

1 James H. Weingarten, DC Bar No. 985070  
 Peggy Bayer Femenella, DC Bar No. 472770  
 2 James Abell, DC Bar No. 990773  
 Cem Akleman, FL Bar No. 107666  
 3 Meredith R. Levert, DC Bar No. 498245  
 Jennifer Fleury, NY Bar No. 5053178  
 4 James Gossmann, DC Bar No. 1048904  
 Federal Trade Commission  
 600 Pennsylvania Avenue, NW  
 5 Washington, DC 20580  
 Tel: (202) 326-3570  
 6 *jweingarten@ftc.gov; pbayer@ftc.gov;*  
*jabell@ftc.gov; cakleman@ftc.gov;*  
 7 *jfleury@ftc.gov; mlevert@ftc.gov;*  
*kgossmann@ftc.gov*

8 Erika Wodinsky, Cal. Bar No. 091700  
 9 90 7th Street, Suite 14-300  
 San Francisco, CA 94103  
 10 Tel: (415) 848-5190  
*ewodinsky@ftc.gov*

11 [Additional counsel identified on signature page in accordance with Local Rule 3-4(a)(1)]

12 Attorneys for Plaintiff Federal Trade Commission

13  
 14 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 15 **SAN FRANCISCO DIVISION**

16 **FEDERAL TRADE COMMISSION,**

17 Plaintiff,

18 v.

19 **MICROSOFT CORP.**

20 and

21 **ACTIVISION BLIZZARD, INC.,**

22 Defendants.

Case No. 3:23-cv-2880

**PLAINTIFF FEDERAL TRADE  
 COMMISSION'S FINAL PROPOSED  
 FINDINGS OF FACT AND  
 CONCLUSIONS OF LAW**

**REDACTED VERSION OF DOCUMENT  
 SOUGHT TO BE SEALED**

**TABLE OF CONTENTS**

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

I. BACKGROUND ..... 15

    A. Gaming is the Largest Category in the Entertainment Industry, and It Continues to Grow ..... 16

    B. Console Gaming..... 18

        1. PlayStation and Xbox are Fierce Competitors, and Nintendo is Differentiated.. 19

        2. Console Gaming is Distinct from PC and Mobile Gaming ..... 28

            a) PC Gaming Is Distinct..... 28

            b) Mobile Gaming Is Distinct..... 31

    C. Multi-Game Content Subscription Services ..... 33

    D. Cloud Gaming Subscription Services ..... 35

    E. A Gaming Platform Must Offer AAA Content to Succeed ..... 40

        1. The Industry Has a History of Consolidation ..... 42

        2. A Small Group of Top AAA Games Is Particularly Important ..... 44

        3. AAA Games are Difficult and Costly to Make..... 46

    F. Exclusive Gaming Content is Important for Attracting Customers and Driving Sales ..... 47

    G. Activision Content is Particularly Important ..... 52

    H. Microsoft Has a History of Making Content from Acquired Studios Exclusive. 58

II. RELEVANT MARKETS ..... 58

    A. High-Performance Consoles Constitute a Relevant Product Market..... 58

    B. Video Game Consoles Also Constitute a Relevant Market ..... 67

    C. Multi-Game Content Subscription Services Constitute a Relevant Product Market ..... 69

    D. Cloud Gaming Subscription Services Constitute a Relevant Product Market..... 73

    E. Multi-Game Content Subscription Services and Cloud Gaming Subscription Services Together Constitute a Relevant Product Market ..... 80

    F. The Relevant Geographic Market Is the United States..... 82

        1. Game Prices and Releases Vary Country-by-country, Supporting the Ability of Market Participants to Price Discriminate ..... 82

        2. Gamer Preferences and Behavior Vary Country-by-country and Inform Market Participants’ Strategic Decisions ..... 85

III. RELATED PRODUCT ..... 86

    A. Activision Content Is an Important Input that Drives Acquisition, Engagement, and Retention ..... 86

1 **IV. THE PROPOSED ACQUISITION IS LIKELY TO RESULT IN A**  
**SUBSTANTIAL LESSENING OF COMPETITION..... 91**

2 A. Microsoft Would Have the Ability to Foreclose Rivals in the Relevant Markets  
3 ..... 91

4 B. Unlike an Independent Activision, the Combined Firm Would Have an Incentive  
5 to Foreclose in the Relevant Markets..... 93

6 1. The Combined Firm Will Have an Increased Incentive to Foreclose in High-  
7 Performance Consoles and Video Game Consoles..... 93

8 2. The Combined Firm Will Have an Increased Incentive to Foreclose in Content  
9 Subscription Services and Cloud Gaming Services..... 102

10 3. Microsoft’s Deal Model Predicted Recoupment of Losses ..... 108

11 4. The Combined Firm Will Have Decreased Incentive to Collaborate on  
12 Innovations in the Relevant Markets ..... 110

13 C. Microsoft’s Past Statements and Actions Demonstrate Microsoft has the Ability  
14 and Incentive to Foreclose Rivals Post-Acquisition ..... 112

15 1. Microsoft is Willing to Lose Money on First-party Exclusive Titles and Treat  
16 Them as a “Loss Leader.” ..... 112

17 2. Past Acquisitions..... 114

18 3. ZeniMax ..... 116

19 4. *Minecraft* is Not Predictive of Microsoft’s Behavior Here ..... 125

20 5. Current First Party Games ..... 129

21 D. The Proposed Acquisition is Likely to Harm Competition ..... 130

22 1. The Proposed Acquisition is Likely to Result in Competitive Harm in the Market  
23 for High-Performance Consoles and Video Game Consoles..... 130

24 2. The Proposed Acquisition is Likely to Result in Competitive Harm in Content  
25 Subscription Services and Cloud Gaming Services..... 133

26 3. The Proposed Acquisition is Likely to Harm Innovation ..... 138

27 E. Respondents Cannot Rebut Complaint Counsel’s Prima Facie Case Showing the  
28 Proposed Acquisition Would Result in Competitive Harm..... 142

1. Respondents Cannot Demonstrate that Entry or Expansion would be Timely,  
Likely, or Sufficient to Prevent Harm from the Proposed Acquisition ..... 142

a) Entry into Consoles Markets is Unlikely to be Timely, Likely, or Sufficient to  
Reverse the Likely Harm of the Proposed Transaction..... 142

b) Entry or Expansion into the Broader Content and Cloud Services Market, and  
the Content Library Services Market and Cloud Gaming Services Market—is  
Unlikely to be Timely, Likely, or Sufficient to Reverse the Likely Harm of the  
Proposed Transaction ..... 144

2. Defendants Cannot Show Efficiencies or Procompetitive Benefits that Negate  
Competitive Harm..... 146

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

F. Microsoft’s Recently Executed or Proposed Agreements Fail to Replace the Competitive Intensity Likely to Be Lost from the Proposed Acquisition. .... 152

**V. PROPOSED CONCLUSIONS OF LAW** ..... 163

A. The FTC Is Likely to Succeed on the Merits of Its Section 7 Challenge ..... 167

B. High-Performance Consoles, Multi-Game Content Library Subscription Services, and Cloud Gaming Subscription Services Are Relevant Markets ..... 172

1. The Relevant Markets Satisfy the *Brown Shoe* Practical Indicia ..... 175

2. The Relevant Markets Satisfy the HMT ..... 176

3. Harm is Also Likely to Occur in Broader Relevant Product Markets ..... 176

C. The United States is the Relevant Geographic Market..... 177

D. Activision’s Gaming Content Is a Related Product to the Relevant Markets.... 178

E. The Proposed Acquisition Has a Reasonable Probability of Substantially Lessening Competition in the Relevant Markets ..... 179

1. Foreclosure of Microsoft’s Rivals in the Relevant Markets ..... 179

2. Harm to Innovation in the Relevant Markets..... 184

F. Defendants Fail to Meet their Burden to Show Entry Will Be Timely, Likely, and Sufficient to Counteract the Competitive Harm from the Proposed Acquisition ..... 185

G. Defendants Fail to Meet their Burden to Demonstrate That Their Proposed Efficiencies and Any Other Alleged Procompetitive Benefit Offset the Competitive Harm..... 186

H. Proposed Remedies Are of Questionable Relevance in a § 13(b) Proceeding .. 190

I. Temporary Relief to Preserve the Status Quo is in the Public Interest..... 193

**EXECUTIVE SUMMARY**

- i. Microsoft’s proposed acquisition of Activision is a permanent restructuring of the gaming industry. One of the “Big Four” publishers will be permanently owned by one of the largest platform holders. This restructuring would eliminate the independence of the maker of Call of Duty—the most successful video game franchise in history—and place it under the control of Microsoft.
- ii. In the video gaming industry, regardless of whether a gamer likes to play games on a console, through a subscription service, or through cloud gaming streaming services, one thing is clear: “Content is king.” *See* § I. A.
- iii. AAA content is so important that Microsoft is willing to pay \$70 billion to acquire Activision – in large part because of the unique durability and sustainability of Activision’s Call of Duty franchise. *See* § I.; Sec. I. G.
- iv. Despite analogies made during this hearing, the competitive dynamics of the video game industry do not map onto movies, music, and other entertainment. First, the development costs of video games are magnitudes larger than any other form of entertainment. AAA games like Call of Duty require hundreds of millions of dollars to make with development teams in the hundreds.
- v. Second, development cycles take years with uncertain prospects on when the games will be finalized and shipped. Third, video games drive engagement that is far beyond that of movies. Gamers can spend hundreds of hours on a single game like Call of Duty, which translates into billions of dollars monetized from gamers—not only from the sale of the base game but from additional content sold in online stores. For Call of Duty—which has over 20 games in the franchise over 20 years—transferring ownership to Microsoft is not the same as a single movie being made by a different studio.
- vi. As an independent publisher, Activision’s incentives differ significantly from the incentives of a merged Microsoft/Activision. *See* § IV B. 1.; Section IV D. 2.; § IV E. 2.

- vii. Activision is currently “platform agnostic” and wants its gaming content, including Call of Duty, available on as many platforms as possible. *See* § I. H; § IV. D. 2.
- viii. Microsoft and Sony currently compete for partial or full exclusive deals with specific games from Activision (and other independent game developers), in order to differentiate their generation 9 consoles, subscription services, and cloud gaming streaming services. *See* § I. F., G.
- ix. This competition between Microsoft and Sony for gaming content benefits consumers in a number of ways. First, it enables co-development between Microsoft and Activision and between Sony and Activision to innovate on both video games themselves, and on console hardware to improve the gaming experience for consumers. *See* § IV. B. 3; § IV. D. 3.
- x. For example, [REDACTED]  
[REDACTED]  
[REDACTED] *See* § IV. D. 3.
- xi. In order for co-development to be possible and successful, proprietary information about Sony or Microsoft’s consoles, business strategies, and long-term strategic plans, are shared with Activision, who does not compete with Sony or Microsoft in consoles. *See* § IV. B. 3; § IV. D. 3.
- xii. Post-Merger, Microsoft would have the incentive and ability to improperly use this confidential and strategic information from Sony. This ability and incentive will likely prevent Sony from sharing its proprietary information, limiting the ability for innovation on Sony’s video gaming platforms to occur as it does today with Activision. This in turn harms consumers who benefit from [REDACTED]  
[REDACTED] *See* § IV. D. 1, 3.
- xiii. Second, the competition for gaming content promotes competition between video game platform manufacturers to improve and innovate their platforms and their product offerings. *See* § IV. D. 3.

- 1 xiv. Post-Merger, Microsoft will also have the ability and incentive to entirely or partially  
2 foreclose Sony from Activision content, including Call of Duty. *See* § IV. B. 1.
- 3 xv. Microsoft has shown it has both the ability and incentive to engage in foreclosure,  
4 through its actions after past acquisitions. *See* § IV. C. 1-3.
- 5 xvi. While ZeniMax does not have an exact Call of Duty equivalent (no one does), ZeniMax  
6 had popular games that gamers want to play and take into consideration when they make  
7 their purchasing decisions. *See* § IV C. 3.
- 8 xvii. [REDACTED]  
9 [REDACTED]  
10 [REDACTED]. Lawver Tr. 235:9-16;  
11 242:24-246:9.
- 12 xviii. [REDACTED]  
13 [REDACTED]. Lawver Tr. 236:14-18.
- 14
- 15 xix. [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED] *See, e.g.* § IV.C.3, ¶¶ 590-595; *see also*  
19 § IV.C.1.
- 20 xx. These titles included *Redfall* and *Starfield*. Microsoft has also indicated it plans take the  
21 next version of the popular franchise *Elder Scrolls*, *Elder Scrolls VI*, exclusive when it is  
22 released. *See* § IV.C.3.
- 23 xxi. Microsoft did the same type of analysis for its Board of Directors for the  
24 Microsoft/Activision acquisition, modeling [REDACTED] *See*  
25 § IV.B.3
- 26 xxii. While Microsoft may need to consider potential reputational effects, Microsoft still has  
27 the ability and incentive to foreclose or partially foreclose Activision content, including  
28 *Call of Duty* from gamers who prefer the Sony platform. *See* § IV.B.1.

1 xxiii. Microsoft Gaming Chief Financial Officer Tim Stuart modeled different ways to “fill the  
2 gap” from potential revenue losses for Activision arising from reduced business with  
3 Sony could be offset by a boost in Microsoft’s console and online gaming business. *See* §  
4 IV.B.3.

5 xxiv. Dr. Carlton is the only witness for Defendants that testified regarding Plaintiff’s  
6 allegations of potential competitive effects of the Acquisition, and his analysis relied  
7 mostly on the side agreements that Microsoft signed with a limited number of third  
8 parties. *See* § IV.F. Dr. Carlton’s statements and analyses that these agreements  
9 guaranteed the third-parties access to *Call of Duty* had “no evidentiary value in terms of  
10 whether it’s guaranteed.” Trial Tr. Vol.5 at 1115:19-1116:2. *See* § IV.F, ¶ 761.

11 xxv. Defendants offered no analysis, quantitative or otherwise, of the potential procompetitive  
12 benefits of the side agreements.

13 xxvi. There is no evidence in the record, other than the agreements themselves, for how the  
14 terms of the agreements will be interpreted and enforced. *See* § IV.F.

15 xxvii. [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]. (Ryan Trial  
21 Testimony, 62:25-63:08); (PX3110 at 028-29), PX3378 at 019 (Ryan (Sony) Hr’g  
22 Testimony at 65:16-65:19); 4) PX3378 at 017 (Ryan (Sony) Hr’g Testimony at 61:5-11);  
23 PX7053 (Ryan (Sony) Dep.) at 69:19-70:2 (discussing PX3110 at 037 (Microsoft  
24 Proposal to Sony, Dec. 23, 2022)). *See* § IV.F, ¶¶ 800-809.

25 xxviii. Additionally, Sony has concerns about the sharing of confidential business information  
26 with a competitor. If the merger is allowed, collaboration between Sony and Activision  
27 on console innovations would be lost, because “the commercial risks associated with []  
28 knowledge of these feature sets leaking to our principle competitor is not something that

1 we would choose to reply on any contract to enforce.” PX3378 at 011 (Ryan (Sony) Hr’g  
2 Testimony at 39:11-15). *See* § IV.D.3.

3 xxix.

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED] *See* § IV.F, ¶¶760, 792-794; PX3381

7 [REDACTED] PX1781.

8 xxx. A significant portion of the Nvidia agreement is not merger specific. Specifically, as part  
9 of the agreement Nvidia received access to Microsoft gaming content. This deal could  
10 have been reached with out the Acquisition, and there is not merger specific. *See* § IV.F,  
11 ¶¶ 783-787.

12 xxxi.

13 [REDACTED]  
14 [REDACTED] *See* § IV.F, ¶ 786.

15 xxxii. The Nintendo agreement is not merger specific. Bobby Kotick testified that he regretted  
16 not putting Call of Duty on the Nintendo Switch earlier and would consider putting Call  
17 of Duty on the Nintendo Switch. *See* § IV.E.2, ¶ 720.

18 xxxiii. There is no evidence in the record quantifying the potential benefits from Microsoft’s  
19 agreements with the small cloud provider agreements. The evidence indicates that these  
20 providers are not U.S. companies, and that the companies are located in other countries  
21 including Ukraine, Taiwan and Spain. *See* § IV.F, ¶¶ 756-758

22 xxxiv. Temporary relief to ensure the current status quo is in the public interest. There is  
23 immediate harm if Microsoft and Activision are allowed to merge right now. The parties  
24 can immediately begin sharing confidential information including strategic and long-term  
25 plans. *See* § I.

26 xxxv. Microsoft and Activision could also immediately start making exclusivity plans and  
27 announcements. For example, the ZeniMax deal closed on March 9, 2021, and on June  
28

1 13, 2021, Microsoft publicly acknowledged that Starfield and Redfall will be going  
2 exclusive in blog posts. PX00003. *See* § IV.C.3, ¶¶ 598, 603.

3 xxxvi. Record evidence actually indicates that Microsoft made a decision [REDACTED]  
4 [REDACTED] PX1391-003 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] PX4323. PX7042 (Lawver (Microsoft) Dep.) at 302:2-5 [REDACTED]  
8 [REDACTED]  
9 [REDACTED] *See* § IV.C.3, ¶ 602.

10 xxxvii. Plaintiff has demonstrated that Microsoft has the ability and incentive to foreclose or  
11 partially foreclose Activision content in the consoles market, subscription services market  
12 and the cloud game services market and that the equities favor a preliminary injunction.  
13 *See* §§ IV.D, V.E, I.

14  
15 xxxviii. Plaintiff has demonstrated harm in each of the relevant markets but is only required to  
16 demonstrate that the acquisition poses a reasonable probability of harm in *any* relevant  
17 market. *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 812 (9th Cir. 1961) (“In the  
18 statutory phrase ‘in any line of commerce’, the word entitled to emphasis is ‘any’.”). *See*  
19 § V.B.

20 **I. Responses to the Court’s Core Questions at Closing**

21 ***Are ZeniMax titles comparable to Call of Duty, for purposes of assessing Microsoft’s***  
22 ***incentives? Hr’g Tr. 1051:17-20.***

23 xxxix. Yes, ZeniMax titles are comparable to Call of Duty, for purposes of assessing  
24 Microsoft’s incentives. In the ten-year period before ZeniMax was acquired by  
25 Microsoft, ZeniMax had never released a game exclusive to a single console. Hines  
26 (Microsoft) Hr’g Tr. 91:2-13. Since the acquisition, Microsoft has made two major new  
27 releases Microsoft exclusives, *Starfield* and *Redfall*; announced that another ZeniMax  
28 billion-dollar eagerly anticipated title, *Elder Scrolls 6*, will be exclusive to Microsoft; and

1 paid to have a new Indiana Jones game changed from multi-platform, as it was under its  
 2 original contract, to exclusive. *See* § IV.C. The fact that none of these games exactly  
 3 mirrors all of the attributes of *Call of Duty* is not the FTC’s point – *Call of Duty* is  
 4 unique.

5 xl. Instead, Microsoft’s actions and its statements about ZeniMax undermine the credibility  
 6 of its claimed incentives today. Microsoft publicly and privately disclaimed any incentive  
 7 to make ZeniMax content exclusive, just like with Activision today. Once it completed  
 8 the acquisition, it conducted a new analysis and decided it would make future ZeniMax  
 9 content exclusive. *See* § IV. C. 3.

10 xli. *Elder Scrolls 6* is a beloved repeat franchise, like *Call of Duty*. *Redfall* is a multi-player  
 11 game that was designed to work cross platform, like *Call of Duty*. *See* § IV. C. *Starfield*  
 12 is one of the most expensive, ambitious, and eagerly anticipated titles of the year, like any  
 13 *Call of Duty* release, that was switched to being a Microsoft exclusive to the great  
 14 disappointment of a large number of gamers. *See* § IV. C. ZeniMax was one of the few  
 15 powerful independent publishers capable of making billion dollar franchises at the time  
 16 of the Microsoft acquisition. *See* § IV. C. In acquiring ZeniMax, Microsoft acquired four  
 17 additional billion dollar franchises (*Fallout*, *Doom*, *The Elder Scrolls*, *Dishonored*), to  
 18 add to its six (*Halo*, *Minecraft*, *Age of Empires*, *Flight Simulator*, *Gears of War*, *Forza*),  
 19 for a new total of 10 billion dollar franchises. *See* § IV. C. As Phil Spencer told fans at  
 20 the ZeniMax announcement, Microsoft’s spate of acquisitions was about creating a moat  
 21 of exclusive content for its platforms, including Game Pass and xCloud. *See* § IV. C. The  
 22 ZeniMax acquisition offers a clear picture of how the merged firm’s incentives differ  
 23 from an independent developer. In the words of Phil Spencer, the Court should focus on  
 24 “the actions we have taken as a publisher.” Spencer Tr. (Vol. 2) at 360:5-13.

25 ***Should the relevant market include PCs (regular PCs and/or gaming PCs)? Hr’g Tr. 1081:5-***  
 26 ***15.***

1 xlii. No. The type of PCs that can run AAA games like Call of Duty in a comparable way to  
2 the Xbox Series consoles or PlayStation 5 are extremely advanced, dedicated gaming  
3 machines. PX0003 at 136 Bond (Microsoft) Hr’g Tr. 130:18-23. See § I. B. 2.

4 xliii. Typical general purpose laptops cannot, for example, play Call of Duty Modern Warfare  
5 II because their technical abilities are underpowered. Bond (Microsoft) Hr’g Tr. 143:23-  
6 144:2. See § I. B. 2. Advanced gaming PCs are also excluded from the relevant market.  
7 First, the consumer experience is very different from consoles. See § I. B. 2. Gaming PCs  
8 are assembled from specialized parts, often customized and require the consumer to have  
9 greater technical sophistication than the purchasers of consoles who are required to do  
10 very little set up after they take the console out of the box. PX8001 (Ryan (Sony) Decl. ¶  
11 15). Second, the wide variety of specialized PC parts means that gaming PCs have a large  
12 range in technical performance compared to consoles which provides a more  
13 standardized experience; some PCs can run graphically demanding games at a better  
14 performance than the latest Generation 9 consoles. Bond (Microsoft) Hr’g Tr. 130:24-  
15 131:3. Third, the specialized parts also means that gaming PCs tend to be far more  
16 expensive than the Xbox Series consoles and PlayStation 5 consoles, both priced at \$500.  
17 Gaming PCs often cost anywhere from \$800 to more than \$2,500. PX8001 (Ryan (Sony)  
18 Decl.) ¶ 15.

19 xliv. These differences between gaming PCs and consoles from the consumer perspective  
20 translate into different commercial strategies. See § I. B. 2. The consumers shopping for a  
21 device to play Call of Duty do not perceive gaming PCs to be a substitute for consoles  
22 like Xbox and PlayStation. See § I. B. 2. [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED] PX1563 (Microsoft) at 025-30; Ryan Hr’g Testimony  
26 (PX7054 (Ryan (Sony) Dep. Vol. II) at 98:11-14)

27 xlv. The key case for understanding why gaming PCs should not be in the relevant market is  
28 *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008). The FTC in that case

1 proposed a product market of premium, natural, and organic supermarkets. *Id.* at 1032.  
2 The district court concluded that less specialized grocery stores and supermarkets  
3 competed against these premium, natural, and organic supermarkets. *Id.* at 1033. On  
4 appeal, the D.C. Circuit noted that “[o]f course customers cross-shop” between these  
5 premium grocery stores and more generalized grocery stores, but “[t]he fact that a  
6 customer might buy a stick of gum at a supermarket or at a convenience store does not  
7 mean there is no definable groceries market.” *Id.* at 1041. Gamers can play Call of Duty  
8 on very advancing gaming PCs, but that does not imply there is no definable market of  
9 high-performance video game consoles.

10 ***If the merger goes forward, how would consumers in the console market be harmed? Hr’g Tr.***  
11 ***1055:16-23.***

12 *x/vi.* In the consoles market, consumers who want to play each new optimized version of Call  
13 of Duty or other Activision games will be forced to purchase an Xbox or settle for  
14 less. In the subscription services market, Microsoft’s clear intent to make its acquired  
15 content exclusive. [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED] This means other subscription current or future subscription service  
21 competitors will not have the ability to negotiate to offer ATVI’s content on their  
22 services. The same is true for most current or future cloud gaming competitors. While  
23 MSFT has signed deals with several small cloud-gaming providers, all of whom are out  
24 of market other than Nvidia, notably those companies only offer “Bring Your Own  
25 Game” models, where a gamer must already own a game in order to stream it on the  
26 service. MSFT does not have deals with the other two largest cloud-gaming services  
27 (Amazon Luna and PS Plus Premium), both of whom offer subscription content models  
28 (whereby gamers can stream games through the subscription without having to already

1 own the games). Allowing MSFT to pick the winners in this nascent market harms  
 2 competition, particularly when MSFT has picked “winners” who seem to offer the least  
 3 competitive threat.

4 *xlvi.* In all relevant markets, Microsoft’s efforts to build a “moat” of exclusive content through  
 5 acquisitions will stymie new entrants’ ability to provide other options for consumers to  
 6 access gaming content. PX8003, paragraph 24 (“[Google Stadia's] experience with  
 7 Microsoft's 2021 acquisition of ZeniMax, parent of the iconic game studio Bethesda  
 8 Softworks, shows that Activision under Microsoft's ownership very likely will be  
 9 unwilling to bring its titles to competing game platforms, especially those competing with  
 10 its leading cloud gaming and Windows platforms, making it more difficult for existing  
 11 and new platforms to attract users and compete against Microsoft's services.”) See sec.  
 12 IV.C.1. paras. 559-567; IV.C.3. paras. 575-613.

13 ***Why don’t the side agreements address the potential competitive effects of the merger? Hr’g***  
 14 ***Tr. 1133:34***

15 *xviii.* The agreements between Microsoft and cloud gaming services providers and Nintendo do  
 16 not effectively address the potential competitive effects of the merger for several reasons.  
 17 First the agreements are with a limited number of market participants. For example, there  
 18 are no agreements between Microsoft and Google or Microsoft and Amazon – the two  
 19 other significant cloud gaming service providers. While Google Stadia exited the market  
 20 earlier this year, the testimony was clear that the main reason Stadia exited was lack of  
 21 AAA content, and Activision clearly has substantial AAA content. *See* sec. IV.F. paras.  
 22 756-767.

23 *xlix.* Second, Microsoft did not attempt to quantify the potential benefits from any of these  
 24 agreements. *See* sec. IV.F. paras. 758-761. I.D. para. 175; I.E. paras. 183, 187. Microsoft’s  
 25 expert, Dr. Carlton, did not conduct any quantitative analysis of the consumer benefits of  
 26 the hastily signed third party agreements. *See* sec. IV.F. paras. 758-761. Microsoft’s  
 27 Chief Financial Officer for Xbox Gaming, Tim Stuart, did not conduct any financial  
 28 analyses of the signed agreements with Nvidia, Nintendo, or the cloud gaming service

1 providers. See sec. IV.F. paras. 775, 795. Microsoft’s Chief Financial Officer for Xbox  
2 Gaming, Tim Stuart, did not conduct any financial analyses of Microsoft’s proposal to  
3 Sony for Call of Duty. See sec. IV.F. para. 809.

- 4 1. Third, the record evidence demonstrates that at least two companies were concerned with  
5 the terms of the agreements or proposed agreements. See sec. IV.F. paras. 758, 801,806  
6 li. Finally, there is no evidence in the record, other than the agreements themselves, about  
7 their potential efficacy or how they will “guarantee” access to Call of Duty on consoles,  
8 subscription services, or cloud gaming streaming services. See sec. IV.F. paras. 754-766.

9 ***Will immediate harm will occur if the parties are allowed to merge? Hr’g Tr. 1168:1-1169:14.***

- 10 lii. Yes, if this merger is consummated the harm begins immediately. If a preliminary  
11 injunction is not granted, Microsoft and Activision can begin to share confidential  
12 business information, long term strategic planning information, and can begin to make  
13 exclusivity plans. Competitors who currently share information with Activision in order  
14 to engage in procompetitive innovations will likely stop sharing information with a  
15 combined Microsoft/Activision. Without a preliminary injunction, even if the FTC  
16 ultimately prevails in its August 2 administrative trial, Microsoft and Activision could  
17 begin to engage in foreclosure or partial foreclosure during the pendency of the litigation  
18 and any appeals process. This will result in ongoing harm to consumers that will be  
19 difficult to remedy after the full litigation process runs its course.

20 ***What is the basis for Professor Lee’s 20% conversion rate? Hr’g Tr. 1058:14-16.***

- 21 liii. Professor Lee’s 20% Xbox Conversion rate, as used in his Vertical Foreclosure model, is  
22 based on ordinary course evidence and actual data, and therefore was a reliable input into  
23 his model. In his vertical foreclosure model, Professor Lee uses an Xbox Conversion rate  
24 of 20%. The universe for this Conversion rate is all PlayStation Call of Duty gamers  
25 (from projected sales data in Microsoft’s Project Denali) who do not multi-home (i.e.,  
26 who would not switch to playing Call of Duty on an Xbox or suitable gaming PC that  
27 they already own). See PX5000, Expert Report of Robin S. Lee, at 207 (“Figure  
28 48: Recoupment channels for the foreclosure of PlayStation consoles by the Merged

Entity”). The 20% Conversion rate means that 20% of that universe would switch. These are PlayStation Call of Duty gamers that would purchase an Xbox to continue playing Call of Duty in the event of foreclosure. A 20% Conversion rate is justified, because it corresponds to a “share shift” – i.e., an increase in Xbox share versus PlayStation share – in a given year relative to 2022 global console sales of approximately 5.5 percentage points (5.5%).

liv. The 5.5% share shift is reasonable and supported by:

- Professor Lee’s Share Model, which predicts a relative share shift between Xbox and PlayStation of 8.9 percentage points (8.9%) in the event of foreclosure of Call of Duty, compared to an expected 1.8% share shift in response to foreclosure of an average AAA game.
- Microsoft’s ordinary course business documents, including documents that indicate that [REDACTED] [REDACTED] Given that *Call of Duty* has uniquely high sales compared to other AAA titles (cite to Lee Figure red/blue dots), these share shifts likely understate the actual effect of foreclosure of Call of Duty.
- The survey commissioned by Microsoft as advocacy to the UK CMA, which found that 5% of gamers planning to purchase a PlayStation “will purchase an Xbox instead” if *Call of Duty* were not on PlayStation.

iv. Along with the Xbox Conversion Rate, Dr. Lee’s Vertical Foreclosure Model uses Microsoft’s five-year console consumer “lifetime values”, or “LTV.” The LTV provides a “lifetime value” of a customer to Xbox. [REDACTED]

[REDACTED] To account for this difference in spending, between *Call of Duty* gamers and an average Xbox gamer, Dr. Lee incorporates an “LTV adjustment factor” into his vertical model. This LTV adjustment factor adjusts the LTV to account for the difference in spending compared to an average gamer. [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

lvi. Using a 20% Xbox Conversion rate and a 40% LTV adjustment factor, Professor Lee’s vertical foreclosure model calculates that the Merged Entity will recoup over 100% of its lost sales on Sony PlayStation consoles through additional software, Xbox console, and Xbox Game Pass sales. And, as shown in Figure 11 of Professor Lee’s reply report, PX5001-076, the Merged Entity recoups at least 100% of sales under a number of sensitivity adjustments to both the Xbox Conversion Rate and LTV adjustment factors. Even with a modestly higher LTV adjustment factor, Dr. Lee’s model shows the merged entity would have an incentive to foreclose Call of Duty even with a significantly lower Xbox conversion rates and implied share shift and without accounting for other sources of profits that Microsoft acknowledges increase it incentives to take games exclusive.

***How do you prove that enough people would switch to the Xbox such that Microsoft would have the economic incentive to foreclose? Hr’g Tr. 1067:8-19.***

lvii. Even in the absence of Dr. Lee’s vertical foreclosure analysis, Microsoft’s own internal financial analyses demonstrate that it has an economic incentive to foreclose. The CFO of Microsoft Gaming, Tim Stuart, was asked to model how Microsoft could make up a loss in revenue from Activision sales from Sony in preparation for presenting the Activision deal model to the Microsoft Board of Directors in January 2022, three days before the deal was announced. Stuart (Microsoft) Hr’g Tr. 1008:1-20; PX7040 at 202:2-14. Mr. Stuart testified that Microsoft calculated both the incremental subscribers to Game Pass, and how much Activision revenue would need to shift from PlayStation to Xbox console in order to make up the potential loss of Activision revenue on PlayStation. Stuart (Microsoft) Hr’g Tr. 1016:19-1017:24; PX4358 at -001-02. At Tim Stuart’s directive, Jamie Lawver calculated that Microsoft could make up the loss of Sony revenue “if we can shift Activision revenues to be greater on Microsoft console.” Stuart (Microsoft) Hr’g

1 Tr. 1019:8-15, 1020:5-21; PX4358 at -001-02. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 PX7042 (Lawver (Microsoft) Dep.) at 229:8-230:10.

5 viii. Initially, Ms. Lawver calculated that Microsoft would need “either approximately [REDACTED]

6 [REDACTED] additional engage [Game Pass subscribers] or platform mix going from [REDACTED]

7 percent Microsoft to [REDACTED] percent Microsoft.” Stuart (Microsoft) Hr’g Tr. 1016:10-1017:19

8 PX7040 at 224:21-226:5; PX4358 at -001. Mr. Stuart testified that he presented to the

9 Board of Directors that a reduction in Activision royalties could be made up by “mix shift

10 to Xbox Game Pass subscribers of approximately [REDACTED] per year or a [REDACTED] share

11 shift to Game Pass and Xbox consoles.” Stuart (Microsoft) Hr’g Tr. 1024: 25-1026:12;

12 PX4367 at -001. Mr. Stuart testified that attaining these such outcomes was “reasonable”

13 and “achievable.” Stuart (Microsoft) Hr’g Tr. 1028:9-1029:1; PX4472 at -001.

14 lix. Despite performing this modeling days before announcing the deal, Microsoft has argued

15 that in their formal model, they did not forecast any additional consoles sales as a result

16 of putting Activision content on Xbox Game Pass. PX7042 (Lawver (Microsoft) Dep.) at

17 225:3--24. Nonetheless, Microsoft’s board documents still recognized two “strategic

18 benefits” of the deal. One of those benefits, one of which was called “Xbox console

19 ecosystem.” When asked to describe what “Xbox console ecosystem” means, both Tim

20 Stuart and Jaime Lawver noted it refers to increasing console share. Stuart (Microsoft)

21 Hr’g Tr. 998:13-999:13; PX4341 (Microsoft) at 24; (Lawver (Microsoft) Dep.) at 224:14-

22 225; 219:6-13.

23

24

25

26

27

28

1 **I. BACKGROUND**

2 1. Through an “Agreement and Plan of Merger” dated January 18, 2022, Microsoft Corp.  
3 (“Microsoft”) proposes to acquire Activision Blizzard, Inc. (“Activision”) (the “Proposed  
4 Acquisition”), for approximately \$68.7 billion. PX0083 at 001; PX9050 at 025.

5 2. Defendant Microsoft is a publicly traded company organized under the laws of  
6 Washington and is headquartered in Redmond, Washington. PX0083 at 005; PX9050 at  
7 001.

8 3. Microsoft made \$198 billion in revenue in 2022. PX9050 at 043.

9 4. Gaming is part of Microsoft’s More Personal Computing division. PX9050 at 014.

10 5. Microsoft’s gaming business includes Xbox, Xbox Game Pass (a gaming subscription  
11 service), and Xbox Cloud Gaming. PX9050 at 014.

12 6. Microsoft publishes video games through Xbox Game Studios, comprising 23 game  
13 development studios, including eight studios that were included in Microsoft’s  
14 acquisition of ZeniMax Media Inc., announced in September 2020 and finalized in March  
15 2021. Direct Testimony of Robin S. Lee, Ph.D. (Dkt. 224) (“Lee Written Direct”) at ¶ 14;  
16 PX0003 at 086 to 087 (detailing Microsoft acquisitions of gaming studios); PX1527 at  
17 002 (Microsoft).

18 7. Defendant Activision is a publicly traded company organized under the laws of Delaware  
19 and headquartered in Santa Monica, California. PX0083 at 005; PX9388 at 01, 037.

20 8. “Activision develops and publishes video games for consoles, PC’s and mobile devices.  
21 Microsoft often refers to Activision, along with EA, Take-Two Interactive Software, Inc.,  
22 and Ubisoft, as one of the “Big 4” independent video game publishers.” Lee Written  
23 Direct at ¶ 19.

24 9. “Activision’s most successful video game franchise is *Call of Duty*, a first-person shooter  
25 video game series playable on video game consoles and PCs. Since its first release in  
26 2003, *Call of Duty* has become one of the most successful video game franchises in  
27 history, earning approximately ██████████ in sales revenue annually. The most recent  
28 installment in the franchise, *Call of Duty: Modern Warfare II*, earned a franchise record

1 of over \$1 billion in revenue in the first 10 days after its release.” Lee Written Direct at ¶  
2 20; PX9132 at 001.

3 10. “Activision also produces other popular video games for consoles, including games from  
4 the *Diablo*, *Overwatch*, *Crash Bandicoot*, and *Tony Hawk* franchises, as well as video  
5 games for other devices, including games from the *Candy Crush* (for mobile devices) and  
6 *Warcraft* (for PC) franchises.” Lee Written Direct at ¶ 21.

7 11. Activision earned \$7.5 billion in revenue in 2022. PX9388 at 040 (Activision 10-K  
8 2022).

9 12. During the last three years, three Activision franchises (*Call of Duty*, *Warcraft*, and  
10 *Candy Crush*) accounted for approximately 80% of its revenue. PX9388 at 010.

11 **A. Gaming is the Largest Category in the Entertainment Industry, and It**  
12 **Continues to Grow**

13 13. The gaming industry started over 40 years ago with arcade games, and then developed  
14 with consoles and gaming PCs, and has moved into mobile gaming. Bond (Microsoft)  
15 Hr’g Tr. 127:14-19.

16 14. Today, the gaming industry has over 3 billion players worldwide, with revenues larger  
17 than the film, music, and print industries. Bond (Microsoft) Hr’g Tr. 127:20-128:1;  
18 PX1777 (Microsoft) at 032–33.

19 15. Gaming is the fastest-growing form of media and entertainment, and it is expected to  
20 reach over 4.5 billion gamers by 2030. PX1785 (Microsoft) at 009.

21 16. In 2021, one in three people in the world played video games. PX1777 (Microsoft) at  
22 032.

23 17. Video games can be played on different devices, including consoles, PCs, and mobile  
24 devices. PX1777 (Microsoft) at 033.

25 18. Games can be played on general purpose PCs or gaming PCs, but gaming PCs typically  
26 have more advanced hardware to allow them to play more computationally demanding  
27 games. PX8001 (Ryan (Sony) Decl.) ¶ 15.  
28

- 1 19. Conversely, games played on mobile have lower graphics and are less sophisticated than  
2 games played on consoles or gaming PCs. PX0003 at 073.
- 3 20. The three primary console makers are Microsoft (Xbox Series X|S), Sony (PlayStation 5),  
4 and Nintendo (Switch). PX1777 (Microsoft) at 008; Lee Written Direct ¶ 13.
- 5 21. A game publisher brings games to market and sometimes provides funding to the game  
6 developer to do so. PX7014 (Booty (Microsoft) IH) at 28:5-15.
- 7 22. A developer creates the assets for a game, including writing the code and designing the  
8 art. Booty (Microsoft) Hr’g Tr. 50:14-19; PX7014 (Booty (Microsoft) IH) at 28:5-15.
- 9 23. First-party content is created and developed by a console manufacturer at an in-house  
10 studio. Booty (Microsoft) Hr’g Tr. 50:25-51:2; Lee Written Direct at ¶ 15PX7014 (Booty  
11 (Microsoft) IH) at 58:20–59:9.
- 12 24. Microsoft has first-party content that is created at Xbox Game Studios. PX9050 at 015;  
13 PX0003 at 016.
- 14 25. Some of Microsoft’s first-party franchises include *DOOM*, *Forza*, *Gears of War*, *Halo*,  
15 *Minecraft*, and *The Elder Scrolls*. PX9252 at 001.
- 16 26. Third-party content refers to games that are independently developed and published by a  
17 third-party publisher. Booty (Microsoft) Hr’g Tr. 51:6-8; Lee Written Direct at ¶ 15;  
18 PX8001 (Ryan (Sony) Decl.) ¶ 5; PX0003 at 016.
- 19 27. Occasionally, console manufacturers will publish titles developed by a third-party  
20 development studio, known as second-party games. PX8001 at ¶ 5 (Ryan (Sony)  
21 declaration); PX7003 (Bond (Microsoft) IH) at 152:2-10; PX0003 at 016.
- 22 28. Console manufacturers typically negotiate publisher license agreements with game  
23 publishers setting the terms for any titles that the console manufacturer ships from that  
24 publisher. Spencer (Microsoft) Hr’g Tr. 420:11-421:2.
- 25 29. For second- or third- party developers, console manufacturers create development kits for  
26 those second- or -third- party developers to use to ensure that the game will run on the  
27 console. Bond (Microsoft) Hr’g Tr. 156:7-17.
- 28

1 30. Games can be single-player or multi-player. Single-player games are normally story-  
2 driven, and other characters in the game are computations in the game rather than real  
3 people. In multiplayer games, players are matched with other people of similar skill level,  
4 and players interact in real time. Bond (Microsoft) Hr’g Tr. 134:5-19.

