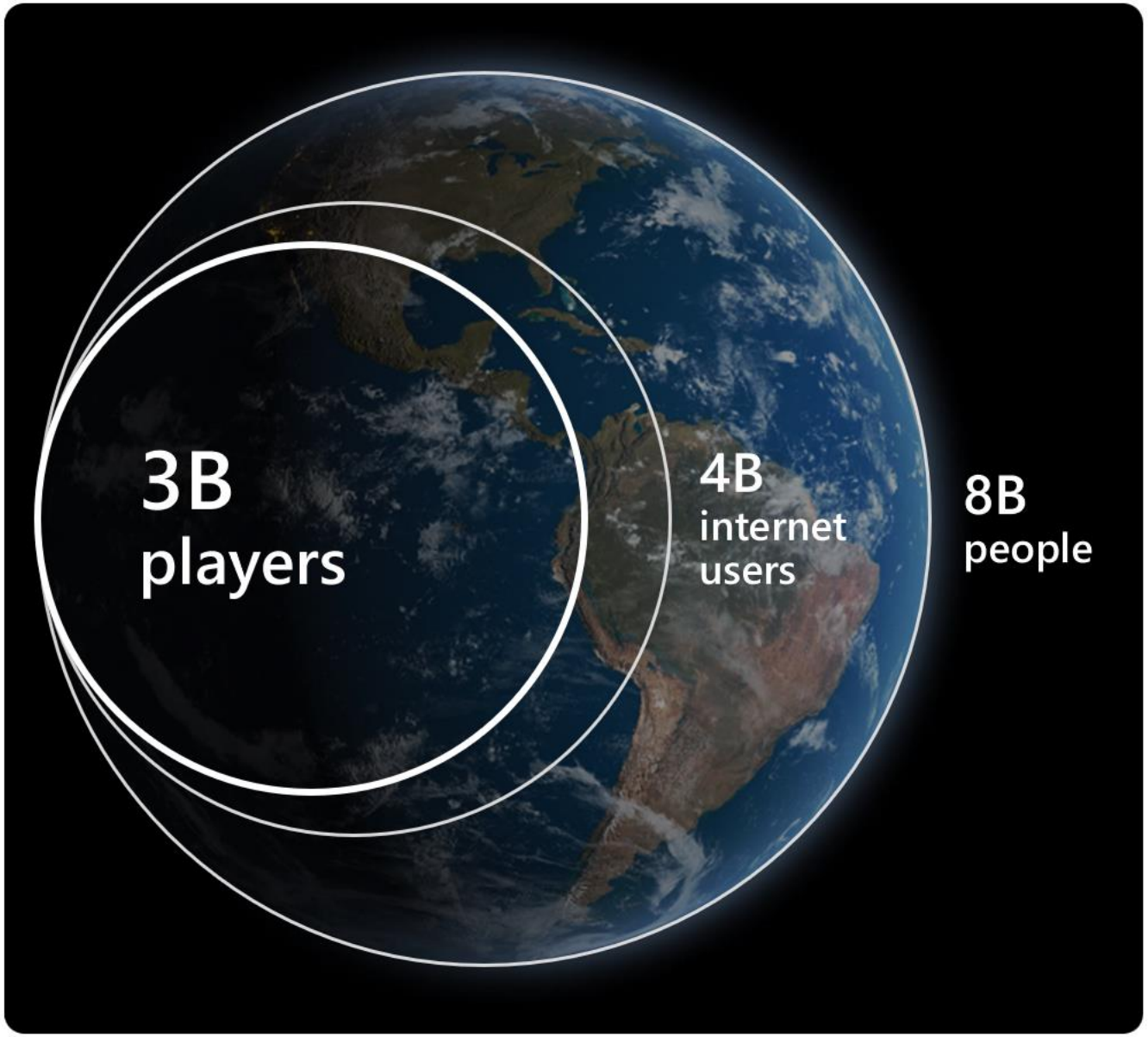
Empower every person and every organization on the planet to achieve more

+

Empower every person and every organization on the planet to achieve more

Connecting and engaging the world through epic entertainment

The gaming world



Microsoft + ACTIVISION | BLIZZARD

Content

Community

Cloud

Microsoft + ACTIVISION BLIZZARD

Legendary games

Billion-dollar franchises

Content

Community

Cloud

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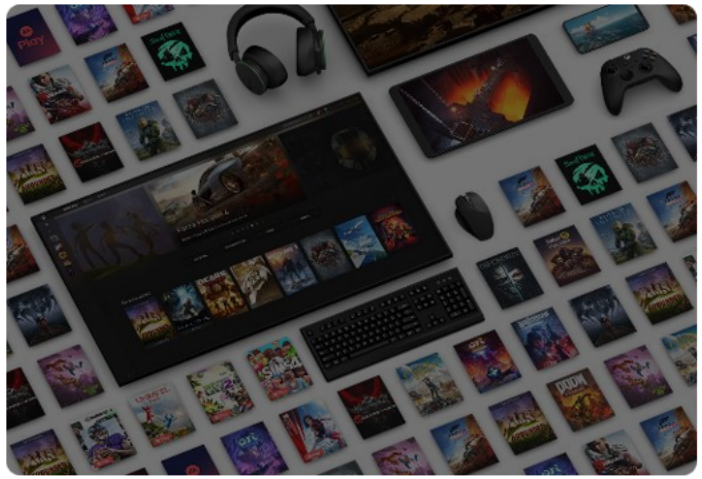


Nearly 400M Activision Blizzard monthly active players

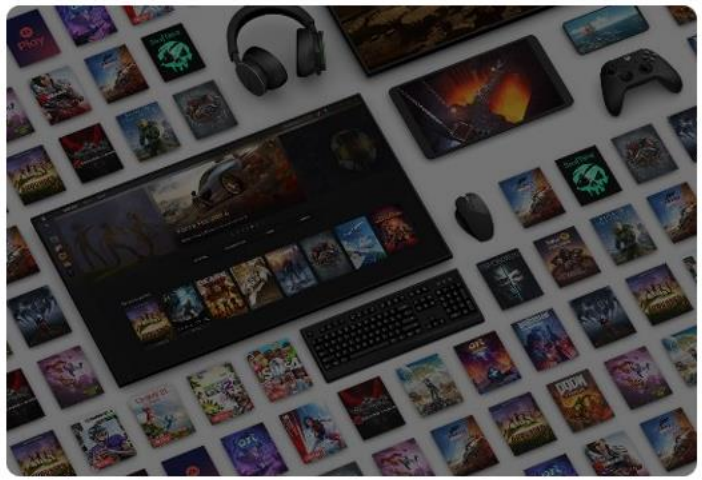
25M+ Game Pass subscribers

Content

Community

Cloud

Microsoft + ACTIVISION BLIZZARD



Content

Community

Millions of Xbox Cloud Gaming users

26 countries

Cloud

Our culture


Microsoft
ACTIVISION
BLIZZARD

Bobby Kotick

CEO, Activision Blizzard

Connecting and engaging the world through epic entertainment

ACTIVISION | BLIZZARD

10,000 talented employees serving nearly 400M MAUs worldwide

Premier fully-owned IP and innovation pipeline

Diversified across platforms, geographies and business models

Strong long-term track record of shareholder value creation

CALL OF DUTY

Candy Crush

WORLD OF WARCRAFT

DIABLO

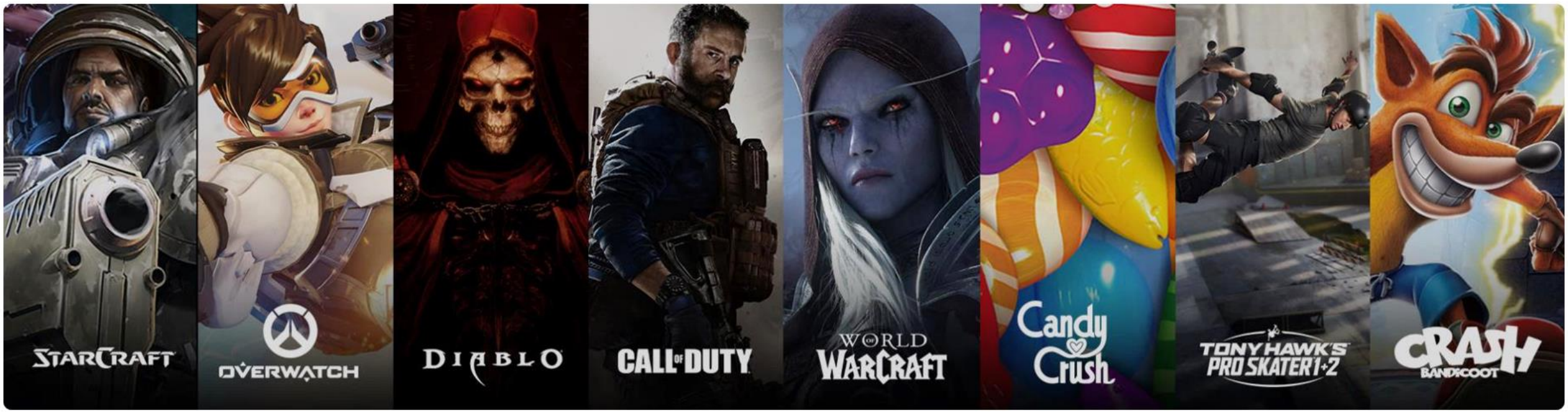
OVERWATCH

Phil Spencer

CEO, Microsoft Gaming


XBOX
Bring the joy and community of gaming to everyone on the planet.
We aspire to empower everyone to play the games they want, with the people they want, anywhere they want.

ACTIVISION | BLIZZARD



Game anytime / Anywhere / With anyone

Play anywhere via the cloud

Play on PC and customize your experience

You are the center of gaming

ONE X SERIES X

The most powerful, fastest, Xbox ever built

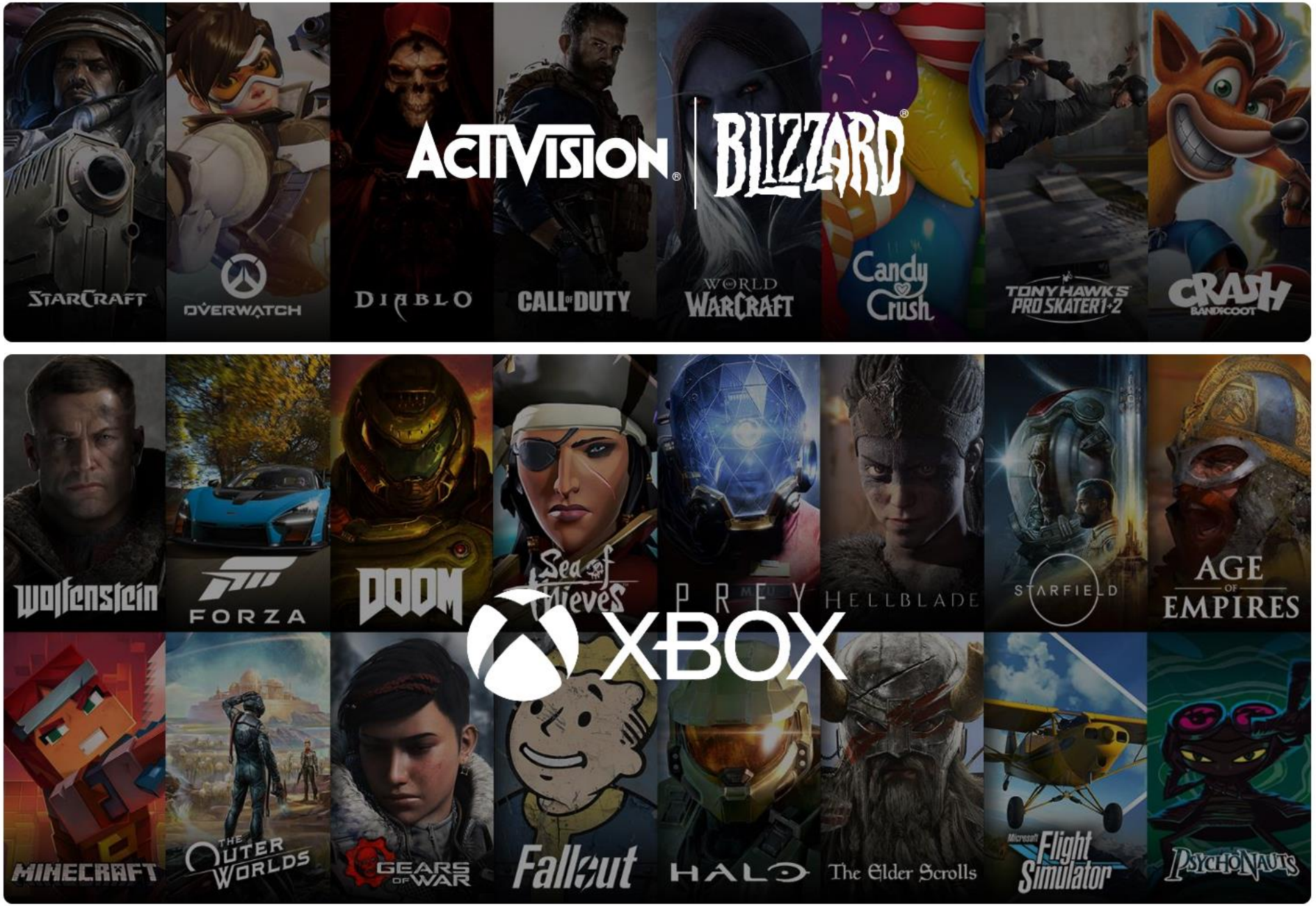
ONE S SERIES S

Next gen performance at an affordable price

GAME PASS

ULTIMATE

Play over 100 games with your friends, including all Xbox Game Studios games on day one, and enjoy exclusive member perks


ACTIVISION
BLIZZARD
StarCraft
Overwatch
Diablo
Call of Duty
World of Warcraft
Candy Crush
Tony Hawk's Pro Skater 1+2
Crash Bandicoot
Wolfenstein
Forza
Doom
Sea of Thieves
Prey
Hellblade
Starfield
Age of Empires
XBOX
Minecraft
The Outer Worlds
Gears of War
Fallout
Halo
The Elder Scrolls
Microsoft Flight Simulator
Psychonauts


Microsoft
+
ACTIVISION
BLIZZARD

Amy Hood

EVP & CFO, Microsoft

Deal overview

Structure

$95 per share

$68.7 billion enterprise value

All-cash consideration

Expected to close in Fiscal Year 2023

Financial impact

Accretive to non-GAAP EPS upon close*

Capital return program

No change expected to previously announced share buyback program

Financial reporting

Currently expect to report results for Activision Blizzard post-close in our Gaming business

Organizational structure

The Activision Blizzard business will report to Phil Spencer, CEO of Microsoft Gaming

*Non-GAAP excludes expected impact of purchase accounting adjustments as well as integration and transaction-related expenses

James H. Weingarten, DC Bar No. 985070
Peggy Bayer Femenella, DC Bar No. 472770
James Abell, DC Bar No. 990773
Cem Akleman, FL Bar No. 107666
Jennifer Fleury, NY Bar No. 5053178
Meredith R. Levert, DC Bar No. 498245
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[Additional counsel identified on signature page in accordance with Local Rule 3-4(a)(1)]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

MICROSOFT CORP.,

and

ACTIVISION BLIZZARD, INC.,

Defendants.

Case No.

COMPLAINT FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION PURSUANT TO SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

Plaintiff Federal Trade Commission ("FTC" or "Commission"), by its designated attorneys, petitions this Court to enter a temporary restraining order and grant a preliminary injunction enjoining Defendants Microsoft Corp. ("Microsoft") and Activision Blizzard, Inc. ("Activision") from consummating their proposed acquisition (the "Proposed Acquisition") or a similar transaction. Plaintiff seeks this provisional relief pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b). Both a temporary restraining order and a preliminary injunction are necessary because Microsoft and Activision have represented that they may consummate the Proposed Acquisition at any time [redacted] without any further notice to the Commission. A preliminary injunction is necessary to maintain the status quo and prevent interim harm to competition during the pendency of the FTC's administrative proceeding to determine whether the Proposed Acquisition violates U.S. antitrust law. A temporary restraining order is necessary to maintain the status quo while this Court decides whether to grant the requested preliminary injunction.

On December 8, 2022, the Commission initiated an administrative proceeding to determine whether the Proposed Acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. An evidentiary hearing in that proceeding will begin in just seven weeks, on August 2, 2023. Fact discovery in the administrative proceeding has closed, expert reports have been served, and final witness lists and exhibit lists have been exchanged. The parties have scheduled expert depositions through the end of June, and motions *in limine* and pretrial briefs are due in July. The administrative hearing will assess the legality of the Proposed Acquisition and will provide all parties a full opportunity to present testimony and other evidence regarding its likely competitive effects. The record from the evidentiary hearing can be submitted to this Court in aid of its adjudication of Plaintiff's request for a preliminary injunction. *See, e.g.*, *FTC v. Tronox Ltd.,* 332 F. Supp. 3d 187, 196 (D.D.C. 2018).

Until recently, Defendants indicated that they would not complete the Proposed Acquisition unless and until they received clearance from European regulators, including in proceedings before this Court in a private case challenging the Proposed Acquisition.

On April 26, 2023, the United Kingdom Competition and Markets Authority ("UK CMA") issued a report finding that the Proposed Acquisition may be expected to result in a substantial lessening of competition in cloud gaming services in the United Kingdom. On May 5, 2023, the UK CMA issued an interim order blocking the Proposed Acquisition as of that date. On May 18, it issued a proposed final order prohibiting the Proposed Acquisition for a ten-year period. Defendants have appealed the UK CMA's decision.

On May 24, [redacted]. Press reports began circulating suggesting that Defendants were seriously contemplating closing the Proposed Acquisition despite the pending administrative litigation and the CMA Orders. [redacted]

Accordingly, pursuant to FTC Act § 13(b), Plaintiff requests (1) a preliminary injunction to protect the Commission's ability to evaluate the antitrust merits of the Proposed Acquisition and (2) a temporary restraining order to protect this Court's ability to decide the FTC's request for a preliminary injunction and order appropriate relief. Plaintiff's request for a temporary restraining order is the subject of a separate emergency motion, in which Plaintiff asks the Court to enter—before 8:59 p.m. Pacific Time on June 15, 2023—an order prohibiting Defendants from consummating the Proposed Acquisition or a substantially similar acquisition until after this Court rules on the FTC's request for a preliminary injunction.

NATURE OF THE CASE

1. Microsoft and Sony control the market for high-performance video game consoles. The number of independent companies capable of developing standout video games for those consoles has contracted, with only a small group of firms commanding that space today. Microsoft now proposes to acquire Activision, one of the most valuable of those developers, in a vertical merger valued at nearly $70 billion (the "Proposed Acquisition") that will increase Microsoft's already considerable power in video games. If consummated, the Proposed Acquisition would be the largest in the history of the video game industry and the largest in Microsoft's history. The Proposed Acquisition would continue Microsoft's pattern of taking control of valuable gaming content. With control of Activision's content, Microsoft would have the ability and increased incentive to withhold or degrade Activision's content in ways that substantially lessen competition—including competition on product quality, price, and innovation. This loss of competition would likely result in significant harm to consumers in multiple markets at a pivotal time for the industry.

2. Microsoft, one of only two manufacturers of high-performance video game consoles, develops and sells Xbox gaming consoles. Microsoft is vertically integrated: through its in-house game studios, it develops and publishes popular video game titles such as Halo. Such in-house games are known as "first-party" titles in the industry. Microsoft also offers a leading video game subscription service, Xbox Game Pass, for which customers pay a monthly fee to access a library of hundreds of first- and third-party video games for console or personal computer ("PC"). The top tier of Xbox Game Pass, called Xbox Game Pass Ultimate, includes "cloud gaming" functionality that enables subscribers to stream certain games, as opposed to downloading games locally, and then to play those games across a variety of devices including consoles, PCs, tablets, and mobile phones.

3. Activision develops and publishes high-quality video games for multiple devices, including video game consoles, PCs, and mobile devices. Activision's games include high-quality games that are commonly referred to in the industry as "AAA" titles. AAA games are

costly to produce because of the creative talent, budgets, and time required for development. Gamers highly anticipate the release of AAA games.

4. Activision produces some of the most iconic video game titles, including several leading AAA franchises. For example, Activision develops the popular franchises *Diablo* and *Overwatch* and the marquee franchise *Call of Duty*.

5. The *Diablo* and *Overwatch* AAA franchises are among several Activision franchises that have individually earned more than [redacted] in lifetime revenues. *Overwatch* just released a successful new title, *Overwatch 2*, available for play on multiple gaming consoles and PCs. Diablo, a long-running franchise first introduced in the 1990s, launched a highly anticipated new title, *Diablo IV*, on June 6, 2023. An Activision Press Release noted that *Diablo IV* quickly became its Blizzard division's "fastest-selling game of all time, with Blizzard's highest pre-launch unit sales ever on both console and PC. In the four days since early access started on June 1, *Diablo IV* has been played for 93 million hours, or over 10,000 years --- the equivalent playing 24 hours a day since the beginning of human civilization."

6. Activision and industry participants also recognize *Call of Duty* as Activision's "key product franchise." *Call of Duty* was originally launched in 2003, and Activision releases new titles for the franchise on an annual basis. Activision allocates substantial resources to the franchise. As many as [redacted] primary development studios are devoted to it at any one time and its budget is significantly larger than other AAA titles.

7. By any measure, *Call of Duty* is a leading AAA franchise. It is one of the most successful console-game franchises ever. From its launch in 2003 up through 2020, it generated $27 billion in revenues. *Call of Duty* also has a massive following, with [redacted] million monthly active users ("MAU") in 2020, according to an Activision strategy document. Its loyal fanbase and enduring appeal have made it particularly valuable, influencing gamer engagement and gaming product adoption. The franchise has achieved sustained dominance over the past decade, with *Call of Duty* titles comprising 10 of the top 15 console games sold between 2010–2019. No other franchise had more than one title in the top 15. *Call of Duty* has continued to top the charts

in 2020 and 2021, and its latest installment, *Modern Warfare* II, amassed more than $1 billion in sales within just ten days of its release. The previous franchise record was held by *Call of Duty: Black Ops II*, which took 15 days to hit the $1 billion mark.

8. Activision's content is extremely important for, and drives adoption of, video game consoles. Given their immense popularity, Activision's titles are of particular importance to console makers, including Microsoft's competition.

9. Microsoft produces its own first-party video game titles. Microsoft has acquired over ten third-party studios and their titles in recent years to expand its offerings. Microsoft has frequently made those acquired titles exclusive to its own consoles and/or subscription services, eliminating the opportunity for consumers to play those titles on rival products or services. By taking games exclusive, Microsoft strengthens the position of its console and subscription service products relative to competitors.

10. The Proposed Acquisition is reasonably likely to substantially lessen competition or tend to create a monopoly in multiple markets because it will create a combined firm with the ability and increased incentive to use its control of Activision titles to disadvantage Microsoft's competitors. The Proposed Acquisition also may accelerate an ongoing trend towards vertical integration and consolidation in, and raise barriers to entering, the relevant markets.

11. Microsoft's ownership of Activision would provide Microsoft with the ability to withhold or degrade Activision content through various means, including manipulating Activision's pricing, degrading game quality or player experience on rival offerings, changing the terms and timing of access to Activision's content, or withholding content from competitors entirely.

12. Microsoft's past conduct provides a preview of the combined firm's likely plans if it consummates the Proposed Acquisition, despite any assurances the company may offer regarding its plans. In March 2021, Microsoft acquired ZeniMax Media Inc. ("ZeniMax"), the parent company of the well-known game developer and publisher Bethesda Softworks LLC ("Bethesda"). Microsoft assured the European Commission ("EC") during its antitrust review of

the ZeniMax purchase that Microsoft would not have the incentive to withhold ZeniMax titles from rival consoles. But, shortly after the EC cleared the transaction, Microsoft made public its decision to make several of the newly acquired ZeniMax titles, including Starfield, Redfall, and Elder Scrolls VI, Microsoft exclusives.

13. Today, Activision touts that it is [redacted] and seeks to offer its games wherever gamers want to be playing them. It has an incentive to offer its titles broadly. Microsoft's ownership of Activision's content would alter that dynamic. As Microsoft seeks to increase its profits from the lucrative video game industry, the Proposed Acquisition will increase Microsoft's incentive to withhold Activision content from, or degrade Activision content on, consoles and subscription services that compete with Xbox consoles and Xbox Game Pass. Such conduct would be reasonably likely to substantially lessen competition and harm gamers in the United States.

14. These effects are likely to be felt throughout the video gaming industry. The Proposed Acquisition is reasonably likely to substantially lessen competition and/or tend to create a monopoly in both well-developed and new, burgeoning markets, including high-performance consoles, multi-game content library subscription services, and cloud gaming subscription services.

15. Defendants cannot show cognizable, merger-specific efficiencies that would offset the reasonably probable and substantial competitive harm resulting from the Acquisition.

16. On December 8, 2022, the Commission found reason to believe that the Acquisition would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45, and commenced an administrative proceeding on the antitrust merits of the Proposed Acquisition. The administrative proceeding provides a forum for fact discovery, which closed on April 7, 2023, after all parties issued document subpoenas, requests for admission, interrogatories, and conducted over thirty depositions of party and non-party witnesses. Pretrial disclosures are underway and the evidentiary hearing is scheduled to begin before an Administrative Law Judge ("ALJ") on

August 2, 2022, with up to 210 hours of live testimony permitted by rule. *See* 16 C.F.R. § 3.41.

17. A temporary restraining order is necessary to prevent Defendants from consummating the Proposed Acquisition until after the fifth business day after this Court rules on the Commission's motion for a preliminary injunction pursuant to Section 13(b), or until after the date set by the District Court, whichever is later. Such a temporary restraining order is necessary to preserve the status quo and protect competition while the Court considers the Commission's application for a preliminary injunction.

18. Preliminary injunctive relief is similarly necessary to preserve the status quo and protect competition during the Commission's ongoing administrative proceeding. Allowing the Proposed Acquisition to proceed while the Commission is assessing whether it violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and is an unfair method of competition that violates Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, would undermine the Commission's ability to order any necessary relief.

JURISDICTIONAL STATEMENT

A. Jurisdiction

19. This Court's jurisdiction arises under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and under 28 U.S.C. §§ 1331, 1337, and 1345. This is a civil action arising under the Acts of Congress protecting trade and commerce against restraints and monopolies, and is brought by an agency of the United States authorized by an Act of Congress to bring this action.

20. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

> Whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond. . . .

21. Defendants and their relevant operating entities and subsidiaries are, and at all relevant times have been, engaged in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

B. Venue

22. Personal jurisdiction exists where service is effected pursuant to a federal statute. Fed. R. Civ. P. 4(k)(1)(C). The FTC Act § 13(b), 15 U.S.C. § 53(b), authorizes nationwide service of process. Defendants are therefore subject to personal jurisdiction in the Northern District of California. Venue is proper in the Northern District of California under 28 U.S.C. § 1391(b) and (c), as well as under 15 U.S.C. § 53(b) ("Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28.")

C. Assignment to the San Francisco Division

23. Assignment to the San Francisco Division is proper. A related proceeding regarding the Proposed Acquisition was filed in the San Francisco Division: *DeMartini v. Microsoft Corp.*, No. C-22-08991-JSC (N.D. Cal.).

THE PARTIES AND THE PROPOSED ACQUISITION

24. Plaintiff, the Commission, is an administrative agency of the United States government, established, organized, and existing pursuant to the FTC Act, 15 U.S.C. §§ 41 *et seq.*, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

25. Defendant Microsoft is a publicly traded technology company incorporated in the State of Washington with headquarters in Redmond, Washington. Microsoft sells software, services, and devices across the technology industry and is among the most valuable companies in the world. Microsoft's gaming division produces Xbox hardware and Xbox content and services. Its total gaming revenues in FY2022 were over $16 billion. Microsoft's total revenues in FY2022 were over $198 billion.

26. Defendant Activision is a publicly traded company, incorporated in the State of Delaware with headquarters in Santa Monica, California. Activision develops and publishes video games for consoles, PCs, and mobile devices. Activision's revenues in FY2021, its most recently reported fiscal year, were $8.8 billion.

27. Microsoft entered into an Agreement and Plan of Merger with Activision on January 18, 2022, for an all-cash purchase price of $95 per Activision share and a total estimated value of $68.7 billion.

28. Unless temporarily restrained and preliminarily enjoined by this Court, Defendants have represented that they that they may consummate the Proposed Acquisition at any time after June 15, 2023.

BACKGROUND

29. Activision's gaming content is extremely important in a gaming industry where content availability shapes gamers' decisions about which video game consoles and services to purchase. If the Proposed Acquisition is allowed to proceed, Microsoft would gain control of Activision's content and have the ability and increased incentive to withhold or degrade Activision's content, which is reasonably likely to reduce competition and cause a number of harmful outcomes, including dampened innovation, diminished consumer choice, higher prices and/or lower quality products, and harm to the millions of Americans who benefit from competition in video game consoles and subscription services.

30. Today, gaming is the largest category in the entertainment industry, with revenues that far exceed those of both the film and music industries. This year, the gaming industry is

expected to be worth more than $170 billion in global revenues, five times greater than global movie box office revenues.

31. Gaming's unrivaled popularity among consumers is expected to continue. Microsoft projects global gaming revenues to grow to [redacted] billion in annual sales by [redacted]. Microsoft also expects the number of gamers worldwide to increase significantly, expanding by another [redacted] billion players and reaching [redacted] of the global population over the next [redacted] years.

32. Video game content and services are generally available on a variety of devices, including video game consoles that are predominantly used for playing video games; PCs, including general purpose PCs as well as high-performance gaming PCs configured to play computationally demanding games; and mobile devices.

33. Consumers purchase consoles based on the technological capability of the console, the price, and the games available for that specific console, among other factors.

II. Consoles

34. For gamers who play games on gaming consoles today, the most popular options, Microsoft's Xbox, Sony's PlayStation, and Nintendo's Switch, come from the same trio of companies that have been manufacturing consoles for decades with no meaningful new competition.

35. Since the 1970s, competing video game console makers have periodically released consoles featuring the latest technological advances, with a new generation of consoles released approximately every five to ten years. Within the video game industry, competition for sales and technological supremacy is commonly referred to as "the console wars."

36. Of these three console makers, PlayStation and Xbox compete in a high-performance segment that includes only the most technologically advanced and capable consoles. In November 2020, both Microsoft and Sony launched their current generation of consoles, the Xbox Series X and Series S consoles (collectively, "Xbox Series X|S") and the PlayStation 5 and PlayStation 5 Digital Edition consoles (collectively, "PS5"), respectively. Xbox Series X|S and PS5 consoles are the only high-performance consoles available today, and

are considered to be in the ninth generation of gaming consoles. In contrast, Nintendo's most recent console—the Nintendo Switch—is not a ninth-generation gaming console. The Nintendo Switch was released in 2017, in the latter half of the eighth generation of gaming consoles, which had begun in approximately 2013. The Nintendo Switch ("Switch") also has lower computational performance, more in line with Microsoft's and Sony's eighth generation consoles.

37. The Xbox Series X|S are two ninth-generation Xbox consoles offered by Microsoft. The Series X is a more powerful console while the Series S is more affordable. Together, these consoles provide Microsoft's [redacted]

38. Microsoft closely tracks the performance of its Xbox consoles relative to Sony's PlayStation consoles. For example, in FY2022, the first full year that Xbox Series X|S consoles were available, one of Microsoft's key metrics for evaluating success was [redacted] In internal communications, Microsoft executives regularly discuss [redacted]

39. Xbox Series X|S consoles have been a commercial success. In a July 26, 2022 earnings call, Microsoft CEO Satya Nadella announced that the company "ha[d] been the market leader in North America for three quarters in a row among next gen consoles."

40. The Xbox Series X|S and PS5 consoles are [redacted] from a broad consumer perspective, in a number of technical specifications, including offering similar graphics, user experiences, and hardware features. In addition, the Xbox Series X and PlayStation 5 are sold at the same price, while the Series S offers lower performance and is sold at a lower price.

41. Other consoles lack the high performance of the Xbox Series X|S and PS5 consoles. For example, the Nintendo Switch, which is designed to allow portable, handheld use, necessarily sacrifices computing power, which leaves it unable to play certain games that require more advanced graphic processing. Retailing at $299.99, the Nintendo Switch is also less expensive than the Xbox Series X and PlayStation 5 consoles, both priced at $499.99. While the

Xbox Series S had the same retail price at launch as the Nintendo Switch, the graphical and processing capabilities of the Series S are much more aligned with the Xbox Series X and PS5 consoles. The Xbox Series S enables gamers to play the same video games as the Xbox Series X, both of which offer more graphically advanced gameplay than on the Nintendo Switch.

III. Gaming Content

A. Multi-Game Content Library Subscription Services

42. For the last several decades, gamers have purchased games through a "buy-to-play" model: either purchasing physical copies of games or, more prevalent today, purchasing digital copies of individual games that gamers download to their gaming console, PC, or other device.

43. Recent years, however, have seen the expansion of a subscription model. Multi-game content library subscription services allow gamers to access a library of games for a fixed monthly or yearly fee. Microsoft's multi-game content library subscription service, Xbox Game Pass, launched in 2017, rapidly grew to 10 million subscribers by 2020 and in 2022 announced it had grown to 25 million subscribers.

44. Xbox Game Pass provides subscribers with unlimited access to a library of over 300 first- and third-party games at no additional cost. The service is priced at $9.99 per month for gamers who seek to download games to play solely on an Xbox console or solely on a PC. The higher tiered service, Xbox Game Pass Ultimate, priced at $14.99 per month, allows gamers to download games for play on either an Xbox console or a PC, and additionally enables gamers to stream games from an off-site server to any web-enabled local device that can access Game Pass (*e.g.*, an Xbox console, PC, mobile device, or smart TV).

45. Sony also offers a multi-game content library subscription service, PlayStation Plus, which at certain tiers is comparable to Xbox Game Pass. The lower comparable tier, PlayStation Plus Extra, priced at $14.99 per month, provides access to a library of hundreds of games that can be played on PlayStation consoles as well as online multiplayer access, discounts on other games, and cloud storage. The higher comparable tier, PlayStation Plus Premium,

priced at $17.99 per month, provides access to an even larger library of games that can be played on PlayStation, along with cloud streaming.

46. In addition to Sony's PlayStation Plus Extra and Premium, other multi-game content library subscription services include EA Play and Ubisoft+. EA Play, starting at $4.99 per month, and Ubisoft+, starting at $14.99 per month, each offer access only to content from the respective publishers, Electronic Arts Inc. ("EA") and Ubisoft Entertainment SA ("Ubisoft").

B. Cloud Gaming Subscription Services

47. Today, video game software typically runs locally on the player's gaming device. Recently, however, cloud gaming subscription services have been introduced that allow players to stream games that run on remote hardware without downloading the game locally. The primary processing for the game occurs in off-site datacenters and a live feed of the game is streamed to the player's device.

48. Microsoft touts numerous benefits of cloud gaming to customers. Cloud gaming 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. Cloud gaming also broadens access to gaming by expanding the universe of devices that can play games. Today, cloud gaming subscription services are available on consoles, Windows PC, Mac PC, Chromebook PC, tablet, mobile phones, and some smart TVs, with device compatibility varying by service. This permits gamers to play computationally demanding games on less powerful devices that otherwise lack the computing power or storage to support the games.

49. In September 2020, Microsoft added cloud gaming to its top-tier multi-game content library subscription service offering, Xbox Game Pass Ultimate. To date, more than 20 million gamers have used the service to stream games from the cloud. Microsoft has stated that cloud gaming subscription services are integral to its goal of expanding gaming to 3 billion gamers worldwide and enabling gamers "to play the games you want, with the people you want, anywhere you want."

50. Other cloud gaming subscription services include Amazon Luna, Nvidia GeForce NOW, and Google Stadia, although Alphabet Inc. announced that it discontinued Stadia in January 2023. Amazon's Luna+ (a tier of Amazon Luna), priced at $9.99 per month with additional options available for further purchases, provides streaming access to a library of over 100 third-party games. Nvidia GeForce NOW, priced at $49.99 for six months for the Priority tier or $99.99 for six months for the RTX 3080 tier, allows gamers to stream game titles that they already own, with the streaming hosted on Nvidia Corporation ("Nvidia") datacenters. Although it will soon be discontinued, Stadia Pro, priced at $9.99 per month with additional options for further purchases, allows gamers to stream games from a library of hundreds of third-party games.