5 31. Both consumers and industry participants acknowledge that content drives sales. As a  
6 2021 Microsoft document states, “In the business of gaming, content remains king.” Lee  
7 Written Direct at ¶ 22 (citing PX1070 (Microsoft) at 003). *See also* PX1538 (Microsoft)  
8 at 005; PX1087 (Microsoft) at 001 (“well said, content is king”); PX9102 at 009  
9 (Microsoft FY2022 Q2 Earnings Call transcript) (“The big bets we have made across  
10 content, community, and cloud over the past few years are paying off ... Our  
11 differentiated content is driving the service’s growth.”).

## 12 **B. Console Gaming**

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

15 33. Consumers purchase video game consoles based on the hardware features of the consoles  
16 as well as the availability of game content on that console. PX8001 (Ryan (Sony) Decl.)  
17 at ¶¶ 4, 11; PX7053 (Ryan (Sony) Dep. Vol. I) at 21:1-5.

18 34. Console manufacturers earn revenues from several sources: sales of consoles and  
19 accessories like game controllers, headsets, supplemental storage, cables, and power  
20 supplies (*i.e.*, hardware) and revenue shares or royalties from sales of video game titles  
21 (*i.e.*, software) and accessories for the console. PX8001 (Ryan (Sony) Decl.) ¶ 4; PX0003  
22 at 016. Within the gaming industry, the customary revenue share for content published on  
23 a console is 70% to the content creator and 30% to the console manufacturer. Spencer  
24 (Microsoft) Hr’g Tr. 270:9-12.

25 35. Console manufacturers can also earn revenue from post-sale monetization. For example,  
26 console manufacturers may split royalties with publishers and developers on the sale of  
27 add-on content or in-game purchases. PX1110 (Microsoft) at 012 ; PX1065 (Microsoft)  
28 at 003.

1 36. A trio of gaming companies—Microsoft (under its Xbox brand), Sony (under its  
2 PlayStation brand), and Nintendo—produce the most popular video game consoles today.  
3 PX0003 at 060.

4 37. These manufacturers historically release new generations of their consoles approximately  
5 every five to ten years in “generations.” PX0003 at 060; PX9037 at 001-03.

6 38. Consoles are in the ninth generation and include Sony’s PlayStation 5 and Microsoft’s  
7 Xbox Series X|S. PX0003 at 105; Lee Written Direct at ¶ 13.

8 39. Nintendo’s most recent console, the Switch, was released in 2017. PX7059 (Prata  
9 (Nintendo) Dep.) at 19:24-20:1; PX8002 (Prata (Nintendo) Decl.) ¶ 2.

10 40. The Nintendo Switch is not a Generation 9 console, consistent with Nintendo staying at  
11 least one generation behind current generation hardware. PX2421 at 008-09 (Activision);  
12 Lee Written Direct at ¶ 13.

13 41. In addition to the Switch, Nintendo also makes the Switch OLED and the Switch Lite,  
14 two models of the Switch with slight hardware differences. PX8002 (Prata (Nintendo)  
15 Decl.) ¶ 5.

16 42. The OLED version has the same features and functionality of the Switch, but with a  
17 slightly larger OLED touch screen that allows for more vivid color and sharper contrast.  
18 PX8002 (Prata (Nintendo) Decl.) ¶ 5. There are no additional games or functionality  
19 available on the OLED version as compared to the Switch. PX8002 (Prata (Nintendo)  
20 Decl.) ¶ 5.

21 43. The Switch Lite can only be played in handheld mode. All games that play in handheld  
22 mode are supported on the Switch Lite. PX8002 (Prata (Nintendo) Decl.) ¶ 5.

23 **1. PlayStation and Xbox are Fierce Competitors, and Nintendo is Differentiated**

24 44. For the last 20 years, Microsoft and Sony have viewed each other as each company’s  
25 closest competitor in console gaming. PX8001 (Ryan (Sony) Decl.) ¶ 12. Lori Wright,  
26 the Corporate Vice President of Gaming Ecosystem Partners, testified in another matter  
27 that the Sony PlayStation is “[Microsoft’s] most direct competitor,” with Nintendo  
28

1 Switch competing in console sales “to a much lesser extent.” Dkt. 228 (Joint Stip. and  
2 [Proposed] Order) at 2.

3 45. An internal Microsoft Gaming analysis provides: “Historically, Sony has been  
4 Microsoft’s primary competitor in gaming, with similar products, services, and business  
5 models vying for similar customers.” PX1638 (Microsoft) at 019. An example of this, as  
6 Activision’s CEO testified to, Call of Duty has not been on a Nintendo console in the  
7 past ten years. Kotick (Activision) Hr’g Tr. 29:12-17.

8 46. Each console generation represents an opportunity for Sony or Microsoft to “win” the  
9 console generation by shifting the distribution of gamers onto their respective consoles.  
10 PX8001 (Ryan (Sony) Decl.) ¶ 11.

11 47. In the United States, Microsoft won Generation 7 with the Xbox 360 pitted against the  
12 PlayStation 3. PX8001 (Ryan (Sony) Decl.) ¶ 11. However, Sony won Generation 8 with  
13 the PlayStation 4. PX8001 (Ryan (Sony) Decl.) at ¶ 11.

14 48. In this current generation—the ninth generation—the Xbox Series X|S and PlayStation 5  
15 were both launched in November 2020 in direct competition. PX0003 at 050, 060; *see*  
16 *also* Booty (Microsoft) Hr’g Tr. 57:21-58:2, 58:25-59:4.

17 49. Since its launch, Microsoft’s Xbox Series X|S has been a successful player in the  
18 Generation 9 console competition with aspirations to match sales of Sony’s PlayStation  
19 5. Spencer (Microsoft) Hr’g Tr. 296:11-297:6 (discussing PX1145 (Microsoft) at 002

20 [REDACTED]

21 [REDACTED] Spencer (Microsoft) Hr’g Tr.  
22 286:17-287:2 (discussing PX1889 (Microsoft) at 035 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 50. The release of the Nintendo Switch in 2017, three years before the PlayStation 5 and  
26 Xbox Series X|S, means that it did not have similar launch conditions in the market as the  
27 Generation 9 consoles. PX7028 (Spencer (Microsoft) Dep.) at 160:9-25.

1 51. Microsoft Gaming CEO Phil Spencer explained why Nintendo was excluded from  
2 Microsoft's estimations of Generation 9 console share: "Because PlayStation 5 and Xbox  
3 Series X are at the same place in their lifecycle in the consumer market." Spencer  
4 (Microsoft) Hr'g Tr. 291:21-292:18; PX7028 (Spencer (Microsoft) Dep.) at 159:2-11.  
5 The Nintendo Switch is not considered a Generation 9 console. Booty (Microsoft) Hr'g  
6 Tr. 59:5-7.

7 52. Microsoft's President of Xbox Games Marketing Aaron Greenberg went as far as to say,  
8 [REDACTED]  
9 [REDACTED] PX5000 (Lee Report) at 77 (quoting PX1950 (Microsoft) at  
10 001).

11 53. The Xbox Series X|S and PlayStation 5 also launched with similar pricing schemes. The  
12 more advanced Xbox Series X and PlayStation 5 launched with a price of \$499, while the  
13 Xbox Series S and PlayStation 5 Digital Edition launched at \$299 and \$399, respectively.  
14 PX7028 (Spencer (Microsoft) Dep.) at 138:22-139:8; PX8001 (Ryan (Sony) Decl.) ¶ 12;  
15 PX4905 (Microsoft) at 001.

16 54. The Xbox Series X is a "premium" console while the Series S is more affordable.  
17 PX0003 at 016. Together, these consoles provide Microsoft's "flagship gaming  
18 experience." PX4627 (Microsoft) at 003.

19 55. Microsoft Gaming CFO Tim Stuart testified that the Xbox Series S was priced at \$299 as  
20 the best entry point for Gen 9 consoles. Stuart (Microsoft) Hr'g Tr. 947:4-948:4: PX4380  
21 at -001.

22 56. Microsoft CEO Satya Nadella highlighted the achievements of the Xbox Series X|S in an  
23 April 26, 2022 earnings call when he announced that Microsoft had "had taken share  
24 globally for two quarters in a row and we are the market leader this quarter among the  
25 next gen consoles in the United States, Canada, U.K., and Western Europe." Nadella  
26 (Microsoft) Hr'g Tr. 827:18-21; PX9015 (Microsoft) at 005.

27 57. Satya Nadella further hailed the success of the Xbox Series X|S in a July 26, 2022  
28 earnings call when he announced that the company "ha[d] been the market leader in

1 North America for three quarters in a row among next gen consoles.” Nadella (Microsoft)  
2 Hr’g Tr. 828:14-16; PX7010 (Nadella (Microsoft) IH) at 66:12-21; PX9084 at 005.

3 58. When Satya Nadella submitted his most recent annual self-assessment package to the  
4 Board of Directors, [REDACTED]

5 [REDACTED]  
6 [REDACTED] Nadella (Microsoft) Hr’g Tr. 830:20-831:7;  
7 PX1747 (Microsoft) at 009. Satya Nadella’s CEO self-assessment memo forms part of  
8 the basis of his compensation package. Nadella (Microsoft) Hr’g Tr. 832:20-23.

9 59. In Generation 9, Microsoft’s Xbox Series X|S and Sony’s PlayStation 5 have engaged in  
10 very close competition in the United States. PX7028 (Spencer (Microsoft) Dep.) at 156:3-  
11 156:13; PX1240 (Microsoft) at 019; PX7053 (Ryan (Sony) Dep.) at 14:16-15:5.

12 60. Although Nintendo is often [REDACTED]  
13 [REDACTED]  
14 [REDACTED] PX8002 (Prata (Nintendo)  
15 Decl.) ¶ 3.

16 61. As Nintendo’s Executive Vice President of product development and publishing, Tom  
17 Prata, stated, the Switch [REDACTED]  
18 [REDACTED] PX8002 (Prata Decl.) ¶ 4.

19 62. [REDACTED]  
20 [REDACTED] PX8002 (Prata  
21 (Nintendo) declaration) at ¶ 3.

22 63. The Switch [REDACTED]  
23 [REDACTED] PX8002 (Prata  
24 (Nintendo Decl.) ¶ 3.

25 64. To start, Nintendo is a “hybrid” console, while Xbox and PlayStation are considered  
26 stationary consoles. PX7059 (Prata (Nintendo) Dep.) at 20-25; PX7065 (Singer  
27 (Nintendo) Dep.) at 72:5-12.  
28

1 65. As a hybrid console, Nintendo offers both stationary and portable play modes, which  
2 include handheld or tabletop mode. PX8002 (Prata (Nintendo) Decl.) ¶ 4.

3 66. The Switch controllers, called “Joy-Cons,” can be detached to control gameplay both  
4 through movement and pressing buttons, and provide [REDACTED]  
5 [REDACTED] PX8002 (Prata (Nintendo) Decl.) ¶ 4.

6 67. Joy-Cons can be used separately so that two players can simultaneously enjoy  
7 multiplayer games while physically in the same place, and they can also be used in  
8 tabletop mode. PX8002 (Prata (Nintendo) Decl.) ¶ 4.

9 68. The Xbox and PlayStation do not have these same capabilities. The Xbox and PlayStation  
10 have more traditional gaming console controllers that cannot be detached, and the system  
11 itself, being stationary, “cannot be easily taken out of the home.” PX7065 (Singer  
12 (Nintendo) Dep.) at 70:22-71:17; PX7035 (Kotick (Activision) Dep.) at 143:14-21.  
13 Unlike the Switch, the Xbox does not have a battery, a screen built into the console,  
14 speakers, or touchscreen functionality. Dkt. 228 (Joint Stip. And [Proposed] Order) at 2.

15 69. While the Switch can run from a battery in portable mode, the Xbox and PlayStation  
16 must be plugged into a wall and connected to a TV. PX7065 (Singer (Nintendo) Dep.) at  
17 72:5-19.

18 70. As a result of these hardware differences, Nintendo provides a differentiated console  
19 experience, in which motion controls and portability inform game development. PX7059  
20 (Prata (Nintendo) Dep.) at 59:23-60:7; PX1950 (Microsoft) at 001; PX7035 (Kotick  
21 (Activision) Dep.) at 215:7-215:19, 225:6-225:16; PX7059 (Prata (Nintendo) Dep.) at  
22 67:13-21.

23 71. As the CEO of Microsoft Gaming, Phil Spencer, testified, “Switch is a differently  
24 designed device” and “the Switch is radically different” from Xbox and PlayStation Hr’g  
25 Tr. (Spencer) 274:17, 459:10-11.

26 72. While Nintendo provides a unique form of gameplay, the Xbox and PlayStation offer  
27 higher performance. The Nintendo Switch has a less technically capable hardware than  
28 the current PlayStation and Xbox consoles, and its lower power impacts which games can

1 run on the Switch. Booty (Microsoft) Hr’g Tr. 60:15-61:23. As President of Xbox Games  
2 Marketing Aaron Greenberg explained, the Switch is a “lower spec device” because  
3 games are designed to match the specifications of a device. Games built for the  
4 PlayStation 5 or Xbox Series X|S would have to be designed differently for the Switch.  
5 PX7031 (Greenberg (Microsoft) Dep.) at 59:23-60:21; *see also* Spencer (Microsoft) Hr’g  
6 Tr. 273:20-274:17 (Xbox Series X|S and PlayStation 5 can showcase Generation 9  
7 hardware and capabilities, unlike Switch).

8 73. As Sony Interactive Entertainment’s (“SIE”) CEO recognizes, “Nintendo’s hardware  
9 technology is of a much less sophisticated nature than PlayStation or Xbox.” PX7053  
10 (Ryan (Sony) Dep.) at 21:9-16. Similarly, Activision’s CFO testified, “Nintendo has . . .  
11 very different capabilities than Microsoft and Sony has. . . Nintendo is not at the forefront  
12 of technology.” PX7004 (Zerza (Activision) IH) at 74:2-14.

13 74. A December 15, 2022 internal briefing for Activision’s CEO stated, “Switch  
14 development [is] difficult: [REDACTED]

15 [REDACTED]  
16 [REDACTED] PX2421 (Activision) at 002.

17 75. The Xbox and PlayStation are significantly more powerful than the Switch. The Switch’s  
18 maximum processing power reaches only 393 gigaflops (even less in handheld mode –  
19 236 gigaflops), while the Xbox Series X and PlayStation 5 are at least 26 times (*i.e.*,  
20 2,600%) more powerful, capable of 12 and 10.3 *teraflops* (12,000 and 10,300 gigaflops,  
21 respectively. PX5000 (Lee Report) at 080, fig. 13; *see also* Spencer (Microsoft) Hr’g Tr.  
22 277:1-14 (agreeing that the Xbox Series X and S both operate at higher FLOPS rates than  
23 the Switch).

24 76. [REDACTED]  
25 [REDACTED]  
26 PX7065 (Singer (Nintendo) Dep.) at 85:25-86:9.

1 77. The Xbox Series X and PlayStation 5 have one terabyte and 825 gigabytes, respectively,  
2 of internal storage, providing more than 25 times the storage capacity for game  
3 downloads. PX5000 (Lee Report) at 080, fig. 13.

4 78. While the Switch only has four gigabytes of system memory, the Xbox Series X and  
5 PlayStation 5 each have 16 gigabytes, four times as much as the Switch. PX5000 (Lee  
6 Report) at 080, fig. 13.

7 79. The Switch is only capable of rendering games at a lower resolution than the Xbox and  
8 PlayStation, achieving a maximum frame rate of 60 frames per second, while Xbox and  
9 PlayStation can reach up to 120 frames per second. Spencer (Microsoft) Hr’g Tr. 276:6-  
10 18, 23-25; PX3270 (Nintendo) at 002; PX5000 (Lee Report) at 080, fig. 13; *see also*  
11 Spencer (Microsoft) Hr’g Tr. 275:20-276:4, 276:19-22 (Xbox Series X|S and PlayStation  
12 5 can scale up to support maximum resolution of 4K HD, unlike Switch).

13 80. The Switch’s hardware differences also limit the kinds of third-party games that can be  
14 offered on the Switch. The Nintendo Switch lacks the PlayStation 5 or Xbox Series X|S’s  
15 processing power and graphics ability. PX7053 (Ryan (Sony) Dep.) at 21:21-22:3;  
16 Spencer (Microsoft) Hr’g Tr. 279:9-19 (“In terms of CPU and GPU, [the Switch] would  
17 be more akin to a Gen 8 device.”); PX7028 (Spencer (Microsoft) Dep.) at 114:18-21,  
18 119:11-23. Consequently, porting a third-party game to run on Switch requires  
19 “significant work and modifications,” including reducing the graphical complexity,  
20 resolution, and frame rate, and possibly incorporating less complex scenes. Booty  
21 (Microsoft) Hr’g Tr. 62:4-64:6.

22 81. Because of performance limitations, there are games that can run on Xbox and  
23 PlayStation consoles (including the previous generations of these consoles) that cannot  
24 run on the Switch. PX4684 (Microsoft) at 003. *See also* PX7028 (Spencer (Microsoft)  
25 Dep.) at 191:24-192:4; PX9372 at 001 (press release explaining that, while *The Forgotten*  
26 *City* is available natively on Xbox One, Xbox X/S, PS4 and PS5, “the Switch isn’t quite  
27 powerful enough to run [the game] at its best,” and must be streamed in order to be  
28 played on the Switch); PX2093 (Activision) at 005 [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

82. Some third-party games are only available on the Switch via cloud streaming [REDACTED] PX8002 (Prata (Nintendo) Decl.) ¶ 16; PX9372 at 001 (press release explaining that, while *The Forgotten City* is available natively on Xbox One, Xbox X/S, PS4 and PS5, “the Switch isn’t quite powerful enough to run [the game] at its best” and must be streamed in order to be played on the Switch).

83. Porting games that run on Xbox and PlayStation to the Switch can be difficult and at times impossible. PX7048 (Booty (Microsoft) Dep.) at 113:5-115:5; PX9371 at 001 (Hi Rez press release announcing the end of support of its game *Rogue Company* due to “performance of [its] Switch port.”); PX2421 (Activision) at 008 (“Switch system is a challenging choice . . . for the majority third-party porting efforts, for all the usual reasons we always encounter with Nintendo,” including that [REDACTED]

[REDACTED]

84. [REDACTED] PX8002 (Prata (Nintendo) Decl.) ¶ 6.

85. [REDACTED] PX8002 (Prata (Nintendo) Decl) at ¶ 6. As a result, Nintendo’s first-party titles are not available on Xbox or PlayStation. PX8002 (Prata (Nintendo) Decl.) ¶ 6.

1 86. Nintendo’s content portfolio differs from Xbox and PlayStation in other ways, too. An  
 2 internal Activision briefing states that [REDACTED] of Switch sales in 2020 were first-party titles.  
 3 PX2093 (Activision) at 005. In 2022, Nintendo’s first-party sales accounted for 78.8% of  
 4 Nintendo’s total software sales. PX9207 at 005.

5 87. As of December 31, 2022, Nintendo’s top 10 selling titles were Nintendo first-party  
 6 games. PX9209 at 001–03.

7 88. Nintendo’s distinctive gaming experiences has created a deeply loyal fanbase. PX8002  
 8 (Prata (Nintendo) Decl.) ¶ 9.

9 89. By contrast, Xbox and [REDACTED]  
 10 [REDACTED] PX1072 (Microsoft) at 001; PX8001 (Ryan (Sony) Decl.) ¶ 5 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED] Microsoft executive  
 14 Lori Wright estimated that there were roughly 3,500 third-party games for Xbox in 2021  
 15 but less than a hundred Microsoft-developed first-party games. Dkt. 228 (Joint Stip. and  
 16 [Proposed] Order) at 5.

17 90. For several reasons, Switch [REDACTED]  
 18 [REDACTED] when compared to the “Xbox and PlayStation.” PX8002 (Prata (Nintendo)  
 19 Decl.) ¶ 10; PX7059 (Prata (Nintendo) Dep.) at 94:14-20.

20 91. Nintendo tends to be more family-friendly and its most iconic games appeal to a younger  
 21 audience. PX7053 (Ryan (Sony) Dep.) at 22:11-22; PX8002 (Prata (Nintendo) Decl.) ¶  
 22 10.

23 92. Nintendo has [REDACTED]  
 24 [REDACTED] PX8002 (Prata (Nintendo) Decl.) ¶ 10.

25 93. [REDACTED]  
 26 [REDACTED] PX8002  
 27 (Prata (Nintendo) Decl.) ¶ 10.  
 28

1 94. According to testimony from Activision CEO Bobby Kotick, the Nintendo Switch is a  
2 “very well differentiated” console. Kotick (Activision) Hr.g Tr. 73:18-20. Mr Kotick  
3 agrees the Switch has unique characteristics including unique hardware, different  
4 capabilities, and has portability. Kotick (Activision) Hr’g Tr 73:11-20

5 95. Because of these differences, gamers often own both a Switch and an Xbox or  
6 PlayStation. [REDACTED]

7 [REDACTED]  
8 [REDACTED] PX3161 (Nintendo) at 011.

9 **2. Console Gaming is Distinct from PC and Mobile Gaming**

10 **a) PC Gaming Is Distinct**

11 96. PCs are used more broadly for general purposes rather than dedicated gaming. PX0003 at  
12 136 Bond (Microsoft) Hr’g Tr. 130:18-23.

13 97. Although consumers may play games on PCs, it is a distinct and differentiated  
14 experience. PX5000 (Lee Report) at 093; Bond (Microsoft) Hr’g Tr. 130:18-23.  
15 Microsoft executive Lori Wright testified in another matter that besides the Sony  
16 PlayStation—Xbox’s “most direct competitor”—and “to a lesser extent” the Nintendo  
17 Switch, Xbox consoles did not compete against any other device for hardware sales. Dkt.  
18 228 (Joint Stip. and [Proposed] Order) at 2-3.

19 98. Gaming PCs, which possess specialized parts dedicated to run computationally  
20 demanding games, may have superior performance to that of even the most recent  
21 Generation 9 consoles; they can more easily handle games with greater graphical  
22 intensity and run them faster. Sarah Bond testified that PCs and consoles have different  
23 experiences in gaming because they have different specs. Bond (Microsoft) Hr’g Tr.  
24 130:24-131:3; PX8001 (Ryan (Sony) Decl.) ¶ 15; PX1324 (Microsoft) at 001; PX3053  
25 (Sony) at 003.

26 99. Lower-powered PCs that are not specialized for gaming cannot play some games. Bond  
27 (Microsoft) Hr’g Tr. 143:23-144:2.  
28

1 100. Gaming PCs tend to be more expensive than video game consoles, with gaming PCs  
2 costing anywhere from \$800 to more than \$2,500, while Generation 9 consoles retail for  
3 approximately \$300 to \$500. PX8001 (Ryan (Sony) Decl.) ¶ 15.

4 101. High-performance consoles—unlike PC gaming devices—rely heavily on subsidies,  
5 generating most of their revenue from subsequent game sales after a customer has  
6 purchased a console. PX1494 (Microsoft) at 001; PX1145 (Microsoft) at 001.

7 102. The audience for PC gaming is also different than the audience for console gaming.  
8 High-end PC gaming often requires a higher level of technical competency in assembling  
9 specialized equipment. PX8001 (Ryan (Sony) Decl.) ¶ 15. PC gamers will often build or  
10 specially customize their devices with a wide variety of components to add extra  
11 upgrades and personalize their experience. PX8001 (Ryan (Sony) Decl.) ¶ 15. That stands  
12 in contrast to consoles, which are designed to be used out of the box, and whose users  
13 tend to customize their devices far less. PX8001 (Ryan (Sony) Decl.) ¶ 15.

14 103. [REDACTED]  
15 [REDACTED]  
16 [REDACTED] PX3053 (Sony) at 022 (Sony).

17 104. [REDACTED]  
18 [REDACTED]  
19 [REDACTED] PX3050 (Sony) at 034 [REDACTED]  
20 [REDACTED]  
21 PX3050 (Sony) at 019–20, 031.

22 105. These differences between PC gaming and console gaming affect the commercial  
23 strategy and revenues of gaming companies [REDACTED]  
24 [REDACTED]  
25 [REDACTED] PX4647 (Microsoft) at 002 ; PX1476 (Microsoft) at  
26 001–02.

27 106. Microsoft considers their presence on PC to be small. Bond (Microsoft) Hr’g Tr. 130:10-  
28 12.

1 107. Microsoft’s internal documents show that they saw console gaming and PC gaming as  
2 distinct, with a now-Activision, former Microsoft executive remarking, [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED] PX1639 (Microsoft) at 003.

6 108. In a yearly report on the gaming market, [REDACTED]  
7 [REDACTED] PX1563 (Microsoft) at 025-30 [REDACTED]  
8 [REDACTED]

9 109. Similarly, Activision CFO Armin Zerza distinguished between PC and console segments  
10 in terms of where Activision competes and who the major participants are: “[W]e  
11 compete across different platforms, you know, with PC platforms, like Steam, with  
12 console platforms like, Sony, Nintendo, Microsoft, with mobile platforms like Apples  
13 and Googles.” PX7004 (Zerza (Microsoft) Dep.) at 219:7-12.

14 110. [REDACTED]  
15 [REDACTED] PX3378, Ryan Hr’g Testimony (Ryan Dep. Vol II at  
16 98:7-10). [REDACTED] PX3378,  
17 Ryan Hr’g Testimony (PX7054 (Ryan (Sony) Dep. Vol II) at 98:11-14).

18 111. While buy-to-play games accounted for [REDACTED] of the revenue for console gaming in 2020,  
19 it accounted for only [REDACTED] of revenue for PC gaming. PX1571 (Microsoft) at 017. Nearly  
20 [REDACTED] of PC gaming revenue was derived from free-to-play games. PX1571 (Microsoft) at  
21 017.

22 112. Microsoft is much more likely to publish their games on PC than rival consoles.  
23 Microsoft CEO Phil Spencer testified “We launch games on PC and console almost every  
24 instance on the same day.” PX7011 (Spencer (Microsoft) IH Vol. I) at 124:2-4.

25 113. The most popular distribution channels for PC games do not resemble the distribution  
26 channels for consoles. While Sony and Microsoft make sales in their respective digital  
27 stores, the most prominent digital marketplaces for PC games include Valve’s Steam  
28

1 Store, the Epic Games Store, and Activision’s Battle.net. PX1476 (Microsoft) at 001;  
2 PX0004 at 030.

3 **b) Mobile Gaming Is Distinct**

4 114. Mobile is the largest segment of gaming according to Microsoft’s internal gaming  
5 analysis, with [REDACTED] of gamers playing on mobile. PX1563 (Microsoft) at 005, 011.

6 115. Microsoft reported that many players either exclusively play mobile, or multi-home with  
7 mobile and other gaming devices. Forty-five percent of gamers only play on mobile, 21%  
8 play on console, mobile, and PC, and 5% only play on console and mobile. PX1563  
9 (Microsoft) at 032.

10 116. In a yearly report on the gaming market, [REDACTED]  
11 [REDACTED] PX1563 (Microsoft) at 025–30.

12 117. Mobile games have to be built specifically for the mobile operating system. Bond  
13 (Microsoft) Hr’g Tr. 132:6-10.

14 118. Game development for mobile devices is significantly less expensive than development  
15 for consoles. PX0003 at 073.

16 119. Mobile game development also relies on smaller teams of developers and less  
17 technological innovation. PX0003 at 073. Mobile games do not require the same level of  
18 computing power as console games to run on devices. Dkt. 228 (Joint Stip. and  
19 [Proposed] Order) at 4. Console games often require “massive game size files” of 150,  
20 250, or even 450 gigabytes of data, which require “a lot of graphics intensity and all sorts  
21 of other technical requirements” that cannot run on a mobile device like an iPhone. Dkt.  
22 228 (Joint Stip. and [Proposed] Order) at 4.

23 120. Activision CEO Bobby Kotick explained that, though there is a Call of Duty game  
24 available on mobile, it is not linked to the other Call of Duty games, rather it is its own  
25 game. Hr’g Tr. (Kotick Rough) 27:25-28:3. Call of Duty Mobile was largely developed  
26 by an outside company, Tencent. Kotick (Activision) Hr’g Tr. 68:20-22. Additionally,  
27 Mr. Kotick testified at the hearing that King is the assembled workforce at ABK for  
28

1 mobile, and outside of King, ABK does not have a well developed capability to make  
2 mobile games. Kotick (Activision) Hr’g Tr. 66:16-22.

3 121. Mobile games are also distinct from console games because they “are typically more  
4 casual” than console games which often involve “thoughtful, long storyline[s]” and are  
5 more “immersive.” Dkt. 228 (Joint Stip. and [Proposed] Order) at 3. For example,  
6 Microsoft’s first-party franchise *Halo* was “built for the console” and “could not run on  
7 mobile” due to its immense 150 gigabyte size, which is approximately 50 times too large  
8 to run on a mobile device. Dkt. 228 (Joint Stip. and [Proposed] Order) at 4.

9 122. As the Court confirmed with Activision CEO Bobby Kotick, mobile devices are not at  
10 the point to where AAA games such as *Modern Warfare II* will be playable on them.  
11 Kotch (Activision) Hr’g Tr. 81:4-8.

12 123. Mobile gaming also requires different design considerations given the large difference in  
13 form factor. As Activision’s CEO expressed, “the controller matters greatly. So when  
14 you’re playing on glass [mobile], it’s going to be a different experience than the one  
15 you’re going to play on the PlayStation.” PX7035 (Kotick (Activision) Dep.) at 142:12-  
16 25.

17 124. Tim Stuart, Microsoft Gaming CFO, recognized that mobile gaming tends to be a more  
18 “casual path” than console gaming. PX1170 (Microsoft) at 001.

19 125. As Lori Wright, Microsoft’s Vice President of Business Development for Gaming,  
20 Media, and Entertainment, testified in a previous matter, the Xbox lacks many basic  
21 capabilities of a smartphone, including a screen, speakers, touch controls. Dkt. 228 (Joint  
22 Stip. and [Proposed] Order) at 1–2.

23 126. Dr. Bailey concedes that the transaction would not affect competition in any mobile  
24 market. Bailey (Defendants’ Expert) 819:21-820:4.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**C. Multi-Game Content Subscription Services**

127. Multi-Game Content Subscription Services (or “content subscription services”) provide subscribers access to a library of video games for a periodic subscription fee, typically monthly or yearly. PX0003 at 018; PX0006 at 013.

128. Unlike traditional buy-to-play games, with content subscription services, gamers purchase a recurring subscription and can play any game contained in the library for zero additional cost above the subscription fee. PX0003 at 018; PX0006 at 013. Bond (Microsoft) Hr’g Tr. 138:2-9.

129. Microsoft launched its content subscription service, Game Pass, in 2017. PX0006 at 013.

130. Game Pass is available in two different tiers for console. PX0003 at 018. Xbox Game Pass for Console and Xbox Game Pass for PC provides subscribers access to a library of over 300 first-party and third-party games for download to play on an Xbox console and Windows PC, respectively. PX0003 at 018. Bond (Microsoft) Hr’g Tr. 137:23-138:1; Lee Written Direct at ¶ 16.

131. The highest tier, Xbox Game Pass Ultimate, provides access to a library of games for both Xbox consoles and Windows PCs, which subscribers can download and play or access through cloud gaming, allowing subscribers to play certain games by streaming from a remote server to any supported web-enabled device such as an Xbox console, PC, mobile device, or smart TV. Lee Written Direct at ¶ 16.. PX0003 at 018.

132. Approximately [REDACTED] of Game Pass subscribers subscribe to Game Pass Ultimate. PX0003 at 018.

133. Microsoft’s CEO Satya Nadella has described Game Pass as a “Netflix for Games.” PX7010 (Nadella (Microsoft) IH) at 78:17-20; PX1283 (Microsoft) at 008.

134. Xbox Game Pass had over 25 million total subscribers by the beginning of 2022. PX1516 (Microsoft) at 039; PX9003 at 003.

135. In the United States, [REDACTED]  
[REDACTED]  
[REDACTED] PX5000 (Lee Report) at 055, 056 (citing Microsoft monthly subscriber

- 1 counts data). Xbox Game Pass is the market leader in content subscription services.  
2 PX5000 (Lee Report) at 041; PX8001 (Ryan (Sony) Decl.) ¶ 9.
- 3 136. Microsoft Gaming CEO Phil Spencer called Game Pass “a reach bet off of console fueled  
4 by console users as an early catalyst.” Spencer (Microsoft) Hr’g Tr. 301:8-17; PX7028  
5 (Spencer (Microsoft) Dep.) 225:5-13. Microsoft tells game developers that Game Pass is  
6 accretive to standalone game sales to attract them to put their games into the service.  
7 Spencer (Microsoft) Hr’g Tr. 299:25-300:7.
- 8 137. Aside from Game Pass, Microsoft also offers Xbox Live Gold, which provides  
9 subscribers with access to online, multiplayer games and a limited selection of  
10 downloadable games each month among other benefits, such as audio and visual  
11 communications and certain discounts. PX0003 at 018; Bond (Microsoft) Hr’g Tr.  
12 136:18-24.
- 13 138. Xbox Live Gold does not provide subscribers with access the vast library of games that  
14 subscribers of Xbox Game Pass for PC or Console and Game Pass Ultimate receive.  
15 PX0003 at 018.
- 16 139. Sony has the second most popular content subscription service, called PlayStation Plus.  
17 PlayStation Plus has three tiers. The highest two tiers—PlayStation Plus Extra and  
18 PlayStation Plus Premium—are content subscription services. PX7053 (Ryan (Sony)  
19 Dep.) at 17:9-14. Those two tiers provide similar features that correspond to Microsoft’s  
20 Xbox Game Pass for PC or Console and Game Pass Ultimate. PX7053 (Ryan (Sony)  
21 Dep.) at 17:9-22.
- 22 140. By subscribing to PlayStation Plus Extra, subscribers gain access to up to 400 games  
23 within PlayStation’s library. PX8001 (Ryan (Sony) Decl.) ¶ 9. Those who subscribe to  
24 PlayStation Plus Premium receive access to a library of up to 740 games and cloud  
25 gaming services for certain games. PX8001 (Ryan (Sony) Decl.) ¶ 9.
- 26 141. As of July 2022, PlayStation Plus Extra had approximately ██████████ subscribers and  
27 PlayStation Plus Premium had approximately ██████████ subscribers. PX7053 (Ryan  
28 (Sony) Dep.) at 17:23-18:4.

1 142. Like Microsoft’s Xbox Live Gold, the lowest tier of PlayStation Plus—PlayStation Plus  
2 Essential—offers subscribers access to online, multiplayer games and two monthly  
3 downloadable games alongside discounts on other games and cloud storage. PX8001  
4 (Ryan (Sony) Decl.) ¶ 9. PlayStation Plus Essential does not provide subscribers access  
5 to the vast libraries available to subscribers of PlayStation Plus Extra and PlayStation  
6 Plus Premium receive. PX8001 (Ryan (Sony) Decl.) ¶ 9.

7 143. PlayStation Plus Essential, the most basic tier, of PlayStation Plus services, provides  
8 similar services to Microsoft’s Xbox Live Gold: access to online multiplayer and the  
9 ability to access a limited selection of monthly downloadable games. PX7053 (Ryan  
10 (Sony) Dep.) at 17:1-8.

11 144. Amazon provides two content subscription services: Prime Gaming and Luna+. Prime  
12 Gaming is included with an Amazon Prime subscription, which costs \$14.99 per month  
13 and includes several other non-gaming related benefits. Luna+ offers subscribers access  
14 to a library of games, priced at \$9.99 per month with additional options available for  
15 further purchases and provides streaming access to a library of over 100 third-party  
16 games. See Amazon Luna, <https://www.amazon.com/luna>; PX3206 (Amazon), Luna OP1  
17 22 (Oct. 5, 2021) at 004.

18 145. Electronic Arts also offer content library services, EA Play, for its own published titles.  
19 EA Play can also be accessed through a subscription to Microsoft’s Game Pass Ultimate.  
20 PX7011 (Spencer (Microsoft) IH Vol. I) at 260:3-15; PX0003 at 018, 019.

21 146. Ubisoft offers Ubisoft+ in two tiers: PC Access, for \$14.99/month, and Multi Access, for  
22 \$17.99/month. Both tiers allow subscribers to pay over 100 Ubisoft games on PC  
23 (through Ubisoft Connect or Steam), including new releases available at launch, premium  
24 editions, and select third-party indie games. PX0006 at 80.

#### 25 **D. Cloud Gaming Subscription Services**

26 147. For years, video games have run locally on the player’s hardware—typically a Windows  
27 PC or gaming console located in the player’s home. PX8000 (Eisler (Nvidia) Decl.) ¶¶ 6,  
28

1 50. Nvidia executive Philip Eisler described cloud gaming as “the future of gaming.”  
2 PX3381 (Eisler Video) at 59:21-60:5.

3 148. Recently, however, cloud gaming services have been introduced that allow players to  
4 stream games that run on remote hardware without downloading the game locally.  
5 PX8000 (Eisler (Nvidia) Decl.) ¶ 7; PX0003 at 077; Booty (Microsoft) Hr’g Tr. 64:8-10;  
6 PX3381 (Eisler Video) at 29:24-30:2; Zimring (Google) Hr’g Tr. 467:24-468:22.

7 149. Microsoft’s xCloud app is available on Samsung smart TVs. Nadella (Microsoft) Hr’g Tr  
8 846: 9-12. No console is required for Samsung smart TV owners to stream games.  
9 Nadella (Microsoft) Hr’g Tr. 846:12-1.3

10 150. Microsoft CEO Satya Nadella has highlighted the fact that xCloud is available on  
11 Samsung smart TVs to the investor community. PX7036 (Nadella (Microsoft) Dep.) at  
12 125:6-10 PX9084 at 005. Satya Nadella expressed excitement about the news of the  
13 Samsung deal. PX7036 (Nadella (Microsoft) Dep.) at 55:15-24. ;PX1750 (Microsoft) at  
14 001

15 151. Satya Nadella acknowledged that the cloud is one of the pillars that makes up the core of  
16 Microsoft’s gaming strategy. Nadella (Microsoft) Hr’g Tr. 835: 10-12.

17 152. Satya Nadella stated to investors that cloud was one of the big bets that is paying off for  
18 Microsoft’s gaming business. Nadella (Microsoft) Hr’g Tr. 836: 1-4; PX9102 (Microsoft)  
19 at 009.

20 153. Satya Nadella wrote that he wanted “to make it clear to the world that Microsoft is  
21 focused on cloud first approaches, Teams, WIN 365, xCloud as the future of their end-  
22 use sockets.” Nadella (Microsoft) Hr’g Tr. 841: 15-19; PX4066 (Microsoft) at 002.

23 154. Satya Nadella and Phil Spencer have discussed the “North Star” vision of [REDACTED]  
24 [REDACTED] Nadella  
25 (Microsoft) Hr’g Tr. 839:22-840:1; PX1751 (Microsoft) at 001.

26 155. [REDACTED] Nadella  
27 (Microsoft) Hr’g Tr. 844: 2-6; PX1746 (Microsoft) at 018. A needle moving priority is  
28

1 defined as an initiative that can generate or impact at least \$10 billion of new revenue by  
2 FY2030. Nadella (Microsoft) Hr’g Tr. 843: 17-24;PX1746 (Microsoft) at 009.

3 156. During a gaming CSA Senior Leadership Team strategy review, [REDACTED]  
4 [REDACTED]  
5 [REDACTED] Nadella (Microsoft) Hr’g Tr.  
6 847:2-848:5; PX1777 (Microsoft) at 003.

7 157. The primary computational processing for the game occurs in a remote datacenter, and a  
8 live video feed of game is streamed to a player’s device. PX0003 at 095; PX8000 (Eisler  
9 (Nvidia) Decl.) ¶ 7; Bond (Microsoft) Hr’g Tr. 131:20-132:5; PX3381 (Eisler Video) at  
10 33:8-33:12 (“Our cloud gaming servers are more powerful than consoles, so we’re able to  
11 run higher resolutions, higher frame rates and add more visual effects.”), 33:13-33:22.

12 158. Cloud gaming broadens access to gaming by expanding the universe of devices that can  
13 play games. PX8000 (Eisler (Nvidia) Decl.) ¶¶ 6, 9, 17. Mr. Eisler of Nvidia explains that  
14 “[s]hifting gaming hardware to the cloud has helped AAA gaming reach users in lower  
15 socioeconomic groups who otherwise would not be able to purchase, or could not afford,  
16 their own video game system or gaming PC”. PX8000 (Eisler (Nvidia) Decl.) ¶ 10.

17 159. Today, cloud gaming subscription services can stream games to consoles, Windows PCs,  
18 Mac PCs, Chromebook PCs, tablets, mobile phones, and some smart TVs, with device  
19 compatibility varying by service. PX0003 at 018; PX7050 (Choudhry (Microsoft) Depo.)  
20 at 22:11-21; PX0006 at 088. See also PX8000 (Eisler (Nvidia) Decl.) ¶ 7.

21 160. Cloud gaming enables gamers to begin playing a game in seconds, rather than waiting for  
22 games to download or update, and streaming rather than downloading avoids burdening  
23 the storage limits on a gaming device. [https://support.xbox.com/en-US/help/games-](https://support.xbox.com/en-US/help/games-apps/cloud-gaming/playing-console-game-from-cloud-versus-installing)  
24 [apps/cloud-gaming/playing-console-game-from-cloud-versus-installing](https://support.xbox.com/en-US/help/games-apps/cloud-gaming/playing-console-game-from-cloud-versus-installing) (“You can start  
25 playing a game in seconds. There’s no waiting for games to finish installing or  
26 updating.... download times or storage limits aren’t a factor.”); PX8000 (Eisler (Nvidia)  
27 Decl.) ¶ 17.

1 161. This permits gamers to play computationally demanding games on less powerful devices  
2 that otherwise lack the computing power or storage to support the games. Nadella  
3 (Microsoft) Hr’g Tr. 834:3-7; [https://www.nvidia.com/en-us/geforce/geforce-](https://www.nvidia.com/en-us/geforce/geforce-experience/)  
4 [experience/](https://www.nvidia.com/en-us/geforce/geforce-experience/); PX8000 (Eisler (Nvidia) Decl.) at ¶¶ 9, 17; PX3103 (Nvidia) at 008.

5 162. In September 2020, Microsoft added cloud gaming to its top-tier multi-game content  
6 library subscription service offering, Xbox Game Pass Ultimate. PX9091 at 001–06.

7 163. Xbox Cloud Gaming (also referred to as xCloud) enables Xbox Game Pass Ultimate  
8 subscribers to stream certain games, as opposed to downloading games locally, and then  
9 to play those games on the device most convenient to them, including consoles, Windows  
10 PCs, tablets, and mobile phones. PX0003 at 018.

11 164. Microsoft also offers free access to Xbox Cloud Gaming for Epic Games’ *Fortnite*.  
12 PX0003 at 019.

13 165. *Fortnite* on Xbox Cloud Gaming is separate from Game Pass Ultimate (*i.e.*, no  
14 subscription is required to play *Fortnite*), and [REDACTED]  
15 [REDACTED] PX0003 at 019.

16 166. As Microsoft Gaming CEO Phil Spencer testified, Microsoft’s xCloud strategy was to  
17 allow who wanted to play Microsoft games on their mobile phones “to have access to  
18 those through streaming,” allowing Microsoft to “find a significant number of customers  
19 given the installed base of people playing games on mobile phones.” Spencer (Microsoft)  
20 Hr’g Tr. 393:16-394:6.

21 167. As Microsoft CEO Satya Nadella told investors, to date, more than 20 million gamers  
22 have used Xbox Cloud Gaming to stream games from the cloud. PX9171 at 017 (Nadella:  
23 “[W]ith Cloud Gaming, we’re transforming how games are distributed, played, and  
24 viewed. More than 20 million people have used the service to stream games to date.”);  
25 *see also* Hines (Microsoft) Hr’g Tr. 93:6-10 (Hines) (testifying to personally using  
26 xCloud to play games on a regular basis).

27 168. In ordinary course documents, Microsoft has stated that cloud gaming “dramatically  
28 expand[s] our market opportunity.” Spencer (Microsoft) Hr’g Tr. 308:4-11; PX1056

1 (Microsoft) at 017. According to Microsoft, “[c]loud gaming services remain in their  
2 infancy but cloud gaming is evolving rapidly (both in terms of the number of services  
3 available and the size of the relevant catalogues), and is expected to grow in the short- to  
4 medium-term.” PX0003 at 074.

5 169. Microsoft CEO Satya Nadella acknowledged that by allowing lower powered devices to  
6 play high intensity games, cloud gaming potentially expands the overall gaming market.  
7 Nadella (Microsoft) Hr’g Tr. 834:15-18.

8 170. Other companies that have introduced cloud gaming include Amazon, Nvidia, and  
9 Google. PX0003 at 068. Sony has also introduced cloud gaming available on the highest  
10 tier of its PlayStation Plus subscription service, “PlayStation Plus Premium,” [REDACTED]  
11 [REDACTED] PX8001 (Ryan (Sony) Decl.) ¶ 9; PX3080 (Sony) at  
12 075.

13 171. Sony Interactive Entertainment CEO Jim Ryan testified that Sony “is making significant  
14 investments in cloud in anticipation of it becoming a very meaningful way in the way that  
15 gamers access game content.” PX3378-050 (Ryan (Sony) Hr’g Testimony, 65:1-4) [REDACTED]  
16 [REDACTED]  
17 [REDACTED] PX3378-055 (Ryan (Sony) Hr’g Testimony, 112:24) [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED] PX3378-052 (Ryan (Sony) Hr’g Testimony, 97:14-25, 98:04-06).

21 172. Amazon’s Luna+ (a tier of Amazon Luna), priced at \$9.99 per month with additional  
22 options available for further purchases, provides streaming access to a library of over 100  
23 third-party games. See Amazon Luna, <https://www.amazon.com/luna>; PX3206 (Amazon)  
24 at 004.

25 173. Nvidia GeForce NOW, priced at \$49.99 for six months for the Priority tier or \$99.99 for  
26 six months for the RTX 3080 tier, allows gamers access streaming versions of game titles  
27 that the gamers already own, with the streaming hosted on Nvidia Corporation  
28 datacenters. Nvidia, GeForce NOW, <https://www.nvidia.com/en-us/geforce-now/>;

1 PX8000 (Eisler (Nvidia) Decl.) at ¶¶16, 18, 28. Bond (Microsoft) Hr’g Tr. 177:6-177:24.

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] PX3381

5 (Eisler Video) at 49:17-50:01.

6 174. Google Stadia Pro was priced at \$9.99 per month with additional options for further  
7 purchases, allowing gamers to stream games from a library of hundreds of third-party  
8 games. PX8003 (Zimring (Google) Decl.) at ¶ 3.

9 175. Google discontinued Stadia in January 2023 in part due to the cost and difficulty of  
10 securing content to offer to Stadia users. Zimring (Google) Hr’g Tr. 470:15-471:1;  
11 PX8003 (Zimring (Google) Decl.) ¶ 2.

12 176. As Professor Lee stated in his written direct, cloud gaming is a nascent technology and is  
13 growing in usage, and cloud usage on Microsoft’s cloud gaming service offering through  
14 Xbox Game Pass has increased, measured both by hours and the number of monthly  
15 active users. Lee Written Direct at 158.

16 **E. A Gaming Platform Must Offer AAA Content to Succeed**

17 177. “AAA” content is an industry term and can be synonymous with “a tentpole title, a  
18 marquee title, a big blockbuster title” that has a high development budget and high  
19 expectations for sales. Bond (Microsoft) Hr’g Tr. 147:20-148:2 (“[AAA] tends to imply a  
20 game of a certain size and scope, a certain level of investment put into the game.”);  
21 PX7046 (Leder (Microsoft) Dep.) at 97:1-11; PX7011 (Spencer (Microsoft) IH Vol. 1) at  
22 36:22-37:3 (“I wouldn’t say there’s an industry definition for what AAA actually means.  
23 I think the notion of a AAA game is a game with a high development budget with  
24 presumably a high expectation for -- for sales and kind of splash when it launches.”);  
25 PX8001 (Ryan (Sony) Decl.) ¶ 20 (“AAA games often feature cinematic storytelling,  
26 immersive environments, and detailed graphics.”). AAA games are “immersive,” “major  
27 blockbuster titles” that tend to include “thoughtful, long storyline[s]” with significant  
28 “compute power” and “graphic fidelity.” Dkt. 228 (Joint Stip. and [Proposed] Order) at 3.

1 178. AAA games are particularly important in the gaming industry. PX8001 (Ryan (Sony)  
2 declaration) at ¶¶ 18-23; Booty (Microsoft) Hr’g Tr. 51:20-52:8.

3 179. “Video game sales, revenues, and engagement are concentrated among a relatively small  
4 number of hit “blockbuster” titles and franchises, often referred to as “AAA” games.  
5 AAA games often are high-budget video games that have, or are expected to have, high  
6 unit sales and revenues. They tend to have high quality graphics and gameplay, have  
7 significant marketing and promotion, and usually require substantial investment and take  
8 longer to develop and than those without the AAA description. Lee Written Direct at ¶ 23  
9 (citing PX4671 (Microsoft) at 001; PX8001 (Ryan (Sony) Decl.) ¶ 20; PX1063  
10 (Microsoft) at 003.

11 180. “AAA” or tentpole titles can drive customer growth and engagement, as they “lift the  
12 entire tent” for other types of content. PX1089 (Microsoft) at 009; PX7046 (Leder  
13 (Microsoft) Dep.) at 111:24-112:12

14 181. Former Stadia Product Director Dov Zimring testified that all of Google’s consumer  
15 research indicated that new games platforms needed these AAA or “blockbuster[]” games  
16 in order to generate player interest. Zimring (Google) Hr’g Tr. 477:3-10. Google even  
17 invested in its own games studio, Stadia Games and Entertainment, in the hopes of  
18 creating exclusive games for Stadia that would draw players to the platform. Zimring  
19 (Google) Hr’g Tr 478:3-479:5.

20 182. Microsoft and Sony need to have these AAA titles to build their gaming ecosystems.  
21 Spencer (Microsoft) Hr’g Tr. 301:24-302:15 (agreeing that Microsoft needs to offer “a  
22 predictable cadence of AAA launches in its products and services” to drive acquisition  
23 and retention of users across Microsoft products and services); PX1102 (Microsoft) at  
24 001 [REDACTED]  
25 [REDACTED]  
26 PX8001 (Ryan (Sony) Decl.) ¶ 24 (Activision content critical to PlayStation  
27 competitiveness).  
28

1 183. AAA titles have long development cycles with high engagement, leading to a reduced  
2 supply of gaming content. PX1050 (Microsoft) at 034-35 [REDACTED]

3 [REDACTED]  
4 [REDACTED]  
5 184. Microsoft CEO Phil Spencer testified that gaming users do not use the term AAA when  
6 discussing mobile games. Spencer (Microsoft) Hr’g Tr. 309:2-3.

7 185. Consolidation in the industry has led to fewer AAA titles. PX1154 (Microsoft) at 001

8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED] Former Product Director for Stadia Dov Zimring testified that Stadia’s  
11 development studio, Stadia Games and Entertainment, closed in early 2021 as a result of  
12 the high costs brought on by industry consolidation. Zimring (Google) Hr’g Tr 479:14-  
13 23.

14 186. In past acquisitions, Microsoft has made procuring AAA content its main driver. For  
15 example, during the proposed acquisition of [REDACTED]

16 [REDACTED]  
17 [REDACTED] PX1791 (Microsoft) at  
18 004.

19 **1. The Industry Has a History of Consolidation**

20 187. Over the last decade there has been significant, accelerating consolidation among video  
21 game publishers and developers. PX2094 (Activision) at 015; PX0027 at 002–04;  
22 PX7039 (Sakhnini (Activision) Dep.) at 116:5-117:9.

23 188. As CEO of Microsoft Gaming, Phil Spencer has been the leader of Microsoft’s strategy  
24 to acquire more first-party gaming content. Spencer (Microsoft) Hr’g Tr. 268:12-16. Over  
25 the course of Mr. Spencer’s nine years as CEO, Microsoft has more than doubled the  
26 number of gaming studios it owns. Spencer (Microsoft) Hr’g Tr. 268:19-269:11. The  
27 include eight studios that Xbox Game Studios acquired between 2018 and 2020,  
28

1 including Playground, The Initiative, Ninja Theory, Undead Labs, Compulsion Games,  
2 inXile, Obsidian, and Playground. PX1425 (Microsoft) at 005.

3 189. The need for and scarcity of content has driven this consolidation. Microsoft Gaming  
4 CFO Tim Stuart explained, [REDACTED]  
5 [REDACTED]  
6 [REDACTED] PX1154 (Microsoft) at 001.

7 190. Microsoft Gaming CEO Phil Spencer was concerned about [REDACTED]  
8 [REDACTED] PX1136  
9 (Microsoft) at 001.

10 191. Microsoft Gaming CEO Phil Spencer [REDACTED]  
11 [REDACTED]  
12 [REDACTED] PX1136 (Microsoft) at 001; PX1791 (Microsoft) at 018. The  
13 “Gaming Industry Outcomes” memo found that [REDACTED]  
14 [REDACTED]  
15 [REDACTED] PX1791 (Microsoft) at 049.

16 192. The “Gaming Industry Outcomes” memo also concluded [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED] PX1791 (Microsoft) at 026.

22 193. Microsoft generated [REDACTED]  
23 [REDACTED]  
24 [REDACTED] PX7026 (Hampton (Microsoft) Dep.) 253:11-  
25 254:11.

26 194. When seeking board approval for the ZeniMax acquisition, Microsoft noted that

27 [REDACTED]  
28 [REDACTED]

1 [REDACTED] PX1050 (Microsoft) at 004. Microsoft recognized that subscriber scale  
2 is imperative for a successful subscription service, and that “the supply of attractive  
3 games is structurally limited.” Spencer (Microsoft) Hr’g Tr. 308:10-20 (discussing  
4 PX1065 (Microsoft) at 017); PX1050 (Microsoft) at 032, 034–36.

5 195. [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED] PX1050 (Microsoft) at 035.

9 196. Activision was also aware of consolidation in the gaming industry. A July 2021 Long  
10 Range Plan explains: [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 PX2094 (Activision) at 006, 015.

## 14 2. A Small Group of Top AAA Games Is Particularly Important

15 197. Video game sales and revenues are concentrated among a relatively small number of hit  
16 “blockbuster” titles and franchises often referred to as “AAA” games. PX5000 (Lee  
17 Report) at 035. Microsoft Gaming CEO Phil Spencer testified that “AAA games are a  
18 small part of the overall game releases in a given year.” Spencer (Microsoft) Hr’g Tr. at  
19 304:7-14, 304:25-305:14; PX7011 (Spencer (Microsoft) IH) (in camera) at 38:22-39:7  
20 (estimating 10-20 AAA games out of 300-400 console games per year).

21 198. Microsoft’s Corporate Vice President of Gaming Jerrett West defines tentpole content as  
22 “things we believe will drive acquisition, engagement hours, and have talkable and  
23 shareable marketing value” and describes them as “rare commodities.” PX1102  
24 (Microsoft) at 001. Matt Booty, Head of Xbox Game Studios, notes that “[t]he number of  
25 AAA developers continues to drop.” PX7014 (Booty) (Microsoft) IH) 230:12-231:4.

26 199. Mr. Booty testified that “AAA” can refer to the quality level, budget size, consumer  
27 expectations about a gaming, and “tentpole” means games that are well-known or  
28 recognizable. Booty (Microsoft) Hr’g Tr. 51:20-52:15; *see also* PX7005 (West)

1 (Microsoft) IH) at 75:24-76:1 (“tentpole game” and “AAA game” are largely  
2 interchangeable).

3 200. In a 2023 email, a Microsoft executive noted that, “there are relatively few of these  
4 games being released—either by us or by 3P—annually. The stat to call out here is  
5 there’s been [REDACTED] In  
6 other words, the pool of available tentpoles is [REDACTED] PX4673  
7 (Microsoft) at 002.

8 201. Microsoft uses the term “exclusive” to refer to a game available on Xbox consoles, Xbox  
9 Game Pass, and PC. Booty (Microsoft) Hr’g Tr. 54:12-15. Microsoft documents highlight  
10 the importance of AAA exclusive content for driving console sales and Xbox Game Pass  
11 growth. [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED] PX1136 (Microsoft) at 004.

17 202. A 2021 report by a consultant to Microsoft explains that tentpoles are “pre-eminent  
18 acquisition *and* retention drivers.” PX1089 (Microsoft) at 009.

19 203. Regardless of the specific term used, there is widespread industry recognition that certain  
20 games are particularly important drivers of sales and engagement. PX7033  
21 (Schnakenberg (Activision) Dep. 146:4-147:22). As Phil Spencer, CEO of Microsoft  
22 Gaming, testified, “[T]he most profitable thing in our industry are massively hit games,  
23 and what you do to keep those games at their [peak] of popularity is to continue to deliver  
24 high-quality content to as many customers as you can.” Spencer (Microsoft) Hr’g Tr.  
25 362:2-6; *see also* Spencer (Microsoft) Hr’g Tr. 432:2-5 (“The highest value driver in the  
26 gaming business are the hit franchises.”). .

1 204. Phil Eisler, Vice President and General Manager of Nvidia GeForce Now, stated,  
2 “Access to AAA titles, which are the latest, most-popular gaming franchises, is critical to  
3 the success of any gaming platform.” PX8000 (Eisler (Nvidia) Decl.) ¶ 30.

4 **3. AAA Games are Difficult and Costly to Make**

5 205. Microsoft recognizes four independent publishers, collectively known as the “Big 4”—  
6 Activision, Entertainment Arts, Take-Two, and Ubisoft—are necessary for Xbox.  
7 PX1019 (Microsoft) at 004 (“Guiding principle #1 – Scarlett success requires the Big 4 +  
8 Epic.”).

9 206. The latest version of *Halo, Halo Infinite*, [REDACTED]  
10 [REDACTED] PX1419 (Microsoft) at 003. [REDACTED]  
11 [REDACTED]

12 207. Other games can take even longer, with Matt Booty at Microsoft predicting [REDACTED]  
13 [REDACTED] PX7014 (Booty (Microsoft) IH) at 131:3-6.

14 208. Phil Spencer, CEO of Microsoft Gaming, testified “Developing big games today is very  
15 expensive.” Spencer (Microsoft) Hr’g Tr. 361:12.

16 209. Over 3,000 people worked on Call of Duty: Modern Warfare. PX9005 at 004.

17 210. [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED] PX1805 (Microsoft) at 006.

21 211. [REDACTED]  
22 [REDACTED]  
23 [REDACTED] PX1050 (Microsoft) at 034.

24 212. [REDACTED]  
25 [REDACTED]  
26 [REDACTED] PX1050 (Microsoft) at 036.

27 213. [REDACTED]  
28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED] PX2107 (Activision) at 073.

4 214. Phil Eisler, Vice President and General Manager of Nvidia GeForce Now, explained the  
5 challenge that “[t]oday’s AAA video games . . . require tens of millions of dollars (in  
6 some cases over \$100 million) and years to produce.” PX8000 (Eisler (Nvidia) Decl.) at  
7 ¶ 31. Developing games has become more expensive in the last five to ten years, with  
8 games on average taking longer to develop and experiencing delays in development.  
9 Booty (Microsoft) Trial Tr. 53:10-21.

10 215. [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]

15 PX1063 (Microsoft) at 003. Activision CEO Mr. Kotick concluded in his hearing  
16 testimony that sustaining AAA games requires broad and deep capabilities, and a AAA  
17 title is not guaranteed even with that capability (though Mr. Kotick admits Activision has  
18 the capability to release a AAA every single year). Kotick (Activision) Hr’g Tr. 43:14-22

19 216. Because of Microsoft’s gaming content advantages, Mr. Spencer has stated that even  
20 well-capitalized competitors like Google and Amazon “will not catch up to Microsoft in  
21 gaming.” Spencer (Microsoft) Hr’g Tr. 303:16-20, 304:2-4.

22 **F. Exclusive Gaming Content is Important for Attracting Customers and**  
23 **Driving Sales**

24 217. Exclusive content can be a driver of consumer console purchase decisions, as a Microsoft  
25 strategy document explains, If the content any player wants to play is not available on our  
26 platform, even the best Xbox fans will use another platform to play those games.” Lee  
27 Written Direct at ¶ 24 (citing PX1070 (Microsoft) at 003).

1 218. Microsoft Gaming CFO Tim Stuart testified that content is a key differentiator for  
2 gaming products and services. Stuart (Microsoft) Hr’g Tr. 939:4-11. Mr. Stuart testified  
3 that a pipeline of content helps drive user or consumer decisions about a subscription  
4 service or ecosystem for video games. Stuart (Microsoft) Hr’g Tr. 940:12-15.

5 219. Microsoft Gaming CEO Phil Spencer testified that discussions about the impact of  
6 exclusive gaming content on Xbox platforms has been a topic of discussion throughout  
7 the Xbox’s two decades in the gaming industry. Spencer (Microsoft) Hr’g Tr. 315:9-13.  
8 Mr. Spencer testified that one of the benefits of owning content is that it allows Microsoft  
9 to decide where the content appears. Spencer (Microsoft) Hr’g Tr. 314:2-5.

10 220. Mr. Spencer testified that he has told colleagues that he does not see a point in putting  
11 Microsoft’s first-party games on other closed platforms. Spencer (Microsoft) Hr’g Tr.  
12 318:24-319:8.

13 221. Microsoft’s decision to keep its *Halo* franchise exclusive to Xbox is instructive. *Halo* is a  
14 first-person shooter franchise that offers multiplayer mode. PX7005 (West (Microsoft)  
15 IH) at 42:16-18, 43:13-19. As Mr. Spencer admitted on the stand, Microsoft chooses not  
16 to ship *Halo* on PlayStation because the exclusives available on its platform are “one of  
17 the decisions people make when they’re going into a store on what console to buy.”  
18 Spencer (Microsoft) Hr’g Tr. 362:8-23.

19 222. Differentiated and exclusive content allows a console or service to provide a distinct  
20 benefit to customers. Lee Written Direct at ¶ 24 (citing PX7031 (Greenberg (Microsoft)  
21 Dep.) 75:24-76:22).

22 223. Ample evidence exists to show that industry participants acknowledge that video game  
23 content availability and quality are one of the important determinants of whether  
24 consumers purchase a video game console. For example, a 2019 Microsoft document  
25 regarding a potential acquisition of ██████████ explains that “having access to relevant  
26 content is one of the single most important drivers in ... console growth. ██████████

1 [REDACTED] Lee Written Direct at ¶ 26. Differentiated and  
2 exclusive content allows a console or service to provide a distinct benefit to customers.  
3 Lee Written Direct at ¶ 24 (citing PX7031 (Greenberg (Microsoft) Dep. Tr.) 75:24-  
4 76:22).

5 224. Internal market share simulators and machine-learning models produced by Microsoft  
6 [REDACTED]  
7 [REDACTED] PX5000 (Lee Report) at 155; PX1477  
8 (Microsoft) at 001; PX1075 (Microsoft) at 002.

9 225. Microsoft Gaming CEO Phil Spencer testified Microsoft's acquisition of ZeniMax was  
10 motivated by a desire to have greater control over ZeniMax content on its own platform.  
11 Spencer (Microsoft) Hr'g Tr. 314:7-24. [REDACTED]  
12 [REDACTED] PX1050 (Microsoft) at  
13 034.

14 226. [REDACTED]  
15 [REDACTED]  
16 [REDACTED] PX1080  
17 (Microsoft) at 001.

18 227. [REDACTED]  
19 [REDACTED]  
20 [REDACTED] PX7053  
21 (Ryan (Sony) Dep.) at 20:16-21:5. Likewise, almost all of Microsoft's first-party games  
22 are exclusive to Xbox. PX7011 (Spencer (Microsoft) IH Vol. 1) at 360:2-13.

23 228. [REDACTED]  
24 [REDACTED]  
25 [REDACTED] PX7053 (Ryan (Sony) Dep.) at 24:20-26:8.

26 229. A model of consumer demand for consoles and titles estimated by Dr. Lee using  
27 historical Microsoft sales data predicts an average share shift of 8.9% toward Microsoft  
28

1 from making past *Call of Duty* titles exclusive, and a smaller but significant shift toward  
2 Microsoft from making other Activision titles exclusive. PX5000 (Lee Report) at 156-57.

3 230. Microsoft Gaming CEO Phil Spencer testified that Microsoft’s goal is to increase the  
4 number of Game Pass subscribers by adding attractive content. Spencer (Microsoft) Hr’g  
5 Tr. 302:24-303:1. In attracting subscribers to Game Pass, Microsoft recognizes the  
6 importance of “content that is ... exclusive to the service, to differentiate relative to other  
7 services,” and has noted “a strong relationship, which we believe is causal, between  
8 differentiated content and subscriber growth.” Spencer (Microsoft) Hr’g Tr. 307:6-21;  
9 PX7011 (Spencer (Microsoft) IH Vol. 1) at 102:24-103:15 (discussing PX1065  
10 (Microsoft) at 015, 017.

11 231. Microsoft Gaming CFO Tim Stuart testified that exclusive content is important to  
12 attracting subscribers to Game Pass, saying, “[H]aving content that is exclusive to that  
13 service is an optimal ... way to attract customers into that service.” PX7007 (Stuart  
14 (Microsoft) IH) at 167:5-168:9. Mr. Stuart testified that a subscription services requires a  
15 robust content pipeline to scale up and reach scale, and that there is correlation between  
16 content, engagement, and revenue on a subscription service. Stuart (Microsoft) Hr’g Tr.  
17 939:12-16; 941:4-7.

18 232. The head of marketing for Xbox Game Studios, Aaron Greenberg, observed that  
19 launching titles exclusively on Xbox for the first year will enable Microsoft to [REDACTED]  
20 [REDACTED] PX1951 (Microsoft) at 001; *see*  
21 PX7031 (Greenberg (Microsoft) Dep.) at 74:18-75:5 [REDACTED]

22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 233. Microsoft has negotiated exclusive content for Game Pass subscribers in the past,  
26 including exclusive weapons, skins, and maps for *Destiny 2*. PX7007 (Stuart (Microsoft)  
27 IH) at 111:5-16.  
28

1 234. [REDACTED]  
2 [REDACTED] PX2083 (Activision) at 013.  
3 235. [REDACTED]  
4 [REDACTED]  
5 236. [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED] PX4808  
10 (Microsoft) at 011. [REDACTED]  
11 [REDACTED]  
12 237. [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED] PX4775 at 008-9.  
16 238. Microsoft and Sony compete to reach agreements with third-party game studios for  
17 content, including for exclusive content. Both Sony and Microsoft have deals with third-  
18 party game publishers that prohibit the publishers from placing certain games onto  
19 competing consoles or subscription services. PX3354 (Sony) at 020 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED] PX3378 at 52-53 (Ryan (Sony) Hr’g Testimony at 95:09-  
23 13). [REDACTED]  
24 [REDACTED]  
25 [REDACTED] PX3378 at 52-53 (Ryan (Sony) Hr’g Testimony at  
26 94:14-95:13).  
27 239. [REDACTED]  
28 [REDACTED] PX4743 (Microsoft). [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

[REDACTED] PX4743

(Microsoft) at 014.

**G. Activision Content is Particularly Important**

240. Activision develops and publishes high-quality video games for multiple devices, including video game consoles, PC, and mobile devices. PX9005 at 010–11.

241. According to Microsoft’s Board presentation summarizing the deal, [REDACTED] [REDACTED] PX4341 (Microsoft) at 027.

242. Activision’s “legendary franchises” include *Call of Duty*, *World of Warcraft*, *Diablo*, and *Overwatch*. PX4218 (Microsoft) at 001.

243. Activision’s CEO Bobby Kotick testified that Activision’s games are “iconic” and “beloved.” PX7006 (Kotick (Activision) IH) at 74:23-76:4). Mr. Kotick explained he and the gaming industry view Activision games as beloved and iconic because of the “duration, the popularity, the joy, and the fun people experience” with Activision games. Kotick (Activision) Hr’g Tr. 44:1-6.

244. Activision’s Vice Chairman Hunan Sakhnini testified that Activision makes “iconic IP” in titles like *Diablo 4* and *World of Warcraft*, and that he expected *Diablo 4* to become a “megahit.” PX7039 (Sakhnini (Activision) Dep.) at 93:3-24, 108:17-24.

245. *Call of Duty*, alone, has approximately 100 million active gamers and span a “pretty broad range” of player types. Kotick (Activision) Hr’g Tr. at 717:6-9; 717:10-17.

246. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Lee Written Direct

at ¶ 29 (citing PX7003 Bond (Microsoft) (IH) at 110:4-111:2; 218:19- 219:4; 257:20-258:9; PX1182 (Microsoft) at 003; PX 0006 at 016; PX2157 (Activision) at 005; PX7052 (Zerza (Activision) (Dep.) at 203:24-204:2; PX1245 (Microsoft) at 001).

1 247. [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 [REDACTED] Lee Written Direct at ¶ 29 (citing PX1182  
8 (Microsoft) at 004).

9 248. Dr. Lee found that this evidence also indicates that there is “no comparable replacement  
10 for Activision content: if Microsoft and Sony could easily replace Activision content with  
11 alternative content that generated comparable value, then there is no clear economic  
12 reason that [REDACTED]

13 [REDACTED] Lee Written Direct at  
14 ¶ 30.

15 249. To further investigate the impact of Activision content on share of console sales, Dr. Lee  
16 developed and estimated an econometric model of consumer demand for video game  
17 consoles and video game titles using Generation 8 sales data, (the “share model.”). Dr.  
18 Lee estimated “that removing a *Call of Duty* title from PlayStation consoles could  
19 increase the share of Xbox consoles sold of the course of a year, relative to PlayStation  
20 consoles, by approximately 8.9 percentage points on average.” Dr. Lee also estimated  
21 that “removing a non-*Call of Duty* Activision title from Play Station consoles could  
22 increase the share of Xbox consoles sold over the course of a year by [REDACTED]

23 [REDACTED] Lee Written Direct at ¶ 31.

24 250. As shown in Figure 1 of his written direct report, Dr. Lee’s share model predicts that  
25 making games with high unit sales exclusive tends to generate greater changes in Xbox  
26 and PlayStation console shares. Dr. Lee also found that “the predicted increases in Xbox  
27 shares from making *Call of Duty* titles exclusive are higher than for many other AAA  
28

1 titles, as *Call of Duty* game sales are correspondingly higher than for most other AAA  
2 titles.” Lee Written Direct at ¶ 32.

3 251. Activision’s iconic video game titles include several leading AAA franchises – like *Call*  
4 *of Duty*, *Overwatch*, and *Diablo*, [REDACTED]  
5 [REDACTED] PX1741 (Microsoft) at 010; PX2113 (Activision) at 010. In a  
6 presentation to a credit ratings agency, Activision’s CFO and others characterized those  
7 three titles as “super franchises.” PX2107 (Activision) at 051.

8 252. Activision has released a new *Call of Duty* in 19 of the past 20 years. Kotick (Activision)  
9 Hr’g Tr. 44:10-15.

10 253. Mr Kotick confirmed at the hearing that not only has *Call of Duty* been the best selling  
11 game in the United States every single year for the past 13 years, but the 2022 release of  
12 *Call of Duty: Modern Warfare* was the best selling *Call Of Duty* title of all time, the  
13 highest grossing entertainment opening of the year, and made \$1 billion dollars in the  
14 first ten days of its release. Kotick (Activision) Hr’g Tr. 44:15-45-21

15 254. Activision’s *Diablo* franchise also had a record breaking year with its release of *Diablo*  
16 *IV* the same month as this hearing, June 2023. Kotick (Activision) Hr’g Tr. 48:17-49:3.  
17 *Diablo IV* was both the best-selling *Diablo* game at launch of all time, *Diablo IV* also had  
18 the biggest opening week of the year with a record breaking \$666 grossed in just 5 days.  
19 Kotick (Activision) Hr’g Tr. 48:25-49:13

20 255. Microsoft, in presentations to its Board of Directors regarding the Proposed Acquisition,  
21 called Activision’s content “world class ... across console, PC, and mobile.” PX4341  
22 (Microsoft) at 027.

23 256. Activision’s largest franchise, *Call of Duty*, is a AAA game. Spencer (Microsoft) Hr’g  
24 Tr. 309:6-7. It is “one of the most successful entertainment franchises of all time.”  
25 PX9005 at 004.

26 257. Microsoft and Sony compete fiercely for access to Activision content, and Microsoft has  
27 agreed to [REDACTED] with Activision to keep Activision titles from  
28 skipping its platform. [REDACTED]

1 [REDACTED] Spencer (Microsoft) Hr’g Tr.  
2 312: 2-19 (“Q. Okay. And you were willing to make that that kind of offer that would  
3 have [caused Microsoft to lose money], because you had to make the economics good  
4 enough for Activision to not skip Xbox X and S; right? A. That was the threat.”); PX7011  
5 (Spencer (Microsoft) IH Tr.) 125:14-126:15, 127:20-24; *see also* Spencer (Microsoft)  
6 Hr’g Tr. 311:5-21, 313:9-14; PX7011 (Spencer (Microsoft) IH Vol. 1) at 118:14-119:10

7 [REDACTED]  
8 [REDACTED] Dr. Lee determined that “if a console or gaming service were to lose access  
9 to Activision content there are limited and likely insufficient alternative options for a  
10 console manufacturer or gaming service provider to *replace* the impact and attractiveness  
11 of Activision content.” Lee Written Direct at ¶ 33.

12 258. In its [REDACTED]  
13 [REDACTED] PX2094  
14 (Activision) at 007.

15 259. Even among AAA games, Activision’s most well-known franchise, *Call of Duty*, is  
16 particularly strong. First released nearly twenty years ago in 2003, *Call of Duty* is, in  
17 Activision’s own words, “one of the most successful entertainment franchises of all  
18 time.” PX9005 at 004. Microsoft concurs. [REDACTED]

19 [REDACTED]  
20 [REDACTED] PX4341 (Microsoft) at 027.  
21 260. *Call of Duty* is Activision’s “key product franchise.” PX9052 at 037; *see also* PX8001  
22 (Ryan (Sony) Decl.) ¶ 25 (calling COD “unique”).

23 261. Activision releases new *Call of Duty* titles every year. Hines (Microsoft) Hr’g Tr. 112:10-  
24 16. This annual release cycle is unique among AAA games, with the exception of sports  
25 games, because games of this caliber often require immense time and resources that take  
26 years in between releases. PX8001 (Ryan (Sony) Decl.) ¶ 25. Activision uses four  
27 separate studios and several support studios to complete the development work necessary  
28 to launch an annual release. PX8001 (Ryan (Sony) Decl.) ¶ 25; PX3378-015 (Ryan

1 (Sony) Hr’g Testimony at 52:1-19) (“[Activision has] been able to organize themselves to  
2 release basically new [Call of Duty] games every single year. And the games are  
3 different, unique games. There’s nothing like it in the industry.”).

4 262. As SIE CEO Jim Ryan explains, the annual releases of Call of Duty are unlike anything  
5 else in the industry: “They have different themes. They have different story lines. They  
6 have different came play. They’re made by different [Activision] studios. The closest  
7 analogy would be of annual iterations of the major sports franchises, but that situation is  
8 totally different. The developer and publisher build incrementally on the previous year’s  
9 version of the game. Activision manages somehow to make a new game every single  
10 year. The situation is very different.” PX3378-015 (Ryan (Sony) Hr’g Testimony at  
11 52:09-19).

12 263. [REDACTED]  
13 [REDACTED] PX3378 (Ryan (Sony) Hr’g Testimony at 50:19-51:08). [REDACTED]  
14 [REDACTED]  
15 [REDACTED] PX3378 (Ryan (Sony) Hr’g  
16 Testimony at 50:23-51:01).

17 264. *Call of Duty*’s loyal fanbase and enduring appeal have made it particularly valuable,  
18 influencing gamer engagement and gaming product adoption. PX2160 (Activision) at  
19 009; PX0031 at 003-004. [REDACTED]  
20 [REDACTED]  
21 [REDACTED] PX8000 (Eisler Decl.) at ¶ 49.

22 265. Call of Duty has a massive following, with [REDACTED] monthly active users (“MAU”) in  
23 2020, according to an Activision strategy document. PX2094 (Activision) at 007.

24 266. In every year since 2014, the best-selling buy-to-play console game in the United States  
25 has been a *Call of Duty* game except for 2018, when *Red Dead Redemption II* was  
26 released. PX8001 (Ryan (Sony) Decl.) ¶ 26; see PX9053 at 003 (*Call of Duty* will remain  
27 best-selling U.S. franchise in 2022 for 14th consecutive year). In 2018, *Call of Duty*  
28 *Black Ops 4* ranked #2. PX8001 (Ryan (Sony) Decl.) ¶ 26.

1 267. In 2020, the #1 and #2 best-selling paid console games were *Call of Duty* titles. PX8001  
2 (Ryan (Sony) Decl.) ¶ 26.

3 268. In 2021, *Call of Duty: Vanguard* topped the revenue charts as the best-selling game in the  
4 United States, with another *Call of Duty* title, *Black Ops Cold War*, coming in second.  
5 PX2056 (Activision) at 001.

6 269. In 2022, *Call of Duty: Modern Warfare II* took in \$1 billion globally in the first ten days  
7 following its launch, making it the highest grossing entertainment opening of 2022.  
8 PX9132 at 001–02.

9 270. By comparison, the highest grossing film of 2022, *Top Gun: Maverick*, took one month  
10 to reach the \$1 billion threshold.

11 [https://www.economist.com/business/2022/11/29/microsoft-activision-blizzard-and-the-  
13 future-of-gaming](https://www.economist.com/business/2022/11/29/microsoft-activision-blizzard-and-the-<br/>12 future-of-gaming).

14 271. *Call of Duty* was the most requested title on GeForce NOW in April 2022. PX3052  
15 (Nvidia) at 031.

16 272. ██████████ PlayStation gamers play *Call of Duty*. PX7053 (Ryan (Sony) Dep. Vol.  
17 1) 54:14-55:2; PX8001 (Ryan (Sony) Decl.) ¶ 28 (Since 2019, ██████████ PlayStation’s  
18 total user base played *Call of Duty*).

19 273. In the United States since 2019, ██████████ unique PlayStation gamers have  
20 played *Call of Duty*. ██████████ of PlayStation’s total user base.  
21 PX8001 (Ryan (Sony) Decl.) ¶ 28.

22 274. *Call of Duty* has the ██████████  
23 ██████████ PX8001 (Ryan (Sony) Decl.) ¶ 28.

24 275. In 2021, *Call of Duty* players ██████████ playing *Call of Duty*.  
25 PX8001 (Ryan (Sony) Decl.) ¶ 28.

26 276. Activision gets 60% of its global revenue from inside the United States. Bailey  
27 (Defendants’ Expert) 803:17-804:1

28 277. SIE CEO Jim Ryan testified that “Call of Duty players, meaning those who engage with  
Call of Duty at some point in a year, drive a significant portion of SIE’s revenue, with the

1 total spend on PlayStation by these players across all items—including hardware,  
 2 accessories, subscriptions, games and add-ons—accounting for over █████ of overall  
 3 PlayStation spending.” PX8001 (Ryan (Sony) Decl.) ¶ 27.

#### 4 **H. Microsoft Has a History of Making Content from Acquired Studios Exclusive**

5 278. As described *infra* in Sections IV.C., Microsoft has a history of acquiring game studios  
 6 and making future releases from those studios exclusive to Xbox.

7 279. For example, Microsoft acquired a number of game studios in 2018-2019, and its  
 8 approach to those acquisitions was that “going forward these new studios will focus on  
 9 making games for our console and we have no plans to expand our exclusive first party IP  
 10 to other consoles.” PX1949 (Microsoft) at 002 ; *see infra*, Section IV.C.2.

11 280. As discussed *infra* in Section IV.C.3., in 2021 Microsoft acquired ZeniMax Media  
 12 (“ZeniMax”), the parent company of the large game developer and publisher Bethesda  
 13 Softworks LLC (“Bethesda”), for \$7.5 billion. Microsoft told the European Commission  
 14 that it would not have the incentive to withhold future ZeniMax titles from rival consoles,  
 15 but subsequently decided to do exactly that. *See infra*, Section IV.C.3.

16 281. Microsoft’s tendency to make its acquired studios’ future games exclusive to Xbox (as  
 17 mentioned above) is contrary to Activision’s view that Activision CEO Bobby Kotick  
 18 referred to as “platform agnostic”. Kotick (Activision) Hr’g Tr. 50:2-4. Activision CEO  
 19 Bobby Kotick also testified to Activision not having a multigame subscription service, a  
 20 console, or a cloud streaming service; and their core business is limited to making games.  
 21 Kotick (Activision) Hr’g 49:14-23.

## 22 **II. RELEVANT MARKETS**

### 23 **A. High-Performance Consoles Constitute a Relevant Product Market**

#### 24 ***Brown Shoe* – Industry and Public Recognition**

25 282. It is acknowledged within the industry that Microsoft and Sony are extremely close  
 26 competitors. PX0006 at 064–65; PX1275 (Microsoft) at 001; PX8001 (Ryan (Sony)  
 27 Decl.) ¶¶ 12, 14. Microsoft executive Lori Wright previously testified in another matter  
 28 that “[t]he most direct competitor for hardware sales would be the Sony PlayStation” and

1 that Microsoft competed against Nintendo’s Switch “to a much lesser extent.” Dkt. 228  
2 (Joint Stip. and [Proposed] Order) at 2-3. Defining a relevant product market requires  
3 identifying the set of products that, from a consumer perspective, are reasonable  
4 substitutes. Bailey (Defendants’ Expert) 795:5-23. However, Dr. Bailey did not study  
5 consumer purchases of gaming consoles. Pg: 797 Ln: 17 – 23.

6 283. [REDACTED]  
7 [REDACTED] PX7028 (Spencer (Microsoft)  
8 Dep.) at 151:20-152:17, 157:11-18; PX1635 (Microsoft) at 002. [REDACTED]  
9 [REDACTED]  
10 PX7028 (Spencer (Microsoft) Dep.) at 158:16-25.