C. Importance of AAA Games

51. AAA games are particularly important within the gaming industry. The term "AAA" is frequently used by industry participants to refer to highly anticipated games bearing similar characteristics: high development costs, superior graphical quality, and expectations of high unit sales and revenue, typically from a studio with large development and publishing teams, supported by extensive marketing and promotion. AAA content can act as [redacted] content, where, as a consultant to Microsoft explained, it [redacted]

52. In the words of one Microsoft executive, AAA games are [redacted] They are also not numerous. Phil Spencer, CEO of Microsoft Gaming, estimates there are [redacted]

53. Production budgets for AAA games frequently exceed [redacted] million, if not [redacted] million, and development teams can include thousands of developers working over several years. The high cost of AAA game development is driven by many factors such as long development cycles and the scarcity of AAA-capable studios and talent.

54. The gaming industry recognizes a limited top tier of independent game publishers,

sometimes referred to as the "Big 4" or simply the AAA publishers: Activision, Electronic Arts, Take-Two, and Ubisoft. These publishers reliably produce AAA games for high-performance consoles and collectively own a significant portion of the most valuable IP in the gaming industry. These high-profile franchises include, for example, *Call of Duty* (Activision), *FIFA* (EA), *Grand Theft Auto* (Take-Two), and *Assassin's Creed* (Ubisoft).

55. Only a few other studios are typically credited with releasing AAA games. Epic Games, maker of *Fortnite*, a free-to-play game that is currently one of the most popular games in the United States, is sometimes viewed within the industry as a AAA-level publisher, such that industry participants will sometimes refer to the "Big 4 + Epic."

56. Internally, Microsoft recognizes that [redacted] Despite significant growth in the gaming industry, the head of Xbox Game Studios has noted [redacted] Creating a studio with the capability to produce AAA games requires scarce talent and is a capital-intensive endeavor.

57. Microsoft and Sony also produce AAA games. The *Elder Scrolls*, *Halo*, and *Forza* franchises are AAA games from Microsoft, while the *God of War*, *MLB The Show*, and *Spider-Man* franchises are AAA games from Sony.

58. Microsoft's own experience with releasing AAA games reflects the cost and time to develop such content. *Halo Infinite*, a recent title from the Microsoft's first-party *Halo* franchise, was in production for [redacted] years, and cost almost $[redacted] million. Other AAA games may take even longer to develop. For instance, according to one Microsoft executive, [redacted] a forthcoming title from the [redacted] franchise, may take a [redacted] to develop.

59. Access to AAA content is crucial for Microsoft, and the company strives to ensure that new AAA content is available on its console and subscription services on a regular basis. In May 2022, Mr. Spencer of Microsoft [redacted]

[redacted]

60. AAA content has particularly important downstream effects because it generates player interest, develops a base of users, and drives monetization opportunities. As Microsoft's CEO has explained, [redacted] As an internal Microsoft document explained, [redacted] An internal strategy document on scaling Xbox Game Pass [redacted]

61. To differentiate their products from rivals, console manufacturers and subscription service providers may seek to make certain titles exclusive to their products and unavailable on rivals' products, including by obtaining exclusive licenses from third-party game publishers. An internal Microsoft analysis estimates [redacted] Typically, exclusivity in this context does not prevent a game from being available for PC or other non-console devices.

62. A diverse array of AAA content that increases adoption and engagement gives a console or subscription service greater leverage in attracting additional content. The console or subscription service can tout the size of its player base in negotiations with publishers and developers seeking to increase the discoverability and engagement of their content. As an internal Microsoft strategy document notes, [redacted] The result of these dynamics is to generate competition among console manufacturers and subscription service providers for AAA content.

63. Microsoft Xbox's Chief Marketing Officer has emphasized the importance of such content, noting: [redacted]

64. Microsoft expects that Activision's AAA content [redacted] As Mr. Spencer explained to Microsoft investors, "[a]s our platform becomes more attractive, the flywheel of content creators and players accelerates. As the creative range on our platform continues to expand, more players are attracted to the service, and the growing scale of the customer base makes the platform more attractive for additional publishers, and so on."

65. Activision content is especially valuable to any gaming console or subscription service due to the ability of Activision games to drive sales and engagement. Activision's CEO Bobby Kotick testified that Activision's games are "[redacted]" and "[redacted]." Microsoft, in presentations to its Board of Directors regarding this Proposed Acquisition, called Activision's content [redacted]

66. Activision currently has a combined [redacted] million MAU globally across its console and PC games and the company expects this number to grow to over [redacted] million MAU by 2024. Activision's statements reflect its ability to influence video game product purchase decisions. [redacted]

67. Even among AAA games, Activision's most well-known franchise, *Call of Duty*, is particularly strong. First released nearly twenty years ago in 2003, *Call of Duty* is, in Activision's own words, "***one of the most successful entertainment franchises of all time***." In 2021, *Call of Duty*: *Vanguard* topped the revenue charts as the best-selling game in the United States, with *Call of Duty: Black Ops Cold War* coming in second. And in 2022, *Call of Duty: Modern Warfare II* took in $1 billion globally *in the first ten days following its launch*. By

comparison, the highest grossing film of the year so far, *Top Gun: Maverick*, took one month to reach the $1 billion threshold.

THE RELEVANT ANTITRUST MARKETS

68. The Proposed Acquisition will result in a combined firm with the ability and increased incentive to withhold or degrade Activision's valuable gaming content to undermine its competitors in multiple Relevant Markets. This anticompetitive behavior is reasonably likely to lead to reduced consumer choice, higher prices and/or lower quality products, and less innovation, and the Proposed Acquisition will not produce cognizable procompetitive effects sufficient to offset such harms.

69. The Proposed Acquisition is likely to harm innovation, for instance, by decreasing the combined firm's incentive to optimize Activision's content for gameplay on rival hardware, thereby reducing the quality of consumer gaming experiences on competing products.

70. The Proposed Acquisition is reasonably likely to substantially lessen competition or tend to create a monopoly in the Relevant Markets for High-Performance Consoles, Multi-Game Content Library Subscription Services, and Cloud Gaming Subscription Services. The Proposed Acquisition is therefore reasonably likely to result in harm to both competition and consumers.

I. High-Performance Consoles are a Relevant Product Market

71. High-Performance Consoles are a Relevant Market for evaluating the likely competitive effects of the Proposed Acquisition.

72. The only High-Performance Consoles offered for sale today are the most recent generation of Microsoft Xbox and Sony PlayStation consoles—the Xbox Series X|S and the PS5. The Xbox Series X|S and PS5 are therefore included within the Relevant Market.

73. The third major gaming console available today, the Nintendo Switch, is highly differentiated from the Xbox and PlayStation consoles in significant ways. The Nintendo Switch, therefore, is not included in the Relevant Market.

74. Microsoft's Xbox Series X|S and Sony's PS5 consoles are characterized by

greater computational power, different content portfolios, different form factors and technical specifications, generally higher prices, and different release cadences than the Nintendo Switch and other handheld consoles.

75. Superior computational power enables faster processing that shapes the kind of content that can run on High-Performance Consoles, enabling higher resolution, more realistic graphics, and cutting-edge performance. Both Xbox Series X|S and PS5 consoles have similar hardware, and Microsoft and Sony compete closely on hardware innovation, including over graphics and performance. Conversely, Nintendo pursues a different strategy of integrating its lower performance, portable hardware with its own distinctive first-party games to appeal to player nostalgia for Nintendo's unique gaming experience over high resolution, life-like graphics, and performance speed. While Microsoft's Xbox Series X|S and Sony's PS5 consoles incorporate semi-custom systems-on-a-chip ("SoC") designed by AMD, Nintendo's Switch runs on a non-AMD SoC that is more closely related to a mobile device processor found in higher-end mobile phones and tablets.

76. Microsoft and Sony compete closely for high-quality, resource-intensive AAA console games. They compete over genre coverage, portfolio size and quality, and multiplayer game availability, and they routinely benchmark their [redacted] against each other. A substantial share of High-Performance Console content is available on both Xbox and PlayStation consoles. By contrast, although Nintendo offers third-party content on the Switch, Nintendo's main strategy centers on [redacted]

77. Xbox Series X|S and PS5 consoles provide a technologically advanced gaming experience from a stationary endpoint. The Xbox Series X|S and PS5 consoles are plug-in devices that draw electrical power to support advanced computations and are connected to an external display like a television. In contrast, the Nintendo Switch is a portable battery-operated device with a built-in display screen, and it can optionally be connected to an external display. Nintendo's Switch also has detachable controllers that can be used for motion-based game play

that is not available on the Xbox or PlayStation consoles. Microsoft and Sony commonly benchmark against each other on [redacted]

78. The PlayStation 5 and the Xbox Series X, the companies' latest flagship consoles, retail for $499.99. By contrast, the Nintendo Switch retails for $200 less at $299.99.

79. Since the 2000s, Microsoft and Sony have released new console generations largely contemporaneously—most recently in 2020. The prior generation (Generation 8) Xbox One and PlayStation 4 were released in 2013, and the current generation (Generation 9) Xbox Series X|S and PS5 consoles were released in November 2020. By contrast, the Nintendo Switch launched in March 2017, nearly five years after the beginning of the eighth generation.

80. Microsoft's own ordinary course documents regularly [redacted] Defendants conceded in a regulatory filing that [redacted]

81. Due to their distinct offerings, Microsoft and Sony consoles appeal to different gaming audiences than the Nintendo Switch. While Xbox Series X|S and PS5 consoles offer more mature content for more serious gaming, Nintendo's hardware and content tends to be used more for casual and family gaming.

82. Indeed, "dual console owners" are more likely to own one High-Performance Console and a Nintendo Switch than two High-Performance Consoles. NPD Group, a trusted source for video game industry data, shows that as of 2020, nearly 40 percent of PlayStation and Xbox owners also owned a Switch, while only [redacted] percent of PlayStation console owners owned an Xbox and only [redacted] percent of Xbox console owners own a PlayStation.

83. Other video gaming devices available today are not commercially reasonable alternatives to High-Performance Consoles and are therefore not included in the Relevant Market. These include gaming PCs, and mobile devices.

84. Gaming PCs are distinct from High-Performance Consoles due to differences in price, hardware, performance, and functionality (*i.e.*, where and when a game can be played),

among other factors. Gaming PCs are therefore not included in the Relevant Market. Mobile devices are distinct from High-Performance Consoles due to differences in complexity and quality of game performance, content offerings, monetization approach, gameplay and interface, and audience, among other factors. Microsoft recently confirmed this factual distinction in testimony during the trial of *Epic Games, Inc. v. Apple Inc.,* 559 F.Supp.3d 898, 981 (N.D. Cal. 2021). Mobile gaming devices are therefore not included in the Relevant Market.

85. High-Performance Consoles are a relevant antitrust market. However, although the Nintendo Switch is highly differentiated from the Xbox Series X|S and PS5 consoles, it shares many of the same characteristics that make High-Performance Consoles distinct from PCs, and mobile devices. Accordingly, the anticompetitive effects of the Proposed Acquisition alleged in this Complaint are also reasonably likely to occur in a broader market for gaming consoles that includes High-Performance Consoles and the highly differentiated Nintendo Switch.

II. Multi-Game Content Library Subscription Services are a Relevant Product Market

86. Multi-Game Content Library Subscription Services are a relevant product market for evaluating the competitive effects of the Proposed Acquisition.

87. The Relevant Market for Multi-Game Content Library Subscription Services includes services that offer unlimited access to a library of video games that are predominantly played on non-mobile devices and are available to play at zero additional cost beyond the subscription fee, either via download or cloud streaming.

88. Microsoft is already a significant player in this market through its Xbox Game Pass offerings and continues to expand rapidly in this market. Microsoft offers three tiers of Game Pass, each of which provide unlimited access to hundreds of games, with Game Pass Ultimate also providing access to Xbox Cloud Gaming. Microsoft is already the market leader with an announced 25 million Game Pass subscribers.

89. Each service competes aggressively to offer the best, most exciting titles to attract users to its service, with each attempting to provide access to a compelling library of high-end,

AAA games. Services offer a range of incentives to developers and publishers including attractive revenue splits or co-marketing arrangements in order to ensure games are available on their services.

90. Multi-Game Content Library Subscription Services rely on distinct pricing compared to the traditional "buy to play" model, where gamers purchase individual games for up to $70 per title, or more. Multi-Game Content Library Subscription Services seek to offer a new method of accessing games by offering access to an entire library of games for a periodic fee, rather than a single title for a fixed cost.

91. Subscription services in the Relevant Market [redacted] Microsoft's ordinary course documents show that [redacted] For example, Xbox CFO Tim Stuart sent an email [redacted] Mr. Stuart went on to report: [redacted]

92. Buy-to-play games are not commercially reasonable alternatives and therefore are not included in the Relevant Market. Multi-Game Content Library Subscription Services provide immediate access to hundreds of game titles for a monthly fee, facilitating content discovery. The pricing of individual games does not dictate Microsoft's pricing decisions for its Xbox Game Pass subscriptions. Additionally, when speaking with third-party game developers, Microsoft's executives tout Game Pass as [redacted] Microsoft further showcases the additive nature of Game Pass through public statements that report Game Pass subscribers invest more time and money in gaming than their fellow gamers without a subscription.

93. Subscription services that focus on enabling online multiplayer gaming, such as Xbox Live Gold and PlayStation Plus Essential, are not commercially reasonable alternatives and therefore are not included in the Relevant Market. Xbox Live Gold and PlayStation Plus

Essential, as currently structured, award a limited number of free games as "bonus content." These services do not provide access to the same breadth and diversity of content as Multi-Game Content Library Subscription Services and do not facilitate the same level of game discoverability.

94. Subscription services that do not offer a library of video games that are predominantly played on non-mobile devices are also not commercially reasonable alternatives and therefore are not included in the Relevant Market. Mobile-native games are distinct from games accessed natively on a console and from the most performant games accessed natively on a PC, due to differences in complexity and quality of game performance, monetization approach, gameplay and interface, and audience, among other factors.

95. Multi-Game Content Library Subscription Services comprise a Relevant Market. The anticompetitive effects of the Proposed Acquisition also are reasonably likely to occur in any relevant antitrust market that contains Multi-Game Content Library Subscription Services, including a combined Multi-Game Content Library and Cloud Gaming Subscription Services market.

III. Cloud Gaming Subscription Services are a Relevant Market

96. Cloud Gaming Subscription Services are a relevant product market for evaluating the competitive effects of the Proposed Acquisition.

97. The Relevant Market for Cloud Gaming Subscription Services includes services that offer the ability to play predominantly non-mobile video games via cloud streaming.

98. The Relevant Market includes Multi-Game Content Library Subscription Services that offer access to games via cloud streaming as well as any services that offer streaming via a "Bring Your Own Game" ("BYOG") approach where users play games they own in their own personal library by streaming those games through their Cloud Gaming Subscription Service. In all cases, users pay a periodic fee, either monthly or yearly, to access the Cloud Gaming Subscription Service.

99. Cloud Gaming Subscription Services provide a way to play games that is distinct

from running them locally on the player's gaming device. Such subscription services make predominantly non-mobile video games available instantly on a wide variety of devices, reducing the need for gamers to make large investments in expensive hardware, such as a High-Performance Console or a gaming PC, and eliminating download time.

100. Cloud Gaming Subscription Services are designed to reach a different set of consumers than other forms of game distribution. These subscription services enable gaming on devices that do not meet the minimum specifications for large and technologically complex games, such as older and less expensive PCs, MacBooks, Chromebooks, tablets, mobile devices, and smart TVs. They also enable gamers to play games that were developed for other devices and/or operating systems. Microsoft has estimated that the total addressable market for cloud gaming is approximately 3 billion users, compared to [redacted] console users.

101. Microsoft's executives recognize the expanded opportunity Cloud Gaming Subscription Services offer. For example, Microsoft executives have explained that xCloud (now referred to as Xbox Cloud Gaming) offers [redacted] and that, [redacted]

102. Microsoft's documents show that [redacted] In a recap of insights and learnings from FY2022, the Xbox Cloud Gaming team reported that "[redacted]

103. Cloud Gaming Subscription Services also require specialized inputs. Cloud Gaming Subscription Services operate on cloud infrastructure, either by deploying their own dedicated infrastructure or by contracting with a third party. For example, Microsoft built Xbox Cloud Gaming by deploying racks of dedicated Xbox console hardware in Microsoft data

centers, investing [redacted]. Microsoft has plans to support [redacted] on its [redacted] in the future and expects to spend over [redacted] on Xbox Cloud Gaming infrastructure in the next several years.

104. Cloud Gaming Subscription Services are a Relevant Market. The anticompetitive effects of the Proposed Acquisition alleged in this complaint are also likely to occur in any relevant antitrust market that contains Cloud Gaming Subscription Services, including a combined Multi-Game Content Library and Cloud Gaming Subscription Services market.

IV. The Relevant Geographic Market is the United States

105. The relevant geographic market in which to assess the Proposed Acquisition's effects is the United States.

106. In each of the Relevant Markets, consumer preferences and gaming behavior differ across countries. Internal research from both Microsoft and Activision also finds significant variation among countries on metrics like [redacted]. For its most recent Generation 9 consoles, Microsoft differentiated its [redacted]. Given its large installed base of Generation 8 consoles, Microsoft placed the United States into a [redacted] along with only [redacted] other countries. Microsoft has identified the United States as a [redacted]

107. Microsoft is a leader in the United States in the Multi-Game Content Library Subscription Services market. As of the [redacted] Microsoft offers Game Pass at different price points outside the United States.

108. Microsoft and other Cloud Gaming Subscription Service providers have similarly focused on the United States [redacted]. Microsoft launched Game Pass Ultimate first in the United States and Canada, with Nvidia's GeForce NOW and Amazon Luna undertaking a similar strategy. Cloud Gaming Subscription Service providers also

note that the proximity of cloud servers to gamers is important in light of the technological demands of cloud gaming.