11 284. [REDACTED]  
12 [REDACTED]  
13 [REDACTED] PX1114 (Microsoft) at 013; PX7011 (Spencer  
14 (Microsoft) IH Vol. 1) at 165:22-166:23; PX1240 (Microsoft) at 019; PX1274  
15 (Microsoft).

16 285. Internal analyses within Microsoft often exclude Nintendo consoles from their market  
17 research and focus on comparing Xbox to PlayStation in terms of branding and consumer  
18 preferences. Spencer (Microsoft) Hr’g Tr. 283:13-284:4; PX1888 (Microsoft) at 036  
19 (explaining that Microsoft’s Generation 9 console share estimates exclude Generation 8  
20 consoles and the Switch); PX1636 (Microsoft) at 011–12.

21 286. Microsoft analyses of Xbox and PlayStation console market shares [REDACTED]  
22 [REDACTED]  
23 [REDACTED] PX7028 (Spencer (Microsoft) Dep.) at 144:16-145:13.

24 287. Microsoft generally [REDACTED]  
25 [REDACTED] PX7028  
26 (Spencer (Microsoft) Dep.) at 161:2-17. Microsoft Gaming CFO Tim Stuart testified that  
27 Microsoft breaks down the console market into a Gen 9 component, consisting of Xbox  
28 X/S and PlayStation 5, and a total console market, which includes the Gen 9 component

1 in addition to the Nintendo Switch and Generation 8 consoles. Stuart (Microsoft) Hr'g Tr.  
2 937:7-21; PX1240 at -019.

3 288. [REDACTED]  
4 [REDACTED]  
5 [REDACTED] PX3081 (Sony) at 028,  
6 040.

7 289. As Sony Interactive Entertainment's CEO describes, "[w]e considered Nintendo to  
8 participate in a different market segment to Xbox and PlayStation." PX7053 (Ryan  
9 (Sony) Dep.) at 21:9-14.

10 290. Gaming journalists and commentators in the public also frequently observe the vigorous  
11 competition between Xbox and PlayStation while excluding Nintendo's consoles. In a  
12 public interview, the former head of Xbox commented, "We encouraged the console  
13 wars, not to create division, but to challenge each other. And when I say each other I  
14 mean Microsoft and Sony." PX9061 at 001; PX9037 at 006 ("Microsoft and Sony at the  
15 forefront of the console wars, releasing competing devices within months of each other:  
16 first with the Xbox 360 and PlayStation 3 in the 00s, then with the Xbox One and  
17 PlayStation 4 in 2013, and now with the Xbox Series X and PlayStation 5. Nintendo,  
18 meanwhile, decided that warring over the cutting edge of entertainment was for suckers,  
19 and instead put out a series of comparatively underpowered consoles, most recently the  
20 Nintendo Switch, that cheerfully sold hundreds of millions of units.").

21 ***Brown Shoe – Characteristics and Uses***

22 291. Dr. Lee found that the Xbox Series X|S and PlayStation 5 have similar technical  
23 specifications and Microsoft and Sony regard them as the most powerful video game  
24 consoles available today. Lee Written Direct at ¶ 67 (citing PX5000 (Lee Report) at 080  
25 fig. 13.

26 292. Xbox Series X|S and PS5 consoles are the only high-performance consoles available  
27 today and are considered to be in the ninth generation of gaming consoles. PX1635  
28 (Microsoft) 002. [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]  
[REDACTED]  
[REDACTED] PX1638 (Microsoft) at 019.

293. The new generation of Xbox and PlayStation consoles possess extremely fast processing, which shapes the kind of content that can run on high-performance consoles, enabling higher resolution, realistic graphics, and cutting-edge performance. The delta between the technical performance of the Xbox Series X and PlayStation 5 is smaller than the delta between the Xbox One X and PS4 Pro. PX1635 (Microsoft) at 002; *see also* PX7053 (Ryan (Sony) Dep. Vol. 1) at 21:16-22:3, (“Many of the games that we make for PlayStation are simply too powerful to be played on a Nintendo Switch.”); PX7048 (Booty (Microsoft) Dep.) at 42:17-43:6 (“Well, the Nintendo Switch is a very popular console, but it also is less technically capable, just the hardware); PX7028 (Spencer (Microsoft) Dep.) at 114:1821.

294. From a consumer perspective, the Xbox Series X|S and PlayStation 5 consoles are “roughly comparable” in a number of technical specifications, including offering similar graphics, user experiences, and hardware features. PX1275 (Microsoft) at 002.

295. Nintendo prides itself on [REDACTED]  
[REDACTED] PX7059 (Prata (Nintendo) Dep.) at 66:19-67:3 158:7-22, 161:16-20; *see also* PX8002 (Prata (Nintendo) Decl. ¶ 3

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

296. Mr. Kotick also testified that Nintendo’s Switch is “very well differentiated,” including that it has unique characteristics, unique hardware, different processors, and different capabilities. Kotick (Activision) Hr’g Tr. 765:14-23.

1 297. Mr. Kotick explained to the Court that the reason he decided against offering *Call of Duty*  
2 on the Switch was because he did not think that *Call of Duty* was appropriate for the  
3 Switch. Kotick (Activision) Hr’g Tr. at 768:8-13.

4 298. [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] PX1638 (Microsoft) at 018.

8 299. Both the Xbox Series X|S and PlayStation 5 consoles are home consoles typically played  
9 on television screens and use a “traditional type of control scheme” that relies on analog  
10 sticks and buttons as opposed to motion control. PX7059 (Prata (Nintendo) Dep.) at 45:5-  
11 46:23, 158:13-22. They lack the ability to remove controllers from their console and  
12 cannot be easily taken out of the home. PX7065 (Singer (Nintendo) Dep.) at 71:11-17.

13 300. However, their stationary design allows them the power and technical capability to run  
14 more computationally demanding games. PX7053 Ryan (Sony) Dep. Vol. 1) at 21:16-  
15 22:3 (“Many of the games that we make for PlayStation are simply too powerful to be  
16 played on a Nintendo Switch.”).

17 301. In contrast, Nintendo’s most recent console—the Nintendo Switch—is not a ninth-  
18 generation gaming console. PX0003 at 060; PX1888 (Microsoft) at 036 [REDACTED]

19 [REDACTED]  
20 [REDACTED] The Switch  
21 also has lower computational performance, more in line with Microsoft’s and Sony’s  
22 eighth generation consoles. PX7011 (Spencer (Microsoft) IH Vol. 1) at 169:19-25;  
23 PX7053 (Ryan (Sony) Dep. Vol. 1) at 21:12-22:3)

24 302. Microsoft’s expert, Dr Bailey, compared the Nintendo Switch for only a ten-week period  
25 over six years ago with the last generation of consoles -- when the Switch was a brand  
26 new product. Bailey (Microsoft) Hr’g Tr. 89:2-8. Additionally, Microsoft’s second expert  
27 did not attempt to define a relevant market at all, and did not rely on Dr. Bailey’s report  
28 for any product market statements. Carlton (Microsoft) 168:25-169:8

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

303. Dr. Lee found that “evidence indicates the Xbox Series X|S and PlayStation 5 are differentiated from the Nintendo Switch with respect to performance, form factor, technical specifications, pricing and game availability.” Lee Written Direct at ¶ 66.

***Brown Shoe – Sensitivity to Price Changes / Substitutability***

304. Multi-homing patterns also show that gamers tend to find the Xbox Series X|S and PlayStation 5 more substitutable for each other than the Nintendo Switch. Industry group data shows that from October 2020 through December 2020, [REDACTED]  
[REDACTED]  
[REDACTED] PX5000 (Lee Report) at ¶ 213.

305. Dr. Lee determined that “Xbox Series X/S and PlayStation 5 consoles have video game content portfolios that are more similar with each other than with the Nintendo Switch. The majority of sales for Xbox Series X/S and PlayStation 5 are of titles that are available on both Xbox and PlayStation consoles but not on the Nintendo Switch. By comparison, over 70% of game sales for the Nintendo Switch are from titles that are exclusive to the Switch.” Lee Written Direct at ¶ 69.

306. Similarly, according to Jim Ryan, Sony Interactive Entertainment’s CEO, [REDACTED]  
[REDACTED]  
[REDACTED] PX8001 (Ryan (Sony) Decl.) ¶ 14.

***Brown Shoe – Distinct Prices***

307. The Xbox Series X|S and PlayStation 5 also launched with similar pricing schemes. The more advanced Xbox Series X and PlayStation 5 launched with a price of \$499 while the Xbox Series S and PlayStation 5 Digital Edition launched with a price of \$299 and \$399, respectively. PX7028 (Spencer (Microsoft) Dep.) at 138:22-139:8; PX8001 (Ryan (Sony) Decl.) ¶ 12. Microsoft Gaming CEO Phil Spencer testified that Microsoft competes on price with Sony in consoles. Spencer (Microsoft) Hr’g Tr. 299:19-21. The price of the

1 Nintendo Switch, by contrast, is lower than the PlayStation 5 and Xbox Series X. Hr’g  
2 Tr. (Spencer) 278:7-13.

3 308. While the Xbox Series S had the same retail price at launch as the Nintendo Switch,  
4 PX7028 (Spencer (Microsoft) Dep.) at 138:22-139:8; [REDACTED]  
5 [REDACTED]  
6 [REDACTED] PX8002 (Prata (Nintendo) Decl.) ¶ 3; PX5000 (Lee Report) at  
7 080. In addition, [REDACTED]  
8 PX4631 (Microsoft) at 008, 009; PX9207 at 005.

9 ***Brown Shoe – Distinct Customers***

10 309. According to NPD data for October 2020–December 2020, [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED] See PX0006  
14 at 290; see also PX3161 (Nintendo) at 011 [REDACTED]  
15 [REDACTED]  
16 [REDACTED] PX3065 (Sony) at  
17 051 [REDACTED]

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 310. [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 PX8001 (Jim Ryan (Sony) Decl.) ¶ 14.

25 311. These multi-homing patterns are consistent with, on average, owners of an Xbox Series  
26 X|S console obtaining more value from purchasing a Nintendo Switch than a PlayStation  
27 5 console and, likewise, owners of a PlayStation 5 console obtaining more value from  
28 purchasing a Nintendo Switch than an Xbox Series X|S console.

1 312. The patterns are also consistent with Nintendo’s claim in a declaration that [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED] PX8002 (Prata (Nintendo) Decl. ¶ 3 001–  
5 002.

6 313. [REDACTED] PX3047 (Sony) at 014 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10 314. High-performance consoles target a different audience than their next closest substitute,  
11 the Nintendo Switch. *See* PX7048 (Booty (Microsoft) Dep.) at 124:20-125:20 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED] *Booty (Microsoft) Hr’g Tr.* 62:12-13. The geographic footprint of the high-  
16 performance consoles is also different because the Nintendo consoles “skews much more  
17 heavily towards the Japanese market than the PlayStation market does or the Xbox  
18 market does.” PX7053 (Ryan (Sony) Dep.) at 104:19-105:2.

19 315. [REDACTED]  
20 [REDACTED]  
21 [REDACTED] PX8002 (Prata  
22 (Nintendo) Decl.) ¶¶ 3, 10; PX7053 (Ryan (Sony) Dep. Vol. 1) 22:11-22. SIE CEO  
23 remarked that Nintendo’s consoles were “defined by characters such as Mario and Zelda,  
24 whereas [Sony’s] platform is characterized by games such as Call of Duty or God of War,  
25 much more adult themed content.” PX7053 (Ryan (Sony) Dep.) at 103:4-104:6.

26 316. SIE CEO Jim Ryan observed that when Call of Duty was on Nintendo a decade ago, its  
27 sales on Nintendo were not significant. Based on his experience in the industry, Mr. Ryan  
28 believes that Call of Duty is “aimed at a very different audience to the standard Nintendo

1 audience that enjoys Mario and Zelda but not Call of Duty.” PX3378 (Ryan (Sony) Hr’g  
2 Testimony at 101:04-22).

3 317. Dr. Lee’s analysis shows Microsoft and Sony impose the most significant competitive  
4 constraints on one another among console manufacturers and consumer substitution to  
5 products outside of the High-Performance Video Games Consoles Market would not  
6 constrain a hypothetical monopolist of high-performance consoles from likely profitably  
7 implementing a small but significant and non-transitory increase in price (“SSNIP”). Lee  
8 Written Direct at ¶ 64; PX5000 (Lee Report) at 102. His analysis concluded that a  
9 hypothetical monopolist of high performance consoles would likely profitably impose a  
10 SSNIP on at least one product contained within this market and thus High-Performance  
11 Video Game Consoles market satisfies the hypothetical monopolist test. Lee Written  
12 Direct at ¶ 64; PX5000 (Lee Report) at 102; Lee (Plaintiff Expert) Hr’g Tr. 529:9-530:7,  
13 530:8-17.

14 318. Dr. Lee concluded that High-Performance Video Game Consoles is a relevant product  
15 market for analyzing the competitive effects of this Proposed Transaction. Lee Written  
16 Direct at ¶ 60.

17 319. Dr. Lee determined that the High-Performance Video Game Consoles market includes  
18 only Microsoft’s Xbox Series X|S consoles, and Sony’s PlayStation 5 consoles.  
19 Professor Lee also found that this “market excludes other video game consoles, including  
20 the Nintendo Switch (released in 2019) as well as PCs, mobile devices, virtual reality  
21 devices and non-console cloud gaming.” Lee Written Direct at ¶ 61.

22 320. Dr. Lee also found that “[e]vidence supports the conclusion that Xbox Series X|S and  
23 PlayStation 5 consoles compete more closely with each other than with the Nintendo  
24 Switch.” Lee Written Direct at ¶ 62.

25 321. Finally, Professor Lee concluded that “other video game consoles would likely not  
26 constrain a hypothetical monopolist of high-performance video game consoles from  
27 profitably imposing a SSNIP. Lee Written Direct at ¶ 70. (citing PX5000 (Lee Report) at  
28 090).

**B. Video Game Consoles Also Constitute a Relevant Market**

1  
2 322. The console market can be expanded to include Xbox Series X|S, PlayStation 5, and  
3 Nintendo Switch, although this is broader than necessary and does not eliminate the  
4 anticompetitive effects. PX5000 (Lee Report) at 102; Lee (Plaintiff Expert) Hr’g Tr.  
5 528:9-14, 529:3-14 (“I think it’s important to understand the role of market definition.  
6 It’s to focus attention on where competitive effects may occur, and there need not be a  
7 single market to use when evaluating these competitive effects.”).

8 323. Dr. Lee concluded that Video Game Consoles “is a relevant product market, albeit  
9 broader than is necessary to satisfy the Hypothetical Monopolist Test, for analyzing the  
10 competitive effects of the Proposed Transaction.” Lee Written Direct at ¶¶ 76, 79.

11 324. Dr. Lee found that the Video Game Console market would include “the Xbox Series X|S,  
12 PlayStation 5, and Nintendo Switch consoles, as well as other home video game consoles  
13 and handheld consoles.” Lee Written Direct at ¶ 76.

14 325. Dr. Lee testified that “because the Video Game Consoles market wholly contains all  
15 products in the High-Performance Video Game Consoles market, any competitive effects  
16 of the Proposed Transaction that would occur in the High-Performance Video Game  
17 market would also occur in the broader Video Game Consoles market.” Lee Written  
18 Direct at ¶ 77.

19 326. [REDACTED]  
20 [REDACTED]  
21 [REDACTED] PX1240 (Microsoft) at 019.

22 327. In its representations to the Federal Trade Commission, Microsoft identifies other console  
23 distributors as Sony and Nintendo. PX0003 at 048, 060, 132.

24 328. [REDACTED]  
25 [REDACTED]  
26 [REDACTED] PX5000 (Lee Report) at 108.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

329. [REDACTED]  
[REDACTED]  
[REDACTED] PX5000 (Lee Report) at 108.

330. By comparison, the next largest video game console is the Valve Steam Deck, which according to Dr. Lee accounted for [REDACTED] of console unit sales and [REDACTED] of console revenue in 2022. PX5000 (Lee Report) at 108.

331. [REDACTED]  
[REDACTED] PX8002 (Prata (Nintendo) Decl.) ¶¶ 1–3.

332. Dr. Lee’s analysis of the High-Performance Video Game Consoles market shows that the High-Performance Video Game Consoles market satisfies the hypothetical monopolist test. PX5000 (Lee Report) at 103. Because all products within the High-Performance Video Game Consoles market are wholly contained within the Video Games Consoles market, that indicates the Video Game Consoles market also satisfies the hypothetical monopolist test. PX5000 (Lee Report) at 103. Dr. Lee explained that the aggregate diversion ratio for the Video Games Consoles market would necessarily be greater than or equal to the aggregate diversion ratio for the High-Performance Video Game Consoles market because the hypothetical monopolist of the Video Game Consoles market would own strictly more products than the hypothetical monopolist of the High-Performance Video Game Consoles market.

333. Additionally, as opposed a PC, which has multiple uses, Microsoft’s expert witness Dr Bailey explained “there is nothing else you can do with a console... the console is no good without the game.” Bailey (Microsoft) Hr’g Tr. 102:7-14. Dr. Bailey did not conduct analysis of consumers’ ability to switch between gaming devices in response to price increases. Bailey (Defendants’ Expert) 802:19-24. She did however, note that Activision gets 60% of its global revenue from inside the United States. Bailey (Defendants’ Expert) 803:17-804:1

1           **C.     Multi-Game Content Subscription Services Constitute a Relevant Product**  
2                           **Market**

3 334. Dr. Lee found that a narrower market wholly contained within the Multi-Game Content  
4 Subscription Services and Cloud Gaming Subscription Services market is a market  
5 consisting of only Multi-Game Content Subscription Services. (In his Written Direct Dr.  
6 Lee refers to Multi-Game Content Subscription Services as Content Library Services  
7 which have the same meaning. Dr. Lee also refers to Cloud Gaming Subscription  
8 Services as Cloud Gaming Services which have the same meaning). And that Multi-  
9 Game Content Subscription Services is also a relevant product market for analyzing the  
10 competitive effects of the Proposed Transaction. Lee Written Direct ¶ 166.

11 335. Dr. Lee testified that products in the Multi-Game Content Subscription Services market  
12 include Xbox Game Pass (all tiers), PlayStation Plus (Extra and Premium tiers), Nintendo  
13 Switch Online, Amazon Luna+ and Prime Gaming, EA Play, and Ubisoft+. Lee Written  
14 Direct ¶167.

15 ***Brown Shoe - Industry and Public Recognition***

16 336. Market participants view content library services as a distinct product segment. For  
17 example, [REDACTED]

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 PX1995 (Microsoft) at 008.

24 337. Microsoft has represented that it [REDACTED]  
25 [REDACTED]  
26 [REDACTED] PX0003 at 077.

27 ***Brown Shoe – Characteristics, Benefits and Uses***

1 338. Sarah Bond, Microsoft Gaming Corporate Vice President of Creator Experiences and  
2 Ecosystem Management, testified that users of Xbox Game Pass value being able to play  
3 well-known video game titles through the content library service as well as discovering  
4 games that they would not otherwise have played. PX7003 (Bond (Microsoft) IH) at  
5 139:7-19.

6 339. Subscribing to Game Pass reduces subscribers' cost of playing a wider set of games. [REDACTED]

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED] PX1767  
10 (Microsoft) at 001.

11 340. A Microsoft presentation on Xbox Game Pass observes that [REDACTED]

12 [REDACTED]  
13 [REDACTED] PX4695 (Microsoft) at-025-26.

14 341. In a July 2021 earnings call, Microsoft told investors "Game Pass is growing rapidly and  
15 it's transforming how people discover, connect, and play games. Subscribers play  
16 approximately 40% more games and spend 50% more than nonmembers." PX9012 at  
17 006.

18 342. In a regulatory submission to the European Commission regarding the Proposed  
19 Transaction, the merging parties have represented, [REDACTED]

20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED] PX0006 at  
23 013.

24 ***Brown Shoe – District Pricing and Marketing***

25 343. Subscribers to Multi-game content subscription services typically pay periodic  
26 subscription fees (frequently monthly, quarterly, or annually) for access to the games  
27 offered by the service. The monthly subscription fee for Xbox Game Pass ranged from  
28 \$9.99 to \$14.99 per month, but in late June Microsoft announced the base Game Pass

1 subscription for console price will increase from \$9.99 to \$10.99. PX9446-002. The  
2 monthly subscription fee for PlayStation Plus Extra and Premium tiers (the content  
3 subscription tiers) ranges from \$14.99 to \$17.99. PX8001 (Sony) Decl.) ¶¶ 9, 17.

4 344. Microsoft has explicitly compared and benchmarked the pricing and features of Xbox  
5 Game Pass to Sony’s PlayStation Plus. Stuart (Microsoft) Hr’g Tr. 942:13-943:21;  
6 PX1151 (Microsoft) at 001. Microsoft Gaming CFO Tim Stuart testified that there is an  
7 opportunity for Microsoft to increase the price of Game Pass and highlight the much  
8 better value that Game Pass top tiers represent versus PlayStation’s subscription service.  
9 Stuart (Microsoft) Hr’g Tr. 944:1-945:16; PX1151 at -001.

10 345. [REDACTED]  
11 [REDACTED]  
12 [REDACTED] PX7053 (Ryan (Sony)  
13 Dep.) at 19:4-8.

14 346. [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED] PX3090 (Sony) at 002.

18 347. [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED] PX1767 (Microsoft) at -001 (emphasis in original). At trial, Ms. Bond  
25 testified that people buy the game after playing it on Game Pass. Microsoft found “people  
26 are very likely to actually go buy the game so they can permanently have it in their  
27 library.” Bond (Microsoft) Hr’g Tr. 140:12-141:12.

28 ***Brown Shoe – Distinct Customers***

1 348. Buy-to-play games do not facilitate the same discovery of new content among gamers as  
2 content subscription services do. [REDACTED]

3 [REDACTED]  
4 [REDACTED]  
5 PX4652 (Microsoft) at 007.

6 349. Microsoft Gaming CEO Phil Spencer testified that Microsoft targets distinct customers  
7 with its Game Pass catalog, noting, “When a game reaches a certain point in its evolution,  
8 in its sales, it’s an opportunity for us to find customers who did not originally buy the  
9 game. Spencer (Microsoft) Hr’g Tr. 423:19-23.

10 ***Brown Shoe – Sensitivity to Price Changes***

11 350. Microsoft observed that Game Pass promotes subscriber engagement and retention. [REDACTED]

12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED] PX1050 (Microsoft) at 038.

17 351. [REDACTED]

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 PX4260 (Microsoft) at 005.

23 352. Xbox Live Gold and PlayStation Plus Essential may offer a limited number of free games  
24 on a monthly basis, but they do not offer the same diversity of content and game  
25 discoverability as content library services, which often offer a library of hundreds of  
26 games. Jerrett West, Corporate Vice President of Gaming Marketing at Microsoft,  
27 testified that Xbox Live Gold is “currently separate from Game Pass” and “[t]he big  
28 difference is Game Pass has a catalog of games. Live Gold is specifically focused on

1 multiplayer gaming. ... We offer free games with Gold every month, and a Game Pass  
 2 subscriber and a Gold subscriber gets those games with Gold—games that we call them  
 3 every month, but it’s not the catalog of Game Pass games.” PX7005 (West (Microsoft)  
 4 IH) at 20:3–24.

5 353. Companies like Apple sometimes offer access to a content library of games that are  
 6 primarily played on mobile devices. Mobile games are highly differentiated from video  
 7 games primarily played on non-mobile devices. PX0006 (Microsoft) at -052–53.

8 354. Consumer substitution to products outside of the Content Library Services (otherwise  
 9 known as multi-game content subscription services) market does not constrain a  
 10 hypothetical monopolist of Content Library Services from likely profitably implementing  
 11 a SSNIP. PX5000 (Lee Report) at 133-34; Lee (Plaintiff Expert) Hr’g Tr. 535:19-536:7.  
 12 For this reason, a hypothetical monopolist of Content Library Services would likely  
 13 profitably impose a SSNIP on products within this this market, including Game Pass, and  
 14 thus, the Content Library Services market satisfies the hypothetical monopolist test.  
 15 PX5000 (Lee Report) at 133–34; Lee (Plaintiff Expert) Hr’g Tr. 640:9-641:3 (“ If Netflix  
 16 and all those other streaming services, you know, raised their prices slightly, maybe a  
 17 dollar a month, would people start just buying movies or buying a la carte TV shows in  
 18 response? Or would it maybe be more likely they would substitute to other subscription  
 19 service?”).

20 355. Dr. Lee concluded that the Multi Game Content Subscription Services market (Content  
 21 Library Services market) satisfies the Hypothetical Monopolist Test and is a relevant  
 22 product. Lee Written Direct at ¶ 172.

#### 23 **D. Cloud Gaming Subscription Services Constitute a Relevant Product Market**

##### 24 ***Brown Shoe - Industry and Public Recognition***

25 356. Dr. Lee testified that a narrower market wholly contained within the Content Library and  
 26 Cloud Gaming Services market (also known as the Multi-Game Content Subscription  
 27 Services and Cloud Gaming Subscription Services market) consisting only for Cloud  
 28 Gaming Services, concluding that Cloud Gaming Services (also known as Cloud Gaming

1 Subscription Services) is “a relevant product market for analyzing the competitive effects  
2 of the Proposed Transaction.” Lee Written Direct ¶ 174.

3 357. Dr. Lee found that the Cloud Gaming Services market contains “all cloud gaming  
4 services that offer access to games that are played primarily on non-mobile devices.” Lee  
5 Written Direct at ¶ 174.

6 358. Dr. Lee found that products in the Cloud Gaming Subscription Services market “include  
7 Xbox Game Pass Ultimate, PlayStation Plus Premium, Nvidia GeForce Now, Amazon  
8 Luna+ and Prime Gaming. With the exception of Nvidia GeForce Now, these products  
9 also offer content library services.” Lee Written Direct ¶ 174.

10 359. Dr. Lee found that there is substantial evidence that Microsoft considers cloud gaming  
11 subscription services as a distinct product segment and other cloud gaming subscription  
12 service providers as competitors. Lee Written Direct ¶ 177.

13 360. Microsoft identifies Xbox Cloud Gaming as a separate economic entity in its public  
14 statements. In Microsoft’s July 28, 2022 Annual Report Form 10-K, Microsoft described  
15 the Gaming segment as “including Xbox hardware and Xbox content and services,  
16 comprising first- and third-party content (including games and in-game content), Xbox  
17 Game Pass and other subscriptions, Xbox Cloud Gaming, third-party disc royalties,  
18 advertising, and other cloud services.” PX9050 at 014.

19 361. Microsoft CEO Satya Nadella admitted that he doesn’t “think of [cloud streaming] as a –  
20 strictly a substitute to the console.” (Microsoft) Hr’g Tr. 834: 11-12.

21 362. An October 22 Microsoft presentation directly compares “Other Cloud Gaming  
22 Solutions” including Nvidia, GeForce Now, PlayStation Plus and Amazon Luna.” Lee  
23 Written Direct ¶ 177 fig. 9 (citing PX5000 (Lee Report) at 136 fig. 32.

24 363. In Microsoft’s July 2021 earnings call, CEO Satya Nadella stated: “We continue to lead  
25 in the fast-growing cloud gaming market with last month -- just last month, we made  
26 Xbox Cloud Gaming available on PCs as well as Apple phones and tablets via the  
27 browser in 22 countries with more to come.” Nadella (Microsoft) Hr’g Tr. 838:10-14;  
28 PX9012 at 006.

1 364. Microsoft views Nvidia GeForce Now as a competitor [REDACTED]  
2 [REDACTED]  
3 [REDACTED] PX4351  
4 (Microsoft) at 002.

5 365. In internal documents, Microsoft compares xCloud (and, later, Xbox Cloud Gaming) to  
6 other cloud gaming streaming services. PX1110 (Microsoft) at 024 (Phil Spencer  
7 presentation to Microsoft’s Board identifies the following competitors in a slide titled  
8 [REDACTED]  
9 [REDACTED] PX4640 (Microsoft) at 001 [REDACTED]  
10 [REDACTED]

11 366. Satya Nadella and Phil Spencer discussed the potential for xCloud to capitalize on the  
12 fact that Google Stadia “hit tech hard, which is important, but totally missed content and  
13 business model.” Nadella (Microsoft) Hr’g Tr. 844:20-845:10; PX1750 (Microsoft) at  
14 001.

15 367. [REDACTED]  
16 [REDACTED] PX2183 (Activision) at 008 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 368. [REDACTED]  
20 [REDACTED] PX3069 (Nvidia) at 008 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 369. Phil Eisler, Vice President and General Manager of Nvidia GeForce Now, explained in  
24 his declaration that GeForce Now benchmarks its pricing to other cloud gaming services,  
25 including Xbox Game Pass Ultimate. PX8000 (Eisler (Nvidia) Decl.) ¶¶ 36–37.

26 370. [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

371. Documents from Google analyze cloud game streaming services separately from other methods of game distribution. PX3058 (Google) at -001–04 (comparing Stadia to Luna, Nvidia and xCloud).

***Brown Shoe – Characteristics and Uses***

372. Cloud Gaming Subscription Services provide a way to play games that is distinct from running them locally on the player’s gaming device, by enabling 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. PX0006 at -088 (“[Cloud gaming] enables gamers to...start gameplay instantaneously without waiting for a game to download to a device...this area is particularly vibrant, with a large number of players.”); PX8000 (Eisler (Nvidia) Decl.) at ¶ 17.

373. Cloud Gaming Subscription Services allow gamers to play computationally demanding games on less powerful devices that otherwise lack the computing power or storage to support the games, reducing the need for gamers to make large investments in expensive hardware. <https://www.nvidia.com/en-us/geforce/geforce-experience/>; PX8000 (Eisler (Nvidia) Decl.) ¶¶ 6, 9, 17 (explaining the advantage of permitting gamers to play large and technologically complex games on less powerful devices that otherwise lack the computing power or storage to support the games); PX3103 (Nvidia) at 007.

374. Cloud Gaming 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. PX0006 at 088.

375. Cloud Gaming Subscription Services enable gamers to play games that were developed for other devices and/or operating systems. PX0006 (Microsoft) at 088.

1 376. As an executive with one of the leading cloud gaming services averred, “cloud gaming  
2 provides a high-end gaming experience . . . without requiring customers to upgrade the  
3 latest graphics card, PC, or console.” PX8000 (Eisler (Nvidia) Decl.) ¶ 9.

4 377. Kareem Choudhry, Microsoft’s former Corporate Vice President for Cloud Gaming,  
5 testified that “prior to [xCloud], if you wanted to play an Xbox game, you had to be  
6 playing it on an Xbox,” and that xCloud’s goal was to “free that restriction” and “enable  
7 more people to play and participate.” PX7002 (Choudhry (Microsoft) IH) at 40:8-18.

8 378. Mr. Choudhry testified that xCloud offers “a visionary statement of the games you want,  
9 with the people you want, anywhere you want.” PX7002 (Choudhry (Microsoft) IH) at  
10 40:10-12.

11 379. Mr. Choudhry testified: [REDACTED]

12 [REDACTED]

13 [REDACTED] PX7002 (Choudhry (Microsoft) IH) at 116:12-15.

14 380. Sarah Bond, Microsoft’s Corporate Vice President of Gaming Ecosystem, explained:  
15 “We believe that the players should be the center of their experience, that you should be  
16 able to play your games with who you want on the device you want, where you want. We  
17 believe you should be able to start on PC and pick up on console, you should be playing  
18 on console and then be able to play on your phone. And xCloud is one of the many  
19 capabilities that are required to deliver that experience.” PX7003 (Bond (Microsoft) IH)  
20 at 74:4-13.

21 ***Brown Shoe – Unique Production Facilities***

22 381. Cloud gaming service providers operate on cloud infrastructure, either by deploying their  
23 own dedicated infrastructure or by contracting with a third party. *See* PX0003 at 141–42 ;  
24 PX3272 (Sony) at 016-27.

25 382. Xbox Cloud Gaming operates on dedicated Xbox console hardware in Microsoft data  
26 centers. PX0003 at 141–42.

27 383. Microsoft has [REDACTED] in xCloud server capacity.  
28 PX1039 (Microsoft) at 002.

1 384. [REDACTED]

2 [REDACTED] PX1039 (Microsoft) at 002.

3 ***Brown Shoe – Distinct Prices and Marketing***

4 385. Users access cloud gaming services either by paying a periodic fee (either monthly or  
5 yearly) or by streaming free-to-play games (which is available for free on some services).

6 PX0003 at 019; <https://www.xbox.com/en-US/cloud-gaming>;

7 <https://www.nvidia.com/en-us/geforce-now/memberships/>;

8 <https://www.amazon.com/luna/landing-page>; [https://www.playstation.com/en-us/ps-](https://www.playstation.com/en-us/ps-plus/#premium)  
9 [plus/#premium](https://www.playstation.com/en-us/ps-plus/#premium).

10 386. Xbox Cloud Gaming marketing highlights the “play anywhere” functionality of cloud  
11 gaming, encouraging users to “discover the freedom and flexibility the cloud brings to  
12 your gaming experience” with “more choices in how to play” and the ability to “jump in  
13 and start playing in seconds.” PX9091 at 001–02; Kareem Choudhry, “Cloud Gaming  
14 with Xbox Game Pass Ultimate Launches with More Than 150 Games,” XBOX NEWS  
15 (Sept. 14, 2020), [https://news.xbox.com/en-us/2020/09/14/cloud-gaming-with-xbox-](https://news.xbox.com/en-us/2020/09/14/cloud-gaming-with-xbox-game-pass-ultimate)  
16 [game-pass-ultimate](https://news.xbox.com/en-us/2020/09/14/cloud-gaming-with-xbox-game-pass-ultimate).

17 387. Nvidia GeForce NOW marketing highlights the “play anywhere” functionality of cloud  
18 gaming, using the slogan “Your Games. Your Devices. Play Anywhere.” Nvidia,  
19 GeForce NOW, <https://www.nvidia.com/en-us/geforce-now/>.

20 ***Brown Shoe – Distinct Customers***

21 388. Cloud gaming expands the total addressable market for high-end video games by making  
22 these games available to customers that do not own high-end Windows gaming PCs or  
23 consoles. PX7062 (Fisher (Nvidia) Dep.) at 46:2-47:14.

24 389. When Microsoft introduced Xbox Cloud Gaming, Corporate Vice President for Cloud  
25 Gaming Kareem Choudhry announced, “[C]loud gaming as part of Xbox Game Pass  
26 Ultimate now opens up the world of Xbox to those who may not own a console at all.”  
27 PX9091 at 002; Kareem Choudhry, “Cloud Gaming with Xbox Game Pass Ultimate  
28

1 Launches with More Than 150 Games,” XBOX NEWS (Sept. 14, 2020),  
2 <https://news.xbox.com/en-us/2020/09/14/cloud-gaming-with-xbox-game-pass-ultimate>.

3 390. Microsoft has estimated that the total addressable market for cloud gaming is  
4 approximately [REDACTED] compared to [REDACTED] PX7011 (Spencer  
5 (Microsoft) IH Vol 1): at 273:3-10; PX9012 at 006.

6 391. Microsoft Gaming CEO Phil Spencer confirmed that cloud gaming enables Microsoft to  
7 reach a distinct customer base. [REDACTED]  
8 [REDACTED]  
9 [REDACTED] PX1038 (Microsoft) 002.

10 392. Microsoft internal documents [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED] PX1025 (Microsoft)  
17 007.

18 393. Nvidia has similarly made the case that [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED] PX2186 (Activision) at 008.

22 394. Google has also recognized that cloud gaming appeals to a distinct set of customers and  
23 is currently marketing three of its Chromebooks as “cloud gaming machines, disguised as  
24 Chromebooks.” Google, “Cloud Gaming Chromebooks,”  
25 <https://www.google.com/chromebook/discover/gaming>.

26 395. Dr. Lee opines that the combined qualitative and quantitative evidence supports the  
27 conclusion that a hypothetical monopolist owning all cloud gaming services would likely  
28 implement a SSNIP on at least one of these products. PX5000 (Lee Report) at 137.

1 Hence, the Cloud Gaming Services market satisfies the hypothetical monopolist test.  
2 PX5000 (Lee Report) at 138.

3 **E. Multi-Game Content Subscription Services and Cloud Gaming Subscription**  
4 **Services Together Constitute a Relevant Product Market**

5 396. The market for Multi-Game Content Subscription Services (also called Content Library  
6 Services) and Cloud Gaming Subscription Services (also called Cloud Gaming Services)  
7 includes all video game subscription services that offer either content library services for  
8 games played primarily on non-mobile devices or cloud gaming services for games  
9 played primarily on non-mobile devices. The market also includes any gaming services  
10 that offer both Multi-Game Content Subscription Services and Cloud Gaming  
11 Subscription Services. Lee Written Direct at ¶ 143; PX5000 (Lee Report) at 103; PX5000  
12 (Lee Report) at 104 (Figure 22).

13 397. Products in the Multi-Game Content Subscription Services and Cloud Gaming  
14 Subscription Services market than offer multi-game content subscription services for  
15 games that are primarily played on non-mobile devices include, among others, Xbox  
16 Game Pass (all tiers), PlayStation Plus (Extra and Premium tiers), Amazon Luna+, and  
17 EA Play. This market also includes Nvidia GeForce Now, which offers cloud gaming  
18 subscription services but not multi-game content subscription services. Lee Written  
19 Direct at ¶ 144.

20 398. Several of the products in this market offer both Multi-Game Content Subscription  
21 Services, and Cloud Gaming Subscription Services for games that are primarily played  
22 on non-mobile devices, including Xbox Game Pass Ultimate, PlayStation Plus Premium,  
23 and Amazon Luna+. Products outside of the Multi-Game Content Subscription Services  
24 and Cloud Gaming Subscription Services market do not offer either multi-game content  
25 subscription services or cloud gaming subscription services for games primarily played  
26 on non-mobile devices. Lee Written Direct at ¶ 144.

27 399. Dr. Lee finds that the Multi-Game Content Subscription Services and Cloud Gaming  
28 Services market is broader than and wholly contains all the products in both the Multi-

1 Game Content Subscription market and the Cloud Gaming Services markets. Because  
2 Microsoft’s Xbox Game Pass Ultimate products offers both multi-game content  
3 subscription services and cloud gaming subscription services, each product in the Multi-  
4 Game Content Subscription and Cloud Gaming Subscription market competes with Xbox  
5 Game Pass Ultimate on at least one of these services. Lee Written Direct at ¶ 145;  
6 PX5000 (Lee Report) at 103.

7 400. Dr. Lee explains in his written direct that “[s]ubscription services that focus on enabling  
8 online multiplayer gaming (“multiplayer gaming subscription services”) are not in the  
9 Content Library and Cloud Gaming Services market, as they do not offer the same  
10 diversity of content and game discoverability as content library services, which often  
11 offer a library of hundreds of games. Examples of such services include Xbox Live Gold  
12 and PlayStation Plus Essential. Jerrett West, Corporate Vice President of Gaming  
13 Marketing at Microsoft, testified that Xbox Live Gold is “currently separate from Game  
14 Pass” and “the big difference is Game Pass has a catalog of games. Live Gold is  
15 specifically focused on multiplayer gaming.” Lee Written Direct at 160; PX7005 (West  
16 (Microsoft) IH) at 20:3-24.

17 401. Dr. Lee concludes that Apple Arcade and other services that offer access to a content  
18 library of games that are primarily played on mobile devices are also not in the relevant  
19 market. Dr. Lee found that mobile games are highly differentiated from video games  
20 primarily played on non-mobile devices, such as consoles or PCs. Lee Written Direct at ¶

21 161. [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED] PX0006  
25 (European Commission Form CO) at 52.

26 402. Microsoft itself has indicated that it views Xbox Game Pass, and its multi-game content  
27 subscription services, as complementary to and not a substitute for buy-to-play sales. In  
28 an email discussing digital sales and subscription services address to a third-party

1 publisher, Sarah Bond, Microsoft Gaming Corporate Vice President of Creator  
2 Experiences and Ecosystem Management, wrote that “[Microsoft’s] intent with Game  
3 Pass (GP) long-term is to be additive to the ecosystem. Our research of subscriptions  
4 across media forms has shown that consumers like and use both models.” Lee Written  
5 Direct at ¶ 164 (citing PX1767 (Microsoft) at 001).

6 403. A hypothetical monopolist of all products in the multi-game content subscription services  
7 and cloud gaming subscription services market would likely profitably impose a small  
8 but significant non-transitory increase in price that would not be defeated by products  
9 outside the market, including buy-to-play games. PX5000 (Lee Report) at 127-31.

10 404. Dr. Lee concludes the Multi-Game Content Subscription Services and Cloud Gaming  
11 Subscription Services satisfies the Hypothetical Monopolist Test and is a relevant product  
12 market for evaluating the effects of the proposed transaction. Lee Written Direct at ¶¶  
13 143, 165.

14 **F. The Relevant Geographic Market Is the United States**

15 **1. Game Prices and Releases Vary Country-by-country, Supporting the Ability**  
16 **of Market Participants to Price Discriminate**

17 405. Dr. Lee concluded that the United States is a relevant geographic market for both the  
18 High-Performance Video Game Consoles market and the Video Game Consoles market.  
19 Lee Written Direct at ¶ 80.

20 406. Console manufacturers set prices on a country-by-country basis. PX5000 (Lee Report)  
21 at 104.

22 407. Sony raised prices for PlayStation 5 consoles in certain countries, including Canada but  
23 not the United States. PX5000 (Lee Report) at 104.

24 408. Responding to Sony’s price increase announcement, [REDACTED]  
25 [REDACTED] PX1752  
26 (Microsoft) at 001.

27 409. Console video games are released on a country-by-country basis, and the exclusivity  
28 periods that console makers negotiate with publishers vary from country to country.

1 PX5000 (Lee Report) at 106; PX2167 (Activision) at 023 ; PX2170 (Activision) at 015–  
2 16.

3 410. Sony negotiates separate software distribution agreements for different geographic  
4 regions. PX7048 (Booty (Microsoft) Dep.) at 149:12-150:14.

5 411. Dr. Lee concluded in his testimony that the United States is a relevant Geographic Market  
6 for the (i) Multi-Game Content Subscription Services and the Cloud Gaming  
7 Subscription Services market, (ii) the Multi-Game Content Subscription Services market,  
8 and (iii) the Cloud Gaming Subscription Services market for assessing the competitive  
9 effects of the Proposed Transaction. Lee Direct Report ¶ 180. Dr. Bailey applies an  
10 incorrect concept of geographic market that does not account for consumers' ability, or  
11 inability, to substitute purchases outside of a relevant geographic market. Bailey  
12 (Defendants' Expert) 798:8-799:13; 800:16-801:3.

13 412. Dr. Lee also concluded that evidence indicates that customers do not view purchasing  
14 multi-game content subscription services or cloud gaming subscription services in  
15 another country as a reasonable substitute for purchasing those gaming services in the  
16 United States, and gaming services vary in pricing, content and availability across  
17 countries. Lee Written Direct at ¶ 181.

18 413. The price that Microsoft sets for Game Pass in the United States differs from the price it  
19 sets in other countries. Lee Written Direct at ¶ 182; PX5000 (Lee Report) at 138; PX7005  
20 (West (Microsoft) IH) at 221:18-222:11.

21 414. The availability of gaming services varies by county, even if such services are provided  
22 by the same company. Microsoft's Xbox Game Pass for PC supports many more  
23 countries than Game Pass for Console or Game Pass Ultimate. Lee Written Direct ¶ 183;  
24 PX5000 (Lee Report) at 138.

25 415. As of April 2023, Xbox Cloud Gaming is only available in 28 countries, and is released  
26 on a country-by-country basis. Lee Written Direct ¶ 183; PX5000 (Expert Report) at  
27 139.

1 416. Dr. Lee found that “[E]vidence indicates that proximity to cloud services is important to  
2 cloud gaming performance.” Lee Written Direct at ¶ 185; (citing PX5000 (Lee Report) at  
3 139-140.

4 417. Availability of Xbox games on its multi-game content subscription services varies by  
5 country. According to Microsoft, “[g]aming titles, number, features and availability {on  
6 Xbox Game Pass] vary over time, by region and platform.” Lee Written Direct at ¶ 184  
7 (citing PX5000 (Lee Report) at 139).

8 418. If users “move[] to a different country” or are “already in a region different from the one  
9 set for your account and/or console,” they must “change [their] Xbox country/region.”  
10 PX5000 (Lee Report) at 139.

11 Microsoft Gaming CFO Tim Stuart testified that Microsoft breaks out the United States  
12 Gen 9 market separate from other geographies. Stuart (Microsoft) Hr'g Tr. 937:22-  
13 938:11; PX1240 at -019.

14 419. Activision’s VP of Global Platform Strategy noted “for various  
15 reasons, sometimes legal, sometimes commercial, sometimes creative, a territory or a  
16 country or a region may have a version of the title that is slightly different. It might have  
17 different languages, localizations. Content may be  
18 slightly altered for regional restrictions.” PX7008 (Schnakenberg IH Tr.) at 283:14-23.

19 420. Xbox Game Studios Head Matt Booty also explained in his deposition that Nintendo and  
20 Sony are really three separate companies. As an example, Mr Booty testified that there is  
21 “no central approval group for Sony”. “So if you ship a game on Playstation you need to  
22 negotiate that contract with Sony in the US, which is SCEA Sony Computer  
23 Entertainment of America.” PX 7048 (Booty (Microsoft) Dep.) at 149:14-150:6.

24 421. Dr. Lee concluded that the “[e]vidence indicates that customers do not view purchasing  
25 video game consoles in another country as a reasonable substitute for purchasing video  
26 game consoles in the United States, and console manufacturers treat the United States as  
27 a distinct geographic market. Lee Written Direct at ¶ 82.  
28

1 422. The United States is also the geographic market for cloud gaming subscription services  
2 due to the need for a proximity between the consumer and the data centers used by cloud  
3 gaming subscription services. Former Product Director of Google Stadia Dov Zimring  
4 testified that the “data center is ideally close to end users” because “the further away the  
5 data center is from a consumer, the more latency will exist in the connection” which  
6 affects the consumer’s experience. Zimring (Google) Hr’g Tr. 469:2-21. Mr. Zimring  
7 testified that a consumer located in the United States accessing a cloud streaming  
8 service’s data center in Europe would have a “far from ideal experience” that “would  
9 really be degraded relative to what they could if – if the servers were much closer.”  
10 Zimring (Google) Hr’g Tr. 460:22-470:6.

11 **2. Gamer Preferences and Behavior Vary Country-by-country and Inform Market**  
12 **Participants’ Strategic Decisions**

13 423. [REDACTED]  
14 [REDACTED]  
15 [REDACTED] PX5000 (Lee Report) at 106 ; PX1721 (Microsoft) at 011 (Microsoft); *see also*  
16 Microsoft (Spencer) Hr’g Tr. 287:3-12; PX1889 (Microsoft) at 035 [REDACTED]  
17 [REDACTED] Microsoft Gaming CEO Phil Spencer testified that “Xbox’s  
18 market share versus Sony has traditionally been more competitive” in the United States  
19 versus Europe. Spencer (Microsoft) Hr’g Tr. 293:23-294:1.

20 424. Microsoft recognizes that [REDACTED]  
21 [REDACTED] PX7036  
22 (Nadella (Microsoft) Dep.) at 161:6-162:17.

23 425. Recognizing that console preferences vary by geography, Microsoft includes Nintendo  
24 Switch console sales in its share calculations when it wants “an accurate global  
25 perspective of [its] relevance.” Spencer (Microsoft) Hr’g Tr. 293:6-18; PX7028 (Spencer  
26 (Microsoft) Dep.) at 161:6-17.  
27  
28

1 426. Microsoft’s CEO Satya Nadella specifically requested a share breakdown of Microsoft’s  
2 position against Sony’s for Gen 9 consoles in the United States. Nadella (Microsoft) Hr’g  
3 Tr. 833:14-21; PX1274 (Microsoft) at 001.

4 427. Satya Nadella also referred to the United States as [REDACTED]  
5 [REDACTED] PX7010 (Nadella (Microsoft) IH) at 185:2-6;  
6 PX1274 (Microsoft) at 001.

7 428. Sony Interactive Entertainment CEO Jim Ryan explained that “console gaming is the  
8 more prevalent form of gaming [in the United States] than it is elsewhere in the world.”  
9 PX7053 (Ryan (Sony) Dep. Vol. I) at 232:24-233:4.

10 429. Certain types of games—such as shooter games—are more popular in the United States  
11 than in other countries. PX7053 (Ryan (Sony) Dep. Vol. I) at 15:20-16:2.

12 430. Activision's share of gaming revenue inside the United States is three times as large as it's  
13 share outside the United States. Bailey (Defendants’ Expert) 805:4-25.

14 431. Gamers located in closer proximity to cloud services are likely to experience better cloud  
15 gaming performance. PX5000 (Lee Report) at 139 (Lee Report); PX7054 (Ryan (Sony)  
16 Dep. Vol. II) at 115:2-13; PX7062 (Fisher (Nvidia) Dep.) at 53:14-54:5.

17 432. Professor Lee testified in his written direct that “[t]he United States is a relevant  
18 geographic market for each of these relevant product markets”. . Lee Written Direct at ¶142

19 **III. RELATED PRODUCT**

20 **A. Activision Content Is an Important Input that Drives Acquisition,**  
21 **Engagement, and Retention**

22 433. Activision has internally called several of its franchises, including *Call of Duty* and  
23 *World of Warcraft*, [REDACTED]  
24 [REDACTED] PX2107 (Activision) at 043, 051.

25 434. *Call of Duty* is a multi-player game that has an annual release, based in different war  
26 scenarios. Bond (Microsoft) Hr’g Tr. 152:18-153:2.

27 435. *Call of Duty* is available on Xbox, PlayStation, and PC, but not Nintendo Switch. Bond  
28 (Microsoft) Hr’g Tr. 154:7-8.

1 436. In every year since 2014, the best-selling buy-to-play console game in the United States  
2 has been a *Call of Duty* game except for 2018, when *Red Dead Redemption II* was  
3 released. PX8001 (Ryan (Sony) Decl.) ¶ 26; see PX9053 at 003 (*Call of Duty* will remain  
4 best-selling U.S. franchise in 2022 for 14th consecutive year). In 2018, *Call of Duty*  
5 *Black Ops 4* ranked #2. PX8001 (Ryan (Sony) Decl.) ¶ 26.

6 437. *Call of Duty*'s annual release cycle—which is unique among non-sports franchises is a  
7 key to its singular importance. See PX3378-015 (Ryan (Sony) Hr'g Testimony at 52:09-  
8 19). The *Call of Duty* franchise generates a top game *year after year*. In contrast, most  
9 AAA game franchises go years between new titles. PX8001 (Ryan (Sony) Decl.) at ¶ 25  
10 ("This annual release cycle is unique among AAA games (other than sports games),  
11 which typically are released with much longer gaps because of the time and resources  
12 required to develop the games.; PX7031 (Greenberg (Microsoft) Dep.) at 248:18-249:1  
13 (five years between the last two Halo launches)

14 438. ██████████ PlayStation gamers play *Call of Duty*. PX3378-016 (Ryan (Sony) Hr'g  
15 Testimony at 54:21). ██████████

16 ██████████  
17 PX8001 (Ryan (Sony) Decl.) ¶ 28.

18 439. In 2021, *Call of Duty* players ██████████ playing *Call of*  
19 *Duty*. PX8001 (Ryan (Sony) Decl.) ¶ 28.

20 440. ██████████ PlayStation gamers spent ██████████ playing *Call of Duty*  
21 and ██████████ playing *Call of Duty*. PX8001  
22 (Ryan (Sony) Declaration) at ¶ 28.

23 441. *Call of Duty* players drive a significant portion of SIE's total revenue, with the total  
24 spend on PlayStation by these players—including on hardware, accessories,  
25 subscriptions, game purchases, and add-ons—accounting for ██████████ of PlayStation  
26 spending. PX8001 (Ryan (Sony) Decl.) ¶ 27,

27 442. Activision's portfolio of games has the ability to influence video game product purchase  
28 decisions. When Activision and Nvidia negotiated over offering Activision games on the

1 Nvidia GeForce NOW cloud gaming subscription service, Activision stated “[w]e  
2 influence players’ subscription decisions” and “[w]e influence hardware purchase  
3 decisions.” PX2159 (Activision) at 007.

4 443. In an internal Activision analysis [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] PX2419 (Activision) at 004. A similar  
8 Activision analysis considering [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED] PX2082 (Activision) at 004.

13 444. [REDACTED]  
14 [REDACTED]  
15 [REDACTED] PX2049  
16 (Activision) at 006.

17 445. In a letter to Phil Spencer summarizing third-party relationships, [REDACTED]  
18 [REDACTED]  
19 [REDACTED] PX1019 (Microsoft) at 009.

20 446. In December 2020, the Head of Microsoft Studios Matt Booty identified the top drivers  
21 of Xbox Game Pass subscriber acquisition for the Xbox leadership team. PX1425  
22 (Microsoft) at 012. [REDACTED]  
23 [REDACTED] PX1425  
24 (Microsoft) at 012; PX5000 (Lee Report) at 172 fig. 41.

25 447. Internal Activision survey evidence reaffirms the impact of Activision’s portfolio on  
26 player acquisitions to subscription services. [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]  
[REDACTED]  
[REDACTED] PX2159 (Activision) at 007 (Activision).

448. [REDACTED]  
[REDACTED]  
[REDACTED] PX5000 (Lee Report) at 171–72 & fig. 41 (citing PX1425 (Microsoft) at 012).

449. An expert analysis of [REDACTED]  
[REDACTED]  
[REDACTED] PX5000 (Lee Report) at 171. Dr. Lee testified at the evidentiary hearing that *Call of Duty* sells more units than many other AAA games and thus drives share shift to a greater degree in his foreclosure model. Lee (Plaintiff Expert) Hr’g Tr. 630:3-16. Activision gets 60% of its global revenue from inside the United States. Bailey (Defendants’ Expert) Hr’g Tr. 803:17-804:1 All of Activision’s revenue inside the United States is AAA. Bailey (Defendants’ Expert) Hr’g Tr. 804:14-805:3-

450. Microsoft also recognized that Activision’s other franchises also drive sales, retention, and engagement. [REDACTED]  
[REDACTED]  
[REDACTED] PX7007 (Stuart (Microsoft) IH) at 98:11-99:17.

451. [REDACTED]  
[REDACTED]  
[REDACTED] PX7011 (Spencer (Microsoft) IH Vol. I) at 117:20-118:13.

1 452. [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED] PX7011 (Spencer (Microsoft) IH Vol. I) at 118:14-119:10.  
5 Microsoft Gaming CEO Phil Spencer justified the loss as an attempt to shore up  
6 Microsoft Gaming’s long-term player acquisition and retention strategy in an email to  
7 Microsoft CEO Satya Nadella: [REDACTED]  
8 [REDACTED] PX1245 (Microsoft) at 001.

9 453. Sony Interactive Entertainment CEO Jim Ryan similarly identified the *Overwatch* and  
10 *Diablo* franchises as part of Activision’s “stronger portfolio of games.” PX7053 (Ryan  
11 (Sony) Dep. Vol. 1) at 48:10-49:11.

12 454. The *Call of Duty* franchise is one of the most recognizable and popular video game  
13 series. [REDACTED] play *Call of Duty* on PlayStation. PX8001 (Ryan (Sony)  
14 Decl.) ¶ 28.

15 455. One way Activision’s portfolio drives acquisition, engagement, and retention is by tying  
16 their top franchises to esports, which are online multiplayer leagues similar to  
17 professional sports teams. PX7052 (Zerza (Activision) Dep.) at 215:12-16. Activision  
18 organizes leagues in which professional gamers compete in *Overwatch* and *Call of Duty*  
19 matches to build community among the franchise’s loyal fanbase, which furthers  
20 Activision’s opportunities for monetization. PX7052 (Zerza (Activision) Dep.) at 215:17-  
21 216:4; PX2107 (Activision) at 056 (“We also continue to lead the industry in rolling our  
22 professional, global city-based esports leagues for key franchises.”).

23 456. The importance of Activision content to platforms is reflected in the price. [REDACTED]  
24 [REDACTED]  
25 The publisher or developer agree to a revenue split with the platform called a “rev share,”  
26 which is typically 70/30, with the publisher or developer receiving 70% and the platform  
27 receiving 30% [REDACTED]  
28 [REDACTED] Bond (Microsoft) Hr’g Tr. 154:15-21, 155:3-17, 158:11-23

1 160:16-161:3; *see also* PX1742 (Microsoft) at 003; PX7003 (Bond (Microsoft) IH) at  
2 110:11-23; 218:24-219:4 [REDACTED]  
3 PX7007 (Stuart (Microsoft) IH) at 67:8-11; PX7011 (Spencer (Microsoft) IH Vol. I) at  
4 88:12-13; PX7008 (Schnakenberg (Activision) IH) at 59:16-22; PX2157 (Activision)  
5 at005 ; PX7052 (Zerza (Activision) Depo.) at 203:24-204:2 [REDACTED]

6 [REDACTED]  
7 **IV. THE PROPOSED ACQUISITION IS LIKELY TO RESULT IN A SUBSTANTIAL**  
8 **LESSENING OF COMPETITION**

9 **A. Microsoft Would Have the Ability to Foreclose Rivals in the Relevant**  
10 **Markets**

11 457. Dr. Lee concluded that the Merged Entity would have the ability to “foreclose  
12 Microsoft’s rivals in each of the Consoles Markets from Activision content.” Further,  
13 withholding Activision content from or partially foreclosing or degrading Activision  
14 content to Microsoft’s rivals would meaningfully affect their competitiveness and  
15 consumer demand for their products.” Lee Written Direct at ¶ 88.

16 458. Dr. Lee also found that the merged entity would have access to a number of viable  
17 foreclosure strategies, including withholding the Activision content to Microsoft’s rivals  
18 entirely or various forms of partial exclusivity. Lee Written Direct at ¶ 89.

19 459. Today, Activision has the ability to control whether and how its content is delivered.  
20 PX2049 (Activision) at 006. Post-transaction, Microsoft would gain that ability to control  
21 whether and how Activision content is provided to Microsoft’s competitors.

22 460. As Bobby Kotick testified, game publishers like Activision evaluate how best to optimize  
23 their content for every device. Kotick (Activision) Hr’g Tr. at 762:16-21. “Optimize”  
24 means take the steps and do the work needed to ensure a good player experience. Kotick  
25 (Activision) Hr’g Tr. at 76219-21. He also testified that different features, like different  
26 maps and weapons, can be offered on one console versus another. Kotick (Activision)  
27 Hr’g Tr. at 728:7-13.  
28

1 461. Nintendo's senior vice president of publisher and developer relations Steve Singer

2 confirmed that [REDACTED]

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED] PX7065 (Singer (Nintendo) Dep.) at 66:5-69:2.

6 462. Microsoft would gain the ability to totally withhold Activision content from Microsoft's  
7 competitors. PX7031 (Greenberg (Microsoft) Dep.) at 42:3-11 (confirming any publisher  
8 or developer can determine on what platforms its content is available).

9 463. Microsoft would gain the ability to partially withhold Activision content from  
10 Microsoft's competitors. *See* PX7031 (Greenberg (Microsoft) Dep.) at 42:3-11.

11 464. Partial foreclosure strategies include: (1) timed exclusivity, where Microsoft could delay  
12 the release of Activision games on competing products; (2) content exclusivity, where  
13 Microsoft makes certain versions or add-on content for Activision games exclusive to  
14 Microsoft products; and (3) degraded content, where Microsoft degrades the  
15 performance, gameplay, or features of Activision games. Lee Written Direct at ¶ 89;  
16 PX5000 (Lee Report) at 181. Timed exclusivity refers to a scenario where Microsoft  
17 initially launches a game on Xbox platforms, with subsequent release on competing  
18 platforms. Booty (Microsoft) Hr'g Tr. 54:16-21. Activision's CEO testified that different  
19 features, such as different game maps or weapons, can be available on one platform  
20 versus another, and that he considers these features to be for marketing. Kotick  
21 (Activision) Hr'g Tr. at 728:7-13, 18.

22 465. In November 2020, Microsoft Gaming CFO Tim Stuart told an investor conference that  
23 Microsoft Gaming wants ZeniMax content "in the long run to be either first or better or  
24 best or pick your differentiated experience on our platforms." Stuart (Microsoft) Hr'g Tr.  
25 957:19-958:5; PX9192 at -014. Tim Stuart told investors at this conference that Microsoft  
26 was moving towards this "first or better or best approach on [Microsoft] platforms."  
27 Stuart (Microsoft) Hr'g Tr. 961:9-18. Mr. Stuart testified that a platform could degrade  
28 the resolution, safety, or security of content as ways Microsoft could ensure content was

1 deemed "best" on Xbox versus other platforms. Stuart (Microsoft) Hr'g Tr. 960:4-10. Tim  
2 Stuart also testified that "better" or "best" could also refer to the timing of the game or  
3 downloadable content. Stuart (Microsoft) Hr'g Tr. 959:8-22

4 466. [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 PX2465-005; PX2465-005 (See also Bailey (Defendants' Expert) Hr'g Tr. at 812:15-  
9 814:7; PX2465-005 [REDACTED]  
10 [REDACTED]

11 467. Microsoft [REDACTED]  
12 [REDACTED] PX1015 (Microsoft) at 027.

13 468. [REDACTED] *See*  
14 PX7031 (Greenberg (Microsoft) Dep.) 47:7-49:13; 53:19-54:21 [REDACTED]

15 469. [REDACTED]  
16 [REDACTED] PX1949 (Microsoft) at 001.

17 **B. Unlike an Independent Activision, the Combined Firm Would Have an**  
18 **Incentive to Foreclose in the Relevant Markets**

19 **1. The Combined Firm Will Have an Increased Incentive to Foreclose in High-**  
20 **Performance Consoles and Video Game Consoles**

21 470. Activision's CEO testified that the company "view has always been to create [its] content  
22 for as many platforms as possible" Kotick (Activision) Hr'g Tr. 715:21-23, and

23 471. This incentive, however, would change if the Proposed Transaction occurs. Dr. Lee  
24 testified that the Merged Entity would have a greater economic incentive to engage in  
25 foreclosure of Microsoft's console rivals than an independent Activision would have. Lee  
26 Written Direct ¶ 90.

27 472. Dr. Bailey does not offer any analysis of how the transaction would change Activision's  
28 incentives to make its games broadly available across platforms. Bailey (Defendants'

1 Expert) Hr’g Tr. 814:13-24. Additionally, Dr. Bailey did not conduct any analysis, and  
2 offers no opinion, as to how the addition of Activision content would impact consumer  
3 welfare. Bailey (Defendants’ Expert) Hr’g Tr. 817:6-16.

4 473. Microsoft has the incentive to foreclose Activision content from PlayStation consoles due  
5 to the impact of such foreclosure across the entirety of the Microsoft Xbox ecosystem,  
6 which includes a host of complementary products, including Xbox consoles, Xbox cloud  
7 gaming services, hardware accessories for Xbox products and services, Xbox  
8 subscription services, and games for which Microsoft receives a portion of the revenue on  
9 each sale. PX5000 (Lee Report) at 019; Spencer (Microsoft) Hr’g Tr. 269:12-22 (Xbox  
10 ecosystem includes Xbox console, Game Pass, Xcloud, and Xbox products on PC);  
11 PX0003 at 019–20, 047, 052–53. These incentives are reflected in the testimony of  
12 industry participants, in Microsoft’s ordinary course documents, and in the economic  
13 analysis of Dr. Lee.

14 474. The combined firm is also incentivized to partially foreclose or degrade Activision  
15 content on PlayStation consoles for the same reasons that it has to remove games entirely  
16 from PlayStation. Post-acquisition, however, the combined firm will have an interest in  
17 optimizing Xbox business by disadvantaging PlayStation consoles to drive gamers to  
18 Xbox platforms and thereby removing the ability of PlayStation gamers to access  
19 Activision content on their preferred console. PX3378-009 (Ryan (Sony) Hr’g.  
20 Testimony at 36:01-06); *see also* PX3378-010 (Ryan (Sony) Hr’g Testimony at 36:7-13)  
21 (incentives of independent Activision), 67:7-13 (incentives of acquired Activision).  
22 These incentives are likewise reflected in the testimony of industry participants, in  
23 Microsoft’s ordinary course documents, and in the economic analysis of Dr. Lee.

24 475. The consequences of these incentives are straightforward. If Microsoft fully or partially  
25 forecloses Activision’s content from PlayStation consoles, consumers—who would  
26 otherwise purchase or remain playing on PlayStation—are more likely to purchase a new  
27 Xbox Series console instead. *See* Lee (Plaintiff Expert) Hr’g Tr. 617:11-618:14  
28 (responding to Court’s inquiry that *Call of Duty* is one franchise within Activision’s

1 portfolio that may be foreclosed alongside others). These new Xbox console owners  
2 would generate additional profits for Microsoft through content, accessory, and  
3 subscription service sales. PX4631 (Microsoft) at 011.

4 476. [REDACTED]  
5 [REDACTED] PX8001 (Ryan (Sony) Decl.  
6 ¶ 35). [REDACTED]  
7 [REDACTED]  
8 [REDACTED] PX8001 (Ryan (Sony) Decl. ¶ 35).

9 477. As to testimony of industry participants, in the absence of the merger, Activision CEO  
10 Bobby Kotick described Activision’s incentives as “platform agnostic.” Kotick  
11 (Activision) Hr’g Tr. 50:2-4.

12 478. Sony Interactive Entertainment CEO Jim Ryan testified that “[a]s an independent  
13 company, Activision is incentivized to make great games on all platforms,” but that he  
14 “believe[s] [Microsoft’s] primary incentive [], post-acquisition, would be to optimize its  
15 overall Xbox business, not the business of Activision.” PX3378-009 to -010; Ryan Hr’g  
16 Testimony, 36:03-36:11.

17 479. As Mr. Ryan explained, “Microsoft is a platform holder. That’s why this deal is so  
18 difficult. There is complete difference in incentive – between the incentives that  
19 Activision has and the incentives that Microsoft would have post-acquisition.” PX3378-  
20 029 (Ryan (Sony) Hr’g Testimony 179:1-8).

21 480. Mr. Ryan further testified, “I do believe that if Call of Duty was not available on our  
22 platform and was only available on Xbox, that [REDACTED] would desert  
23 PlayStation to go to Xbox.” PX7053(Ryan (Sony) Dep. Vol. I) at 92:4-7. [REDACTED]

24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED] PX3378-020 (Ryan (Sony) Hr’g Testimony 67:7-13).

27 481. Mr. Spencer described the impact of Microsoft’s first party titles appearing on Sony’s  
28 product. Microsoft Gaming CEO Phil Spencer testified that Sony is “an aggressive

1 competitor” and that shipping more Microsoft gaming content on PlayStation, including  
2 content with multiplayer and cross-platform play, would allow Sony “to further damage  
3 our aspirations” in gaming. Spencer (Microsoft) Hr’g Tr. 297:7-298:11, 298:19-299:11;  
4 PX7011 (Spencer (Microsoft) IH) at 363:14-25.

5 482.

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED] PX7003 (Bond (Microsoft)) IH) at 54:1-55:18  
9 [REDACTED]

10 PX7014 (Booty (Microsoft)) IH Tr. at 186:6-187:8 [REDACTED]  
11 [REDACTED]

12 483.

13 Microsoft’s incentives are reflected in Microsoft’s ordinary course documents, which  
14 reinforce Dr. Lee’s quantitative model and provide additional support to the combined  
15 firm’s incentive to foreclose. In an email regarding the transaction, Microsoft Gaming  
16 CEO Phil Spencer [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED] PX1759

21 (Microsoft) at 001.

22 484.

23 Microsoft’s presentation to the Board of Directors [REDACTED]  
24 [REDACTED]  
25 [REDACTED] PX1741 (Microsoft) at 014. [REDACTED]  
26 [REDACTED]  
27 [REDACTED] PX7011 (Spencer (Microsoft) IH Vol. I) at 35:11-36:14; *see also* Hr’g Tr. 269:12-  
28

1 270:2 (Xbox ecosystem includes Xbox console, Game Pass, Xcloud, and Xbox products  
2 on PC).

3 485. [REDACTED]  
4 Lawver (Microsoft) Hr’g Tr. 233:2-4. Microsoft is acquiring Activision for \$68.7 billion.  
5 PX0083 at 001. [REDACTED]

6 [REDACTED]  
7 486. A slide from a 2019 Microsoft presentation [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED] Lee Written Direct at ¶ 92 fig. 4) (citing PX1828  
11 (Microsoft) at 005).

12 487. Microsoft’s documents show that increasing Microsoft’s console sales and share position  
13 against Sony is a priority of the Gaming Leadership Team. Spencer (Microsoft) Hr’g Tr.  
14 279:22-281:1; 282:7-21; 289:2-11; PX1114 (Microsoft) 013 [REDACTED]  
15 [REDACTED] *id.* [REDACTED]  
16 [REDACTED] PX1888 (Microsoft) at 036  
17 [REDACTED] PX1887 (Microsoft) at  
18 001 [REDACTED]

19 [REDACTED]  
20 488. Internally, [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 PX4007 (Microsoft) at 006.

26 489. Microsoft also realizes long-term strategic benefits from the foreclosure of rival consoles  
27 from Activision content. In an April 2021 presentation with other members of the Xbox  
28 team, Senior Xbox Games Business planner Diarmuid Murphy [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

[REDACTED] PX1471 (Microsoft) at 009; PX4602 at 27:8-28:5. Mr. Murphy recalled that Phil Spencer noted that if they [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX4602 (Microsoft) at 30:8-24.

490. Microsoft has reached a similar conclusion that favors foreclosure of content from PlayStation consoles in its analyses of other potential and actual mergers. An internal Microsoft email, when analyzing a potential acquisition of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX1012 (Microsoft) at 002.

491. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PX1136 (Microsoft) at 015.

492. Microsoft and Activision ordinary course documents also reflect the incentives for partial foreclosure. A Microsoft email notes [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX4505 (Microsoft) at 002.

493. Activision documents further reinforce the benefits of partial foreclosure. [REDACTED]

[REDACTED]

[REDACTED]

1 PX2049 (Activision) at 006. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] PX2049 (Activision) at 006.

5 494. Finally, Microsoft’s economic incentives, should it acquire Activision, are reflected in  
6 Dr. Lee’s economic analysis. Dr. Lee’s quantitative economic analysis shows that the  
7 combined firm would likely have an incentive to engage in the foreclosure of acquired  
8 Activision content from PlayStation consoles. PX5000 (Lee Report) at 215. Dr. Lee’s  
9 model predicts that the combined firm would incur substantial costs by foreclosing  
10 PlayStation consoles, but these costs are more than offset by the benefit of bringing  
11 additional gamers to Xbox consoles and Xbox Game Pass—which provide Microsoft  
12 additional sales of complementary products. PX5000 (Lee Report) at 215. Therefore, Dr.  
13 Lee predicts that Microsoft would recoup more than 100% of its lost profits from  
14 foreclosing Activision’s content and the substantial benefits that Microsoft would incur  
15 as a result of bringing additional players to Xbox consoles and adding Activision content  
16 to Game Pass would have the effect of also making foreclosure more valuable to  
17 Microsoft. PX5000 (Lee Report) at 215. Dr. Lee testified that the new user who switches  
18 to Xbox to play *Call of Duty* spends more than the average Xbox user, which sharpens  
19 Microsoft’s incentive to foreclose. Lee (Plaintiff Expert) Hr’g 572:2-23.

20 495. Dr. Lee’s model of the proposed transaction and analysis of qualitative and quantitative  
21 evidence indicates that the merged entity would likely have an economic incentive to  
22 withhold new Activision content, both *Call of Duty* and non-*Call of Duty* titles, from  
23 Sony PlayStation consoles. Lee Written Direct at ¶¶ 94, 111.

24 496. Dr. Lee’s analysis accounted for partial foreclosure—strategies that Microsoft may use to  
25 make content exclusive on a timed basis, withhold premium in-game items or benefits, or  
26 fail to optimize the performance of its rivals. Lee (Plaintiff Expert) Hr’g Tr. 621:5-21. Dr.  
27 Lee analyzed that the incentives for full and partial foreclosure are very similar: “to steer  
28

1 consumers away from rivals to one’s own console or subscription service.” Lee (Plaintiff  
2 Expert) Hr’g Tr. 622:3-15.

3 497. A model of consumer demand for consoles and titles estimated by Dr. Lee using  
4 historical Microsoft sales data predicts an average share shift of 8.9% toward Microsoft  
5 from making *Call of Duty* titles exclusive, and a smaller but significant shift toward  
6 Microsoft from making other Activision titles exclusive. Lee (Plaintiff Expert) Hr’g  
7 544:25-545:7, 545:15-546:5, 580:13-16 (“*Call of Duty* likely has a much larger share  
8 shift than a typical AAA title”); PX5000 (Lee Report) at 156–58 (Lee Report); *see*  
9 PX7053 (Ryan (Sony) Dep. Vol. I) at 92:4-7. As Dr. Lee stated, “Call of Duty is a  
10 unicorn” because its above-average software sales leads to higher predicted share shifts.  
11 Lee (Plaintiff Expert) Hr’g Tr. 631:20-632:7.

12 498. Lee’s 20% Xbox Conversion rate, as used in his Vertical Foreclosure model, is based on  
13 ordinary course evidence and actual data, and therefore was a reliable input into his  
14 model. In his vertical foreclosure model, Professor Lee uses an Xbox Conversion rate of  
15 20%. Lee Direct Testimony at ¶ 106. The universe for this Conversion rate is all  
16 PlayStation Call of Duty gamers (from projected sales data in Microsoft’s Project Denali)  
17 who do not multi-home (i.e., who would not switch to playing Call of Duty on an Xbox  
18 or suitable gaming PC that they already own). *See* Lee Direct Testimony at ¶ 103;  
19 PX5000-207 (Expert Report of Robin S. Lee) [REDACTED]

20 [REDACTED] The 20% Conversion rate  
21 means that 20% of that universe would switch. These are PlayStation Call of Duty  
22 gamers that would purchase an Xbox to continue playing Call of Duty in the event of  
23 foreclosure. A 20% Conversion rate is justified, because it corresponds to a “share shift”  
24 – i.e., an increase in Xbox share versus PlayStation share – in a given year relative to  
25 2022 global console sales of approximately 5.5 percentage points (5.5%). Lee Direct  
26 Testimony at ¶ 106.

27 499. The 5.5% share shift is reasonable and supported by: (i) Professor Lee’s Share Model,  
28 which predicts a relative share shift between Xbox and PlayStation of 8.9 percentage

1 points (8.9%) in the event of foreclosure of Call of Duty, compared to an expected 1.8%  
2 share shift in response to foreclosure of an average AAA game (Lee Direct Testimony at  
3 ¶ 31; PX5000 (Lee Opening Report) at ¶¶ 401-406, Fig. 36 & 37); (ii) Microsoft’s  
4 ordinary course business documents, including documents that indicate that [REDACTED]  
5 [REDACTED]  
6 [REDACTED] (PX1136 at -004; *see also* PX5000 (Lee Opening Report) at ¶¶ 396-399;  
7 PX1477; PX1075), given that *Call of Duty* has uniquely high sales compared to other  
8 AAA titles, these share shifts likely understate the actual effect of foreclosure of Call of  
9 Duty (Lee Direct Testimony at Fig. 1, ¶ 32, ¶ 104); and (iii) the survey commissioned by  
10 Microsoft as advocacy to the UK CMA, which found that 5% of gamers planning to  
11 purchase a PlayStation “will purchase an Xbox instead” if *Call of Duty* were not on  
12 PlayStation (PX5000 at ¶ 762).

13 500. Along with the Xbox Conversion Rate, Dr. Lee’s Vertical Foreclosure Model uses  
14 Microsoft’s five-year console consumer “lifetime values”, or “LTV.” Lee Direct  
15 Testimony at ¶¶ 103-105. The LTV provides a “lifetime value” of a customer to Xbox.  
16 PX5000 at ¶¶ 116-117, Figures 7-8. Using Microsoft and Sony telemetry data, Dr. Lee  
17 [REDACTED]  
18 [REDACTED] PX5000 (Lee Opening Report) at ¶ 567. [REDACTED]  
19 [REDACTED]  
20 [REDACTED] Lee Direct Testimony at  
21 ¶¶ 104-105; PX5000 (Lee Opening Report) at ¶ 567 [REDACTED]  
22 [REDACTED] Lee  
23 Direct Testimony at ¶¶ 104-105; PX5000 (Lee Opening Report) at ¶ 567. Dr. Lee’s  
24 analysis also shows that gamers who play Call of Duty the most and would be most likely  
25 to purchase an Xbox in the event of foreclosure [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 Lee Direct Testimony at ¶ 104.

1 501. Using a 20% Xbox Conversion rate and [REDACTED] Professor Lee's  
2 vertical foreclosure model calculates that the Merged Entity will recoup over 100% of its  
3 lost sales on Sony PlayStation consoles through additional software, Xbox console, and  
4 Xbox Game Pass sales. Lee Direct Testimony at ¶¶ 108-109; PX5000 (Lee Opening  
5 Report) at ¶ 573. And, as shown in Figure 11 of Professor Lee's reply report, PX5001-  
6 076, the Merged Entity recoups at least 100% of sales under a number of sensitivity  
7 adjustments to both the Xbox Conversion Rate and LTV adjustment factors. Even with a  
8 modestly higher LTV adjustment factor, Dr. Lee's model shows the merged entity would  
9 have an incentive to foreclose Call of Duty even with a significantly lower Xbox  
10 conversion rates and implied share shift and without accounting for other sources of  
11 profits that Microsoft acknowledges increase its incentives to take games exclusive.  
12 PX5001-076, Fig. 11.

13 **2. The Combined Firm Will Have an Increased Incentive to Foreclose in**  
14 **Content Subscription Services and Cloud Gaming Services**

15 502. Dr. Lee testified that the "Merged Entity would have the ability to foreclose Microsoft's  
16 rivals in each of the Gaming Service Markets from Activision content." Lee Written  
17 Direct ¶ 187.

18 503. Further, Dr. Lee found that "the Merged Entity would have the ability to foreclose  
19 Microsoft's rivals in the Gaming Service Markets from both new and back-catalog  
20 content. Lee Written Direct ¶ 188.

21 504. Dr. Lee's analysis shows that "the Merged Entity would have a greater economic  
22 incentive to engage in foreclosure than an intended Activision in the Gaming Services  
23 Markets. In addition, the Merged Entity would likely have the economic incentive to  
24 engage in foreclosure by withholding Activision content from, or degrading Activision  
25 content to, Microsoft's rivals in the Gaming Services Markets." Lee Written Report ¶  
26 189.

1 505. Dr. Lee found that Microsoft “realizes additional and longer-term benefits from  
2 foreclosing rival gaming service and gaining scale in Xbox Game Pass.” Lee Written  
3 Direct ¶ 192.

4 506. Dr. Bailey does not offer any opinion as to how the transaction would change Activision's  
5 incentives to contribute its games to cloud subscription services. Bailey (Defendants'  
6 Expert) Hr'g Tr. 815:12-23.

7 507. Several Microsoft documents explicitly reference longer-term benefits of gaining scale in  
8 content library and cloud gaming service markets.

9 508. [REDACTED]  
10 [REDACTED] [REDACTED]  
11 [REDACTED] [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED] PX1049 (Microsoft) at 003.

16 509. A [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 PX1050 (Microsoft) at 004.

24 510. A 2021 email from Senior Marketing Director of Xbox Guy Welch drew comparisons  
25 with video subscription services like Netflix and noted [REDACTED]  
26 [REDACTED]  
27 [REDACTED] PX1877  
28 (Microsoft) at 001 (Microsoft) (emphasis in original).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

511. [REDACTED]

[REDACTED] PX4267 (Microsoft) at 003.

512. Microsoft’s statements and internal documents recognizing the company’s incentive to withhold content from rival content library services providers are consistent with actions and statement Microsoft made for prior acquisitions, and in the case of Minecraft and ZeniMax, executed.

513. Microsoft Gaming CEO Phil Spencer, in a September 2021 email to members of Gaming Leadership team, wrote, [REDACTED]

[REDACTED] PX1897 (Microsoft) at 001.

514. In an email discussing [REDACTED] PX1065 (Microsoft) at 002. [REDACTED]

[REDACTED] PX1065 (Microsoft) at 008.

515. [REDACTED] PX1529 (Microsoft) at

021.

1 516. During the contemplated acquisition of [REDACTED]

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED] PX1313 (Microsoft) at 002.

5 517. Microsoft noted in its regulatory filings to the European Commission regarding the  
6 ZeniMax acquisition that “Microsoft will make all acquired games and future releases  
7 available to subscribers of its Game Pass service on the day the games are launched  
8 (which can be used to play on PCs, Xbox consoles and Android mobiles), but does not  
9 currently anticipate distributing them through other subscription services.” PX1651  
10 (Microsoft) at 013, 014. This view is reflected in Microsoft’s ordinary course documents.  
11 Per Matt Booty, “No effing way”: “[Microsoft is] not putting our first-party IP on  
12 competing streaming or subscription services.” Booty (Microsoft) Hr’g Tr. 66:8-19  
13 (discussing PX4351 (Microsoft) at 002).

14 518. The content that Microsoft pulled from included popular games that Microsoft had  
15 previously acquired, including *Minecraft*. PX7060 (Eisler (Nvidia) Dep. 99:16-100:3).

16 519. The quality of cloud gaming has improved dramatically in recent years. PX8000 (Eisler  
17 (Nvidia) Decl. ¶ 7; PX7062 (Fisher (Nvidia) Dep.) at 51:13-51:21; PX3381-004 (Eisler  
18 Video) at 48:04-48:23. Cloud publishers can add new content and fix bugs in the cloud,  
19 which saves gamers time, effort, and data. PX8000 (Eisler (Decl. ¶ 11).

20 520. Cloud gaming has a profitable future. PX7062 (Fisher (Nvidia) Dep.) at 63:19-63:20  
21 (“It’s my strong belief that cloud gaming has a profitable future, yes.”). A May 2022  
22 Xbox presentation entitled “Roadmap to 2030” projects the number of cloud-first  
23 subscribers to Game Pass (*i.e.*, those playing on devices other than video game consoles  
24 or gaming PCs) to reach [REDACTED] by 2030, representing a growing share of all Game  
25 Pass subscribers over time. PX1517 (Microsoft) at 008.