ANTICOMPETITIVE EFFECTS

109. The Proposed Acquisition is reasonably likely to substantially lessen competition or tend to create a monopoly in the Relevant Markets by creating a combined firm with the ability and increased incentive to withhold Activision's valuable gaming content from, or degrade Activision's content for, Microsoft's rivals. The combined firm would have the ability to exclude Microsoft's rivals from access to some or all of Activision's content in the Relevant Markets. Microsoft would have the power to decide if, when, and to what extent Activision content will be available on competing products. The Proposed Acquisition is likely to increase entry barriers, thereby dampening beneficial rivalry and innovation. If permitted to make Activision a captive supplier, Microsoft would have a substantially increased incentive to engage in strategies to that would likely lead to reduced consumer choice, higher prices or lower quality products, and less innovation.

I. As the Owner of Activision's Gaming Content, Microsoft Would Have the Ability to Disadvantage Rivals by Withholding or Degrading Activision Content in the Relevant Markets

110. AAA gaming content is a substantially important input for High-Performance Consoles, Multi-Game Content Library Subscription Services and Cloud Gaming Subscription Services, as these products use AAA content to attract and retain users and drive adoption. AAA content is difficult to produce given the intense resources and specialized competency required to develop these valuable games.

111. Activision is a leader amongst an already limited number of developers able to produce such content through its cherished gaming franchises, including *Call of Duty*, *Diablo*, and *Overwatch*. As the owner of Activision's gaming content, Microsoft would have the ability to disadvantage rivals by withholding or degrading Activision content in the Relevant Markets.

A. AAA Content is a Substantially Important Input for Products in the Relevant Markets

112. As discussed above, AAA gaming content is an important input for consoles and gaming subscription services. AAA games typically represent an outsized portion of revenue on these products and drive greater engagement and adoption.

113. Microsoft's own executives repeatedly emphasize [redacted] In a 2019 internal email, Xbox's then-Chief Marketing Officer told Microsoft's Mr. Nadella that [redacted] In a June 2020 conversation between other Microsoft executives about Game Pass growth drivers, one aptly points out, "[redacted]."

114. Similarly, Microsoft echoes the importance of AAA content on its High-Performance Consoles. As one direct report to Mr. Spencer relayed to him, [redacted] During negotiations with top third-party publishers for inclusion of their games on Xbox Series X|S, Microsoft internally noted that Activision "[redacted]" entitled to "[redacted]."

115. Activision's powerful influence on gaming product adoption is also borne out by its revenue share negotiations with [redacted] In one Microsoft executive's words, Activision's share on *Call of Duty* is "[redacted]" and is the [redacted]

B. As the Owner of the Activision Content, Microsoft Would Have the Ability to Withhold Activision's Content from, or Degrade Activision Content on, Rival Consoles and Subscription Services

116. The Proposed Acquisition would give Microsoft total control over Activision's

content, thereby giving Microsoft the ability to fully withhold Activision content from rivals, raise rivals' costs, change the terms and timing of access to Activision content, or degrade the quality of Activision content available for rival consoles and subscription services.

117. The Proposed Acquisition would give Microsoft the ability to engage in several strategies to degrade access to Activision content on rival consoles and subscription services, including timed exclusivity, exclusive downloadable content available only on Microsoft's products, and a variety of other means across the Relevant Markets.

118. Microsoft also would gain the ability to engage in tactics to degrade the quality of Activision content on competing consoles and subscription services and create a less desirable player experience for users choosing to play anywhere other than on Microsoft's products.

119. The Proposed Acquisition also would give Microsoft the ability to reduce efforts to optimize Activision content for rival products. Currently, Activision collaborates closely with gaming hardware manufacturers to ensure an optimal experience for gamers. For example, Activision collaborated with [redacted] Should the Proposed Acquisition close, the combined firm will have the ability to reduce such collaboration in the High-Performance Console Market.

120. Activision also works to optimize its games, including *Call of Duty*, to work on [redacted]. A GPU (or Graphics Processing Unit) is a hardware component that renders graphics for video games. [redacted] The Proposed Acquisition would give Microsoft the ability to reduce efforts to optimize Activision content for hardware used by rival Cloud Gaming Subscription Services.

II. The Proposed Acquisition Would Increase Microsoft's Incentive to Disadvantage Rivals by Withholding or Degrading Activision Content in the Relevant Markets

121. If permitted to take control of Activision, Microsoft would have an incentive to disadvantage rivals by withholding or degrading Activision content. Gaming is a growing and lucrative market opportunity and one in which Microsoft is already well-positioned. Microsoft already has a built-in incentive to promote its own products wherever possible, and it fully understands the competitive power that owning Activision's leading gaming content would yield.

122. Prior to the Proposed Acquisition, Activision sought to maximize its profits from sales of its video game titles. The Proposed Acquisition would change Activision's incentives, because Microsoft stands to gain significant profits from additional gamers purchasing Xbox consoles or Xbox Game Pass. Hence, the combined firm will be incentivized to disadvantage Microsoft rivals by withholding Activision content from, or degrading Activision content on, rival consoles and subscription services to promote sales of Microsoft's products.

123. While AAA content in general is important to competitors in the Relevant Markets, Activision content is especially important because of its ability to drive gaming product adoption and engagement by users.

124. Activision's own documents point out the significant role Activision content plays in consumers' choice of gaming products. In a 2019 presentation to [redacted], Activision highlighted consumer survey data showing that [redacted]

125. The Proposed Acquisition would reduce Microsoft's incentive to optimize Activision content for rival products, including via collaboration with Microsoft's rivals. Given the competition between Microsoft and Sony, the combined firm will have less incentive to collaborate with Sony to [redacted]. In addition, because Microsoft's Game Pass Ultimate competes [redacted]

[redacted]

III. Microsoft's Statements and Past Actions Indicate that It Will Likely Act on Its Incentives to Disadvantage Rivals by Withholding or Degrading Activision Content

126. Microsoft stated in 2022 that it [redacted] Microsoft subsequently has wavered in its representations as to [redacted]

127. Moreover, Microsoft's past conduct is telling. Despite statements by Microsoft to European regulators disavowing the incentive to make ZeniMax content exclusive post-close, after the EC cleared the transaction, Microsoft plans for three of the newly acquired titles to become exclusive to Microsoft's Xbox consoles and Xbox Game Pass subscription services. For example, although previous titles in ZeniMax's [redacted] franchise were released on PlayStation, Microsoft has confirmed that the upcoming [redacted] will be available only on Xbox consoles, Windows PCs, and Xbox Game Pass subscription services. Microsoft has also stated that *Starfield* and *Redfall,* two of the highly anticipated new games in development at the time of Microsoft's purchase of ZeniMax, will also become Xbox console and Xbox Game Pass exclusives upon release.

128. Microsoft's previous representations to the EC about its incentives after its purchase of ZeniMax were not borne out by Microsoft's own post-merger behavior. Instead, Microsoft put its true post-merger incentives on full display when it decided to deny rivals its newly acquired future releases and thwart consumers who would choose to play them on a competing product. Microsoft's past behavior should also cast more suspicion on its non-binding public commitments to keep *Call of Duty* available on PlayStation consoles through the end of Activision's existing agreement with Sony (*i.e.*, through [redacted]).

129. Microsoft is eager to further build upon its already significant strength in gaming,

with Mr. Nadella declaring publicly, "Microsoft's ***all-in on gaming***." Looking to reap the financial opportunity available in the gaming industry, Microsoft would be incentivized to withhold Activision content from, or degrade content on, rival products in order to disadvantage its rivals, thereby weakening competition and increasing its profits.

130. Moreover, as Microsoft internally recognizes, acquisitions in this industry [redacted] This Proposed Acquisition—the largest ever announced in the gaming industry—poses a reasonable probability of further accelerating this trend.

IV. Withholding Activision Content From, or Degrading Activision Content On, Microsoft's Rival Products Will Harm Competition and Consumers in the Relevant Markets

131. Withholding Activision content from, or degrading Activision content on, Microsoft's rivals' products is reasonably likely to substantially lessen competition in the Relevant Markets.

132. This lessening of competition will result in harm to consumers, including reduced consumer choice, reduced product quality, higher prices, and less innovation.

LACK OF COUNTERVAILING FACTORS

133. Defendants cannot demonstrate that entry or expansion in the Relevant Markets would be timely, likely, or sufficient to reverse the anticompetitive effects of the Proposed Acquisition.

134. Defendants cannot demonstrate that the Proposed Acquisition would likely generate verifiable, cognizable, merger-specific efficiencies that would reverse the likely competitive harm from the Proposed Acquisition.

LIKELIHOOD OF SUCCESS ON THE MERITS, BALANCE OF EQUITIES, AND NEED FOR RELIEF

135. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Commission, whenever it has reason to believe that a proposed merger is unlawful, to seek preliminary

injunctive relief to prevent consummation of a merger until the Commission has had an opportunity to adjudicate the merger's legality in an administrative proceeding. In deciding whether to grant relief, the Court must balance the likelihood of the Commission's ultimate success on the merits against the equities, using a sliding scale. The principal equity in cases brought under Section 13(b) is the public's interest in effective enforcement of the antitrust laws and ensuring the Commission is not deprived of the ability to order appropriate relief. Private equities affecting only Defendants' interests cannot tip the scale against a preliminary injunction.

136. The Commission is likely to succeed in proving that the effect of the Proposed Acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act and/or Section 5 of the FTC Act, and that the Merger Agreement and Proposed Acquisition constitute unfair methods of competition in violation of Section 5 of the FTC Act.

137. Preliminary relief is warranted and necessary. Should the Commission rule, after the full administrative proceeding, that the Proposed Acquisition is unlawful, reestablishing the status quo would be difficult, if not impossible, if the Proposed Acquisition has already occurred in the absence of preliminary relief. Allowing the Proposed Acquisition to close before the completion of the administrative proceeding would enable the combined firm to, among other things, begin altering Activision's operations and business plans, accessing Activision's sensitive business information, eliminating key Activision personnel, changing Activision's game development efforts, and entering into new contractual relationships on behalf of Activision. In the absence of relief from this Court, harm to competition would occur in the interim.

138. Accordingly, the equitable relief requested here is in the public interest. The Commission respectfully requests that the Court:

1. Enter a temporary restraining order and preliminarily enjoin Defendants from consummating the Proposed Acquisition, or any other acquisition of stock, assets, or other interests of one another, either directly or indirectly;

2. Retain jurisdiction and maintain the status quo until the administrative proceeding initiated by the Commission is concluded; and
3. Award such other and further relief as the Court may determine is appropriate, just, and proper.

Dated: June 12, 2023

Respectfully submitted,

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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** **FINAL 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.

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.)

B. 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.)

a. Console Gaming

Video game consoles are consumer devices designed for, and whose primary use is, to play video games. (PX8001 (Ryan Decl.) at ¶ 10.) Consumers purchase video game consoles based on the hardware features of the consoles as well as the availability of game content on the console. (PX8001 (Ryan Decl.) at ¶¶ 4, 11; PX7053 (Ryan Dep. Tr. Vol. I) at 21:1-5.) Console manufacturers earn revenues from several sources: sales of consoles and accessories like game controllers, headsets, supplemental storage, cables, and power supplies (*i.e.*, hardware) and revenue shares or royalties from sales of video game titles (*i.e.*, software) and accessories for the console. (PX8001 (Ryan Decl.) ¶ 4; PX0003-016.) Console manufacturers can also earn revenue from post-sale monetization. For example, console manufacturers may split royalties with publishers and developers on the sale of add-on content or in-game purchases. (PX1110-012; PX1065-003.)

Microsoft entered the gaming industry in 2001 with the launch of its first Xbox video game console, competing with the established incumbents Sony and Nintendo. (RX5055-100.) With every succeeding generation, Sony, Nintendo, and Xbox have remained the three major console producers, and have been engaged in what some refer to as the "console wars." (PX7054 (Ryan Dep. Tr. Vol. II) at 25:22–26:8 (reporting since the release of PlayStation 5 and Xbox Series X|S, Xbox outsold PlayStation "about three months"); Dkt. No. 283, 6/23/23 Tr. (Spencer) at 294:23-295:6; Dkt. No. 285, 6/28/23 Tr. (Nadella) at 850:4 (describing the console market as "us and Sony and Nintendo").)

Each console generation represents an opportunity to "win" the console generation by shifting the distribution of gamers onto their respective consoles. (PX8001 (Ryan Decl.) at ¶ 11.) In the United States, Microsoft won Generation 7 with the Xbox 360 pitted against the PlayStation 3. (*Id.*) However, Sony won Generation 8 with the PlayStation 4. (*Id.*) In this current generation—the ninth generation—the Xbox Series X and PlayStation 5 both launched with a price of $499 in November 2020 in direct competition. (RX5055-076, Ex. 42; PX0003-050; *see also* Dkt. No. 282, 6/22/23 Tr. (Booty) at 57:21-58:2, 58:25-59:4.) Microsoft released the Xbox Series S at the same time as the Series X, and at the same price point ($299) as the Nintendo

Switch which had been released three years earlier. (PX7059 (Prata Dep.) at 19:24-20:1; PX8002 (Prata Decl.) at ¶ 2; *see* Dkt. No. 285, 6/28/23 Tr. (Bailey) at 783:11–19; RX5055-076, Ex. 42; PX0003-050.)

In recent years, Xbox's console has consistently ranked third (of three) behind PlayStation and Nintendo in sales. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 129:3-4; Dkt. No. 283, 6/23/23 Tr. (Spencer) at 295:2–6, 9-10; RX5046.) In 2021, Xbox had a [redacted] share of the console market, while Nintendo and PlayStation had a [redacted] and [redacted] share, respectively. For console revenues and share of consoles currently in use by gamers ("installed base"), Xbox trails with [redacted] while PlayStation and Nintendo have shares of [redacted] and [redacted], respectively.

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.) Jim Ryan, Sony Interactive Entertainment's CEO, referred to PC gaming as "a very direct competitor to the PlayStation platform." (PX7053 (Ryan Dep. Tr. Vol. I) at 112:17-22.) In fact, "Sony delays the launch of their games on PC because they're

trying to drive people to buy a PlayStation." (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 363:20-22; *see also* RX5055 at ¶ 91; Dkt. No. 285, 6/28/23 Tr. (Bailey) at 786:13-787:4.) 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.)

d. Cross-Platform Play

Games can be single-player or multi-player. Single-player games are normally story-driven, 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

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 third-party 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. As a 2021 Microsoft document states: "In the business of gaming, content remains king." (Dkt. No. 226-2, Lee Decl. at ¶ 22 (citing PX1070-003); *see also* PX1538-005; PX1087-001 ("well said, content is king"); PX9102-009 ("The big bets we have made across content, community, and cloud over the past few years are paying off … Our differentiated content is driving the service's growth.").)

The gaming industry recognizes four independent publishers, collectively known as the "Big 4": Activision, Entertainment Arts, Take-Two, and Ubisoft. (PX1019 (Microsoft) at 004 [redacted]

a. AAA Content

"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"); PX7046 (Leder Dep.) at

97:1-11; PX7011 (Spencer IH Tr. Vol. 1) at 36:22-37:3 ("I wouldn't say there's an industry definition for what AAA actually means. I think the notion of a AAA game is a game with a high development budget with presumably a high expectation for -- for sales and kind of splash when it launches."); PX8001 (Ryan Decl.) at ¶ 20 ("AAA games often feature cinematic storytelling, immersive environments, and detailed graphics.").) AAA games are "immersive," "major blockbuster titles" that tend to include "thoughtful, long storyline[s]" with significant "compute power" and "graphic fidelity." (Dkt. 228 (Joint Stip. and [Proposed] Order) at 4.) AAA games are particularly important in the gaming industry. (PX8001 (Ryan Decl.) at ¶¶ 18-23; Dkt. No. 282, 6/22/23 Tr. (Booty) at. 51:20-52:8.) Phil Eisler, Vice President and General Manager of Nvidia GeForce NOW, testified "Access to AAA titles, which are the latest, most-popular gaming franchises, is critical to the success of any gaming platform." (PX8000 (Eisler Decl.) at ¶ 30.)

Eisler explained the challenge: "[t]oday's AAA video games . . . require tens of millions of dollars (in some cases over $100 million) and years to produce." (*Id.* at ¶ 31.) Developing games has become more expensive in the last five to ten years, with games on average taking longer to develop and experiencing delays in development. (Dkt. No. 282, 6/22/23 Tr. (Booty) at 53:10-21.) The immense costs to develop quality games has limited the number of publishers with a proven track record of making AAA titles. [redacted] (PX1063-003.) Activision CEO Bobby Kotick concluded sustaining AAA games requires broad and deep capabilities, and even then, a AAA title is not guaranteed (though Mr. Kotick admits Activision has the capability to release a AAA game every single year). (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 43:14-22.)

b. Exclusive Content

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*

also id., 6/23/23 Tr. (Spencer) at 440:24-441:4 (exclusives are "an established part of the console business, the video game business, and Sony and Nintendo are very strong with their exclusive games.").)

As a game publisher, Sony's PlayStation Studios, is responsible for blockbuster hits like *God of War*, *The Last of Us*, and *Spider-Man*, the vast majority of which can be played only on PlayStation. (*See* PX7053 (Ryan Dep. Tr. Vol. I) at 20:16–20:23; RX5055 at 015–016.) And as a purchaser of third-party games, [redacted] (PX7054 (Ryan Dep. Tr. Vol. II) at 107:10–18.; Dkt. No. 283, 6/23/23 Tr. (Spencer) at 357:12–16.)

Sony views exclusive content as crucial to PlayStation's continued success and to "differentiate [their] platform." (PX7053 (Ryan Dep. Tr. Vol. I) at 212:19–23; RX0079.) As a result, Sony offers far more exclusive first- and third- party titles than Xbox. (PX7053 (Ryan Dep. Tr.) at 169:24–170:2; Dkt. No. 283, 6/23/23 Tr. (Spencer) at 362:17–23.) Sony also enjoys "an enormous competitive advantage" because it can draw on the intellectual property of "Sony Music, Sony TV, and Sony's film library" for its game development. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 723:13-16.) The number of exclusive games available on PlayStation dwarfs the number available on Xbox, with eight exclusive games on PlayStation for every one on Xbox. (RX2098-001 ("Overall, for every 1 exclusive Microsoft game, PlayStation has 8 of them."); *see* Dkt. No. 284, 6/27/23 Tr. (Bailey) at 684:3–25; RX5055 at 018–019, Exs. 11A, 11B; Dkt. No. 285, 6/28/23 Tr. (Nadella) at 849:1–8 ("The dominant player [*i.e.*, Sony] there has defined market competition using exclusives and so that's the world we live in.").)