26 521. Microsoft is well-positioned to grow in the cloud gaming market. Microsoft owns a large  
27 portfolio of first-party games and has established relationships with third-party  
28

1 publishers, both of which provide content for the xCloud gaming service. PX0003 at  
2 016–19.

3 522. xCloud is the leading cloud gaming service: “xCloud has put itself in a leading position  
4 relative to its streaming competitors by leveraging Xbox Game Pass. With Game Pass  
5 and xCloud we create a flywheel of user engagement, subscription value and content  
6 relevance that is difficult for competition to match.” PX1037 (Microsoft) at 041.  
7 Microsoft executive Lori Wright testified in another matter that she agreed with the  
8 positive press reviews of XCloud’s “super-solid experience” on PC and iOS devices  
9 when it first launched with “smooth and stable” performance. Dkt. 228 (Joint Stip. and  
10 [Proposed] Order) at 6-7. Even at the beta stage, Xcloud was a “remarkably polished”  
11 experience. Dkt. 228 (Joint Stip. and [Proposed] Order) at 8.

12 523. Microsoft is also one of a limited set of companies that has cloud computing  
13 infrastructure with global coverage. [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED] PX7050 (Choudry (Microsoft) Dep.) at 64:7-13,  
18 154:21-155:20, 158:3-160:4. As Microsoft executive Lori Wright testified in another  
19 matter, to develop the development of xCloud, Microsoft “had to effectively go and  
20 use—find data centers around the world that were already, you know—as part of our  
21 Azure operations.” Dkt. 228 (Joint Stip. and [Proposed] Order) at 6. Microsoft has  
22 identified the global coverage of its cloud infrastructure as a competitive strength for its  
23 cloud gaming service, PX1029 (Microsoft) at 024, and predicts that [REDACTED]  
24 [REDACTED] PX1037(Microsoft) at 007.

25 524. Microsoft has indicated its willingness to foreclose rival cloud streaming services from its  
26 first-party content [REDACTED]  
27 [REDACTED]  
28 [REDACTED] PX4351 (Microsoft) at 002; Booty (Microsoft)

1 Hr’g Tr. 65:13-14. The content that Microsoft pulled included popular games that  
2 Microsoft had previously acquired, including Minecraft. PX3381 (Eisler (Hr’g  
3 Testimony) 99:16-100:3.

4 525. [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 PX4351 (Microsoft) at 001.

12 526. Despite Microsoft’s representation that cloud gaming investment has been “paused,”

13 [REDACTED]  
14 [REDACTED] PX4818 (Microsoft) at 013; PX7050 (Choudhry (Microsoft) Dep.) at 189:12-  
15 190:11. In late 2022, [REDACTED]

16 [REDACTED]  
17 [REDACTED] See PX4181  
18 (Microsoft) at 083. In order to offer two of the three Generation 10 devices [REDACTED]

19 [REDACTED]  
20 [REDACTED] PX7050 (Choudhry (Microsoft) Dep.) at 198:22-201:25; PX4181  
21 (Microsoft) at 083.

22 527. Dr. Lee’s analysis found that the combined firm would likely foreclose Activision  
23 content in the content library subscription services market. Lee (Plaintiff Expert) Hr’g Tr.  
24 635:21-636:6. Dr. Lee analyzed documentary evidence that exclusivity in subscription  
25 and cloud gaming services is a practice that Microsoft engages in and there is “a tendency  
26 not supply rivals in these markets with its own first-party content.” Lee (Plaintiff Expert)  
27 Hr’g Tr. 636:14-18, 637:9-638.

1 528. Further Dr. Lee testified that the Merged Entity would likely have the economic incentive  
2 to engage in foreclosure in Gaming Services Markets by withholding Activision content  
3 from or degrading Activision content for Microsoft’s rivals. Lee Written Direct ¶ 193.

4 **3. Microsoft’s Deal Model Predicted Recoupment of Losses**

5 529. Despite purchasing the largest independent game publisher in the United States, the  
6 Microsoft’s deal model for the Activision acquisition conspicuously forecasts *no* change  
7 in Microsoft’s share of the console market resulting from the deal. This is hard to square  
8 with both the deal model itself as well as Microsoft’s ordinary course documents.

9 530. [REDACTED]  
10 [REDACTED] PX7042 (Lawver (Microsoft)  
11 Dep.) at 216:15-22 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED] PX7042 (Lawver (Microsoft) Dep.) at 213:13-22. [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] PX7042  
20 (Lawver (Microsoft) Dep.) at 203:24-207:18. [REDACTED]  
21 [REDACTED]  
22 PX7042 (Lawver (Microsoft) Dep.) at 225:3-24. [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED] Stuart (Microsoft) Hr’g Tr. 998:13-999:13; PX4341 (Microsoft) at 24; (Lawver  
26 (Microsoft) Dep.) at 224:14-225; 219:6-13  
27 .  
28

1 531. Microsoft Gaming CFO Tim Stuart testified that Game Pass, Store, and advertising  
2 synergies made up the other half of total value of the Activision deal to Microsoft, with  
3 Game Pass being [REDACTED] of the remaining [REDACTED] in value to Microsoft. Stuart  
4 (Microsoft) Hr’g Tr. 1000:06 - 1001:1; PX4341 at -025. Mr. Stuart testified that the  
5 majority of the synergies from the Activision deal model are from Game Pass through  
6 “accelerating Game Pass subscriptions across console and PC.” Stuart (Microsoft) Hr’g  
7 Tr. 1002:2-6; 1003:23-1004:02; PX4341 at -025. Mr. Stuart testified that Microsoft  
8 estimated that *Call of Duty* would generate the most hours of engagement and the most  
9 revenues on Game Pass. Stuart (Microsoft) Hr’g Tr. 1004:12-1005:15.

10 532. In preparation for presenting the Activision deal model to the Microsoft Board of  
11 Directors in January 2022, Microsoft modeled a scenario of partial revenue foreclosure  
12 on Sony as a result of the Activision transaction. Microsoft Gaming CFO Tim Stuart  
13 testified [REDACTED]  
14 [REDACTED] Stuart (Microsoft) Hr’g Tr. 1008:1-  
15 20; PX7040 at 202:2-14. Tim Stuart was asked to calculate the revenue risk of such an  
16 event, and how [REDACTED]  
17 [REDACTED] Stuart (Microsoft) Hr’g Tr. 1010:15 - 1012:11; PX1190 at -001. Tim Stuart  
18 testified that he told fellow Microsoft employee Jamie Lawver that any margin risk from  
19 a decline in the Activision PlayStation revenue split “can be offset with shift to Xbox in  
20 overall platform mix.” Stuart (Microsoft) Hr’g Tr. 1014:2-18; PX4319 at -001.

21 533. Microsoft Gaming CFO Tim Stuart testified that Microsoft calculated both the  
22 incremental subscribers to Game Pass, and how much Activision revenue would need to  
23 shift from PlayStation to Xbox console in order to make up the potential loss of  
24 Activision revenue on PlayStation. Stuart (Microsoft) Hr’g Tr. 1016:19-1017:24; PX4358  
25 at -001-02. Tim Stuart testified that fellow Microsoft employee Jamie Lawver calculated  
26 that Microsoft could make up the loss of Sony revenue “if we can shift Activision  
27 revenues to be greater on Microsoft console.” Stuart (Microsoft) Hr’g Tr. 1019:8-15,  
28 1020:5-21; PX4358 at -001-02 [REDACTED]

1 [REDACTED]

2 [REDACTED] PX7042 (Lawver

3 (Microsoft) Dep.) at 229:8-230:10.

4 534. Microsoft later calculated that Microsoft could make up the lost revenues to Sony  
5 through either additional Game Pass subscriber or through getting more Activision  
6 revenue on the Microsoft platform. Stuart (Microsoft) Hr’g Tr. 1022:3-15; PX4359 at -  
7 001. [REDACTED]

8 [REDACTED]

9 [REDACTED] Stuart (Microsoft) Hr’g Tr. 1016:10-  
10 1017:19; PX7040 at 224:21-226:5; PX4358 at -001.

11 535. Microsoft Gaming CFO Tim Stuart testified that for the final presentation to the  
12 Microsoft Board of Directors, Microsoft had calculated that [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED] Stuart (Microsoft) Hr’g Tr. 1024: 25-1026:12; PX4367 at -001. Tim Stuart  
16 testified that attaining these additional Game Pass revenues or platform share shifts was  
17 “reasonable” and “achievable.” Stuart (Microsoft) Hr’g Tr. 1028:9-1029:1; PX4472 at -  
18 001.

19 **4. The Combined Firm Will Have Decreased Incentive to Collaborate on**  
20 **Innovations in the Relevant Markets**

21 536. Hardware providers work closely with video game developers. *See* PX7062 (Fisher  
22 (Nvidia) Dep. 20:1318 (“When Nvidia is developing and launching a new series of GPUs  
23 for gaming, does Nvidia’s gaming business work with game developers to optimize the  
24 work – the interplay between the game – a game and the new chipset. A: We do, yes.”))

25 537. As Jim Ryan, CEO of Sony Interactive Entertainment, put it, “So from an early stage in  
26 the development of our future consoles we consult with the most valued and prestigious  
27 development partners to get their input into what features our next generation hardware  
28 should offer.” PX7053 (Ryan (Sony) Dep.) at 31:11-15.

1 538. In particular, hardware providers have acknowledged that “over the past two decades,  
2 Activision has been an important development partner,” collaborating closely with  
3 console manufacturers. PX8001 (Ryan (Sony) Decl.) ¶ 40; *see also* PX7061 (Fisher  
4 (Nvidia) Dep. 37:2-37:8 (Q: Okay. Do you have an understanding of how long there has  
5 been a collaborative relationship between Nvidia and Activision to make Nvidia games  
6 performant on Nvidia GPUs? A: It’s been some number of years. I don’t recall when –  
7 when we first started working with Activision or Blizzard as separate companies.”).

8 539. For example, Activision has collaborated with Sony on the development of features that  
9 make gameplay “more enjoyable and more realistic,” [REDACTED]  
10 [REDACTED] among others. PX7053 (Ryan (Sony) Dep.) at 30:5-35:5. In order to collaborate on  
11 developing console features with Activision, Sony must share confidential details about  
12 its console development. *See* PX8001 (Ryan (Sony) Decl.) ¶ 40.

13 540. This collaboration leads to high quality products. PX7053 (Ryan (Sony) Dep.) at 34:1-4;  
14 *see also* PX7062 (Fisher (Nvidia) Dep. 20:20-21:21 (“[T]he most common reason is for  
15 interplayability to make sure that the game is fully compatible with our . . . newest  
16 device. . . the other reason most common is that with our new architectures, we add  
17 additional features that games can take advantage of. And we need to teach game  
18 developers and work with them so they understand how to modify their games to take  
19 advantage of the latest features in our . . . GPUs.”).

20 541. For example, Nvidia, which sells the cloud streaming service GeForce Now, has  
21 produced technology to reduce latency when streaming a game. PX3381 (Eisler Video) at  
22 47:12-23, 48:5-23 [REDACTED]  
23 [REDACTED] PX7062 (Fisher (Nvidia)  
24 Dep. 22:23-23:21).

25 542. [REDACTED] PX7062 (Fisher  
26 (Nvidia) Dep.) 34:13-35:18) [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 543. The acquisition of a major publisher would jeopardize this relationship. As Mr. Ryan put  
2 it, “We simply could not run the risk of a company that was owned by a direct competitor  
3 having access to that information.” PX7053 (Ryan (Sony) Dep.) at 34:16-24; *see also*  
4 PX1486 (Microsoft) at 002; PX7014 (Booty (Microsoft) IH) at 174:20-175:16 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] *see also* PX7014

12 (Booty (Microsoft) IH 176:22-176:25 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 544. This would also affect Activision’s incentives to work with other platforms. PX7053  
16 (Ryan (Sony) Dep.) at 35:18-36:13.

17 **C. Microsoft’s Past Statements and Actions Demonstrate Microsoft has the**  
18 **Ability and Incentive to Foreclose Rivals Post-Acquisition**

19 **1. Microsoft is Willing to Lose Money on First-party Exclusive Titles and Treat**  
20 **Them as a “Loss Leader.”**

21 545. There is significant evidence that Microsoft considers the benefits of foreclosing rivals  
22 from content when deciding whether to make content exclusive for its consoles and Xbox  
23 Game Pass subscription services. Microsoft Gaming CEO Phil Spencer testified that the  
24 Gaming Leadership Team has had conversations about the financial implications of not  
25 shipping content on other platforms, including PlayStation. Spencer (Microsoft) Hr’g Tr.  
26 316:17-317:10; *see* PX7007 (Stuart (Microsoft) IH) at 167:22-168:9 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

[REDACTED]

[REDACTED] Booty (Microsoft) Hr’g Tr. 55:22-14.

546. [REDACTED]

[REDACTED] PX4007 (Microsoft) at 006 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX4007

(Microsoft) at 005 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Similarly, Microsoft is willing to lose money on Game Pass for a number of years before the service becomes profitable, as “the idea is to create a moat that nobody else can attack.” Booty (Microsoft) Hr’g Tr. 67:19-68:5 (discussing PX1442 (Microsoft) at001). As Mr. Booty noted to Mr. Stuart, “Content is the one moat that we have in terms of a catalog that runs on current devices and capability to create new. Sony is really the only other player who could compete with Game Pass and we would have a two-year and [10 million] subs lead.” Booty (Microsoft) Hr’g Tr. 69:1-12 (discussing PX4352 (Microsoft) at 001).

547. As Pete Hines, head of publishing for Bethesda Softworks (a division of ZeniMax) testified, Trial Tr. 88:7-22, he is unaware of any reason why, if Microsoft acquires Activision, games from Activision Blizzard King “would be treated differently” with respect to exclusivity than ZeniMax titles have been treated. Hines (Microsoft) Hr’g Tr. 88:7-22, 101:10-102:3 (discussing PX4406 (Microsoft) at 001).

548. Further, Professor Lee testified that “[f]irst party publishers tend to have a greater economics incentive than third-party publishers to make content exclusive to their own consoles and gaming services.” Lee Written Direct at ¶ 38.

1 549. Professor Lee also found that [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED] Lee Written Direct at ¶39 (citing PX7011 (Spencer (IH) at  
5 360:2-362:13).

6 550. Consistent with this testimony, Microsoft’s popular first-party console franchises such as  
7 *Halo* and *Gears of War* are exclusive to Xbox consoles and PC’s.” Lee Written Direct at  
8 ¶ 39 (citing PX5000 (Expert Report) at ¶ 522).

9 551. Professor Lee found that this behavior extended to acquired studios. Lee Written Direct a  
10 ¶ 40.

11 552. Conversely, Professor Lee found that in contrast to first-party publishers, independent  
12 publishers typically have strong economic incentives to support multiple consoles as  
13 doing so provides access to a larger potential customer base and greater potential game  
14 sales. Lee Written Direct at ¶ 43 (citing PX5000 (Lee Report) at 161 fig. 38).

15 553. Professor Lee calculated that for each of the “Big 4” independent publishers, well over  
16 90% of revenue was earned from multi-platform titles. Conversely, [REDACTED]  
17 [REDACTED] while  
18 just over 70% of Xbox Games Studios revenue was from games exclusive to Xbox  
19 consoles. “This greater propensity for first-party titles to be exclusive is consistent with  
20 console manufacturers benefiting sufficiently from exclusivity and increased console  
21 sales to be willing to forgo selling first-party titles to a larger set of users on rival  
22 consoles. Lee Written Direct at ¶ 44 (citing PX5000 (Lee Expert Report) at 160.

## 23 2. Past Acquisitions

24 554. Microsoft’s discussion and actions surrounding proposed and consummated  
25 acquisitions of video game studios also indicate Microsoft’s willingness to forgo  
26 profits on content sales to obtain benefits arising from content exclusivity, which is  
27 economically rational if the benefits of exclusivity outweigh the foregone sales on  
28 other gaming platforms. This has been the case even for new titles that are

1 released in existing franchises.

2 555. In evaluating a potential acquisition, Microsoft considers both economic value  
3 (near-term financial return) and strategic value (how the acquisition relates to the  
4 company's gaming strategy). Spencer (Microsoft) Hr'g Tr. 321:2-10, 322:3-8. The  
5 two considerations differ from one another and there is no number assigned to  
6 strategic value. Spencer (Microsoft) Hr'g Tr. 322:9-16.

7 556. For example, Microsoft acquired a series of game studios in 2018 and 2019,  
8 including Ninja Theory, Double Fine, Obsidian Entertainment ("Obsidian"), and  
9 inXile Entertainment. (PX0003 at 086-087).

10 557. Microsoft's internal documents state that [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED] PX1949 (Microsoft) at 002 ; PX1951 (Microsoft) at  
14 007. *See also* PX1950 (Microsoft) at [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 558. For example, [REDACTED]  
18 [REDACTED] PX7031 (Greenberg (Microsoft) Depo.) at 48:11-  
19 49:13, 54:6-21.

20 559. Obsidian games *Grounded* (which offers multiplayer play) and *Pentiment* were  
21 launched in 2022 and are exclusive to Xbox. PX7031 (Greenberg (Microsoft)  
22 Depo.) at 56:2-24.

23 560. [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED] PX1805  
27 (Microsoft) at 013, 015.  
28

1                   **3. ZeniMax**

2 561. In addition, Microsoft’s actions — and internal rationale for those actions —following  
3 the acquisition of ZeniMax Media (“ZeniMax”) are consistent with Microsoft  
4 recognizing that it obtains significant benefits from exclusivity and are instructive as to  
5 how Microsoft will handle Activision content post-closing.

6 562. ZeniMax is the parent company of Bethesda Softworks, an established game publisher  
7 with eight game development studios. PX7049 (Hines (Microsoft) Dep.) at 8:17-23.  
8 ZeniMax makes “big AAA tentpole launches that when [ZeniMax] put[s] out a game,  
9 people stop and pay attention if they’re a gamer.” PX7049 (Hines (Microsoft) Dep.) at  
10 268:5-16.

11 563. In September 2020, Microsoft announced it was acquiring ZeniMax for \$7.5 billion in  
12 cash. PX1962 at 002; *see also* Booty (Microsoft) Hr’g Tr. 57:7-16; Hines (Microsoft)  
13 Hr’g Tr. 88:21-22 (Hines) (noting Microsoft acquired ZeniMax in 2021). The Bethesda  
14 acquisition added four additional billion-dollar franchises to Microsoft’s game portfolio,  
15 including *The Elder Scrolls*, *Dishonored*, *Fallout*, *Doom*, as well as major new releases  
16 *Starfield* and *Redfall*. PX1425 (Microsoft) at 015; PX4627 (Microsoft) at 001.

17 564. Prior to being acquired by Microsoft, ZeniMax had historically released its games on  
18 both Xbox and PlayStation. PX7053 (Ryan (Sony) Dep.) at 28:9-15. In the ten-year  
19 period before ZeniMax was acquired by Microsoft, ZeniMax had never released a game  
20 exclusive to a single console. Hines (Microsoft) Hr’g Tr. 91:2-13.

21 565. [REDACTED]  
22 [REDACTED] Lawver (Microsoft) Hr’g Tr. 234:19-235:3; PX4672 (Microsoft) at 001  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

26 566. [REDACTED]  
27 [REDACTED]

28 Lawver (Microsoft) Hr’g Tr. 235:9-13; Stuart (Microsoft) Hr’g Tr. 950:7-19. Microsoft

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

[REDACTED] Lawver (Microsoft) Hr’g Tr. 235:14-25.

567. Initially, Microsoft’s statements to the public and foreign regulators attempted to dispel any concerns over the exclusivity of future ZeniMax games. In announcing the ZeniMax acquisition, Microsoft publicly stated that it would decide whether to make future ZeniMax releases exclusive to Xbox on a “case-by-case basis.” PX1962 (Microsoft) at 002. In November 2020, Microsoft Gaming CFO Tim Stuart told an investor conference that Microsoft gaming did not have any intention of pulling ZeniMax content off of Sony, Nintendo, or other platforms. Stuart (Microsoft) Hr’g Tr. 955:8-12; PX9192 at -014.

568. Microsoft informed the European Commission that it had “strong incentives to continue making ZeniMax games available for rival consoles (and their related storefronts)” and that it would be “implausible” to earn enough new Xbox console users to offset the losses it would realize from lost sales on competing platforms due to an exclusive strategy. Notably, Microsoft cited to the [REDACTED] [REDACTED]. See PX9036 at 021; PX1651 at 125-29 (Microsoft Form CO submitted to the European Commission for Microsoft/ZeniMax, Jan. 29, 2021).

569. However, Microsoft’s internal document and post-acquisition actions contradict Microsoft’s representations and initial financial modeling for the ZeniMax deal. On the morning the ZeniMax acquisition was announced, Microsoft Gaming CEO Phil Spencer wrote a global email to Microsoft Gaming employees: [REDACTED] [REDACTED] [REDACTED] PX1527 (Microsoft) at 002 (Microsoft) (emphasis added).

570. [REDACTED] [REDACTED] Lawver (Microsoft) Hr’g Tr. 236:4-13; PX7048 (Booty (Microsoft) Dep.) at 8:11-18; PX7042 (Lawver (Microsoft) Dep.) at 257:21-258:2; PX1954 (Microsoft) at 001 [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

[REDACTED]

[REDACTED]

*id.* at 259:23-260:6, 258:21-23.

571. Microsoft Gaming CFO Tim Stuart testified that when Microsoft evaluated exclusivity of ZeniMax games in December 2020, despite having more than 10 million units forecasted for both *Starfield* and *Indiana Jones* on PlayStation, Microsoft believed it could offset losses incurred from taking ZeniMax games exclusive through upside to Game pass and increased console sales. Stuart (Microsoft) Hr'g Tr. 965:15-967:22; PX4376 at -001. Mr. Stuart testified that the Microsoft needed fewer dollars in the short term to make up for the financial impact of exclusivity of ZeniMax games on Microsoft. Stuart (Microsoft) Hr'g Tr. 967:23-969:2; PX4376 at -001.

572. [REDACTED] PX1966 (Microsoft); PX7048 (Booty (Microsoft) Dep.) at 31:19-32:9, 33:11-22; PX7040 (Stuart (Microsoft) Dep.) at 302:14-303:14. *See also* PX1519; PX4535 (Microsoft) at 001; PX7056 (Murphy (Microsoft) Dep.) at 135:13-15.

573. [REDACTED] PX1966 (Microsoft) at -008 (Microsoft); PX4484 (Microsoft) at 009.

574. [REDACTED] PX4484 (Microsoft) at 009, 011.

575. [REDACTED] PX1966

1 (Microsoft) at 002 (Xbox CFO Tim Stuart: [REDACTED])

2 [REDACTED]

3 576. Microsoft Gaming CFO Tim Stuart testified that around the time of this presentation  
4 February 2021, ZeniMax leadership did not want their IP cut from "the potential biggest  
5 base" of PlayStation consumers, but that it was "consideration" and "not...a blocker" for  
6 Microsoft. Stuart (Microsoft) Hr'g Tr. 974:6-975:7; PX1966 at -003.

7 577. Mr. Spencer's decision to pursue full exclusivity for ZeniMax games was made

8 [REDACTED]

9 [REDACTED]

10 [REDACTED] See PX1471 (Microsoft) at 024.

11 578. [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED] Stuart

19 (Microsoft) Hr'g Tr. 982:5-18; PX1116 (Microsoft) at 001; Lawver (Microsoft)

20 Hr'g Tr. 236:14-237:7. See also PX7040 (Stuart (Microsoft) Dep.) 323:18-23;

21 PX7042 (Lawver (Microsoft) Dep.) 263:4-20, 264:22-25, 265-22-266:3.

22 579. [REDACTED]

23 [REDACTED] Lawver

24 (Microsoft) Hr'g Tr. 23814-239:3; PX1116 (Microsoft) at 001;; Stuart (Microsoft)

25 Hr'g Tr. 983:19-984:3 PX7040 (Stuart (Microsoft) Dep.) at 327:17-20, 328:14-20;

26 PX7043 (Lawver (Microsoft) Corp. Dep. At 14:10-19; see also PX4672

27 (Microsoft) at 001 [REDACTED]

28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 580. Microsoft Gaming CFO Tim Stuart testified that despite making Starfield exclusive  
4 he believed that Microsoft Gaming could meet its commitment to the board as set  
5 out in the final ZeniMax deal model. Stuart (Microsoft) Hr'g Tr. 984:20-985:11.

6 581. As Microsoft prepared to announce the completion of the acquisition, Phil Spencer  
7 wrote to senior leaders including Mr. Stuart, Mr. Booty, and Sarah Bond, "I want  
8 us to be bold in our announce of Bethesda close regarding Bethesda titles focused  
9 on Xbox" and that he recognized the "financial implications" of the strategy.  
10 Spencer (Microsoft) Hr'g Tr. 344:5-345:5; PX1851 (Microsoft) at 002.

11 582. [REDACTED]

12 [REDACTED]

13 [REDACTED] PX7012 (Spencer (Microsoft) IH) at 412:7-  
14 13; PX7040 (Stuart (Microsoft) Dep. At 333:7-17); Lawver (Microsoft) Hr'g Tr.2  
15 240:11-16; PX4819 (Microsoft) [REDACTED]

16 [REDACTED] PX7042 (Lawver (Microsoft) Dep.) at 309:16-  
17 310:11; PX7007 (Stuart (Microsoft) IH) at 280:20-22 [REDACTED]

18 [REDACTED]

19 Bond (Microsoft) Hr'g Tr. 191:13-22 ("Q: And Phil Spencer is responsible for the  
20 other decisions about exclusivity, correct? A: He is."); Stuart (Microsoft) Hr'g Tr.  
21 964:17-20 (testifying that Phil Spencer makes the ultimate decisions about whether  
22 content that Microsoft owns is going to be exclusive to Microsoft).

23 583. [REDACTED]

24 [REDACTED] Lawver (Microsoft) Hr'g Tr. 252:9-13; PX7042  
25 (Lawver (Microsoft) Dep.) at 348:19-349:3, 360:13-20 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED] PX4430 (Microsoft) at 005; PX4303 (Microsoft) at 005. *See also* PX4435

1 (Microsoft) at 001, 012 ; PX7042 (Lawver (Microsoft) Dep.) at 358:16—359:10.

2 Bond (Microsoft) Hr’g Tr. 191:13-22 (“Q: And I also believe you testified that Phil  
3 Spencer made the final call on [the Starfield exclusivity] decision, correct? A: He  
4 did.”).

5 584. Following clearance by the European Commission on March 8, 2021, Microsoft  
6 closed the ZeniMax transaction. In a press release on March 9, Microsoft Gaming  
7 CEO Phil Spencer stated that some future ZeniMax titles would be exclusive.  
8 “With the addition of the Bethesda creative teams, gamers should know that Xbox  
9 consoles, PC, and Game Pass will be the best place to experience new Bethesda  
10 games, including some new titles in the future that will be exclusive to Xbox and  
11 PC players.” Phil Spencer, “Officially Welcoming Bethesda to Team Xbox,” Xbox  
12 Wire, Mar. 2021, [https://news.xbox.com/en-us/2021/03/09/officially-welcoming-  
13 bethesda-to-the-xbox-family/](https://news.xbox.com/en-us/2021/03/09/officially-welcoming-bethesda-to-the-xbox-family/).

14 585. In a roundtable discussion following closure of the ZeniMax acquisition, Mr.  
15 Spencer said, “If you’re an Xbox customer, the thing I want you to know is this is  
16 about delivering great exclusive games for you that ship on platforms where Game  
17 Pass exists and that’s our goal. That’s why we’re doing this.” Spencer (Microsoft)  
18 Hr’g Tr. 339:2-11.

19 586. Additionally, in August 2021, Microsoft Gaming CFO Tim Stuart made public  
20 statements consistent with a desire to prioritize the quality of Bethesda content on  
21 Microsoft’s own products, even if they were not withheld from rivals: “[W]hat we want  
22 is we want that content, in the long run, to be either first or better or best or pick your  
23 differentiated experience, on our platforms. We will want Bethesda content to show up  
24 the best as – on our platforms.” PX9330.

25 587. Free from regulatory scrutiny, following the closing of the ZeniMax deal Microsoft  
26 announced that it planned to release several highly-anticipated future ZeniMax  
27 titles, including *Starfield* and *Redfall*, exclusively on Xbox and PC. Spencer  
28 (Microsoft) Hr’g Tr. 354:2-11, 354:25-355:3; see PX7012 (Spencer (Microsoft))

1 IH) at 406:23-24; 412:7-13; PX7040 (Stuart (Microsoft) Dep.) at 340:6-9, 288:10-  
2 289:11, 338:4-7; PX4323 (Microsoft) at 003. Gamers on Sony PlayStation 5 were  
3 upset at the news that ZeniMax's *Starfield* title would be exclusive to Xbox and  
4 PC. Hines (Microsoft) Hr'g Tr. 95:22-96:7.

5 588. [REDACTED]

6 [REDACTED]  
7 [REDACTED] PX7042 (Lawver (Microsoft) Dep.) at 284:23-285:21  
8 (discussing PX1391-004 [REDACTED])

9 [REDACTED]  
10 [REDACTED]  
11 PX4323-003 (Microsoft) [REDACTED]

12 [REDACTED] (Lawver (Microsoft) Dep.) at 302:2-5 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]

15 589. A pair of Xbox Wire blog posts on June 13, 2021 announced both *Starfield* and  
16 *Redfall* as forthcoming exclusives. Bethesda Game Studios, "Starfield Coming  
17 November 11, 2022," June 13, 2021, [https://news.xbox.com/en-](https://news.xbox.com/en-us/2021/06/13/starfield-coming-november-11-2022/)  
18 [us/2021/06/13/starfield-coming-november-11-2022/](https://news.xbox.com/en-us/2021/06/13/starfield-coming-november-11-2022/); Anne Lewis, "Redfall  
19 Revealed, Coming Exclusively to Xbox Series X|S," Xbox Wire, June 13, 2021,  
20 [https://news.xbox.com/en-us/2021/06/13/redfall-revealed-coming-exclusively-to-](https://news.xbox.com/en-us/2021/06/13/redfall-revealed-coming-exclusively-to-xbox-series-xs/)  
21 [xbox-series-xs/](https://news.xbox.com/en-us/2021/06/13/redfall-revealed-coming-exclusively-to-xbox-series-xs/).

22 590. In addition to taking *Starfield* and *Redfall* exclusive, Microsoft announced publicly  
23 they intended to release another ZeniMax game, *Elder Scrolls VI*, as an Xbox  
24 exclusive. Mr. Spencer testified that "I have made public statements that Elder  
25 Scrolls 6 will be exclusive to Xbox and PC." PX7012, Phil Spencer (Microsoft) IH  
26 Vol. II) 426:4-12; PX4309 (Microsoft) at 001 (Microsoft); PX7042 (Lawver  
27 (Microsoft) Dep.) at 324:9-12; PX0027 at 003; PX9095 at 016-17.

28 591. At the evidentiary hearing, Mr. Spencer testified that he did not know if his prior

1 sworn testimony about his public statements regarding *Elder Scrolls VI* exclusivity  
2 had been accurate. Spencer (Microsoft) Hr’g Tr. 356:8-19; PX7012 (Spencer  
3 (Microsoft) IH Vol. II) at 426:4-12.

4 592.

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] PX4793 (Microsoft) at 001; PX4792  
8 (Microsoft) at 022; PX7042 (Lawver (Microsoft) Dep.) at 314:10-16, 309:16-  
9 310:11, 343:16-19; Lawver (Microsoft) Hr’g Tr. 240:17-25. While ZeniMax’s  
10 initial agreement with Disney called for the Indiana Jones game to be released on  
11 multiple consoles, the agreement was amended after Microsoft acquired ZeniMax  
12 to provide for exclusive release on Xbox and PC. Spencer (Microsoft) Hr’g Tr.  
13 356:23-357:16; PX4725 (Microsoft) at 002 [REDACTED]  
14 [REDACTED] Hines (Microsoft) Hr’g Tr.  
15 99:17-100:13; *id.* at 119:2-120:5 (discussing PX4391 (Microsoft) at 002).

16 593.

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED] Lawver (Microsoft) Hr’g  
23 Tr. 242:20-244:03, 245:1-246:20; PX7042 (Lawver (Microsoft) Dep.) at 320:4-24,  
24 327:10-328:5, 331:13-336:13; PX4309 (Microsoft) at 001. [REDACTED]  
25 [REDACTED]  
26 [REDACTED] PX7042 (Lawver (Microsoft) Dep.) at 318:10-320:24, 326:4-328:19; 330:3-  
27 331:7. Microsoft made the decision to make ZeniMax games exclusive, despite  
28 Microsoft Gaming CFO Tim Stuart noting that Microsoft will have accountability

1 margin issues from the ZeniMax exclusivity decision because the exclusivity  
2 decision “pull[s] a huge amount of PS units out of the model.” Stuart (Microsoft)  
3 Hr’g Tr. 991:5-24; PX4334 (Microsoft) at 001.

4 594. At the evidentiary hearing, Mr. Spencer testified that he did not recall telling Mr.  
5 Leder that ZeniMax titles would be Xbox exclusives. Spencer (Microsoft) Hr’g Tr.  
6 348:7-23; PX7028 (Spencer (Microsoft) Dep.) at 44:16-24. Mr. Spencer claimed  
7 that previous testimony in which he had a “general understanding” of what  
8 platforms ZeniMax games would ship on had been inaccurate. Spencer (Microsoft)  
9 Hr’g Tr. 350:25-351:22; PX7028 (Spencer (Microsoft) Dep. 51:14-22. He testified  
10 that he did not remember conversations with any other Microsoft or ZeniMax  
11 executives about making ZeniMax titles Xbox exclusives, including a meeting  
12 where he provided “Guidance on exclusivity of future titles.” Spencer (Microsoft)  
13 Hr’g Tr. 345:20-346:13; PX1853 (Microsoft) at 002.

14 595. However, [REDACTED]  
15 [REDACTED]  
16 Lawver (Microsoft) Hr’g Tr. 249:13-250:25, 251:10-252:8; PX4312 (Microsoft) at  
17 005, 008

18 596. [REDACTED]  
19 [REDACTED]  
20 [REDACTED] PX7042 (Lawver (Microsoft) Dep.) at 342:13-  
21 344:23. After Microsoft acquired ZeniMax, it asked Nvidia to remove Bethesda  
22 games from GeForce NOW. PX3381 (Eisler (Nvidia) Hr’g Direct) at 96:1-7.

23 597. Microsoft’s strategy of making ZeniMax content exclusive to Xbox continues  
24 through the present. [REDACTED]

25 [REDACTED] PX4818 (Microsoft) at 018, 020, 024 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]

1 598. Microsoft's treatment of ZeniMax games is consistent with Microsoft's strategy of  
 2 taking IP from acquired game developers exclusive. Out of the 24 games that have  
 3 been released from the eight studios that Microsoft has acquired since 2018, only  
 4 six have been released on PlayStation. PX0027 at 002-04..

5 599. [REDACTED]  
 6 [REDACTED] PX0027 at 002-04;  
 7 PX7053 (Ryan (Sony) Dep. Vol. 1) at 29:8-29:21; PX7031 (Greenberg (Microsoft  
 8 Dep.) at 84:23-85:2) [REDACTED]

9 [REDACTED] PX7031  
 10 (Greenberg (Microsoft) Dep.) at 52:30-53:13, 66:24-67:15 [REDACTED]

11 [REDACTED]  
 12 [REDACTED] The two other games are *The Elder Scrolls Online* and  
 13 *Fallout 76*, both older open-world service games that have continued to receive  
 14 content updates, but which were released before Microsoft's acquisition of  
 15 ZeniMax. PX0027 at 004; *see also* PX7031 (Greenberg (Microsoft) Dep.) at  
 16 101:19-104:1 [REDACTED]

#### 17 **4. *Minecraft* is Not Predictive of Microsoft's Behavior Here**

18 600. In 2014, Microsoft acquired Mojang, the developer of *Minecraft*. PX7014 (Booty  
 19 (Microsoft) IH) at 106:3-5; Booty (Microsoft) Hr'g Tr. 56:17-21 .

20 601. *Minecraft* is played across many different kinds of devices, including mobile  
 21 phones, tablets, and the Nintendo Switch, and is available on more devices than  
 22 *Call of Duty*. PX0003 at 132; PX7010 (Nadella (Microsoft) IH) at 17:24-18:4.  
 23 Unlike *Call of Duty*, *Minecraft* was made by a single developer incurring relatively  
 24 limited costs. PX0003 at 072.

25 602. At the time of Microsoft's acquisition of Mojang, Mojang had already released a  
 26 version of *Minecraft* on Sony's PlayStation consoles. PX0003 at 132.

27 603. *Minecraft* is a sandbox game in which users can create a world within the game,  
 28 which focuses on user-driven experiences, creativity, and freedom rather than

1 preset goals or a narrative storyline. PX7049 (Hines (Microsoft) Dep.) at 286:12-  
2 20. In the words of a Microsoft executive, *Minecraft* is “a giant untethered, like,  
3 players can go and do whatever they want, create their own servers...it’s an  
4 amazing sandbox game that’s just different from anything anybody else made.”  
5 PX7049 (Hines (Microsoft) Dep.) at 286:12-20.

6 604. *Minecraft* is a “service-based game.” PX7042 (Lawver (Microsoft) Dep.) at 90:12-  
7 15. Also known as “game as a service,” games like *Minecraft* have “a development  
8 team consistently adding new content to the game to keep it fresh and new.”  
9 PX7031 (Greenberg (Microsoft) Dep.) at 102:17-103:6. While other games, such as  
10 games in Microsoft’s first-party *Gears of War* franchise, may possess a single-  
11 player game mode and a multiplayer game mode, they do not “keep developing the  
12 game as an online service and experience.” PX7031 (Greenberg (Microsoft) Dep.)  
13 at 102:17-103:6.

14 605. As a result, unlike franchises possessing numerous sequels like *Call of Duty* or  
15 *Diablo* to progress a story, *Minecraft* does not release “sequels” and new versions  
16 of *Minecraft* tend to be more akin to updates to the existing game. PX7007 (Stuart  
17 (Microsoft) IH) at 307:22-308:2; PX7004 (Zerza (Activision) IH) at 77:2-4 [REDACTED]

18 [REDACTED]  
19 [REDACTED] PX7006 (Kotick (Activision) IH) at 53:2-5  
20 [REDACTED]

21 [REDACTED] PX7012 (Spencer (Microsoft) IH Vol. II)  
22 at 421:14-20 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 606. While *Call of Duty* is unique in that its franchise comprises three separate  
27 storylines, PX8001 (Ryan Sony Decl.) ¶ 25, each annually released game in the  
28 series is far more than an “update” to an existing game. Each is a true standalone

1 game to preceding titles in the franchise. PX7053 (Ryan (Sony) Dep.) at 52:9-12  
2 (“[Call of Duty games] have different themes. They have different story lines. They  
3 have different game play. They’re made by different studios.”).

4 607. *Minecraft*’s unique and differentiated approach to gaming has led it to develop a  
5 gamer audience distinct from typical Xbox and PlayStation gamers. In an internal  
6 email, Microsoft employees described *Minecraft*’s following as [REDACTED]

7 [REDACTED]  
8 PX4712 (Microsoft) at 001. The email goes onto explain that there were multiple  
9 reasons for differentiating *Minecraft*’s audience from the typical Xbox and  
10 PlayStation console audience, including [REDACTED]

11 [REDACTED]  
12 [REDACTED] PX4712 (Microsoft) at 001.

13 608. Microsoft executives recognized *Minecraft*’s unique status in a messaging app chat  
14 thread about making ZeniMax-acquired games exclusive to Xbox platforms:

15 “*Minecraft* being on all platforms enables its mass mass mass market, imo. But  
16 that’s the *Minecraft* world. I think its different for [ZeniMax] games.” Stuart  
17 (Microsoft) Hr’g Tr. 992:3-993:13; PX1966 (Microsoft) at 006. That same chat  
18 explained how the nature of service-based games like *Minecraft* affected their  
19 commercial strategy regarding exclusivity: [REDACTED]

20 [REDACTED]  
21 [REDACTED] PX1966 (Microsoft) at 005.

22 609. In a presentation regarding the exclusivity status of ZeniMax games, *Minecraft* was  
23 the only first-party title for which Microsoft did not model exclusivity. PX7056  
24 (Murphy (Microsoft) Dep.) at 183:11-14. The Microsoft employee leading the  
25 exclusivity analysis explained during the presentation [REDACTED]

26 [REDACTED]  
27 [REDACTED] PX4602 (Microsoft) at 33:6-14. [REDACTED]  
28 [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

[REDACTED] PX4622 (Microsoft) at 003.

610. Even so, Microsoft has periodically considered making games in the *Minecraft* franchise completely exclusive to Xbox platforms and to make *Minecraft* a timed exclusive title on Xbox platforms. For example, Xbox Chief Marketing Officer Mike Nichols messaged Microsoft Gaming CEO Phil Spencer, “I’m of the mind that [Minecraft] Dungeons ought be Xbox and PC only” to which Mr. Spencer replied, “I agree.” Spencer (Microsoft) Hr’g Tr. 323:11-324:2; PX1898 (Microsoft) at 001; PX4694 (Microsoft) at 001–02.