Sony has often paid third-party studios to "skip" Xbox—either entirely or to delay a title's release on Xbox. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 313:4–8.) For example, on June 22, 2023, while this trial was happening, Square Enix released *Final Fantasy XVI*, the latest release in the iconic *Final Fantasy* franchise, exclusive to PlayStation 5. Previous versions of *Final Fantasy* shipped on Xbox, but the reason *Final Fantasy XVI* is a PlayStation exclusive is because Sony "pa[id] to exclude Xbox." (*Id.* at 312:20–313:8, 441:18–443:1.) ZeniMax, too, was paid by Sony

not to ship *Deathloop* or *Ghostwire* for Xbox, and one of the reasons Microsoft bought ZeniMax was concern Sony would also arrange for *Starfield* to go exclusive and skip Xbox. (*Id.* at 314:16–24.)

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, 186:5–8.) [redacted]

Nintendo is also a significant first-party publisher with some of the most popular exclusive game franchises in the world, including *Mario*, *Zelda* and *Pokémon*. (RX5055 at 026–032, Exs. 15–19.)

c. Activision Content

Activision generates 80% of its annual revenue—which totaled $8.5 billion in fiscal year 2022—from three video game franchises. These core video game franchises are *Call of Duty*, which is developed by Activision; *World of Warcraft* ("*WoW*"), a PC-only game, which is developed by Blizzard; and *Candy Crush*, a mobile game, which is developed by King. (RX3166 at 010; RX5058 (Hood Decl.) at ¶15.) Activision's CEO Bobby Kotick testified Activision's games are "iconic" and "beloved" because of the "duration, the popularity, the joy, and the fun people experience" with Activision games. (PX7006 (Kotick IH Tr.) at 74:23-76:4; Dkt. No. 285, Tr. (Kotick) at 736:1-9.)

i. 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

152:18-23; Dkt. No. 282, 6/22/23 Tr. (Hines) at 112:10-20.) *Call of Duty* has a massive following, with [redacted] monthly active users in 2020, according to an Activision strategy document. (PX2094-007.) Since its first release in 2003, *Call of Duty* has become one of the most successful video game franchises in history, earning approximately [redacted] in sales revenue annually. (PX9005-004.) *Call of Duty* has been the best-selling game in the United States every single year for the past 13 years and the 2022 release of *Call of Duty: Modern Warfare* was the best-selling *Call of Duty* title of all time and the highest grossing entertainment opening of the year, making $2 billion dollars in the first ten days of its release. (Dkt. No. 285, 6/28/23 Tr. (Kotick) at 736:19-737:5.)

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).) This annual release cycle is unique among AAA games, with the exception of sports games, because games of this caliber often require immense time and resources that take years in between releases. (PX8001 (Ryan Decl.) at ¶ 25.) Activision uses four separate studios and several support studios to complete the development work necessary to launch an annual release. (PX8001 (Ryan Decl.) at ¶ 25; PX3378-015 (Ryan Hr'g Testimony) at 52:1-19 ("[Activision has] been able to organize themselves to release basically new [*Call of Duty*] games every single year. And the games are different, unique games. There's nothing like it in the industry.").)

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 *Call of Duty* called *Call of 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.) *Candy Crush* generated approximately [redacted] in revenue in fiscal year 2022—roughly [redacted] of Activision's overall annual revenue. 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 massively-multiplayer-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.

285, 6/28/23 Tr. (Kotick) at 730:1-7.) The *Warcraft* franchise also includes the free-to-play mobile game, *Hearthstone*. (RX3166-010.)

Activision also develops and publishes other games, including *Diablo* and *Overwatch*, both of which are developed and published by Blizzard. Blizzard's *Diablo* franchise and *Overwatch 2* generated approximately [redacted] and [redacted] in revenue in fiscal year 2022, respectively. *Diablo* is a fantasy role-playing franchise available on gaming consoles, PCs, and mobile devices. While most *Diablo* titles are available for sale on a buy-to-play basis, the mobile entry in the *Diablo* franchise, *Diablo Immortal*, is free to play. *Overwatch* is a free-to-play, multiplayer team-based shooter franchise (which was previously buy-to-play) available on gaming consoles and PCs, which Blizzard monetizes through optional in-game microtransactions. (RX3166-010.)

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.) Sony and Xbox also offer users the option of accessing games through subscriptions. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 146:17-24, 192:25-193:3; Dkt. No. 283, 6/23/23 Tr. (Spencer) at 421:21-23; PX7053 (Ryan Dep. Tr. Vol. I) at 260:6-21.)

a. Multi-Game Content Subscription Services

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; RX5044-001.) Approximately [redacted] of Game Pass subscribers subscribe to Game Pass Ultimate. (PX0003-018.) 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; RX5056 (Carlton Report) at ¶ 16 n.10 ("Microsoft has a policy of putting all of its first-party games on Xbox Game Pass on the game's launch date.").) Microsoft CEO Satya Nadella has described Game Pass as "Netflix for Games." (PX7010 (Nadella IH Tr.) at 78:17-20; PX1283-008.) Xbox Game Pass had over 25 million total subscribers by the beginning of 2022. (PX1516-039; PX9003- 003.)

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.)

Sony has the second most popular content subscription service, called PlayStation Plus. PlayStation Plus has three tiers. The highest two tiers—PlayStation Plus Extra and PlayStation Plus Premium—are content subscription services. (PX7053 (Ryan Dep. Tr. Vol. I) at 17:9-14.) Those two tiers provide similar features that correspond to Microsoft's Xbox Game Pass for PC or Console and Game Pass Ultimate. (*Id.* at 17:9-22.) By subscribing to PlayStation Plus Extra, subscribers gain access to up to 400 games within PlayStation's library. (PX8001 (Ryan Decl.) at ¶ 9.) Those who subscribe to PlayStation Plus Premium receive access to a library of up to 740 games and cloud gaming services for certain games. (*Id.* at ¶ 9.) Unlike Xbox, Sony does not add any of its new first-party content to its subscription service day-and-date. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 428:4-20; *see also* PX7053 (Ryan Dep. Tr. Vol. I) at 205:06-25.) As of July 2022, PlayStation Plus Extra had approximately [redacted] subscribers and PlayStation Plus Premium had approximately [redacted] subscribers. (PX7053 (Ryan Dep. Tr. Vol. I) at 17:23-18:4.)

Like Microsoft's Xbox Live Gold, the lowest tier of PlayStation Plus—PlayStation Plus Essential—offers subscribers access to online, multiplayer games and two monthly downloadable games alongside discounts on other games and cloud storage. (PX8001 (Ryan Decl.) at ¶ 9.) PlayStation Plus Essential does not provide subscribers access to the vast libraries available to subscribers of PlayStation Plus Extra and PlayStation Plus Premium. (*Id.* at ¶ 9.)

Amazon, Electronic Arts, and Ubisoft also provide content subscription services. Amazon has two tiers: (1) Prime Gaming, which is included with an Amazon Prime subscription, and (2) Luna+ which offers subscribers access to a library of games for $9.99 per month. Ubisoft likewise has two tiers: (1) PC Access for $14.99/month, and (2) Multi Access for $17.99/month. Both tiers allow subscribers to play over 100 Ubisoft games on PC (through Ubisoft Connect or Steam), including new releases available at launch, premium editions, and select third-party indie games. (PX0006-080.) Finally, Electronic Arts's EA Play can also be accessed through a subscription to Microsoft's Game Pass Ultimate. (PX7011 (Spencer IH Tr. Vol. I) at 260:3-15.)

Publishers of popular games that generate significant buy-to-play revenues are reluctant to allow their games to be included in subscription services upon release because of the significant

cannibalization of buy-to-play revenues that can occur. (*See* PX7053 (Ryan Dep. Tr. Vol. I) at 258:10-258:14.) 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); *see also* PX7054 (Ryan Dep. Tr. Vol. II) at 8:7-16 (Q: "And you then said that you never asked Activision to put the current *Call of Duty* games in day and date because you thought – you knew Mr. Kotick would never agree to that right?" . . . A: "I don't know, but I don't believe he would have agreed to it."); PX7053 (Ryan Dep. Tr. Vol. I) at 258:20-24 (Q: "You have no reason to believe that Mr. Kotick and Activision would put *Call of Duty* on a subscription service like Game Pass for any length of time or day and date if this transaction is not completed, right?" . . . A: "Correct.").)

b. Cloud Gaming Subscription Services

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.) Cloud gaming is a catchall term for technology that runs games on remote servers gamers can access using consoles, PCs, mobile devices, or TVs. (Dkt. No. 283, 6/23/23 Tr. (Zimring) at 468:16-469:13.) Cloud gaming can

allow gamers to play games on less highly-powered and more affordable devices. (PX7060 (Eisler Dep. Tr.) at 35:08-36:17, 45:05-08, 46:10-47:09.) 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, 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.) *Fortnite* on Xbox Cloud Gaming is separate from Game Pass Ultimate (*i.e.*, no subscription is required to play *Fortnite*), [redacted] (PX0003-019.)

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

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).)

Other companies have cloud gaming, including Amazon, Nvidia, and Google. (PX0003 at 068.) Sony also has cloud gaming available on the highest tier of its PlayStation Plus subscription service, "PlayStation Plus Premium," [redacted] (PX8001 (Ryan Decl.) at ¶ 9; PX3080 at 075.) Sony's Jim Ryan acknowledged it is "quite difficult" to provide a cloud platform that "pleases customers," and he acknowledged neither he, nor "anybody in the world," can know when cloud gaming "will become a meaningful component of how gamers access games." (PX7054 (Ryan Dep. Tr. Vol. II) at 60:12-15, 64:9-20.) [redacted] (PX3378-052 (Ryan Hr'g Testimony) at 97:14-25, 98:04-06.)

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. (RX3019 (Letter of Intent); RX1212 (Agreement).) The agreement commits Xbox to releasing new *Call of Duty* titles on Nintendo simultaneous with their launch on other platforms. [redacted] Dkt. No. 285, 6/28/23 Tr. (Kotick) at 776:6-16 (agreeing developers from Activision and Xbox will be able to make "a good [*Call of Duty*] game for the Switch").)

In the two months following Microsoft's agreement with Nintendo, Microsoft also entered into separate ten-year agreements with cloud gaming providers Boosteroid, Nvidia GeForce NOW, NWare, and Ubitus to bring Activision content to their platforms. (RX1211 (Nvidia, signed 2/20/23); RX3024 (Boosteroid, signed 3/9/23); RX3025 (Ubitus, signed 3/11/23); RX1245 (Nware, signed 4/27/23).) It has entered into a similar letter of intent with EE Limited, a subsidiary of British Telecommunications. (RX3027 (EE Limited, signed 4/7/23).) None of these companies could stream *Call of Duty* prior to the acquisition's announcement. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 176:15-17; [redacted]

Finally, while Microsoft has made repeated offers to keep *Call of Duty* on PlayStation consoles, Sony has consistently rejected these offers, including Microsoft's most recent offer to agree to keep *Call of Duty* games on PlayStation for at least 10 years. (*See* PX7054 (Ryan Dep. Tr. Vol. II) at 28:15-25, 30:11-32:19; RX5056 (Carlton Report) at ¶ 24 (noting "Sony refuses to sign a contract that Microsoft offered to guarantee PlayStation access to [*Call of Duty*]"—an offer that includes a ten-year term."); Dkt. No. 283, 6/23/23 Tr. (Spencer) at 443:23-25.) 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

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[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. *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.)

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

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. To be sure, the industry views Xbox and PlayStation as fierce competitors within the console market and this opinion is shared by executives for both companies. (PX0006 at 064-65; PX1275-001; PX8001 (Ryan (Sony) Decl.) ¶¶ at 12, 14.) However, Nintendo is likewise viewed by the industry and the public as a competitor in the console market. The Nintendo Switch is the second most popular and fastest growing console among the three major developers. (RX5055-012 (Bailey Report) at ¶ 13, Ex. 4; PX5000-108 (Lee Report) at ¶ 266.) Indeed, regardless "which metric is used – console units sold, console revenues, or installed base – Xbox's console is now, and has almost always been, the third-place console." (RX5055-012 (Bailey Report) at ¶ 13.) Sony, Nintendo, and Microsoft all view each other as competitors within the console market. (PX7065 (Singer Dep. Tr.) at 224:14-225:20 (confirming Xbox and PlayStation are both competitors to the Nintendo Switch); Dkt. No. 285, 6/28/23 Tr. (Nadella) at 850:4 (describing the console market as "us and Sony and Nintendo"); RX0020 at 001-002; *see* PX7053 (Ryan Dep. Tr. Vol. I) at 108:09-24.)

Further, as Microsoft's expert Dr. Bailey explained, the data suggests customers view the Switch as a gaming substitute for the PlayStation and Xbox. Xbox and Sony data illustrate the release of the Switch in March 2017 led to a decline in the number of weekly users and hours spent per week playing Xbox and PlayStation. (Dkt. No. 285, 6/28/23 Tr. (Bailey) at 779:2-780:21; *see* RX5055 (Bailey Report) at ¶¶ 85-87, Exs. 38-41.) As Dr. Bailey notes, this data is powerful evidence of substitution because "[n]ot only did [Switch users] play on it and purchase it, but more *specifically Xbox gamers and PlayStation gamers switched.* They switched entirely their gaming behavior and they switched in part their gaming behavior." (Dkt. No. 285, 6/28/23

Tr. (Bailey) at 781:19-25.) That is, existing Xbox and PlayStation users decided to spend their time and money on a different console. (Dkt. No. 285, 6/28/23 Tr. (Bailey) at 782:5-10.) In addition, many of the most highly played games on Sony's PlayStation and Xbox consoles are also available on the Nintendo console. (RX5055-074 (Bailey Report) at ¶ 88.)

Certainly, some internal Microsoft and Sony documents measure performance against each other, but many include Nintendo as well. Sarah Bond, Vice President of Xbox creator experience and ecosystem, explained this is because they measure the success of a console at least in part based on the success of other consoles launched at the same time. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 159:25-160:3.) However, Mr. Spencer, testified his weekly reports on unit volume and share of Gen 9 hardware include the Nintendo Switch. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 432:22-24.) Xbox CFO Tim Stuart was questioned about how they report information regarding the console market to the Gaming Leadership Team. (Dkt. No. 286, 6/29/23 Tr. (Stuart) at 936:4-939:3.) While the "Console Market Size/Share" includes a break down by Gen 9 Consoles which include the Xbox X|S and PS5, it also features a break down for "Console Market" which evaluates Microsoft, Sony, *and Nintendo*. (PX1240-019.)

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

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 (*e.g.*, the *Halo* (Xbox) or *Last of Us* (PlayStation) franchises); are coming to the Switch in the near future (*e.g.*, *Hogwarts: Legacy*); or, in the case of the *Call of Duty* franchise, will become available on the Switch if the merger proceeds.

"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. "While PCs are general purpose, there are also specialized gaming PCs with parts selected for high performance while running video games." (PX8001 (Ryan Decl.) at ¶ 15.) These specialized gaming PCs are more expensive—typically costing between $800-$1500—and require a greater "technical competency" for the user. (*Id.*) Although some games can be played on regular PCs, there are some games "that cannot be played on low-powered PCs." (Dkt. No. 282, 6/22/23 Tr. (Bond) at 143:23-144:2.) 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

and behavior vary country-by-country and inform market participants' strategic decision. In support of his opinion, Dr. Lee cites to examples of Sony raising prices in certain countries including Canada, but not the United States, and Xbox raising prices in India and Japan, but not elsewhere. (PX5000 (Lee Report) at ¶ 259.) In addition, he notes introductory pricing for the consoles in November 2020 varied widely by country and provides examples. (*Id.*) Dr. Lee also identifies evidence Microsoft and Sony both analyze competition on a country-by-country basis and consider the United States as its own—and largest share of the business, in the case of Microsoft. (*Id.* at ¶¶ 260-261.) Finally, Dr. Lee offered evidence video game sales and exclusivity arrangements—as a corollary to console sales—varied country-by-country. For example, in a [redacted] (PX2167-023.) Cumulatively, this evidence suggests the relevant market for competition is the United States.

Defendants' arguments in favor of a geographic market beyond the United States are unpersuasive. That Xbox gamers and *Call of Duty* gamers in the United States fall within the same age brackets as gamers in other countries, and have similar gametimes as gamers in other countries, is untethered to the question of the geographic market for *purchases* of consoles. (RX5055 (Bailey Report) at ¶¶ 120-124.) Likewise, that [redacted] of the top [redacted] game franchises are the same for Xbox gamers in the United States as for gamers in other countries, says nothing about the market for competition to *purchase* the consoles on which the games are played. (*Id.* at ¶ 125; *id.* at ¶ 126 (similar figures for PlayStation gamers).) The same is true as to the undisputed fact gamers cross-play games with gamers from other countries. (*Id.* at ¶¶ 114-116.) Dr. Bailey opines, contrary to Dr. Lee's assessment, release dates for consoles and console games are similar between the United States and other countries; however, absent evidence consumers travel to different countries to purchase games based on their availability, this similarity is not probative. (*Id.* at ¶¶ 118-119.) Finally, that console manufacturers do not distinguish between [redacted] in co-marketing agreements, again does not address the relevant question. (*Id.* at ¶ 128.)

The geographic market is both the area "in which the seller operates, *and* to which the

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.

1. 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 market-share 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

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

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.) Two weeks later, Microsoft sent Sony a written proposal. (PX3109.) After reading the proposal, Ryan had no concerns Microsoft was going to make *Call of Duty* exclusive. (PX7053 (Ryan Depo. Tr. Vo. I) at 186:18-21.)

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. (PX4344-012 [redacted] *see also* RX3166-016 [redacted]

[redacted] RX5058-007 (Hood Decl.) at ¶ 17 ("An essential component of that valuation was the [redacted] in forecasted total future sales of Activision's content on all platforms, including continued sales of *Call of Duty* on Sony's PlayStation.").) The model does not rely on increased sales of Xbox consoles for any reason, let alone caused by foreclosing *Call of Duty* from PlayStation. Indeed, Microsoft's Chief Financial Officer, Amy Hood, testified "[t]he possibility of making *Call of Duty* exclusive to Xbox was never assessed or discussed with me, nor was it even mentioned in any of the presentations to or discussions with the Board of Directors." (RX5058-007 (Hood Decl). at ¶ 18.) This valuation is also inconsistent with an incentive to foreclose.