611. *Minecraft* was a game available on Nvidia GeForce NOW while the cloud gaming service was in its beta phase. PX3381 (Eisler Video) at 99:13-17. When GeForce NOW transitioned to a commercial service, [REDACTED] [REDACTED] PX3381 (Eisler Video) at 99:22-100:3.

612. In March 2020, Mr. Spencer expressed frustration that Microsoft continued to ship *Minecraft* on PlayStation day-and-date. Mr. Spencer wrote, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] Spencer (Microsoft) Hr’g Tr. 324:19-326:25; PX1895 (Microsoft) at 001.

613. [REDACTED] [REDACTED] PX4768 (Microsoft) at 001 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] PX4768 (Microsoft) at 001. [REDACTED] [REDACTED] [REDACTED]

1 PX4768 (Microsoft) at 001.

2 614. An internal Microsoft email from Phil Spencer shows that Microsoft did not allow  
3 Mojang to add *Minecraft* to Sony’s PlayStation Now subscription service  
4 (predecessor to PlayStation Plus Extra and PlayStationPlus Premium) because “we  
5 [Microsoft] do see PSNOW as competition to [Xbox Game Pass]” and Microsoft  
6 did not want PlayStation Now to “compete more effectively with [Xbox Game  
7 Pass].” Spencer (Microsoft) Hr’g Tr. 332:5-11; PX1897 (Microsoft) at 001.

8 615. [REDACTED] Spencer  
9 (Microsoft) Hr’g Tr. 327:20-25; PX7058 (Svensson (Sony) Dep.) at 245:12-  
10 246:17. Instead, PlayStation 5 gamers play a backwards-compatible PlayStation 4  
11 version of *Minecraft*. Spencer (Microsoft) Hr’g Tr. 329:7-11. Microsoft Gaming  
12 CEO Phil Spencer testified that Microsoft refused to optimize *Minecraft* for  
13 PlayStation 5 to fight back against Sony for not sending Microsoft software  
14 development kits, which Microsoft felt put it at a competitive disadvantage.  
15 Spencer (Microsoft) Hr’g Tr. 328:6-329:6, 329:22-330:5. [REDACTED]  
16 [REDACTED]  
17 [REDACTED] PX7058 (Svensson (Sony)  
18 Dep.) at 245:12-246:17. Meanwhile, Microsoft has optimized *Minecraft* for  
19 Microsoft’s own Generation 9 consoles—the Xbox Series X|S. Spencer (Microsoft)  
20 Hr’g Tr. 329:12-16; PX7058 (Svensson (Sony) Dep.) at 245:12-246:17.

## 21 5. Current First Party Games

22 616. Almost all of Microsoft’s first-party games are exclusive. PX7011 (Spencer (Microsoft))  
23 IH (Vol. I) at 360:2-13.

24 617. Microsoft’s past and current first-party console franchises with significant online multi-  
25 player functionality including *Halo* and *Gears of War* are exclusive on Xbox consoles or  
26 PC only. See PX7011 (Spencer (Microsoft) IH Vol. I) at 332:17-20, 362:14-20; PX5000  
27 (Lee Report) at 195. If there are significant benefits to supporting multiple platforms for  
28

1 multiplayer franchises like *Call of Duty*, Microsoft would be expected to treat its new  
2 franchise similarly to its existing first-party multi-player franchises.

3 **D. The Proposed Acquisition is Likely to Harm Competition**

4 **1. The Proposed Acquisition is Likely to Result in Competitive Harm in the**  
5 **Market for High-Performance Consoles and Video Game Consoles.**

6 618. Professor Lee analyzed the competitive effects of the Proposed Transaction by first  
7 identifying relevant antitrust markets. Then he analyzed the likely impact of the Proposed  
8 Transaction on competition and consumers in each relevant market. Lee Written Direct at  
9 ¶ 48.

10 619. Dr. Lee testified that, although “the effect of exclusivity on competition and customer is  
11 *case-specific*,” “in the present context a video game console manufacturer and gaming  
12 service provider (Microsoft) is seeking to acquire an existing third-party video game  
13 publisher (Activision) and its suite of *current and future* video game franchises and  
14 intellectual property. Absent a meaningful improvement in the (price-adjusted) quality of  
15 Activision content resulting directly from the Proposed Transaction, making Activision  
16 content exclusive to Xbox products would tend to *reduce* the availability of content on  
17 other consoles and gaming services compared to a world without the merger. This in turn  
18 *decreases the quality of products available and thus likely harms competition.*” Lee  
19 Written Direct at ¶¶ 45, 47.

20 620. Professor Lee concluded that this would lead to likely consumer harm “due to higher  
21 prices, reduced choice, and lower product quality (as [consumers] would be able to  
22 access Activision content on fewer consoles and gaming services), and overall video  
23 game console and gaming service sales would likely be lower.” Lee Written Direct at  
24 ¶ 47.

25 621. Activision would likely continue to release console titles on multiple high-performance  
26 consoles, absent the Proposed Transaction. PX5000 (Lee Report) at 224 (Lee Report).

1 622. All non-*Call of Duty* Activision console games released since 2020 are available on Xbox  
2 and PlayStation consoles. PX5000 (Lee Report) at 224 (citing Microsoft Megapivot  
3 data).

4 623. Activision has represented that [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] PX0060 at 014.

8 624. All *Call of Duty* titles released since the introduction of Microsoft and Sony’s Generation  
9 8 consoles in 2013 have been available on both Xbox and PlayStation consoles. PX5000  
10 (Lee Report) at 224 (citing Microsoft Megapivot data).

11 625. Microsoft has indicated that *Call of Duty* “will likely remain” available on PlayStation  
12 consoles and Xbox consoles, without the Proposed Transaction. PX4476 (Microsoft) at  
13 008.

14 626. Foreclosure of Activision content from Sony PlayStation consoles would lead to lower-  
15 quality products and reduced consumer choice in the High-Performance Video Game  
16 Consoles market relative to the but-for world described above. PX5000 (Lee Report) at  
17 230.

18 627. Withholding or degrading Activision content would lead to a less attractive game catalog  
19 on PlayStation consoles and eliminate options for devices that consumers could use to  
20 play the foreclosed games. PX5000 (Lee Report) at 230.

21 628. Any foreclosed PlayStation consumer who does not already own an Xbox would need to  
22 incur the cost of purchasing an Xbox console to continue playing Activision content on a  
23 high-performance video game console. PX5000 (Lee Report) at 230.

24 629. Microsoft acknowledged the potential harm to consumers that can occur from exclusivity  
25 (and benefits to consumers from making content more widely available). PX4476  
26 (Microsoft) at 008 [REDACTED]

27 [REDACTED]

28

1 630. Microsoft Gaming CEO Phil Spencer noted, [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED] PX4629 (Microsoft) at 001 .

6 631. Microsoft choosing to foreclose its rivals in consoles by withholding or degrading  
7 Activision content would also effectively “punish” gamers on other consoles and tend to  
8 harm competition in these markets. PX5000 (Lee Report) at 230.

9 632. Microsoft’s actions following the ZeniMax acquisition inform the likelihood of harm  
10 arising from the Proposed Transaction. [REDACTED]  
11 [REDACTED] PX7042 (Lawver (Microsoft) Dep.) at  
12 348:19-349:3, 360:13-20. By deciding to take certain ZeniMax titles, including *Starfield*  
13 and *Redfall*, exclusive following the acquisition, Microsoft has reduced the quality of the  
14 portfolio of games available to play on PlayStation relative to the scenario where those  
15 titles were available on PlayStation. PX7049 (Hines (Microsoft) Dep.) at 149:15-150:12;  
16 PX1080 (Microsoft) at 001 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 633. Microsoft’s own distribution decisions with its past and current first-party console  
20 franchises with significant online multi-player functionality, including *Halo* and *Gears of*  
21 *War*, reveal its understanding of the value of keeping its titles exclusive on Xbox  
22 consoles or PC only, and the likelihood of harm arising from the Proposed Transaction.  
23 PX5000 (Lee Report) at 195–96; PX7011 (Spencer (Microsoft) IH) at 332:17-20.

24 634. To provide a quantitative estimate of harm that would arise as a result of a reduction in  
25 the quality of Sony PlayStation consoles if Activision content were foreclosed, Dr. Lee  
26 calibrated an economic model of consumer demand for video game consoles in the  
27 United States to simulate how Xbox and PlayStation console unit sales and prices would  
28

1 adjust if PlayStation 5 consoles suffered a quality reduction arising from content  
2 foreclosure. Lee Written Direct at ¶ 116.

3 635. Results from Dr. Lee’s share model indicated that the quality of the Sony PlayStation 5  
4 would be reduced by ██████████ as expressed in dollar terms, which in turn implies that  
5 the consumer harm from this quality reduction is substantial for consumers who continue  
6 to purchase a PlayStation 5. Lee Written Direct at ¶ 117.

7 636. Dr. Lee also simulated the share model allowing prices to adjust following foreclosure.  
8 Dr. Lee considered the scenario that Microsoft would respond to the quality reduction by  
9 raising its price, while PlayStation responds by decreasing its price, but not enough to  
10 offset the decrease in PlayStation quality. In this scenario every purchaser of Microsoft  
11 consoles is also harmed due to the increase in price arising from the weakening of  
12 competition. Lee Written Direct at ¶ 118.

13 637. Dr. Lee’s “harm model further demonstrates that even if foreclosure brought by Sony and  
14 Microsoft’s market shares closer together and reduced market concentration, competition  
15 and consumers can still be harmed.” Lee Written Direct at ¶ 119.

16 **2. The Proposed Acquisition is Likely to Result in Competitive Harm in**  
17 **Content Subscription Services and Cloud Gaming Services**

18 638. An independent Activision would likely be willing to support non-Microsoft subscription  
19 services. ██████████

20 ██████████  
21 ██████████  
22 ██████████ PX2419 (Activision) at 004.

23 639. Activision has a general goal of platform agnosticism. CEO Bobby Kotick testified that  
24 Activision’s “goal is to get our games out to as many people on as many devices as  
25 possible” and that factors that determine whether an Activision game is available on a  
26 subscription service include reaching agreeable commercial terms, sufficient technical  
27 capabilities, and confidence that the platform will be successful. PX7006 (Kotick  
28 (Activision) IH) at 135:13–138:25.

1 640. Activision CEO Bobby Kotick testified that “the principal reasons [for not offering  
2 Activision games on Game Pass] have been commercial,” and if Microsoft offered  
3 Activision attractive commercial terms to offer their games on Game Pass, “it’s possible”  
4 that Activision would offer their games on Game Pass. PX7006 (Kotick (Activision) IH)  
5 at 204:13–205:10.

6 641. Speaking directly about a potential cloud gaming services arrangement with Nvidia,  
7 Activision CEO Bobby Kotick testified: “The way I would interpret this is that if Nvidia  
8 agreed to all the commercial terms that are outlined here ... I think these are sort of  
9 principles of what a commercial arrangement might look like that would be adequate to  
10 get us to support their service.” PX7006 (Kotick (Activision) IH) at 169:7-25.

11 642. Activision content had been available on Sony’s and Nvidia’s subscription services  
12 before. PX2189 at 015. For example, Activision titles were available on Nvidia’s  
13 GeForce Now between June 2017 and February 2020, including multiple *Call of Duty*  
14 titles. PX8000 (Eisler (Nvidia) Decl.) ¶ 41; PX3381 (Eisler (Nvidia) Hr’g Testimony) at  
15 70:7-17, 70:18-71:1 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] PX3381 (Eisler  
20 (Nvidia) Hr’g Testimony) at 75:17-22.

21 643. [REDACTED]  
22 [REDACTED]  
23 [REDACTED] PX8000 (Eisler (Nvidia) Decl.) ¶¶ 43, 44. [REDACTED]  
24 [REDACTED]  
25 [REDACTED] PX3381 (Eisler (Nvidia) Hr’g Testimony) at 85:1-7 [REDACTED]  
26 [REDACTED] PX3381  
27 (Eisler (Nvidia) Hr’g Testimony) at 71:16-23 [REDACTED]  
28 [REDACTED]

1 [REDACTED] PX3381 (Eisler  
2 (Nvidia) Hr’g Testimony) at 86:11-87:17.

3 644. [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 PX3381 (Eisler (Nvidia) H’rg Testimony) at 87:18-88:12.

7 645. Activision and Microsoft have identified large financial benefits from bringing Activision  
8 content to Game Pass. A [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED] PX2138 (Activision) at 001.

12 646. Other large publishers, including all of the other “Big 4” publishers, support gaming  
13 services through Xbox Game Pass. EA and Ubisoft also support cloud gaming through  
14 Nvidia GeForce Now. PX7060 (Eisler Dep. Tr.) 164:17-164:23.

15 647. Activision also recognized significant financial benefits from putting its content onto  
16 cloud gaming services. [REDACTED]  
17 [REDACTED]  
18 [REDACTED] PX2419 (Activision) at 004.

19 648. Microsoft analyses reinforce that there were substantial benefits to the merged firm from  
20 adding Activision content to Game Pass. [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED] PX1763 (Microsoft)

24 at 013.

25 649. In fact, Activision had not ruled out offering its titles on content or cloud subscription  
26 services, including those offered by Microsoft, Sony, Nintendo, and Nvidia, and its  
27 executives testified that Activision would evaluate commercial terms offered for a  
28 subscription opportunity. PX7035 (Kotick (Activision) Dep.) at 130:23-133:20; PX7052

1 (Zerza (Activision) Dep.) at 42:2-11, 154:13-155:9. With respect to Microsoft’s Game  
2 Pass, in particular, Activision was open to adding its content to the content subscription  
3 service if they could receive “material value” for it and that “[i]t all depends on what  
4 MSFT is willing to offer.” PX2396 (Activision) at 001; PX2406 (Activision) at 001.

5 650. Indeed, when the Court confronted Activision’s CEO Bobby Kotick on the stand  
6 regarding Microsoft’s “express purpose to put Activision content on its Game Pass”  
7 being at odds with Mr. Kotick’s personal philosophy regarding game subscription  
8 services, he explained it’s ok have a philosophical difference in business approaches  
9 because of the premium Microsoft offered to Activision. Kotick (Activision) Hr’g Tr.  
10 60:17-61:1.

11 651. [REDACTED]  
12 [REDACTED]  
13 [REDACTED] PX2006 (Activision) at 001. Activision’s CEO made clear that  
14 his decision was motivated by [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED] PX2006 (Activision) at 001.

18 652. After 2020, internal Activision documents show that its executives were willing to place  
19 Activision content on Game Pass if they received the right commercial terms. [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED] PX2396 (Activision) at 001. [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED] PX2406 (Activision) at 001.

1 653. Several of the other major AAA publishers have added their content to Game Pass,  
2 including Ubisoft, Take-Two, and Electronic Arts. PX7011 (Spencer (Microsoft) IH Vol.  
3 I) at 262:23-263:3; PX4624 (Microsoft) at 001; PX4625 (Microsoft) at 001, 004–05.

4 654. As Dr. Lee testified, both an independent Activision and a provider of multi-game  
5 content subscription services would have realized economic gains from trade, and thus, it  
6 is in the economic interest of the parties to come to an agreement. Lee (Plaintiff Expert)  
7 Hr’g Tr. 650:20-651:13.

8 655. The foreclosure of Activision content from Microsoft’s rivals would likely increase those  
9 rivals’ costs of acquiring content for their cloud and content subscription services.

10 Microsoft internal documents [REDACTED]  
11 [REDACTED] PX1049 (Microsoft) at 003.

12 Microsoft internal documents [REDACTED]  
13 [REDACTED]  
14 [REDACTED] PX1877 (Microsoft) at 001.

15 656. The result of foreclosure is to make it more difficult for rival content subscription  
16 services and cloud gaming services providers to expand the content available on their  
17 products. [REDACTED]

18 [REDACTED]  
19 [REDACTED] PX1613 (Microsoft) at 005; Lee (Expert) Hr’g Tr. 644:4-17  
20 (“In nascent markets, the role that’s smaller players that entrants have in competition  
21 could be greater than in markets that are more mature. And so if smaller players of  
22 entrants are disadvantaged because they can’t get access to content, then harmful  
23 foreclosure could be magnified in the future.”).

24 657. Cloud gaming services require substantial infrastructure and investment. Xbox Cloud  
25 Gaming has deployed approximately [REDACTED] PX4154 (Microsoft) at 005.

26 [REDACTED]  
27 [REDACTED] PX7060 (Eisler (Nvidia) Dep.)  
28 at 48:14-18.

1 658. In fact, the discontinuation of Google Stadia shows that even for deep-pocketed  
 2 competitors, gaining traction in cloud gaming and/or content subscription services is  
 3 difficult without premium content. PX7035 (Kotick (Activision) Dep.) at 154:18-155:5.  
 4 Former Product Director of Stadia Dov Zimring testified that Stadia failed despite over  
 5 [REDACTED]  
 6 [REDACTED] Zimring (Google) Hr’g Tr. 481:3-8; PX8003 at ¶ 2. Stadia’s failure despite  
 7 Stadia’s technology being the “best on the market at the time” according to several  
 8 metrics. Zimring (Google) Hr’g Tr. 471:2-473:3.

9 659. Fewer entrants and competitors with adequate scale protects Microsoft’s position as the  
 10 leading provider of content subscription services and cloud gaming services. [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED] PX8001 (Ryan (Sony) Decl.) ¶ 38; PX8000 (Eisler  
 15 (Nvidia) Decl.) at ¶ 63; *see also* Booty (Microsoft) Hr’g Tr. 71:4-8 (naming only Sony’s  
 16 “PS Now subscription” when asked to identify competitors to Microsoft in subscription  
 17 gaming).

18 660. For example, former Product Director of Stadia Dov Zimring testified as to the  
 19 innovations Stadia was attempting with its cloud streaming service. Zimring (Google)  
 20 Hr’g Tr. 474:1-475:3.

21 661. Microsoft would be more likely to increase the prices of its content subscription and  
 22 cloud gaming services, understanding that gamers could not play Activision content  
 23 elsewhere. PX8000 (Eisler (Nvidia) Decl.) ¶ 63.

### 24 **3. The Proposed Acquisition is Likely to Harm Innovation**

25 662. The Proposed Acquisition also poses a serious risk of harm to innovation. Current  
 26 customers of Activision content are concerned that Microsoft will use their competitively  
 27 sensitive information to reap a competitive advantage, weakening competition and  
 28 stifling innovation. PX8001 (Ryan (Sony) Decl.) ¶¶ 32, 40 [REDACTED]

1 [REDACTED]

2 expressing concern about “shar[ing] in-development console features with a Microsoft-

3 controlled PlayStation”); PX7053 (Ryan (Sony) Dep.) at 34:5-18, 37:19-21 (information

4 about features in development for PlayStation console is “[i]mmensely sensitive” such

5 that Sony “simply could not run the risk of a company that was owned by a direct

6 competitor having access to” confidential details about its next console in development);

7 PX7058 (Svensson (Sony) Dep.) at 243:20 -245:8 (explaining the difference in Sony’s

8 collaboration with independent studios versus Microsoft-owned studios, including

9 specific concern about sharing details on Sony’s future hardware out of concerns

10 including the possibility that the competitor might “up their specs on their competing

11 platform”).

12

13

14 663. For example, with the benefit of its rivals’ strategic secrets through dev kits or other

15 important proprietary information, Microsoft could redirect its own research and

16 development, adjust its product plans, delay product launches, modify its targeted

17 customers, or take other actions to undermine its competitors in the consoles market,

18 subscription services market, and/or cloud services streaming market. Even the threat of

19 this behavior could be enough to discourage Microsoft’s rivals from working

20 collaboratively with Microsoft-owned Activision as they currently do or from taking

21 procompetitive actions they would otherwise take, such as troubleshooting and

22 debugging to optimize and improve their products. PX8001 (Ryan (Sony) Decl) ¶¶ 32,

23 40.

24 664. A Microsoft-owned Activision could also decline to support competitors’ innovations

25 that are not matched on Microsoft’s competing platforms and services. *See* PX8000

26 (Eisler (Nvidia) Decl.) ¶¶ 66-68 [REDACTED]

27 [REDACTED]

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

[REDACTED]

665. The competition between Microsoft’s Xbox and Sony’s PlayStation has resulted in significant advances in hardware innovation of their respective consoles. PX8001 (Ryan (Sony) Decl.) ¶ 13.

666. To provide a better gaming experience, Sony invests in new hardware advancements in its consoles. For example, the PlayStation 5 featured a new type of controller with haptic feedback, a technology feature that uses vibrations to correspond with the gameplay. Older rumble feedback technology vibrated controllers at a static frequency. Haptic feedback enables varied and sensitive vibration that can simulate the feeling of driving with a flat tire or the impact of getting punched. PX8001 (Ryan (Sony) Decl.) ¶ 13.

667. Faced with competition from PlayStation, Microsoft also invested in improving the hardware capabilities of its Generation 9 consoles. PX2393 (Activision) at 002. It doubled the computing power of the previous generation Xbox console—the Xbox One X—and added a solid state drive to the Xbox Series X. PX8001 (Ryan (Sony) Decl.) ¶ 13. The hardware advances by Microsoft permit it to showcase the latest in Generation 9 games. PX7028 (Spencer (Microsoft) Dep.) at 122:17-122:21.

668. [REDACTED]

[REDACTED]

[REDACTED] PX8001 (Ryan (Sony) Decl.) at ¶ 37.

669. Microsoft and Sony share sensitive, technical information with game publishers and developers to collaborate on new gameplay features. PX7053 (Ryan (Sony) Dep.) at 31:19-32:7. [REDACTED]

[REDACTED] PX7053 (Ryan (Sony) Dep.) at 32:18-33:8.

670. [REDACTED]

[REDACTED]

1 [REDACTED] PX7053 (Ryan (Sony) Dep.) at  
2 30:5-31:15.

3 671. Sony is less likely to share confidential, technical information if Microsoft acquires  
4 Activision because it “could not run the risk of a company that was owned by a direct  
5 competitor having access” to information “that could leak into other parts of Microsoft  
6 and potentially allow them to be able to develop similar features to the ones that [Sony]  
7 invented.” PX7053 (Ryan (Sony) Dep.) at 34:13-24.

8 672. [REDACTED]  
9 [REDACTED]  
10 [REDACTED] PX8001 (Ryan (Sony) Decl.) ¶ 39.

11 673. The loss of Activision content may also dampen innovation in the multi-game content  
12 subscription gaming market. Microsoft’s dominant position in multi-game content  
13 subscription services is likely to be further strengthened by the exclusivity of Activision’s  
14 content. PX0003 at 018; PX5000 (Lee Report) at 141.

15 674. Sony’s CEO, Jim Ryan, expressed his concern that “if Microsoft made *Call of Duty*,  
16 along with other popular Activision games like *Overwatch* and *Diablo*, available on  
17 Xbox’s game Pass but chose not to make them available on PlayStation’s PS Plus, [REDACTED]

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED] PX8001 (Ryan (Sony) Decl.) ¶ 41.

21 675. The foreclosure of Activision content is also likely to impact the nascent market of cloud  
22 gaming services. Nvidia GeForce NOW presents an alternative bring-your-own-game  
23 (“BYOB”) model that competes against Microsoft’s subscription-based Xbox Cloud  
24 Gaming. PX8000 (Eisler (Nvidia) Decl.) ¶ 28.

25 676. Nvidia invested significantly to improve its cloud gaming service to the benefit of  
26 gamers, including making resolution upscaling available (reducing image blurring while  
27 streaming), reducing the latency of the cloud gaming service, and rolling out touch screen  
28 controls to games. PX8000 (Eisler (Nvidia) Decl.) at ¶¶ 20–22.

1 677. [REDACTED]  
2 [REDACTED] PX8000  
3 (Eisler (Nvidia) Decl.) at ¶ 44.

4 678. Nvidia Vice President and General Manager Phil Eisler suggests tha [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] PX8000 (Eisler (Nvidia) Decl.) ¶ 49.

8 **E. Respondents Cannot Rebut Complaint Counsel’s Prima Facie Case Showing**  
9 **the Proposed Acquisition Would Result in Competitive Harm**

10 **1. Respondents Cannot Demonstrate that Entry or Expansion would be Timely,**  
11 **Likely, or Sufficient to Prevent Harm from the Proposed Acquisition**

12 **a) Entry into Consoles Markets is Unlikely to be Timely, Likely, or**  
13 **Sufficient to Reverse the Likely Harm of the Proposed Transaction.**

14 679. Dr. Lee concluded in his testimony that the “[e]vidence indicates that entry into Consoles  
15 Market is unlikely to be timely, likely, or sufficient to reverse the likely harm of the  
16 Proposed Transaction.” Lee Written Direct at ¶ 120.

17 680. Meaningful entry into the Consoles Markets is uncommon. Prior to the Xbox console’s  
18 launch, formerly prominent video game console manufacturers Atari and Sega exited the  
19 industry. Lee Written Direct at ¶ 121; PX9347 at 001; PX9346 at 008.

20 681. Microsoft represented that “following the launch of the first Xbox console in 2001,  
21 Microsoft has been one of the three main global console providers,” which are Microsoft,  
22 Sony, and Nintendo. Lee Written Direct at ¶121; PX0006 at 012.

23 682. Recent entrants, such as the Valve Steam Deck, have sold significantly fewer consoles  
24 than Microsoft, Sony, and Nintendo. PX5000 (Lee Report) at 093. In 2022, [REDACTED]  
25 Steam Deck consoles were sold in the United States, with [REDACTED] in  
26 revenue. PX5000 (Lee Report) at 093 (citing RX3113). Meanwhile, [REDACTED]  
27 Xbox Series X|S consoles and [REDACTED] PlayStation 5 consoles were sold in the  
28

1 United States in 2022, amounting to [REDACTED] and [REDACTED] in revenue,  
2 respectively. PX5000 (Lee Report) at 093 (citing RX3114); PX3311 (Valve).

3 683. Entry is expensive. Microsoft has represented that “[g]aming consoles are generally  
4 costly to develop. ... [T]he cost to develop and produce a gaming console continues to  
5 increase. Because consoles can be costly to develop, economies of scale are relevant to  
6 the extent that average costs will decrease as more units are manufactured and sold.”  
7 PX0003 at 070. Microsoft also details various regulations that consoles must comply with  
8 to be sold in the United States. PX0003 at 071.

9 684. To be successful, consoles must offer an attractive catalog of content to attract consumers  
10 and generate sales. Lee Written Direct at ¶ 123; PX1065 at 015, 017. Due to porting and  
11 development costs, publishers are more likely to support consoles with an established  
12 user base and larger installed base. PX5000 (Lee Report) at 049, ¶ 89 fig.5.

13 685. Dr. Lee found testified that “valuable content is scarce and there are limited and likely  
14 insufficient alternative options for entrant console manufacturers to replace the impact  
15 and attractiveness of Activision content in their gaming catalogs if they are foreclosed.”  
16 Lee Written Direct ¶ 123.

17 686. It is unlikely that entrant console manufacturers will be able to replace Activision content  
18 in their prospective video game catalogs if they are foreclosed. The “Big 4” publishers  
19 have accounted for the majority of game sales on Xbox and PlayStation consoles in  
20 almost every year since 2013. PX5000 (Lee Report) at 049 fig.5.

21 687. Few publishers have the resources to consistently produce “AAA” titles. PX4671  
22 (Microsoft) at 001; PX4673 (Microsoft) at 002; PX8001 (Ryan (Sony) Decl.) ¶ 31 .

23 688. Phil Eisler, Vice President and General Manager of Nvidia GeForce Now, declared that  
24 “[t]oday’s AAA video games ... require tens of millions of dollars (in some cases over  
25 \$100 million) and years to produce.” PX8000 (Eisler (Nvidia) Decl.) ¶ 31.

26 689. [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED] PX1063 (Microsoft) at 003.

2 Development costs of *Call of Duty* are particularly high. For example, Activision spent

3 [REDACTED] in development costs for *Call of Duty Cold War* during 2019–2021 and

4 [REDACTED] for *Call of Duty Modern Warfare* (2019 release). PX4271 (Microsoft) at tab

5 “Sheet1.” [REDACTED]

6 [REDACTED] PX1979 (Microsoft) at 003.

7 **b) Entry or Expansion into the Broader Content and Cloud Services**

8 **Market, and the Content Library Services Market and Cloud Gaming**

9 **Services Market—is Unlikely to be Timely, Likely, or Sufficient to**

10 **Reverse the Likely Harm of the Proposed Transaction**

11 690. Dr. Lee testified that the evidence indicates that entry or expansion into the Gaming  
12 Services Market is unlikely to be timely, likely or sufficient to reverse the likely harm of  
13 the Proposed Transaction. Lee Written Direct ¶ 203.

14 691. Dr. Lee found that the data indicate that most other gaming services available today  
15 significantly lag the scale of Xbox Game Pass. Lee Written Direct ¶ 204 (citing PX5000  
16 (Expert Report) at 237.

17 692. Entry and success in content library and cloud gaming services is challenging. Other  
18 subscription services available today significantly lag the scale of Xbox Game Pass.  
19 PX5000 (Lee Report) at 141. The recent discontinuation of Google Stadia provides  
20 additional evidence that entry into cloud streaming services is challenging, even for well-  
21 financed companies like Google and Amazon. PX7035 (Kotick (Activision) Dep.) at  
22 154:18-155:5; PX8003 (Zimring (Google) Decl.) ¶ 2; PX3206 (Amazon) at 001 [REDACTED]

23 [REDACTED]  
24 [REDACTED]  
25 693. Cloud gaming services, in particular, require substantial infrastructure. As of October  
26 2022, Xbox Cloud Gaming had deployed approximately [REDACTED] Lee  
27 Written Direct ¶ 205; PX4154 at 005.

1 694. Microsoft has discussed spending as much as [REDACTED] on Xbox Cloud Gaming servers  
2 through FY2028. PX1039 (Microsoft) at 002.

3 695. Nvidia’s Vice President and General Manager of GeForce Now, Phil Eisler, testified that  
4 Nvidia has [REDACTED]  
5 [REDACTED] PX7060 (Eisler (Nvidia) Dep.) at 48:14-18.

6 696. There are significant economies of scale in subscription services. In particular, the cost of  
7 securing content declines with scale, which gives established incumbents a significant  
8 advantage over potential entrants or less established competitors. Lee Written Direct ¶  
9 206; PX0003 at 139–140. Moreover, the cost of content for entrants increases as  
10 incumbents lock in limited available content. PX1979 at 003.

11 697. Subscriber scale is also an important determinant of the cost and profitability of investing  
12 in new content in that it allows the service to spread investments in content over a larger  
13 subscriber base. [REDACTED]  
14 [REDACTED] PX1065 (Microsoft) at 014.

15 698. [REDACTED]  
16 [REDACTED] PX1065 (Microsoft) at 014.

17 699. [REDACTED]  
18 [REDACTED]  
19 [REDACTED] PX1065  
20 (Microsoft) at 014.

21 700. As noted above for the Consoles Markets, it is unlikely that entrants into the subscription  
22 services market will be able to replace Activision content in their prospective video game  
23 catalogs if they are foreclosed.

24 701. Dr. Lee concluded that “[i]t is unlikely that entrant gaming services will be able to  
25 replace Activision content in their prospective video game catalogs if they are  
26 foreclosed”. Lee Written Direct ¶ 207.

27  
28

**2. Defendants Cannot Show Efficiencies or Procompetitive Benefits that Negate Competitive Harm**

702. Microsoft claims four principal efficiencies or pro-competitive benefits that will result from the Proposed Transaction: (1) making *Call of Duty* titles available on Nintendo; (2) “plans to make Activision content available in Game Pass”; (3) bringing Activision titles to its own cloud gaming service as well as competing services; and (4) “allow[ing] Microsoft to expand into mobile gaming.” Microsoft’s First Interrogatory Responses at 8–10. None of these claimed pro-competitive benefits constitutes a verifiable, merger-specific efficiency.

703. Dr. Lee testified that it is not evident that Microsoft’s “claimed efficiencies are merger-specific, but, even if they are merger-specific, the Merging Parties have not quantified these claimed efficiencies or provided evidence that these efficiencies are likely to eliminate or offset the likely harms arising from the Proposed Transaction in the Consoles Market.” Lee Written Direct at ¶¶ 124, 209.

704. Because the Nintendo Switch is not contained in the High-Performance Video Game Consoles market, the agreement would not address harm arising in that market. See Lee Written Direct ¶ 139.

705. Microsoft’s claim that it will bring “native and console versions of *Call of Duty* titles to Nintendo consoles” for the next 10 years is not a merger-specific efficiency. Lee Written Direct at ¶ 124; Microsoft’s First Interrogatory Responses at 8.

Nintendo’s current-generation console, the Switch, lacks the technical capabilities to run *Call of Duty* today. PX2093 (Activision) at 005. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX8002 (Prata (Nintendo) Decl.) ¶ 17.

706. Nintendo’s Steve Singer testified that “Activision Blizzard King could decide to bring [*Call of Duty*] on their own ... independent of the transaction” and that the [REDACTED]

[REDACTED]

1 [REDACTED] PX7065 (Singer (Nintendo) Depo.) at 123:17-124:6, 204:4-  
2 9.

3 707. [REDACTED]  
4 [REDACTED]  
5 [REDACTED] Kotick (Activision) Hr’g Tr.  
6 766:19-767:23. Mr. Kotick also testified that he regretted the decision not to offer *Call of*  
7 *Duty* on the Switch. Kotick (Activision) Hr’g Tr. at 721:21-722:9; 768:8-19.

8 708. An Activision Executive Briefing prepared for Mr. Kotick in expectation of a call with  
9 the head of Nintendo, Furukawa-San, indicated [REDACTED]  
10 [REDACTED] PX2421 (Activision) at 009.

11 709. Importantly, Mr. Kotick testified that a *Call of Duty* game for the Switch would be a  
12 different game than the *Call of Duty* made for the Xbox or the PlayStation. Kotick  
13 (Activision) Hr’g Tr. at 765:11-13.

14 710. In a December 2022 from Head of Xbox Game Studios Matt Booty to Microsoft Gaming  
15 CEO Phil Spencer and Microsoft Gaming CFO Tim Stuart and others, discussing the  
16 possibility of Xbox Game Studios games on Nintendo Switch, noted that [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] PX4354 (Microsoft) at 001.

20 711. Similarly, Microsoft’s claim that it “plans to make Activision content available in Game  
21 Pass,” Microsoft’s First Interrogatory Responses at 9, is neither verified nor merger-  
22 specific. [REDACTED]

23 [REDACTED] PX4894 (Microsoft) at 001-  
24 002. [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 PX4894 (Microsoft) at 002. The following day, [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

[REDACTED] PX4894 (Microsoft) at 001.

712. Dr. Lee concluded that “there are several reasons why Activision content would likely be available on Xbox Game Pass in the but-for world absent the Proposed Transaction. Hence, it is not evident that plans to bring Activision content to Xbox Game Pass are merger-specific.” Lee Written Direct ¶ 210.

713. Dr. Lee also found that “even if Activision support of Xbox Game Pass was merger specific it would not eliminate or offset the likely harms arising in the evolving and developing Gaming Services Markets, and neither the Merging Parties nor their economic experts have quantified these claimed efficiencies.” Lee Written Direct ¶ 211.

714. Even assuming that Microsoft does put Activision titles into Game Pass, the claimed pro-competitive benefit is not merger-specific because Microsoft and Activision could achieve the same result through contract. Although Microsoft claims that Activision content “will remain” unavailable on subscription services “absent the acquisition,” Microsoft’s First Interrogatory Responses at 9, the evidence shows that an independent Activision would likely agree to make its content available on subscription services, including as day-and-date releases, if it received adequate commercial terms.

715. Activision’s CEO Bobby Kotick testified that he has a “philosophical aversion” to subscription services. PX7035 (Kotick (Activision) Depo.) at 130:23-131-9. Mr. Kotick’s aversion, he testified, is not based on any specific metrics and it is not necessarily based on cannibalization. Kotick (Activision) Hr’g Tr. at 733:23-11. Many people at Activision disagree with Mr. Kotick’s aversion to subscription services. Kotick (Activision) Hr’g Tr. at 5-7.

716. Rather, Mr. Kotick testified that his aversion is based on his view about the best way to create financial opportunity for his games, and that subscription can play a role in those financial opportunities. Kotick (Activision) Hr’g Tr. 745:5-13.

717. Activision has made no decision against offering its games on subscription services, and specifically, Activision has made no decision against offering its games on Game Pass,

1 PlayStation Plus, or GeForce Now. Kotick (Activision) Hr’g Tr. at 746 at 17-21; 751:13-  
2 19; 753:19-25.

3 718. Mr. Kotick testified to the many strategic reasons for why Activision would consider  
4 putting its games on subscription, including, for example, a “greater commercial  
5 context,” “learning about a new device,” “learning about a new market opportunity,”  
6 bundling software with hardware,” “sponsorships” Kotick (Activision) Hr’g Tr. 749:18-  
7 750:25.

8 719. Indeed, Activision has previously offered its games on PlayStation Plus. Kotick  
9 (Activision) Hr’g Tr. at 748:9-16.

10 720. Activision has also offered its content on Nvidia’s GeForce Now. Kotick (Activision)  
11 Hr’g Tr. at 754:1-5. Activision pulled its games from the GeForce Now service because  
12 Activision required a commercial arrangement to continue its participation. Kotick  
13 (Activision) Hr’g Tr. at 754:6-755:17. Activision internally identified the “principles of a  
14 potential commercial arrangement to put Activision’s content back on GeForce Now.”  
15 Kotick (Activision) Hr’g Tr. at 755:18-25; PX2133 at -001. Mr. Kotick testified that  
16 these terms were reasonable. Kotick (Activision) Hr’g Tr. at 756:14-757:8.

17 721. Activision was not dissatisfied with the quality of Activision’s games while being stream  
18 on GeForce Now. Kotick (Activision) Hr’g Tr. at 757:9-758:1.

19 722. When past its latest agreement with Microsoft, Activision considered putting its games  
20 on Game Pass. Kotick (Activision) Hr’g Tr. at 751:1-4.

21 723. Mr. Kotick testified that the “principal reasons” that Activision does not offer its games  
22 on Microsoft’s Game Pass have been commercial, and that if Microsoft offered  
23 Activision attractive commercial terms, it is possible that Activision would put it games  
24 on Game Pass. Kotick (Activision) Hr’g Tr. 751:22-25; 12-19.

25 724. Activision’s CEO has a duty to maximize shareholder value, Kotick (Activision) Hr’g Tr.  
26 at 735 at 14-16, and he would therefore evaluate the commercial terms for a subscription  
27 opportunity. Kotick (Activision) Hr’g Tr. at 749:14-17.  
28

1 725. Mr. Kotick further testified that Activision’s goal as an independent company is to  
2 expand its audience to reach as many players as possible. PX7035 (Kotick (Activision)  
3 Depo.) at 74:3-9.

4 726. Indeed, Activision executive Chris Schnakenberg testified that [REDACTED]  
5 [REDACTED]  
6 [REDACTED] PX7008 (Schnakenberg (Activision) IH) at 174:21-  
7 175:15. [REDACTED]  
8 [REDACTED]  
9 [REDACTED] PX2115 (Activision) at 009.

10 727. Activision’s actions are consistent with predicted economic incentives for independent  
11 third-party publishers, who generally stand to realize greater rewards from supporting  
12 multiple content library and cloud gaming services than do console manufacturers  
13 offering their own subscription services. PX5000 (Lee Report) at 163–65.

14 728. For the same reason, the agreements that Microsoft reached during the pendency of  
15 regulatory review of the Proposed Transaction to bring Activision content to cloud  
16 gaming services, discussed further *infra* in § IV.F, are not merger-specific efficiencies.  
17 Testimony and documentary evidence from Nvidia further confirm that Microsoft’s  
18 claimed benefit of bringing Activision titles to cloud services is not merger-specific.

19 729. Microsoft’s highly speculative plan to expand into mobile gaming is not a verifiable  
20 efficiency. Microsoft claims that, with control of Activision’s mobile gaming user base, it  
21 “intends to scale the Xbox Store to create a new mobile game distribution platform” to  
22 rival incumbent app stores from Apple and Google. First Interrogatory Responses at 10.