Third, the deal plan evaluation model reflects access to mobile content was a critical factor weighing in favor of the deal. Of the [redacted] valuation Microsoft assigned to Activision, "about [redacted] relates to mobile." (Dkt. No. 283, 6/23/23 Tr. (Lawver) at 254:2–256:3; *see also* PX4344-012; RX5058-005 (Hood Decl.) at ¶ 12.) Microsoft CEO Satya Nadella testified acquiring Activision mobile games was part of the rationale in favor of the deal because "we don't have a footprint at all." (Dkt. No. 285, 6/28/23 Tr. (Nadella) 851:25-852:4; *see also* RX5058-006 (Hood Decl.), ¶ 14 (explaining Microsoft's goal of increasing "revenue from mobile transactions from approximately [redacted]").) The FTC attempts to dispute this assertion by emphasizing that growing Microsoft's mobile store is a small percentage of the deal's value. But that argument ignores the "continued sales of Activision Blizzard's portfolio on all platforms"—[redacted]—includes Activision's mobile content. (RX5058-007 (Hood Decl.) at ¶ 17.) And mobile is the largest and fasted growing video gaming sector. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 404:9-22.) Microsoft's keen interest in Activision's mobile content suggests the combined firm is not incentivized to withhold *Call of Duty* merely to aid the shrinking console market.

Fourth, Microsoft witnesses consistently testified there are no plans to make *Call of Duty* 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

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

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, multi-platform 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,

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.

Ninth, on top of that evidence, although not necessary to the Court's finding, is Microsoft's written offer to Sony to offer PlayStation *Call of Duty* on parity with Microsoft for 10 years, including on future PlayStation consoles. (RX2170- at 002-006.) [redacted]

The offer also guarantees Activision games will be released on the same day on PlayStation and Xbox, and the games will have "the same content, feature, and technical parity" on PlayStation and Xbox. (RX2170-004, § 3.3 [redacted] *id.*, § 3.4 [redacted]

The FTC disputes this written offer has any relevance to its *prima facie* 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 *Illumina* decision. There, relying on *E.I. du Pont*, 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 *prima facie* showing. Illumina, Inc. & Grail, Inc., 2023 WL 2823393, at *49-50. But *E.I. du Pont* 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.

[redacted] And when Microsoft purchased ZeniMax, and honored its still-in-effect contracts with Sony, Sony had no issue with the product Microsoft provided. Mr. Ryan does not identify anything specific about the language that is troubling—it is just that he does not want Microsoft to own Activision. Again, no surprise, but not a reason to doubt Microsoft's offer to put *Call of Duty* on PlayStation for the next 10 years with parity and day and date.

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.) According to Prof. Lee, that number, in turn, results in Microsoft making [redacted] more in profits over five years. (*Id.* at ¶ 109.)

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

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:

(PX5000 (Lee Report) at ¶ 572, Fig. II; Dkt. No. 284, 6/27/23 Tr. (Lee) at 572:2-573:12.) Thus, the "assumed" conversion rate is pivotal.

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

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.)

[6] Undaunted, Prof. Lee insists even the 2-3% share shift is consistent with his 5.5% estimate 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 ¶¶ 32, 104; Dkt. No. 291-2, FTC's Findings and Conclusions at pp. 100-101 ¶ 499.) That circular assertion, however, relies upon his share model which, discussed next, is flawed.

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.

Finally, Prof. Lee's expert report relies on a third piece of evidence to justify the 20% conversion rate and the resulting 5.5% share shift figure; namely, a couple of slides from a Microsoft presentation to British regulators. (PX5000-345 (Lee Report) at ¶ 762 & n. 959.) One slide shows the results of a "YouGov" survey and, according to Prof. Lee, shows "3% of existing PlayStation gamers 'would have purchased an Xbox instead' if *Call of Duty* were not available on PlayStation and that 5% of gamers planning to buy a PlayStation 'will purchase Xbox instead' if *Call of Duty* were not on PlayStation." (RX5000-345 (Lee Report) at ¶ 762; RX5054-012; Dkt. No. 284, 6/27/23 Tr. (Lee) at 591:24-594:7.)

But that is not what the survey says. The survey did not report 5% of *all* future PlayStation purchasers converting; it reported conversion rates of future purchasers whose first or second-most favorite game would not be available on the console the gamers plan on purchasing. (RX5053-006.) Prof. Lee opines 5% of all gamers planning to buy a PlayStation (regardless of whether they play *Call of Duty*) converting to Xbox is similar to his 20% of PlayStation "affected users" converting, so the slide supports his 20% conversion rate. 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 was not.

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

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.

b. 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. As Jamie Lawver, head of finance for Xbox Studios explained, taking *Call of Duty* exclusive would be [redacted] more costly to Xbox than taking some ZeniMax games Xbox exclusive. (Dkt. No. 277, 6/23/23 Tr. (Lawver) at 261:2-8.) It would therefore be "financially impossible for us to figure out how we would recover from losing *Call of Duty* on its largest console platform" given "the size of *Call of Duty* [and] the role it plays in the valuation of buying Activision." (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 366:8-12; *see also,* Dkt. No. 277, 6/23/23 Tr. (Lawver) at 261:9-22 (Q: "[C]ould Xbox plausibly make up the lost PlayStation profits if it took Call of Duty exclusive in your opinion?" . . . A: "I don't think so."); Dkt. No. 285, 6/28/23 Tr. (Nadella) at 852:10-19 (explaining a strategy of "forego[ing] sales of *Call of Duty* on the PlayStation to sell more consoles" "makes no economic sense and no strategic sense").)

c. Effect on Innovation

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

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. As Sony's Jim Ryan recognized, "publishers have every incentive to provide an equal gaming experience or as good a gaming experience as possible on all platforms." (PX7053 (Ryan Dep. Tr. Vol. I) at 180:23–181:11.) The FTC's partial foreclosure theory fails.

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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

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.

(i) 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

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.) [redacted]

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.) Sony has never even asked Activision about adding its games to PlayStation Plus because Activision has been so "public" and "vocal" about not putting its content on subscription services. (PX7053 (Ryan Dep. Vol. 1) at 267:11-25.) 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.) In any event, Nvidia is a sophisticated publicly-traded company based in the United States. It believes its agreement with Microsoft, inked in February 2023, "can be a catalyst for the growth of gaming." (PX7060 (Eisler Dep. Tr.) at 153:22-155:10.) [redacted] While it had concerns about the merger prior to the agreement, its inked deal with Microsoft resolves all of those concerns [redacted] This merger-specific agreement is pro-competitive.

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

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 ¶ 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.

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

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

Jacqueline Scott Corley

JACQUELINE SCOTT CORLEY

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, *Plaintiff-Appellant*, v. MICROSOFT CORPORATION; ACTIVISION BLIZZARD, INC., *Defendants-Appellees*.	No. 23-15992 D.C. No. 3:23-cv-02880-JSC OPINION

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, District Judge, Presiding

Argued and Submitted December 6, 2023
San Francisco, California

Filed May 7, 2025

Before: Daniel P. Collins, Danielle J. Forrest, and Jennifer Sung, Circuit Judges.

Opinion by Judge Collins

SUMMARY*

Clayton Act

The panel affirmed the district court's denial of a motion by the Federal Trade Commission ("FTC") for preliminary injunctive relief against Microsoft's acquisition of the video game developer Activision Blizzard, Inc.

The merger is the subject of an administrative proceeding that remains pending before the FTC. In its administrative complaint and in seeking a preliminary injunction in the district court, the FTC asserted that the merger would likely violate § 7 of the Clayton Act because, viewing the merger as a vertical integration between a content-platform operator and a content producer, competition would be substantially lessened in the relevant U.S.-based content-platform markets for gaming console devices, gaming subscription services, and gaming cloud-streaming services.

The panel held that the district court applied the correct legal standards and did not abuse its discretion, or rely on clearly erroneous findings, in holding that the FTC failed to make a sufficient evidentiary showing to establish the requisite likelihood of success on the merits of its § 7 claim. Thus, the FTC had not raised serious questions regarding whether the proposed merger was likely to substantially lessen competition in the relevant markets.

First, pertaining to the console market, the panel agreed with the district court that the FTC failed to sufficiently show

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that Microsoft would foreclose or partially foreclose rivals after the merger either by making the popular game *Call of Duty* exclusive to its Xbox console or by releasing only an inferior version of the game for Sony's rival PlayStation. The panel next found that as to the library subscription services market, the district court did not abuse its discretion by holding that the FTC had not made an adequate showing that the merger would substantially lessen competition. Because Activision Blizzard had long opposed putting its content on library subscription services, the merger's effect of making such content available for the first time in the subscription market, even if exclusive to Microsoft, would not substantially lessen competition. Finally, the district court did not abuse its discretion in similarly finding an insufficient likelihood of success on the FTC's claim that the merger would substantially lessen competition in the cloud-streaming market, given that the FTC failed to show that Activision Blizzard content would be available to this market in the absence of the merger.

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OPINION

COLLINS, Circuit Judge:

The Federal Trade Commission ("FTC") appeals the district court's denial of its motion for preliminary injunctive relief against Microsoft Corporation's acquisition of the video game developer Activision Blizzard, Inc. The merger is the subject of an administrative proceeding that remains pending before the FTC. In its administrative complaint, and in seeking a preliminary injunction in the district court, the FTC asserted that the merger would likely violate § 7 of the Clayton Act, 15 U.S.C. § 18, by substantially lessening competition in various relevant markets. Specifically, viewing the merger as a vertical integration between a content-platform operator and a content producer, the FTC asserted below that competition in what it contended were the relevant U.S.-based content-platform markets (*i.e.*, the markets for gaming console devices, gaming subscription services, and gaming cloud-streaming services) would be substantially lessened. The FTC argued that, under the more lenient standards this court applies to preliminary injunctions sought under § 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), the FTC made an adequate showing of likelihood of success and that the balance of equities favored enjoining the merger. After a lengthy evidentiary hearing, the district court disagreed and denied the preliminary injunction in a detailed opinion. The FTC immediately filed this appeal, and a panel of this court denied the FTC's emergency request for an injunction pending appeal. The merger was subsequently completed shortly after the FTC's reply brief was filed in this court.

We conclude that the district court applied the correct legal standards and that it did not abuse its discretion, or rely on clearly erroneous findings, in holding that the FTC had failed to make a sufficient evidentiary showing to establish the requisite likelihood of success on the merits of its § 7 claim. We therefore affirm.

I

A

Playing video games has become extraordinarily popular, with an estimated three billion or more persons throughout the world regularly playing single-player and multiplayer games. The companies satisfying this demand for gaming include the developers who produce such games and the manufacturers who provide the platforms on which they are played. Many companies perform more than one of these tasks—for example, Microsoft Corporation ("Microsoft") manufactures physical video game consoles (*e.g.*, the "Xbox" console) that can play a variety of games that are loaded into them, and Microsoft also develops and publishes some of its own video games (*e.g.*, *Halo* and *Forza*). Likewise, Nintendo Co. Ltd. ("Nintendo") makes the "Nintendo Switch" game console, and Nintendo is also the first-party developer and publisher of the *Mario* and *Pokémon* game franchises. And Sony Interactive Entertainment ("Sony") manufactures the "PlayStation" gaming console and also publishes games such as *God of War* and *Spider-Man*. Other companies, such as Activision Blizzard Inc. ("Activision Blizzard"), develop and publish games (such as *Call of Duty*) but do not manufacture the devices on which those games would be played. Games developed by device manufacturers such as Microsoft, Sony, and Nintendo are sometimes referred to as "first-party"

games, while games produced by independent developers such as Activision Blizzard are called "third-party" games.

As noted, one of the ways in which video games can be played is by using a physical console that is "designed for, and whose primary use is, to play video games." At present, there are three main manufacturers of gaming consoles, namely, Microsoft (with its Xbox), Nintendo (with its Switch), and Sony (with its PlayStation). Video games can also be played on personal computers ("PCs") or on mobile devices (such as tablets or smart phones), but more sophisticated games may require either consoles or "gaming PCs."

Microsoft introduced its Xbox in 2001, thereby competing with then-established market participants Sony and Nintendo. Over the years, the three major console manufacturers released successive generations of their consoles, with different manufacturers coming out on top across the competing generations. For example, in the United States market, Microsoft's Xbox 360 outsold Sony's PlayStation 3, but Sony won the next generation, with the PlayStation 4 outselling the Xbox One. Currently, the Xbox Series X and the PlayStation 5 have competed since they were both released by their respective manufacturers in November 2020. For the current generation, Xbox ranks third behind PlayStation and Nintendo Switch. In recent years, however, consoles have receded in overall popularity among gamers. Today, more than half of gamers play on mobile devices, with PCs being the next most popular option, ahead of consoles.

To varying degrees, the major console manufacturers have used exclusive content as a means to differentiate themselves in the console market. Some of this exclusivity

is achieved by limiting the availability of a manufacturer's first-party games to its own console. All major manufacturers have engaged in this practice. Microsoft has in recent years released its first-party games exclusively on Xbox and PCs, most of which use Microsoft's Windows operating system. As the district court found, however, Nintendo and Sony "both have significantly higher number of exclusive games on their platform than [Microsoft] does." In particular, the court found that there are approximately "eight exclusive games on [Sony's] PlayStation for every one on Xbox." Sony has also made deals with independent third-party game publishers to get "timed exclusivity," whereby a game would launch first on PlayStation before being released on other platforms. Sony has also paid third-party game developers to skip releasing particular games on Xbox altogether. For example, after Sony had paid for platform exclusivity, a third-party developer released *Final Fantasy XVI* exclusively on PlayStation 5, leaving Xbox with only older versions of *Final Fantasy*.

Over time, the means by which gamers obtain games to be played on their devices has changed. While it was once common for gamers to purchase or rent a physical cartridge, DVD, or disc to play games, most games today are distributed digitally onto the device. Although some games can be played for free, a physical copy or downloaded digital copy of a single standard title normally costs about $70. However, many gamers today rely on digital subscription services rather than the prior "'buy-to-play' model of purchasing the games."

For example, Microsoft launched its subscription service, Xbox Game Pass, in 2017. For a flat monthly fee, Game Pass gives subscribers access on their Xbox console to a large rotating catalog of video games, including

Microsoft's first-party content. Microsoft's CEO has described Game Pass as "Netflix for Games." In 2019, Microsoft made Game Pass available on PCs, thereby allowing gamers to access Game Pass without purchasing an Xbox. Microsoft also offers a higher-tier service called Game Pass Ultimate. Microsoft has generally made all of its first-party content immediately available to Game Pass subscribers on the same day it is released for individual purchase. Although Microsoft thereby loses out on some sales of individual copies that might otherwise have been purchased by subscribers—a phenomenon known as "cannibalization"—any such losses are offset by the fact that, overall, Game Pass subscribers spend more time and consequently more money on games compared to non-subscribers.

Sony offers a competing subscription service with two main tiers—namely, PlayStation Plus Extra and PlayStation Plus Premium. However, unlike Microsoft, Sony does not release its games on PlayStation Plus on the same day that they are released for individual purchase.

Other participants in the market for subscription services include Amazon (which offers Luna+), Electronic Arts (which offers EA Play), and Ubisoft. In late 2020, Microsoft reached an agreement with Electronic Arts to include access to EA Play in Game Pass Ultimate. Game Pass Ultimate also includes access to several Ubisoft games.

Another way in which gamers obtain access to games is through "cloud gaming." In cloud gaming, the game is run on remote servers and streamed to the gamer on his or her device. One of the primary advantages of cloud gaming is that it allows players "to play games on less highly-powered and more affordable devices." While some cloud gaming

services, such as Microsoft's xCloud, offer the ability to play games from a content library, others, such as Nvidia's GeForce Now, use a so-called "bring-your-own-game" model ("BYOG"). In the BYOG model, "users stream individual games that they already own."

The major competitors in cloud gaming are Microsoft's xCloud, PlayStation Plus Premium, Nvidia's GeForce Now, and Amazon's Luna+ and Prime Gaming. At present, Microsoft bundles Game Pass and xCloud, meaning that Game Pass Ultimate subscribers receive access to xCloud as part of their subscription and that it is not possible to use xCloud without subscribing to Game Pass Ultimate. But even as they have become paired with cloud gaming, both Microsoft's Game Pass Ultimate and Sony's PlayStation Plus Premium (Sony's analogous subscription tier) remain available on console and PC.

B

As for independent game developers, they earn revenue in primarily two ways. First, they can sell copies of their games. When a developer sells a game suitable for use on a particular platform, the developer and the platform owner will generally split the revenues from the sale (sometimes referred to as a "royalty split"). Ordinarily, the publisher receives 70% of the revenue, and the platform operator receives 30%. Second, developers can sell content *within* the games (*i.e.*, in-game microtransactions), which is most popular with mobile gaming and free-to-play titles, such as *Overwatch 2* or *Fortnite*.

As noted earlier, video games can be multiplayer or single-player. In single-player games, the gamer plays through the game's built-in narrative, interacting with "non-player characters" as the gamer progresses. In multiplayer

games, by contrast, gamers play with others simultaneously, usually through an online connection. Because multiplayer games involve humans playing against one another, they have an important social component, thereby deepening gamers' connections with each other and the game. Video games can also have both single-player and multiplayer modes; for instance, *Call of Duty* offers a popular online multiplayer component, as well as a single-player option. A limited number of multiplayer games also have so-called "cross play," in which gamers on different platforms can play online with gamers on other platforms.

Of particular importance in the game-development industry are the high-quality games known as "AAA" games. Although the industry has no precise definition of the term, the "AAA" moniker generally refers to games developed at considerable expense to provide a technically sophisticated experience with "cinematic storytelling, immersive environments, and detailed graphics." Because of their technical and narrative complexity, AAA games take a long time to develop, and only a limited supply of approximately 10 to 20 AAA games are released each year. And only a handful of game publishers have the resources to produce multiple AAA games, namely, the so-called "Big 4"—Activision Blizzard, Electronic Arts, Take-Two, and Ubisoft. While these are not the only companies capable of producing AAA games, the Big 4 each offer a suite of AAA games, and they have accounted for a substantial volume of the game sales on Xbox and PlayStation consoles for many years. As a video game executive put the point, "[a]ccess to AAA titles . . . is critical to the success of any gaming platform."

As one of the Big 4, Activision Blizzard is one of the largest game developers in the world. Activision has three

divisions (Activision, Blizzard, and King), each with respective marquee franchises—respectively, *Call of Duty*, *World of Warcraft*, and *Candy Crush*. These three game franchises generated 80% of Activision Blizzard's 2022 revenue. Other Activision Blizzard game series include *Diablo*, *Hearthstone*, *Overwatch*, and *StarCraft*, each with over $1 billion in lifetime revenue. As of December 2022, Activision Blizzard had more than 380 million monthly active users across all of its games.

Activision Blizzard's success is driven in large part by *Call of Duty*, a AAA game and one of the most popular video game franchises of all time. The *Call of Duty* franchise has approximately 100 million monthly active users, of which roughly half play on mobile devices. On any given day, between 7 and 10 million people play *Call of Duty*, according to Activision Blizzard's CEO. Because of its widespread popularity, *Call of Duty* has generated a sizable proportion of Activision Blizzard's total net revenue of $7.5 billion in 2022.

In the United States, a *Call of Duty* game has been the top selling console game every year but one since 2014. The *Call of Duty* series is so popular that, in 2020, different versions of *Call of Duty* were both the first and second best-selling console games in the United States, and in 2021, they were first and third. The district court found that, "with the exception of sports games," *Call of Duty* is "unique among AAA games" in that a new *Call of Duty* title is typically released every year. In addition to its annual releases, the *Call of Duty* franchise also includes the free-to-play *Call of Duty Warzone*, a multiplayer online game that has over 100 million downloads and that generates revenue through in-game microtransactions.

As one of the largest gaming franchises, *Call of Duty* has been important to Sony. Since 2019, tens of millions of unique PlayStation users have played *Call of Duty*, representing a significant percentage of all PlayStation users and accounting for a substantial portion of Sony's overall revenue. This dedicated fan base also spends a substantial amount of time on PlayStation playing *Call of Duty*.

As of the time of the district court's ruling in this case, *Call of Duty* was not available on the Nintendo Switch and was not available on any gaming subscription service or on any cloud gaming service.

Activision Blizzard has other popular AAA franchises in addition to *Call of Duty*. For example, its Blizzard division is known for the *World of Warcraft* franchise, which consists of a multiplayer online roleplaying game. The *World of Warcraft* franchise also includes the popular free-to-play game *Hearthstone*. Among Blizzard's other AAA games are the *Diablo* franchise and *Overwatch 2*, both of which have generated substantial revenue. Activision Blizzard also owns a number of other popular yet dormant franchises, including *Crash Bandicoot* and *Tony Hawk*'s skating games. Activision Blizzard also has a presence in mobile gaming, as it owns *Call of Duty: Mobile*, and King, the creator of *Candy Crush*.

C

On January 18, 2022, Microsoft announced that it would acquire Activision Blizzard for $68.7 billion. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, *see* 15 U.S.C. § 18a, Microsoft reported the planned merger to the FTC on February 1. The FTC then began a lengthy and thorough investigation involving the production of nearly three million documents and 15 investigational hearings. On

December 8, 2022, the FTC filed an administrative complaint against the merger.

Shortly after the FTC filed its complaint, Microsoft entered into binding agreements with console and cloud gaming competitors to ameliorate the concerns of antitrust regulators. In February 2023, Microsoft signed a ten-year agreement with Nintendo to bring future *Call of Duty* titles to Nintendo consoles simultaneously with their release on Microsoft platforms. Thereafter, Microsoft also entered into ten-year agreements with five cloud gaming companies, bringing Activision Blizzard content to platforms where it had previously been absent. Microsoft also made repeated offers to Sony to keep *Call of Duty* on PlayStation for at least ten years, alongside public commitments to the same effect. After this appeal was filed, Sony accepted Microsoft's offer.

While the administrative proceeding was ongoing, the FTC on June 12, 2023 sought a preliminary injunction in the district court under § 13(b) of the FTC Act, 15 U.S.C. § 53(b). The district court held a five-day evidentiary hearing on an expedited basis, given that the merger was set to close on July 18, 2023. On July 10, the district court denied the preliminary injunction, finding that the FTC had "not raised serious questions regarding whether the proposed merger is likely to substantially lessen competition" in the relevant markets. The FTC filed an emergency motion for an injunction pending appeal, and a panel of this court denied that motion on July 14, 2023.

Simultaneously with the U.S. antitrust action, the United Kingdom's Competition and Markets Authority ("CMA") was also reviewing the merger. The CMA's Final Report concluded that, following the merger, "Microsoft would have the ability and incentive to use Activision [Blizzard]'s

content to foreclose current and future rival cloud gaming service platforms and that, as a result, [the merger] may be expected to result in [a substantial lessening of competition] in cloud gaming services in the UK." On August 22, 2023, the CMA issued its final order prohibiting the merger.

However, in response to concessions by Microsoft with respect to streaming rights for Activision Blizzard content, the CMA reversed course and granted final approval to the merger on October 13, 2023. In connection with that approval, Activision Blizzard agreed to divest, to Ubisoft, its cloud-streaming rights outside of the European Economic Area ("EEA") to all current Activision Blizzard games and to all future games released within the next 15 years.[1] As a result, Ubisoft, rather than Microsoft or Activision Blizzard, will control which cloud service or services in the U.S. will have Activision Blizzard games. Moreover, Ubisoft "will not be authorised to license Cloud Streaming Rights to Microsoft or its affiliates on an exclusive basis." Additionally, any non-exclusive license to Microsoft cannot give Microsoft preferential pricing or provide it with "material preferential treatment." As part of the arrangement with Ubisoft, Microsoft is required "to provide Ubisoft with versions of Activision [Blizzard] games that are, with respect to 'quality, content, features and performance[,] . . . the same in all material respects to the non-streaming version[s] of such games.'"

The merger closed on the same day the CMA approved it, *i.e.*, October 13, 2023.

[1] Within the EEA, Microsoft will retain cloud streaming rights to Activision Blizzard games "to comply with its regulatory commitments to the European Commission."

II

"The 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." *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984). While the district court's ultimate decision to deny a preliminary injunction is thus reviewed for abuse of discretion, we review the district court's legal conclusions *de novo* and its factual findings for clear error. *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 969 (9th Cir. 2015).

The FTC's underlying claim in the administrative proceedings is that the merger of Microsoft and Activision Blizzard violates § 7 of the Clayton Act, 15 U.S.C. § 18. *See* Clayton Act § 11, 15 U.S.C. § 21 (granting authority to the FTC, subject to certain exceptions, to directly enforce § 7 of the Clayton Act in administrative proceedings). Section 7 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." *Id.* § 18. The statute is prospective, "requir[ing] 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 . . . § 7 was intended to arrest anticompetitive tendencies in their incipiency." *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (citation omitted). Because a merger's effects cannot be predicted with certainty, the FTC need only show a "reasonable probability that the merger will substantially lessen competition" in any relevant market to prevail on the merits of an underlying § 7 claim. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325

(1962); *see also Warner*, 742 F.2d at 1160 ("It is well established that a section 7 violation is proven upon a showing of reasonable probability of anticompetitive effect.").

In addition to its administrative authorities, the FTC is also authorized, under § 13(b) of the FTC Act, to file suit in a federal district court seeking to preliminarily enjoin any actual or imminent violation of "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b). "Upon 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 district court may grant a preliminary injunction. *Id*. We have held that § 13(b) "places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard" inasmuch as "the Commission need not show irreparable harm to obtain a preliminary injunction." *Warner*, 742 F.2d at 1159. The inquiry under § 13(b) thus focuses on (1) "the likelihood that the Commission will ultimately succeed on the merits"; and (2) the "balance [of] the equities." *Id.* at 1160. The district court concluded that both of these factors weighed against issuing a preliminary injunction. As we explain in the ensuing sections, we affirm based solely upon the likelihood-of-success factor.

III

In addressing the likelihood-of-success factor under § 13(b) of the FTC Act, we have stated that the FTC "meets its burden if it 'raise[s] 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 (quoting *FTC v. National Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979)) (alteration in original). The question, then, is whether the district court abused its discretion in concluding that the FTC had failed to raise sufficiently serious and substantial questions on the merits of its Clayton Act § 7 claim to support preliminary injunctive relief. Viewed through the lens of the FTC's burden under § 7, the question under § 13(b) is whether the FTC's evidentiary showing raised sufficiently serious and substantial questions as to a "reasonable probability that the merger will substantially lessen competition" in any relevant market. *Brown Shoe*, 370 U.S. at 325; *see also United States v. Anthem, Inc.*, 855 F.3d 345, 368 (D.C. Cir. 2017) (noting that a finding of substantial anticompetitive effects in any one market "provides an independent basis for the injunction").

Here, the district court either agreed with, or assumed *arguendo* the correctness of, the FTC's contentions as to the relevant product and geographic markets. Specifically, the district court agreed with the FTC's definition of the "primary market" as the "high-performance console market," and the court also accepted, for purposes of the preliminary injunction inquiry, the FTC's assertion that Nintendo's Switch was too different from the Xbox and PlayStation to be included in this market. The district court further assumed, "without deciding," that "the FTC's additional markets of the multigame content library subscription services [market] and [the] cloud gaming [market]" were "each their own product market when considered singly or in combination." As to the geographic scope of the relevant product markets, the district court agreed with the FTC that the relevant geographic market for high-performance consoles is the United States, and the

court "assume[d] without deciding" that the United States is also the relevant geographic market for "multigame content library subscription services and cloud gaming." The district court ultimately held, however, that the FTC had "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."

At the outset, the FTC points to various phrases used in the district court's opinion, and it argues that those phrases confirm that the district court fundamentally misunderstood the scope of the inquiry in a § 13(b) action seeking a preliminary injunction against an asserted § 7 violation. According to the FTC, rather than focus only on whether the FTC had raised "*serious questions*" about whether there was a "'*reasonable likelihood*' of a substantial lessening of competition in a relevant market," the district court instead required the FTC to *prove* the underlying merits of its § 7 claim—*i.e.*, that competition "*would probably* be substantially lessened" (emphasis altered). We reject this contention.

As the FTC concedes, the district court preceded its substantive discussion of the FTC's likelihood of success with a recitation of the "proper Section 13(b) standard," which is that the FTC's burden is to "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. At the end of its analysis of the likelihood-of-success factor, the district court framed its conclusion by again using *Warner*'s language in stating that "the FTC has not raised serious questions regarding whether the proposed merger is likely to substantially lessen competition" in one

of the relevant markets. Despite the fact that the district court thus expressly framed its analysis, both at the beginning and the end, in terms of the correct § 13(b) "serious questions" preliminary-injunction standard, the FTC points to other sentences in the district court's opinion that discuss the likelihood of success on the merits without repeating the "serious questions" phrase. But the fact that the district court did not repeat this phrase, or some equivalent, every time it made an observation about the FTC's showing on the substantive merits of its § 7 claim does not mean that the district court thereby ignored the overlay that § 13(b) provides in the context of a preliminary injunction motion.[2] Our task is not to flyspeck, out-of-context, isolated phrases in a comprehensive opinion that was issued only four weeks after the FTC filed its time-sensitive emergency motion and that resolves highly complex issues against the backdrop of a voluminous factual record. Rather, in assessing whether the district court applied the wrong legal standards, we review that order as a whole, and in context. Viewing the order that way, we are confident that the district court adhered to, and applied, the *Warner* standard.

The FTC nonetheless argues that the district court departed from the *Warner* standard because the court ruled against the FTC even though the court acknowledged that "at best 'the record contains conflicting evidence on the anticompetitive effects of the merger.'" According to the

[2] In this opinion, we too will not repeatedly use, in every merits-related statement, the cumbersome phrasing that would more precisely capture the relevant application of § 13(b)'s "serious questions" standard under *Warner* and the "reasonable probability" standard applicable to the underlying merits under § 7. Our analysis, however, must be understood as staying within the applicable legal framework that we have set forth.

FTC, that was error because, once the district court identified "conflicting evidence," it was bound to find serious questions going to the merits and was therefore required to hold that the FTC met its burden of showing the requisite likelihood of success. The district court thus committed legal error, the FTC argues, by "resolv[ing] evidentiary conflicts" based "on a preliminary record." This argument profoundly misconceives the applicable § 13(b) standards under *Warner*.

The FTC relies on *Warner*'s statement that, when this court reviews the denial of a preliminary injunction, "we do not resolve the conflicts in the evidence," but merely assess whether the government has presented "evidence sufficient to raise 'serious, substantial, difficult' questions regarding the anticompetitive effects of the proposed joint venture." *Warner*, 742 F.2d at 1164 (citation omitted). But we did not thereby suggest that *no* factual findings may be made in the course of deciding a preliminary injunction motion under § 13(b). Rather, as an earlier comment in the opinion in *Warner* made clear, we should not purport to "make a *final determination* on whether the proposed merger violates Section 7, but rather to make only a *preliminary assessment* of the merger's impact on competition." *Id*. at 1162 (emphasis added). That "preliminary assessment"—*i.e.*, whether the FTC has raised "serious questions" concerning the merits of its § 7 claim—may properly rest upon pertinent factual findings bearing upon whether that showing has been made. We acknowledged as much in *Warner*, because we recognized that we ordinarily must "accord the *usual deference to the district court's findings* regarding relevant market, market concentration and barriers to entry," and that we were relieved of that obligation in *Warner* only because the district court's findings in that case "were improperly

based" on materials that the court should not have considered. *Id*. (emphasis added); *see also FTC v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999) (holding that the "clearly erroneous" standard applies to review of a district court's "factual findings" in a decision granting a § 13(b) preliminary injunction). Just because we concluded that the district court's findings in *Warner* were flawed does not mean that it is categorically inappropriate for district courts to make factual findings in all other cases.

Indeed, the FTC's position—*viz*., that *every* factual dispute should be resolved in its favor when it requests a preliminary injunction under § 13(b)—ignores the settled principle that a preliminary injunction remains "an extraordinary and drastic remedy" that must be affirmatively justified by the FTC. *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (citation omitted). The FTC's proposed construe-everything-my-way standard is more suited for defending against a summary-judgment dismissal of claims than it is for obtaining provisional affirmative injunctive relief.

IV

We turn, then, to whether the district court abused its discretion, or relied on clearly erroneous factual findings, in concluding that the FTC had "not raised serious questions" going to the merits of its § 7 claim.

Although Microsoft contends that the district court's market definitions were flawed in certain respects, it also argues that, even accepting these definitions *arguendo*, the district court correctly concluded that the FTC's showing as to a likelihood of success on the merits was deficient as to each such market. Because we ultimately agree with the latter argument, we have no occasion to consider whether the

district court's definitions of the relevant markets were correct, and we instead assume *arguendo* that they were. We therefore address, with respect to each relevant market, whether the district court abused its discretion in concluding that the FTC made an insufficient showing on the merits of its § 7 claim.

A

At the evidentiary hearing in the district court, the FTC's primary focus was on the high-performance console market. More specifically, the FTC's main theory was that, in light of the enormous popularity of *Call of Duty*, Microsoft would be expected to make it exclusive to Xbox after the merger, thereby causing gamers to defect from PlayStation to Xbox and substantially lessening competition in the console market. According to the FTC, Microsoft's incentive lies in the fact that such an exclusivity arrangement would lead to increased sales of Xbox consoles and associated derivative revenue that would well make up for any loss on *Call of Duty* sales to PlayStation users. Because "the diminution of the vigor of competition which may stem from a vertical arrangement results primarily from a foreclosure of a share of the market otherwise open to competitors," *Brown Shoe*, 370 U.S. at 328, the FTC argues that excluding *Call of Duty* from PlayStation would substantially lessen competition by "leav[ing] consumers with fewer or worse options in the console market."

After an extensive evidentiary record was developed, including the testimony of several witnesses at a five-day evidentiary hearing, the district court concluded that the FTC had failed to make a sufficient showing to support a preliminary injunction on the agency's theory that Microsoft would "foreclose" rivals by making *Call of Duty* exclusive

to Xbox. The district court acknowledged that Microsoft would obviously have the *ability* to foreclose rivals in that, after the merger, it would own and control the rights to *Call of Duty*. But the court was not persuaded that, taking into account the likelihood-of-success standard under § 13(b), the FTC had sufficiently shown that Microsoft had the *incentive* to foreclose with respect to *Call of Duty* and that there was a reasonable possibility that Microsoft might do so. We discern no abuse of discretion in that conclusion and no clear error in the findings that underlie it.

In particular, the district court found that Microsoft would be highly unlikely to withdraw *Call of Duty* from PlayStation, given that "*Call of Duty*'s cross-platform play is critical to its financial success." As explained earlier, *Call of Duty* has a very popular multiplayer component, which allows gamers to play with others across devices. Removing *Call of Duty* from PlayStation would destroy the communities of players that have built up around the multiplayer aspect, particularly given the undisputed evidence that there are significantly more *Call of Duty* players on PlayStation than on Xbox. Indeed, at the hearing, the CEO of Activision Blizzard testified that the company's *Call of Duty* revenues from PlayStation "are probably twice the Xbox revenues." The district court also noted that, in addition to losing very substantial revenue from such PlayStation gamers, Microsoft would be expected to experience serious "reputational harm" if it pulled *Call of Duty* from PlayStation and thereby blocked millions of PlayStation gamers' access to the game.

Moreover, the district court emphasized that the FTC had "not identified any instance in which an established multiplayer, multi-platform game with cross-play . . . has been withdrawn from millions of gamers and made

exclusive." In this respect, the district court considered the evidence concerning Microsoft's prior acquisitions of two game publishers, Mojang and ZeniMax. With respect to Microsoft's acquisition of ZeniMax, the FTC pointed out that, notwithstanding Microsoft's reassurances to regulators that it would have strong incentives to keep ZeniMax content on other platforms, after the merger, "Microsoft made future ZeniMax content—including AAA titles like *Starfield*, *Redfall*, and *Elder Scrolls VI*—exclusive to its platforms." However, the district court permissibly concluded that the FTC's reliance on the ZeniMax acquisition was inapt, because Microsoft's exclusionary behavior regarding the post-merger ZeniMax games did not involve *withdrawing* existing multiplayer, cross-platform games from PlayStation.

The much more pertinent example, the district court held, was Microsoft's treatment of *Minecraft* after acquiring its publisher, Mojang. *Minecraft* "includes a popular multiplayer mode and has produced a large community across platforms." Unsurprisingly, then, Microsoft "continued to ship *Minecraft* on all those same platforms post-acquisition." Microsoft's actions vis-à-vis *Minecraft*, the court concluded, better "exemplifie[d] how a console seller (and Microsoft in particular)" could be expected to behave "when acquiring a hugely popular multiplayer cross-platform game."

Against this backdrop, the district court also noted that, despite exhaustive discovery involving "nearly 1 million documents and 30 depositions, the FTC ha[d] not identified a single document which contradicts Microsoft's publicly-stated commitment to make *Call of Duty* available on PlayStation (and Nintendo Switch)." Reviewing the assembled record, the district court concluded that the

evidence of Microsoft's actions and internal discussions was all consistent with its stated intention to continue to make *Call of Duty* available on PlayStation. In particular, the district court noted that Microsoft's internal model evaluating the value of the Activision Blizzard purchase affirmatively "relie[d] on PlayStation sales and other non-Microsoft platforms post-acquisition" and did "not rely on increased sales of Xbox consoles for any reason, let alone caused by foreclosing *Call of Duty* from PlayStation." In response, the FTC points to one set of internal documents in which Microsoft modeled whether, post-merger, it could recoup lost revenue from *Call of Duty* sales on PlayStation. But this model was based not on a plan to remove *Call of Duty* from PlayStation but rather on a hypothetical where Sony demanded a higher platform fee (*i.e.*, royalty split) from having *Call of Duty* on PlayStation. Because even this internal model affirmatively assumed that *Call of Duty* would remain on PlayStation, it does not support an inference that Microsoft intended to make *Call of Duty* exclusive to Xbox.

While noting that Microsoft's internal documents were consistent with its public statements that Microsoft did not plan to pull *Call of Duty* from PlayStation consoles, the district court also appropriately recognized that such internal deal valuation analyses are "not dispositive of the incentive question," particularly given Microsoft's statements and behavior before and after the ZeniMax acquisition. But we cannot say that the district court abused its discretion in concluding that, when considered together with the other record evidence, these internal documents and external statements provided further support to what the overwhelming weight of the evidence already showed—

namely, that Microsoft lacked any incentive to remove *Call of Duty* from PlayStation.[3]

For the foregoing reasons, we conclude that the district court did not abuse its discretion in holding that the FTC had not made the requisite showing of a likelihood of success on its claim that Microsoft might make *Call of Duty* exclusive to Xbox after the merger. We therefore do not rely on an additional point that was cited by the district court—namely, "Microsoft's written offer to Sony to offer PlayStation *Call of Duty* on parity with Microsoft for 10 years, including on future PlayStation consoles." The district court expressly stated that this additional point was "not necessary" to its ruling on the likelihood-of-success issue, and we likewise find it unnecessary to address that point in reviewing that ruling. We therefore have no occasion to consider whether the FTC is correct in contending that contemplated post-merger arrangements constitute "proposed remedies" that

[3] The district court also exhaustively analyzed the evidence and testimony presented by the FTC's expert, Dr. Robin Lee, who sought to establish Microsoft's incentive to make *Call of Duty* exclusive by using a model that he claimed showed that Microsoft would more than make up for lost PlayStation *Call of Duty* revenue by substantially increasing its position in the console market. The district court noted that Dr. Lee's model depended critically on the assumed "Xbox conversion rate," *i.e.*, the rate at which PlayStation users "would purchase an Xbox console to play *Call of Duty* 2025 if it was not available on PlayStation." In particular, if the conversion rate was only slightly lower than Dr. Lee's assumed 20% rate, Dr. Lee's own model would show net *losses* from making *Call of Duty* exclusive. In addition, over several pages, the district court carefully explained why Dr. Lee's assumed 20% conversion rate was unsupported and speculative. The FTC's opening brief makes no effort to address this detailed analysis or to explain why it is wrong, and it instead presents such an analysis for the first time in its reply brief. We therefore deem any argument challenging the district court's discounting of Dr. Lee's report to be forfeited. *See Warfield v. Alaniz*, 569 F.3d 1015, 1028 n.9 (9th Cir. 2009).

should not be considered when courts assess the FTC's likelihood of success on an underlying Clayton Act § 7 claim for purposes of a preliminary injunction under FTC Act § 13(b).

The district court also rejected the FTC's alternative argument that it had adequately shown that Microsoft would have the incentive to engage in what the FTC characterized as "partial foreclosure" with respect to *Call of Duty*—that is, to disfavor PlayStation by, for example, releasing only an inferior version of the game on PlayStation or by releasing new versions of the game later on PlayStation than on Xbox. The FTC argues that the district court erred in concluding that, "[i]f 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." We agree that the mere fact that a company does not have a financial incentive to engage in full foreclosure does not, without more, establish that it similarly lacks an incentive to engage in partial foreclosure. But the district court also separately held, in addition, that the FTC presented insufficient evidence to support its partial foreclosure theory, and we discern no abuse of discretion in that holding.

In particular, the district court noted that there was record evidence that no game developer had ever "intentionally develop[ed] a 'subpar game for one platform versus another,'" because it would lead to a significant loss of goodwill among gamers. The court also stated that "the record does not include any evidence Microsoft has engaged in such conduct in the past—even with Sony." Indeed, the court observed that even Sony's CEO had testified that "publishers have every incentive to provide an equal gaming experience or as good a gaming experience as possible on all platforms." On appeal, the FTC points to testimony

concerning Microsoft's favoring of Xbox vis-à-vis *Starfield* and *Redfall* after the ZeniMax merger, which assertedly shows that Microsoft may well engage in partial foreclosure by delaying introduction of games on other platforms. The FTC also suggests that Sony may itself cause a form of partial foreclosure to occur by delaying sharing with Microsoft, post-merger, the competitively sensitive development kits necessary to introduce Activision Blizzard games on future versions of Sony's consoles. But the district court permissibly concluded that, absent "expert testimony" addressing the competitive impact of such feared partial disclosure practices, the FTC simply failed to raise serious questions as to whether there was a reasonable possibility that Microsoft would actually have an incentive to engage in such conduct with respect to a well-established multiplayer, multi-platform game such as *Call of Duty*.

To the extent the FTC argues that Microsoft would have an incentive, after the merger, to make "*other* Activision titles exclusive to Xbox"—*i.e.*, titles other than *Call of Duty*—the district court did not abuse its discretion in concluding that the FTC had failed to show that such exclusivity might substantially lessen competition in the console market. The mere fact that, after a vertical merger, a company might make some of its newly acquired intellectual property exclusive to its platforms does not, without more, show a substantial lessening of competition. *Cf. Fruehauf Corp. v. FTC*, 603 F.2d 345, 352 n.9 (2d Cir. 1979) (rejecting assumption that "any vertical foreclosure lessens competition"). It is in the nature of intellectual property rights that the holder ultimately has exclusive control over them, *see Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1215 (9th Cir. 1997), and the question under § 7 is whether there is a reasonable

probability that, if Microsoft acquires such exclusivity rights with respect to the relevant intellectual property, Microsoft will exercise such rights in a manner that *substantially lessens competition* in the pertinent market, *i.e.*, the console market. In the context of a vertical merger, that requires something more than merely showing that some of the rights acquired will be made exclusive. *Cf. United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (holding that, to carry its burden under § 7 for a vertical merger, the Government "must make a 'fact-specific' showing that the proposed merger is 'likely to be anticompetitive'" (citation omitted)). The FTC itself seemed to recognize as much, because it tried to affirmatively establish a substantial lessening of competition from an exercise of exclusivity with respect to *Call of Duty*, but the district court permissibly concluded that the FTC had failed in that endeavor. On this record, the district court did not abuse its discretion in further holding that the FTC had not made a sufficient affirmative showing of a substantial lessening of competition with respect to the exclusivity of *other* titles in the console market.

Finally, the FTC contends that the district court failed to adequately consider whether the FTC had made a sufficient "alternative" showing of a substantial lessening of competition in the console market under the framework set forth in *Brown Shoe*, apart from the "ability and incentive to foreclose" analysis that the district court employed. According to the FTC, *Brown Shoe* sets forth a multi-factor analysis for assessing the competitive impact of a proposed vertical merger, and the district court did not give adequate consideration to all of the relevant factors. But as the FTC's own opening brief makes clear, the competitive significance of the various factors invoked by the FTC—such as the

extent of any foreclosure, the purpose and nature of the merger, the effect of the merger on barriers to entry, and the effect on industry concentration tendencies—ultimately turns, in the context of the record evidence in this case, on the FTC's central premise *that Microsoft will engage in foreclosure*. Accordingly, even if *Brown Shoe* leaves open alternative ways to establish a lessening of competition that do not rely on foreclosure, the FTC did not meaningfully rely on *evidentiary proof* of any such "alternative" theory of a substantial lessening of competition in the proceedings below. The district court therefore properly held that the FTC's supposedly alternative *Brown Shoe* theory did not in fact "make any new arguments not considered" by the court in its analysis of the likelihood and competitive impact of potential foreclosure on the console market.

B

The FTC also challenges the district court's holding that the FTC had not made an adequate showing that the merger would substantially lessen competition in the library subscription services market. We discern no abuse of discretion.

We first address the FTC's foreclosure-based theory in this market. In contrast to its conclusions with respect to the console market, the district court accepted, "for preliminary injunction purposes," that "it is likely *Call of Duty* will be offered exclusively on Game Pass, and *not* offered on rival subscription services" (emphasis added). The court thus started from the premise that Microsoft would have both the ability *and* the incentive to exercise exclusivity rights with respect to *Call of Duty* and other Activision Blizzard content in the subscription market. The district court nonetheless concluded that, because Activision Blizzard had long

opposed putting its content on subscription services, the merger's effect of making such content available for the first time in the subscription market, even if exclusive to Microsoft, would not substantially lessen competition.

The FTC derides the district court's reasoning as an improper "efficiencies defense" to an otherwise-established "prima facie case." *Cf. St. Alphonsus*, 778 F.3d at 788–90 (expressing skepticism about the validity of such a defense). But this argument rests on the premise that, merely by showing that Activision Blizzard content would be exclusive to Microsoft's subscription services after the merger, the FTC sufficiently established a prima facie case that competition would be substantially lessened in that market. We disagree. As we have explained, and as the district court noted, merely showing that some content will be exclusive after a vertical merger does not, without more, establish as a factual matter that competition will be substantially lessened. *See supra* at 30–31. The paradigmatic premise of harm to competition from a vertical merger is that it will lead to "foreclosure of a share of the market *otherwise open to competitors*." *Brown Shoe*, 370 U.S. at 328 (emphasis added). In the unusual circumstances presented here, in which Activision Blizzard as an independent company had persistently resisted allowing its content to be included in subscription services, making Activision Blizzard content exclusive to Microsoft's subscription services would not foreclose a share of the subscription market "otherwise open to competitors." Because this vertical merger would not be expected to result in "foreclosure" in the traditional sense of that term, the district court properly required the FTC to provide more evidence that this vertical merger would harm competition.

The FTC argues that it did sufficiently show that Activision Blizzard's content would eventually be available to subscription services in the absence of the merger, but we conclude that, in holding otherwise, the district court did not abuse its discretion or rely on clearly erroneous findings. The FTC points to testimony from Activision Blizzard's CEO acknowledging that no "formal decision" had been made "never" to offer the company's games on a subscription service; that Activision had engaged in discussions with Microsoft about putting its games on Game Pass but was unable to come to satisfactory terms; and that it was "possible" that its concerns about such arrangements could be addressed. The FTC also points to evidence showing that some Activision Blizzard titles had been included in subscription services in the past. But the district court permissibly concluded that, when considered in light of the record as a whole, such evidence did not sufficiently show that, in the absence of the merger, Activision Blizzard's content would be available to Microsoft's competitors in the subscription market. Specifically, the record evidence strongly supports the district court's finding that Activision Blizzard had persistently concluded that, so long as it was an independent company, its financial interests would not be served by allowing its content to be included in a multi-game subscription service.

Activision Blizzard's CEO testified that concerns about "cannibalization"—*i.e.*, a net loss of revenue from replacing sales to individual gamers with subscription access to those games—played a role in this long-held view and that, based on his experience, he did not "think that there is a circumstance where a company could ever offer us a commercial arrangement [concerning subscription access] . . . that would make sense" for Activision as a stand-alone

company. Indeed, Sony's CEO testified that he did not even try to ask Activision Blizzard to put *Call of Duty* on Sony's subscription service, because its CEO "had been very public and very vocal that he did not see that as a route he wanted to take Activision." The mere fact that Activision Blizzard's CEO could not say that a satisfactory arrangement would *never* occur did not require the district court to conclude that the FTC had sufficiently shown that Activision Blizzard's content might actually be available, absent the merger, in the subscription market. Nor was a contrary conclusion required by the limited evidence showing that some Activision Blizzard games had been included in subscription services in the past. The company's CEO had explained that such occasional arrangements had been done on an "experimental or promotional[] basis" or by using a "very old catalog title for a short period of time."

As with its earlier *Brown Shoe* argument in the console market, the FTC alternatively contends that, even if the merger would not result in foreclosure in the traditional sense of that term in the subscription market, the merger still "would allow Microsoft to seriously disadvantage its rivals" in that market, where it already is a market leader, thereby resulting in a substantial lessening of competition. In support, the FTC relies on Dr. Lee's report, but the district court properly concluded that Dr. Lee had failed to substantiate his largely conclusory assertions on this score. As the district court explained, Dr. Lee "did not perform any quantitative analysis" to determine how Microsoft's exclusive access to Activision Blizzard content in the subscription services market would "affect competition with Game Pass competitors such as Amazon, Electronic Arts, Ubisoft and Sony." To be sure, academics have posited, for example, that vertical mergers, particularly between content

platforms and content creators, may lead to scenarios in which costs to competing platforms rise, leading to higher prices on those platforms and hampering competition overall. *See* HERBERT HOVENKAMP, PRINCIPLES OF ANTITRUST § 9.4 at pp. 383–86 (2d ed. 2021). But in the context of a vertical merger, the FTC cannot rely on intuition, theory, or other "short cut[s]" to carry its ultimate burden under § 7; rather, it "must make a 'fact-specific' showing that the proposed merger is 'likely to be anticompetitive.'" *AT&T*, 916 F.3d at 1032 (citation omitted). And even when that ultimate burden is viewed through the lens of § 13(b)'s more lenient standard for assessing likelihood of success on the merits, the FTC still must come forward with evidence to make a sufficient showing as to the anticipated effect of this particular merger and how it would substantially lessen competition. The district court permissibly concluded that, as to the subscription market, the FTC simply failed to do so.

C

For reasons similar to those just discussed with respect to the subscription market, we also conclude that the district court did not abuse its discretion in finding an insufficient likelihood of success as to the cloud-streaming market.[4]

As with the subscription market, the district court held that the FTC had failed to make a sufficient showing that Activision Blizzard content would be available to the cloud-streaming market in the absence of the merger. Although

[4] The parties vigorously dispute whether we may consider the conditions imposed on Microsoft with respect to the cloud streaming market by British authorities in their approval of the merger in October 2023—*i.e.*, after the FTC had already filed this appeal. *See supra* at 15–16. We find it unnecessary to resolve this issue because, even without considering those conditions, we conclude that the district court did not err.

Activision Blizzard had allowed some titles, including some versions of *Call of Duty*, to be available on Nvidia's GeForce Now streaming platform during Nvidia's "beta test," Activision Blizzard "instructed Nvidia to remove Activision Blizzard games from GeForce Now" in February 2020 when Nvidia "transitioned from the beta stage to a commercial version of GeForce Now" (capitalization altered). Since then, as the district court noted, Activision Blizzard content "has not been on a cloud-streaming service." Moreover, in the limited streaming that Activision Blizzard had allowed during Nvidia's beta testing, gamers "had to own the game." Because the gamers had to already own the Activision Blizzard game in order to stream it on this beta-testing system, that limited use of streaming did not present the sort of "cannibalization" concerns that stand-alone streaming access would.

The FTC points to no other evidence that Activision Blizzard had ever allowed its games to be included in streaming services, and the company's CEO testified that Activision Blizzard did not view streaming, economically, as a "big opportunity for the company." Although the FTC again notes that Activision Blizzard had not concluded that, as an independent company, it would "never" allow its games onto a streaming service and that Activision Blizzard was in conversation with Nvidia on that subject at the time the merger was announced, we cannot say that the district court abused its discretion in concluding that the FTC's evidentiary showing on this point was simply too weak. Because the FTC failed to make an adequate showing that, absent the merger, Activision Blizzard's content would be "otherwise open to competitors" in the streaming market, *Brown Shoe*, 370 U.S. at 328, it failed to show a sufficient

likelihood of success as to its foreclosure-based theory of a substantial lessening of competition.

The FTC again argues that, even apart from its theory of alleged foreclosure of otherwise available content, the FTC has also shown that Microsoft's potential exclusive access to Activision Blizzard's content in the streaming market could be so advantageous that it would substantially harm competition and lead to "higher prices, lower quality, less product variety, and reduced innovation." But on this point, the FTC once again relies on the same sort of conclusory assertions by Dr. Lee that were discussed earlier with respect to the subscription market, and the district court permissibly found these assertions to be inadequate to carry the FTC's burden.

For these reasons, we hold that the district court did not abuse its discretion in concluding that the FTC had not shown a sufficient likelihood of success on its § 7 claim with respect to the cloud-streaming market.[5]

V

Given the FTC's failure to make an adequate showing as to its likelihood of success on the merits as to any of its theories, the district court properly denied the FTC's motion for a preliminary injunction on that basis. We therefore do not address the district court's alternative holding that, even

[5] We therefore find it unnecessary to address whether the FTC's foreclosure-based theory fails for the additional reason that Microsoft entered into post-merger contracts allowing certain Activision Blizzard content to be available on competing cloud-streaming services. The FTC again argues that such post-merger agreements are relevant only to "remedies" and cannot be considered at this stage, but, as before, *see supra* at 28–29, we need not decide this point.

if the FTC had made a sufficient showing, the balance of equities did not favor a preliminary injunction.

AFFIRMED.