23 730. Microsoft has not provided details by which to verify claimed efficiencies in mobile  
24 gaming. David Hampton, the Microsoft executive who prepared strategic documents  
25 related to the Proposed Acquisition, [REDACTED]  
26 [REDACTED] PX7027 (Hampton  
27 (Microsoft) Corp. Dep.) at 8:18-10:2. [REDACTED]  
28

- 1 [REDACTED]
- 2 [REDACTED] PX7026 (Hampton (Microsoft) Corp. Dep.) at 173:22-175:8.
- 3 731. Microsoft Gaming CEO Phil Spencer admitted that Activision did not build *Call of Duty*
- 4 *Mobile*, instead relying on an external developer. Spencer (Microsoft) Hr’g Tr. 453:3-13.
- 5 732. Activision’s CEO testified that the reason that the company had to rely on another
- 6 company to develop the mobile game for their key console game franchise, *Call of Duty*,
- 7 was because Activision was not equipped to make that mobile game. Kotick (Activision)
- 8 Hr’g Tr. at 761:19-762:7.
- 9 733. Activision’s CEO Bobby Kotick also testified that Activision did not build *Diablo*
- 10 *Immortal*, the *Diablo* franchise’s mobile game. Kotick (Activision) Hr’g Tr. at 762:8-18.
- 11 A different company, Netease, made that mobile game for Activision. Kotick (Activision)
- 12 Hr’g Tr. at 762:8-18.
- 13 734. Mr. Kotick also testified that the mobile division of Activision, King, is not focused on
- 14 making any new IP, and that its focus instead is to make content updates to its existing
- 15 franchises. Kotick (Activision) Hr’g Tr. at 759:5-13. [REDACTED]
- 16 [REDACTED]
- 17 [REDACTED] PX2282 (Activision) at 001. [REDACTED]
- 18 [REDACTED]
- 19 [REDACTED] PX2282 (Activision) at 001.
- 20 735. Outside of King, Activision does not have a well-developed capability to make mobile
- 21 games, and this was true at the time that Microsoft agreed to buy Activision. Kotick
- 22 (Activision) Hr’g Tr. at 758:19-759:6.
- 23 736. Microsoft’s proposal to create a mobile store is not a merger-specific efficiency. As Phil
- 24 Spencer testified, Microsoft’s ability to launch a mobile storefront requires approval from
- 25 Google and Apple, which will not change post-Acquisition. Spencer (Microsoft) Hr’g Tr.
- 26 410:13-15, 412:8-12. Indeed, Activision’s most popular mobile properties are already
- 27 available in Apple’s app store. Spencer (Microsoft) Hr’g Tr. 411:15-24. Microsoft’s deal
- 28 model valued the supposed efficiencies from the Microsoft mobile store at just [REDACTED]

1 [REDACTED] Spencer (Microsoft) Hr’g Tr. 451:1-11; RX1156  
2 (Microsoft) at 013; Lawver (Microsoft) Hr’g Tr. 233:2-234:15; Stuart (Microsoft) Hr’g  
3 Tr. 1001:2-1002:1; PX4341 at -025.

4 737. Microsoft Gaming CFO Tim Stuart testified that the mobile store synergy in the  
5 Activision deal model assumes that Microsoft is able to break the Apple and Google  
6 mobile app store duopoly. Stuart (Microsoft) Hr’g Tr. 1005:16-1006:03. Mr. Stuart  
7 testified that there is no guarantee that Microsoft will be able to break the Apple and  
8 Google mobile app store duopoly. Stuart (Microsoft) Hr’g Tr. 1006:4-6.

9 738. Further, even if these were mobile efficiencies, mobile is out of the relevant market.

10 739. The agreements Microsoft wrote were “in response to the allegations by the FTC and  
11 other regulators that [Microsoft] might not actually do what [they] said they were going  
12 to do.” Bond (Microsoft) Hr’g Tr. 179:11-16.

13 740. Satya Nadella and Phil Spencer, and to a lesser extent Sarah Bond, are the final decision  
14 makers for these agreements. Bond (Microsoft) Hr’g Tr. 185:6-20.

15 741. These agreements were unusual for Microsoft. Bond (Microsoft) Hr’g Tr. 198:7-9.

16 742. Dr. Bailey did not verify any of the efficiencies that Microsoft claims. Bailey  
17 (Defendants’ Expert) Hr’g Tr. 820:5-11.

18 **F. F. Microsoft’s Recently Executed or Proposed Agreements Fail to Replace**  
19 **the Competitive Intensity Likely to Be Lost from the Proposed Acquisition.**

20 743. The side agreements that Microsoft has offered to third parties during the pendency of  
21 regulatory review of the Proposed Transaction would not replace competition lost  
22 because of the merger. The impact of these agreements is unclear, as even Mr. Stuart,  
23 CFO of Microsoft Gaming, was unaware of any analysis of the profit and loss impact of  
24 entering agreements to put *Call of Duty* on Nintendo, or entering other agreements with  
25 Nvidia, Ubitus, Boosteroid, Nware, and EE. Stuart (Microsoft) Hr’g Tr. 1046:7-1047:2;  
26 934:1-15. Microsoft Gaming CEO Phil Spencer admitted that Microsoft’s offer to Sony  
27 was offered “as part of us getting passed into this regulatory review.” Spencer  
28 (Microsoft) Hr’g Tr. 446:12-19. Even Mr. Spencer conceded the inadequacy of these

1 proposals when he testified that “the best thing” to judge his promise not to foreclose  
2 competitors is “the actions that we’ve taken as a publisher.” Spencer (Microsoft) Hr’g Tr.  
3 359:24-360:13.

4 744. Moreover, even if Microsoft complies with the terms of the contracts it has entered with  
5 streaming services Ubitus, Boosteroid, Nware, and EE, Microsoft has provided no  
6 evidence of any benefits of those agreements to gamers in the United States, and  
7 ultimately did not present testimony from the executive who negotiated these agreements.  
8 *See* Bond (Microsoft) Hr’g Tr. 182:10-18. Ms. Bond’s inability to identify where Ubitus  
9 is located, *see* Bond (Microsoft) Hr’g Tr. 182:6-7, and Mr. Zimring’s unawareness of  
10 Nware’s and EE’s cloud gaming services, *see* Zimring (Google) Hr’g Tr. 487:12-15, are  
11 consistent with minimal U.S. significance.

12 745. While Dr. Carlton opined that “Microsoft has also signed deals with cloud gaming  
13 services providers Ubitus, Boosteroid, and Nware to give them access to Activision  
14 content post transaction... [which] brings a clear benefit to consumers.” PX5004 at 037,  
15 his analysis did not consider the locations of Ubitus, Boosteroid, and Nware (Taiwan,  
16 Ukraine, and Spain, respectively), the location of those companies’ cloud gaming servers,  
17 or the size and scope of those companies’ cloud gaming services. Carlton (Expert) Hr’g  
18 Tr. 893:16-:6-896:19. Dr. Carlton’s analysis of the benefits of these three agreements was  
19 based on the simple existence of the contracts. Carlton (Expert) Hr’g Tr. 897:11 (“[T]hey  
20 exist, yes.”).

21 746. Similarly, Dr. Carlton opined that Microsoft’s deal with Nvidia “would allow Nvidia to  
22 stream COD and other Activision games to any Nvidia subscriber that has purchased a  
23 stand-alone version of the game for PC,” PX5004 at -036 to -037, but could not recall  
24 (and provided no evidence of) ever reading the full terms of the Nvidia agreement.  
25 Carlton (Microsoft) Hr’g Tr. 886:5-890:9.

26 747. The terms in the agreement between Microsoft and Nvidia include an “Unanticipated and  
27 Unforeseeable Future Events” clause which, as Ms. Bond (Microsoft’s signatory to the  
28 agreement) testified, means that if either Microsoft or Nvidia does not realize more

1 success as a result of their ten-year agreement, they can renegotiate at any time. Bond  
2 (Microsoft) Hr’g Tr. 202:6-22; PX3381 (Eisler (Nvidia) Hr’g Testimony) at 127:1-17,  
3 127:25-128:8. [REDACTED]

4 [REDACTED] PX3381 (Eisler (Nvidia) Hr’g  
5 Testimony) at 128:19-129:3.

6 748. Dr. Carlton’s opinion on whether these contracts completely solve competitive concerns  
7 or guarantee an absence of competitive harms has been stricken, Hr’g Tr. 1115:19 -  
8 1116:2, which undermines the credibility of his analysis on other parts of the contracts as  
9 well.

10 749. Dr. Lee testified that the agreements Microsoft signed with “Nvidia, Ubitus and  
11 Boosteroid, to support their services with Activision content if the Proposed Transaction  
12 consummated do not make it evident that these agreements would eliminate or offset  
13 harm in the Gaming Services Markets arising from the likely foreclosure of Microsoft’s  
14 rivals from Activision content as a result of the Proposed Transaction.” Lee Written  
15 Direct ¶ 213.

16 750. Dr. Lee’s reasoning was that “an independent Activision would have a greater economic  
17 incentive to support Microsoft’s rivals than the Merged Entity. Hence, if brining  
18 Activision content to these gaming services were in the Merged Entities economic  
19 interests, then it would likely be in an independent Activision’s interests to do so as  
20 well.” Lee Written Direct at ¶ 214.

21 751. Dr. Lee testified that the benefits arising from these agreements would not likely be  
22 merger specific. Lee Written Direct at ¶ 214.

23 752. Dr. Lee also reasoned that these agreements only pertain to cloud gaming services and do  
24 not address likely harm in the Content Library market.” Lee Written Direct ¶ 215

25 753. Dr. Lee also found that these agreements do not address foreclosure of rivals offering  
26 content library services alongside cloud gaming services, *i.e.*, PlayStation Plus Premium  
27 and Amazon’s Luna+. Lee Written Direct ¶ 216.  
28

1 754. Dr. Bailey did not assess how foreclosure of Activision content would affect competition.  
2 Bailey (Defendants' Expert) Hr'g Tr. 820:12-23.

3 **Agreement with Nintendo**

4 755. On December 7, 2022, the day before the Commission voted to challenge the Proposed  
5 Transaction in this Court, Microsoft signed a letter of intent purporting to bring certain  
6 to-be-developed *Call of Duty* games to Nintendo. PX4578 (Microsoft) at 001; RX1212.

7 756. [REDACTED]  
8 [REDACTED]  
9 [REDACTED] PX7065 (Singer (Nintendo) Dep.) at 119:15-  
10 122:6.

11 757. [REDACTED]  
12 [REDACTED]  
13 [REDACTED] PX7057 (Wright (Microsoft) Corp. Dep.) at 7:8-8:22.

14 758. [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED] PX4578 (Microsoft) at 005 (Nintendo Side Letter); RX1212 at 005.

18 759. [REDACTED]  
19 [REDACTED] PX7065 (Singer  
20 (Nintendo) Dep.) at 126:9-17, 177:22-178:8.

21 760. In the letter agreement between Microsoft and Nintendo, Microsoft testified that the term  
22 [REDACTED] PX7057 (Wright  
23 (Microsoft) Corp. Dep.) at 20:15-21:2.

24 761. [REDACTED]  
25 [REDACTED] PX7057 (Wright (Microsoft) Corp. Dep.) 21:15-22:9 [REDACTED]  
26 [REDACTED] PX2093 at 005

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

[REDACTED]

762. Microsoft Gaming CFO Tim Stuart testified that he was not aware of any analysis of the profit and loss impact to Microsoft from having executed an agreement with Nintendo for *Call of Duty*. Stuart (Microsoft) Hr’g Tr. 933:18-24. Mr. Stuart testified that Microsoft did not run a financial model on *Call of Duty* going to Nintendo. Stuart (Microsoft) Hr’g Tr. 1046:7-1047:2.

763. Microsoft Gaming CEO Phil Spencer testified that if *Call of Duty* is ported to the Switch, it will not look the same as *Call of Duty* on Xbox. Spencer (Microsoft) Hr’g Tr. 335:13-336:3; PX7028 (Spencer (Microsoft) Dep.) 191:16-192:4.

764. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX7065 (Singer (Nintendo) Dep.) at 101:23-102:23; 183:5-11, 184:11-186:14.

765. [REDACTED]

[REDACTED] PX7057 (Wright (Microsoft) Corp. Dep.) at 28:25-29:20.

766. [REDACTED]

[REDACTED] PX7028 (Spencer (Microsoft) Dep.) at 178–82. At the evidentiary hearing, Mr. Spencer testified that he was not aware of the economic effect of the agreement or the effect on Microsoft’s profit and loss. Spencer (Microsoft) Hr’g Tr. 336:16-25. Mr. Spencer further testified that he was not aware of any work done by Microsoft to determine the effect of the agreement on Microsoft’ deal model. Spencer (Microsoft) Hr’g Tr. 337:15-338:5.

767. [REDACTED]

[REDACTED] PX7048 (Booty (Microsoft) Dep.) at 174:9-174:25.

1 768. [REDACTED]  
2 [REDACTED]  
3 [REDACTED] PX7040 (Stuart (Microsoft) Dep.) at 379:10-383:8; 385:23-387:11;  
4 387:12-388:16; 377:13-379:9.

5 769. [REDACTED]  
6 [REDACTED] PX0070 at 004.

7 **Agreement with Nvidia and Foreign Cloud Gaming Companies**

8 770. [REDACTED]  
9 [REDACTED] Microsoft signed an agreement  
10 purporting to bring Activision games to Nvidia. RX1211; PX1784.

11 771. [REDACTED]  
12 [REDACTED] PX7060  
13 (Eisler (Nvidia) Dep.) at 104:9-15.

14 772. [REDACTED]  
15 [REDACTED] PX7055 (Wright (Microsoft) Dep.) at 102:22-  
16 103:25.

17 773. [REDACTED]  
18 [REDACTED] PX7055  
19 (Wright (Microsoft) Dep.) at 126:5-23.

20 774. Microsoft could have offered its first-party content at any time to Nvidia, outside of this  
21 transaction. Bond (Microsoft) Hr’g Tr. 201:20-23.

22 775. If either Nvidia or Microsoft does not realize more success because of the agreement,  
23 either can renegotiate. Bond (Microsoft) Hr’g Tr. 202:15-22.

24 776. [REDACTED]  
25 [REDACTED]  
26 [REDACTED] PX7055 (Wright (Microsoft) Dep.) at 97:10-98:10.

27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

777. [REDACTED]

[REDACTED] PX7048  
(Booty (Microsoft) Dep.) at 172:11-173:3.

778. [REDACTED]

PX0070 at 004.

779. [REDACTED]

[REDACTED]

[REDACTED] PX7057 (Wright (Microsoft) Corp  
Dep.) at 109:1-110:18, 111:5-112:9.

780. Under the agreement with Microsoft, [REDACTED]

[REDACTED]

[REDACTED] PX7057 (Wright (Microsoft) Dep.) at 114:10-115:4, 116:9-20.

781. [REDACTED]

[REDACTED] PX7057 (Wright (Microsoft) Corp.

Dep.) at 49:2-52:25.

782. Microsoft did not perform any financial analysis of the Nvidia, Boosteroid, or Ubitus  
Agreements. Stuart (Microsoft) Hr’g Tr. 934:1-15; PX7055 (Wright (Microsoft) Dep.) at  
94:4-95:5, 133:10-134:16, 135:10-19, 160:12-21, 161:8-22; 177:7-16.

783. [REDACTED]

[REDACTED] PX7055 (Wright (Microsoft) Dep.) at 198:16-  
22, 200:3-8; PX7057 (Wright (Microsoft) Corp Dep.) at 45:25-46:4; Bond (Microsoft)  
Hr’g Tr. 207:2-14.

784. [REDACTED]

[REDACTED]

[REDACTED] PX7057 (Wright (Microsoft) Corp.  
Dep.) at 27:6-28:7, 42:10-43:21.

1 785. [REDACTED]  
2 [REDACTED] PX7057 (Wright (Microsoft) Corp  
3 Dep.) at 38:6-22.

4 786. [REDACTED]  
5 [REDACTED]  
6 [REDACTED] PX7055 (Wright (Microsoft) Dep.) at  
7 145:18-148:12; 153:1-14.

8 **Discussions with Sony**

9 787. No agreement has been reached with Sony. PX1771 (Microsoft) at 001. In their  
10 Opposition Memorandum, Defendants referenced an email SIE CEO Jim Ryan sent on  
11 the day the deal was announced, in an attempt to cast doubt over Mr. Ryan's assessment  
12 of the competitive impact of the proposed transaction. Opp'n Memo, at 3. However, Mr.  
13 Ryan explained in his testimony that concern about the transaction increased over time  
14 based on continued communications with Microsoft. PX7053 (Ryan (Sony) Dep. Vol. 1)  
15 at 77:18-78:8, 78:21-79:4.

16 788. [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] PX3378 at 017-019 (Ryan (Sony) Hr'g Testimony at 61:2-11, 63:25-  
20 64:05, 64:10-15).

21 789. [REDACTED]  
22 [REDACTED] PX3378 at 019 (Ryan (Sony) Hr'g Testimony  
23 at 65:16-19). [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED] PX3378 at 019-020 (Ryan (Sony) Hr'g  
27 Testimony at 66:17-67:6. [REDACTED]  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

[REDACTED] PX3378 at 020 (Ryan (Sony) Hr’g Testimony at 67:7-13).

790. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX7053 (Ryan (Sony) Dep. Vol. 1) at 59:9-12,  
70:13-23. [REDACTED]

[REDACTED] PX7053 (Ryan (Sony) Dep. Vol. 1)  
at 62:20-63:8.

791. [REDACTED]

[REDACTED] PX7053 (Ryan (Sony) Dep. Vol. 1) at 62:20-63:8.

792. [REDACTED]

[REDACTED] PX7053 (Ryan  
(Sony) Dep. Vol. 1) at 63:16-24.

793. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX7053 (Ryan (Sony) Dep.) at 69:19-  
70:2 (discussing PX3110 at 037 (Microsoft Proposal to Sony, Dec. 23, 2022)).

794. Microsoft Gaming CEO Phil Spencer admitted in testimony that Microsoft’s proposal to  
Sony was made “as part of us getting passed into this regulatory review.” Spencer  
(Microsoft) Hr’g Tr. 446:12-19.

795. [REDACTED] PX7053  
(Ryan (Sony) Dep. Vol. 1) at 59:9-12, 70:13-23.

796. Microsoft Gaming CFO Tim Stuart testified that he was not aware of any analysis of the  
financial implications to Microsoft Gaming of any of Microsoft's proposals to Sony.  
Stuart (Microsoft) Hr'g Tr. 934:16-20.

**Merger Specificity**

1 797. Microsoft’s proposed agreements with third parties also lack the requisite merger  
2 specificity to make them relevant in the analysis of the anticompetitive effects of  
3 Microsoft’s acquisition of Activision.

4 798. The agreement entered into between Nvidia and Microsoft for gaming content is not  
5 dependent on the Activision deal closing. RX1211 at -002 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED] RX1211 at -002. Microsoft  
10 could have entered into an agreement with Nvidia for Microsoft’s games at any time, and  
11 therefore the agreement is not specific to Activision deal. Bond (Microsoft) Hr’g Tr.  
12 201:20-23.

13 799. Furthermore, [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 *See* PX8000 (Eisler (Nvidia) Decl.) ¶ 41. [REDACTED]  
17 [REDACTED] *See*  
18 PX3104 (Nvidia) at 018–20 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED] PX8000 (Eisler (Nvidia) Decl.) ¶ 43 [REDACTED]  
22 [REDACTED] PX8000 (Eisler (Nvidia) Decl.) ¶¶ 44; *see also*  
23 PX3104 at 19–20. [REDACTED]  
24 [REDACTED]  
25 [REDACTED] PX8000  
26 (Eisler (Nvidia) Decl.) ¶¶ 45–46.

27 800. Activision was in favor of putting its content on subscription services for the right price.  
28 Activision CEO Bobby Kotick testified that Activision would “evaluate an opportunity to

1 offer its content on a subscription service.” Kotick (Activision) Hr’g Tr. 746:22-25.

2 Activision had in fact identified “principles of a potential commercial arrangement to put

3 Activision content back on GeForce Now.” Kotick (Activision) Hr’g Tr. 755:18-22.

4 801. Similarly for the Nintendo agreement, Microsoft’s agreement with Nintendo regarding

5 Call of Duty is not specific to this merger because, as Activision CEO Bobby Kotick

6 testified, Activision wanted to make Call of Duty games for the new Nintendo console.

7 Kotick (Activision) Hr’g Tr. 767:10-23.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **V. PROPOSED CONCLUSIONS OF LAW**

- 2 1. Section 7 of the Clayton Act prohibits mergers when “the effect of such acquisition may  
3 be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.
- 4 2. Section 5 of the FTC Act proscribes “[u]nfair methods of competition in or affecting  
5 commerce, are hereby declared unlawful.” 15 U.S.C. § 45(a)(1).
- 6 3. An acquisition that violates Section 7 of the Clayton Act, by definition, is a violation of  
7 Section 5 of the FTC Act. *See, e.g., FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454  
8 (1986).
- 9 4. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Federal Trade  
10 Commission, whenever it has reason to believe that a proposed merger is unlawful, to seek  
11 preliminary injunctive relief to prevent consummation of a merger until the Commission  
12 has the opportunity to adjudicate the merger’s legality in an administrative proceeding.
- 13 5. Specifically, Section 13(b) “allows a district court to grant the Commission a preliminary  
14 injunction ‘[u]pon a proper showing that, weighing the equities and considering the  
15 Commission’s likelihood of ultimate success, such action would be in the public  
16 interest.’” *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (quoting  
17 15 U.S.C. § 53(b)).
- 18 6. The purpose of a § 13(b) proceeding “is not ‘to determine whether the antitrust laws have  
19 been or are about to be violated. That adjudicatory function is vested in the FTC in the  
20 first instance.’” *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009) (quoting  
21 *FTC v. Whole Foods Mkt. Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (Tatel, J.,  
22 concurring); *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (“Our  
23 present task is not to make a final determination on whether the proposed merger violates  
24 Section 7, but rather to make only a preliminary assessment of the merger’s impact on  
25 competition.”); *FTC v. Meta Platforms Inc.*, No. 5:22-cv-04325-EJD, 2022 WL  
26 16637996, at \*5 (N.D. Cal. Nov. 2, 2022) (“[T]he scope of the Section 13 (b) inquiry is  
27 necessarily limited and narrow.”).
- 28

- 1 7. Preliminary injunctions under § 13(b) “are meant to be readily available to preserve the  
2 status quo while the FTC develops its ultimate case.” *FTC v. Whole Foods Mkt., Inc.*, 548  
3 F.3d 1028, 1036 (D.C. Cir. 2008); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327,  
4 352 (3d Cir. 2016) (“The purpose of Section 13(b) is to preserve the status quo and allow  
5 the FTC to adjudicate the anticompetitive effects of the proposed merger in the first  
6 instance.”); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976) (“The  
7 only purpose of a proceeding under § 13 is to preserve the status quo until FTC can  
8 perform its function.”); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001)  
9 (“Section 13(b) itself embodies congressional recognition of the fact that divestiture is an  
10 inadequate and unsatisfactory remedy in a merger case, a point that has been emphasized  
11 by the United States Supreme Court.”) (citation omitted).
- 12 8. Likelihood of ultimate success is not determined by a “statistical calculation of the parties’  
13 odds” of winning on the merits. *FTC v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD,  
14 2022 WL 16637996, at \*5 (N.D. Cal. Nov. 2, 2022). Although a court is “charged with  
15 exercising their ‘independent judgment’ and evaluating the FTC’s case and evidence on  
16 the merits,” “[i]n summary, . . . Section 13(b)’s ‘likelihood of ultimate success’ inquiry .  
17 . . . mean[s] the likelihood of the FTC’s success on the merits in the underlying  
18 administrative proceedings, as opposed to success following a Commission hearing, the  
19 development of an administrative record, and appeal before an unspecified Court of  
20 Appeals.” *FTC v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2022 WL 16637996, at  
21 \*5–6 (N.D. Cal. Nov. 2, 2022) (citing *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088,  
22 1090–91 (S.D.N.Y. 1977) (“[W]hile the statute requires us to consider the FTC’s  
23 likelihood of ultimate success and to exercise our independent judgment in that regard, it  
24 appears that it does not require the FTC to prove, or us to find, probable success on the  
25 merits but something less.”)).
- 26 9. “[A]t this preliminary phase [the FTC] just has to raise substantial doubts about a  
27 transaction.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008); *FTC*  
28 *v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984) (“‘serious, substantial,

- 1 difficult' questions"). As to market definition, for example, the FTC's burden is simply to  
2 "rais[e] some question of whether [a market] is [] well-defined." *FTC v. Whole Foods*  
3 *Mkt. Inc.*, 548 F.3d 1028,1037 (D.C. Cir. 2008). The FTC's burden is met by a "tenable  
4 showing," even if there is also "conflicting evidence on the relevant product market" or  
5 "market shares." *FTC v. Warner Commc 'ns, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984).
- 6 10. Accordingly, to carry their responsive burden on likelihood of success, Defendants must  
7 dispel doubts about the legality of their transaction, such that the court would be  
8 "certain[]" and have "no doubt that [the] merger would not substantially lessen  
9 competition." *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008).
- 10 11. Even as to the ultimate merits, and all the more so "[a]t this [preliminary injunction  
11 stage under Section 13(b)], any 'doubts are to be resolved against the transaction.'" *FTC*  
12 *v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3rd Cir. 2016) (quoting *FTC v.*  
13 *Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) (Posner, J.)).
- 14 12. If there are adequate questions or doubts about the transaction's legality, § 13(b)  
15 temporary relief is warranted—even if ultimately "post-hearing, the FTC may accept the  
16 rebuttal arguments proffered by the [defendants]." *FTC v. H.J. Heinz Co.*, 246 F.3d 708,  
17 725 (D.D.C. 2001).
- 18 13. The statute "places a lighter burden on the Commission than that imposed on private  
19 litigants by the traditional equity standard." *FTC v. Warner Commc 'ns Inc.*, 742 F.2d  
20 1156, 1159 (9th Cir. 1984).
- 21 14. "Under this more lenient standard, 'a court must 1) determine the likelihood that the  
22 Commission will ultimately succeed on the merits and 2) balance the equities.'" *FTC v.*  
23 *Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999) (quoting *FTC v. Warner*  
24 *Commc 'ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)).
- 25 15. And "[w]hen the [FTC] demonstrates a likelihood of ultimate success, a counter showing  
26 of private equities alone would not suffice to justify denial of a preliminary injunction  
27 barring the merger." *FTC v. Warner Commc 'ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984)  
28 (citing *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981)).

- 1 16. In weighing the equities under § 13(b), “public equities receive far greater weight.” *FTC*  
2 *v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984). Public equities include  
3 “effective enforcement of the antitrust laws” and ensuring the Commission’s ability to  
4 obtain adequate relief if it ultimately prevails on the merits. *FTC v. Univ. Health, Inc.*,  
5 938 F.2d 1206, 1225 (11th Cir. 1991). “[T]he preservation of competition is always in the  
6 public interest.” *United States v. Tribune Publ’g Co.*, No. CV 16-01822-AB, 2016 WL  
7 2989488, at \*5 (C.D. Cal. Mar. 18, 2016).
- 8 17. Defendants often complain about the “cost that delaying [their proposed] transaction  
9 would exact” on them, but courts “must afford such concerns little weight” to avoid  
10 undermining “section 13(b)’s purpose of protecting the ‘public-at-large, rather than  
11 individual private competitors.” *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1225 (11th  
12 Cir. 1991) (quoting *FTC v. Nat’l Tea Co.*, 603 F.2d 694, 697 n.4 (8th Cir. 1979)).
- 13 18. Defendants’ assertion “that a preliminary injunction would force them to abandon” their  
14 proposed transaction is a private equity at best, and “private equities alone do not outweigh  
15 the Commission’s showing of likelihood of success.” *FTC v. Warner Commc’ns, Inc.*, 742  
16 F.2d 1156, 1165 (9th Cir. 1984). “[A]lthough the court recognizes the time, resources, and  
17 effort that Defendants have put into planning this transaction, the Defendants’ stated  
18 intention to abandon the transaction prior to the merits proceeding is a private equity and  
19 cannot on its own overcome the public equities that favor the FTC.” *FTC v. Wilh.*  
20 *Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 74 (D.D.C. 2018); *see also FTC v. Peabody*  
21 *Energy Corp.*, 492 F. Supp. 3d 865, 882 n.8 (E.D. Mo. 2020).
- 22 19. “[A] ‘risk that the transaction will not occur at all,’ by itself, is a private consideration that  
23 cannot alone defeat the preliminary injunction.” *FTC v. Whole Foods Mkt.*, 548 F.3d 1028,  
24 1041 (D.C. Cir. 2008); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1346 (4th Cir.  
25 1976) (holding that such arguments are irrelevant to § 13(b) proceedings); *FTC v.*  
26 *Rhinechem Corp.*, 459 F. Supp. 785, 791 (N.D. Ill. 1978) (“That leaves the claimed injury  
27 [from the target’s] announced intention of walking away from the acquisition. [But] the  
28 equities, and consequently the injuries, to be reckoned in section 13(b) cases are not

1 private ones, but public ones.”); *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 791 (N.D.  
2 Ill. 1978) (“[T]his conclusion is particularly appropriate where . . . the alleged private  
3 injury is caused by the parties’ own decision to, in effect, cancel the deal in the event that  
4 an injunction be issued.”).

5 20. Plaintiff FTC has shown that it is likely to succeed on the merits of its Section 7 challenge  
6 in the agency’s administrative court, and the equities favor issuing a preliminary  
7 injunction.

8  
9 **A. The FTC Is Likely to Succeed on the Merits of Its Section 7 Challenge**

10 21. In the administrative merits proceeding, the FTC’s burden will be to prove that the effect  
11 of the Acquisition “*may be* substantially to lessen competition, or to tend to create a  
12 monopoly” in violation of Section 7 of the Clayton Act. *FTC v. Warner Commc’ns, Inc.*,  
13 742 F.2d 1156, 1160 (9th Cir. 1984) (emphasis in original) (“It is well established that a  
14 section 7 violation is proven upon a showing of reasonable probability of anticompetitive  
15 effect”).

16 22. At this preliminary stage, the Ninth Circuit has explained that the government can meet  
17 “its burden of demonstrating a likelihood of success by presenting evidence sufficient to  
18 raise serious, substantial, difficult questions regarding the anticompetitive effects of the  
19 proposed [transaction].” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1164 (9th Cir.  
20 1984) (cleaned up); *see also FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1036 (D.C. Cir.  
21 2008) (“[A]t this preliminary phase [the FTC] just has to raise substantial doubts about a  
22 transaction. One may have such doubts without knowing exactly what arguments will  
23 eventually prevail.”).

24 23. “Because the issue in this action for preliminary relief is a narrow one, [courts] do not  
25 resolve the conflicts in the evidence, compare concentration ratios and effects on  
26 competition in other cases, or undertake an extensive analysis of the antitrust issues.” *FTC*  
27 *v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984); *see also Calif. v. Am.*  
28 *Stores Co.*, 872 F.2d 837, 841 (9th Cir. 1989) (“At this stage, we do not resolve conflicts

1 in the evidence.”), *rev'd on other grounds*, 495 U.S. 271 (1990); *FTC v. H.J. Heinz Co.*,  
2 246 F.3d 708, 714 (D.C. Cir. 2001) (the FTC “is not required to *establish* that the proposed  
3 merger would in fact violate Section 7” (emphasis in original)); *FTC v. CCC Holdings*  
4 *Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009) (“the district court’s task is not to determine  
5 whether the antitrust laws have been or are about to be violated. That adjudicatory function  
6 is vested in the FTC in the first instance.” (quoting *FTC v. Whole Foods Mkt.*, 548 F.3d  
7 1028, 1042 (D.C. Cir. 2008) (Tatel, J., concurring))); *see also FTC v. Whole Foods Mkt.*,  
8 548 F.3d 1028, 1048 (D.C. Cir. 2008) (Tatel, J., concurring) (“Although courts certainly  
9 must evaluate the evidence in section 13(b) proceedings and may safely reject expert  
10 testimony they find unsupported, they trench on the FTC’s role when they choose between  
11 plausible, well-supported expert studies.”).

12 24. Rather, this Court’s task is only to “measure the probability that, after an administrative  
13 hearing . . . the Commission will succeed in proving that the effect of the [proposed]  
14 merger ‘may be substantially to lessen competition, or to tend to create a monopoly’ in  
15 violation of section 7.” *FTC v. H.J. Heinz*, 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting  
16 15 U.S.C. § 18).

17 25. Clayton Act § 7 analysis “necessarily focuses on ‘probabilities, not certainties.’” *St.*  
18 *Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys. Ltd.*, 778 F.3d 775, 783 (9th  
19 Cir. 2015) (quoting *Brown Shoe v. United States*, 370 U.S. 294, 323 (1962)).

20 26. This entails “‘a prediction of [the merger’s] impact upon competitive conditions in the  
21 future; this is what is meant when it is said that the amended § 7 was intended to arrest  
22 anticompetitive tendencies in their incipiency.’” *St. Alphonsus Med. Ctr.-Nampa Inc. v.*  
23 *St. Luke’s Health Sys. Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (quoting *United States v.*  
24 *Phila. Nat’l Bank*, 374 U.S. 321, 362 (1963)); *Int’l Tel. & Tel. Corp. v. Gen. Tel. & Elecs.*  
25 *Corp.*, 449 F. Supp. 1158, 1172 (D. Haw. 1978) (observing that “the lower incipiency  
26 threshold of Clayton 7” is easier to meet than the Sherman Act).

27 27. “[S]urely one premise of an antimerger statute such as § 7 is that corporate growth by  
28 internal expansion is socially preferable to growth by acquisition.” *United States v. Phila.*

1 *Nat. Bank*, 374 U.S. 321, 370 (1963). “Internal expansion is more likely to be the result  
2 of increased demand for the company’s products and is more likely to provide increased  
3 investment in plants, more jobs and greater output. Conversely, expansion through merger  
4 is more likely to reduce available consumer choice while providing no increase in industry  
5 capacity, jobs or output.” *Brown Shoe Co.*, 370 U.S. at 346 n.72.

6 28. At the merits phase, which in this case is the administrative proceeding that begins on  
7 August 2, 2023, Courts and the Commission have traditionally analyzed Section 7 claims  
8 under a burden-shifting framework. *See St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s*  
9 *Health System, Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015); *Otto Bock HealthCare N. Am.,*  
10 *Inc.*, No. 9378, 2019 WL 5957363, at \*11 (F.T.C. Nov. 1, 2019); *Polypore Int’l, Inc.*, No.  
11 D-9327, 2010 WL 9549988, at \*9 (F.T.C. Nov. 5, 2010).

12 29. The Supreme Court has explained that all mergers “must be tested by the same standard,  
13 whether they are classified as horizontal, vertical, conglomerate, or other.” *FTC v. Procter*  
14 *& Gamble Co.*, 386 U.S. 568, 577 (1967).

15 30. The same burden-shifting framework applies to both horizontal and vertical mergers. *See*  
16 *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at \*19 (F.T.C. Mar. 31, 2023)  
17 (applying the burden-shifting framework to a vertical merger); *see United States v. AT&T,*  
18 *Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019). Here, the Proposed Acquisition is a vertical  
19 transaction. “Economic arrangements between companies standing in a supplier-customer  
20 relationship are characterized as ‘vertical.’” *Brown Shoe v. United States*, 370 U.S. 294,  
21 323 (1962).

22 31. At the merits phase in a § 7 case, [t]he plaintiff must first establish a prima facie case that  
23 a merger is anticompetitive.” *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health*  
24 *Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015); *United States v. Bazaarvoice, Inc.*<sup>1</sup>, No. 13-  
25 CV-00133-WHO, 2014 WL 203966, at \*64 (N.D. Cal. Jan. 8, 2014).

26  
27 <sup>1</sup> “We note for the Court that this case, like the other Department of Justice federal-court  
28 merger challenge cases cited herein, was decided following a full merits trial. Unlike the  
(Continued...)

1 32. To establish a prima facie case at the merits trial, the Government’s burden will be to  
2 show a “reasonable probability” that the Proposed Acquisition would substantially lessen  
3 competition. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Illumina, Inc.,*  
4 *& Grail, Inc.*, No. 9401, 2023 WL 2823393, at \*19 (F.T.C. Mar. 31, 2023); (“‘reasonable  
5 likelihood’ of a substantial lessening of competition” (quoting *Brown Shoe*, 370 U.S. 294,  
6 362 (1962))).

7 33. In general, “[a] reasonable probability is, of course, less than a certainty, or even a  
8 likelihood.” *United States v. Koziol*, 993 F.3d 1160, 1186 (9th Cir. 2021) (quoting *United*  
9 *States v. Joseph*, 716 F.3d 1273, 1280 (9th Cir. 2013) (internal quotation marks omitted)),  
10 *cert. denied*, 142 S. Ct. 1372 (2022).

11 34. The Government’s burden of production at this step will be low. Even at the ultimate  
12 merits—and all the more so at the preliminary injunction stage under Section 13(b)—any  
13 “doubts are to be resolved against the transaction.” *Otto Bock HealthCare N. Am., Inc.*,  
14 2019 WL 2118886, at \*2 (F.T.C. May 6, 2019) (Chappell, A.L.J.) (quoting *FTC v. Elders*  
15 *Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) (internal quotation marks omitted)).

16 35. If the Government is able to carry its initial burden, “[t]he burden [will] then shift[] to the  
17 defendant to rebut the prima facie case.” *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s*  
18 *Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015).

19 36. “[I]f the [defendant] successfully rebuts the *prima facie* case, the burden of production  
20 [will] shift[] back to the Government and merge[] with the ultimate burden of persuasion,  
21 which is incumbent with the Government at all times.” *St. Alphonsus Med. Ctr.-Nampa*  
22 *Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (quoting *Chi. Bridge*  
23 *& Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008)).

24 37. Here, Plaintiff has more than met its burden of establishing a likelihood of success on the  
25 merits. Although either path can suffice, the Government has shown a likelihood of  
26

---

27 FTC, the Department of Justice does not house an adjudicatory and remedial function  
28 akin to the one embedded in the FTC’s statutory construction.”

1 success on liability under both the ability-and-incentive and *Brown Shoe* frameworks. *See*  
2 *In the Matter of Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at \*33 (F.T.C.  
3 Mar. 31, 2023); *infra* Conclusions of Law § V.E.

4 38. The Government has raised sufficiently serious, substantial, difficult questions to warrant  
5 temporary relief under § 13(b). *Infra* Conclusions of Law at § V.E. The Proposed  
6 Acquisition has a reasonable probability of substantially lessening competition through  
7 foreclosure in the markets for High-Performance Consoles, Multi-Game Content Library  
8 Subscription Services, and Cloud Gaming Subscription Services (the “Relevant  
9 Markets”). *Infra* Conclusions of Law at § V.E.1.

10 39. The Proposed Acquisition also has a reasonable probability of harming innovation in the  
11 Relevant Markets. *Infra* Conclusions of Law § V.E.2. An emerging market like Cloud  
12 Gaming Subscription services is particularly susceptible to innovation harm. *Infra*  
13 Conclusions of Law § V.E.2.

14 40. New entry or expansion is unlikely to be sufficient to offset the competitive harm of the  
15 Proposed Acquisition. *Infra* Conclusions of Law § V.F.

16 41. Any proposed efficiencies or alleged procompetitive benefits are unlikely to offset the  
17 competitive harm in the Relevant Markets. *Infra* Conclusions of Law § V.G.

18 42. Indeed, proposed remedies, such as the agreements with third parties offered by Microsoft,  
19 are of questionable relevance to a § 13(b) proceeding. *See FTC v. Food Town Stores, Inc.*,  
20 539 F.2d 1339, 1345 (4th Cir. 1976) (holding FTC was “entitled to preserve the status quo  
21 pending adjudication” regardless of what “ultimate remedy” might eventually be deemed  
22 appropriate); *Infra* Conclusions of Law § V.H. And in any event, Microsoft’s proposed  
23 remedies would fail to restore pre-merger competition.

24 43. Again, “at this preliminary phase [the FTC] just has to raise substantial doubts” about  
25 whether a transaction poses a reasonable probability of lessening competition. *FTC v.*  
26 *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008).

**B. High-Performance Consoles, Multi-Game Content Library Subscription Services, and Cloud Gaming Subscription Services Are Relevant Markets**

- 1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28
44. The Supreme Court has recognized that Section 7 prohibits acquisitions that may “substantially lessen competition within the area of effective competition.” *Brown Shoe v. United States*, 370 U.S. 195, 324 (1962) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) (internal quotations omitted)).
45. Acquisitions that pose a reasonable probability of harm in *any* relevant market violate § 7. *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 812 (9th Cir. 1961) (“In the statutory phrase ‘in any line of commerce’, the word entitled to emphasis is ‘any.’”); *United States v. Bertelsmann SE & Co. KGaA*, No. CV 21-2886-FYP, 2022 WL 16949715, at \*14 (D.D.C. Nov. 15, 2022) (“The Court is unswayed by the defendants’ tactic of enumerating other markets or submarkets in which competition would not be harmed by the merger.”).
46. To determine the “area of effective competition,” courts “reference . . . a product market (the ‘line of commerce’) and a geographic market (the ‘section of the country’).” *Brown Shoe v. United States*, 370 U.S. 194, 324 (1962). “Often, the first steps in analyzing a merger’s competitive effects are to define the geographic and product markets affected by it.” *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565 (6th Cir. 2014). Whether the transaction at issue is horizontal or vertical, courts use the same set of analytic tools to define the affected market. *See Brown Shoe v. United States*, 370 U.S. 194, 324–28 (1962).
47. It is well-settled that “the boundaries of the relevant market must be drawn with sufficient breadth to . . . recognize competition where, in fact, competition exists.” *Brown Shoe v. United States*, 370 U.S. 294, 326 (1962); *see also United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439, 452–53 (N.D. Cal. 1967) (citing *Brown Shoe Co.*, 370 U.S. 294, 325) (“[W]ithin a market, ‘well-defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes.’”).
48. The existence of arguable functional substitutes does not affect the existence of relevant markets or submarkets for premium or specialized versions of products. *E.g., Int’l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 252 (1959) (“[C]hampionship boxing is

1 the ‘cream’ of the boxing business, and . . . is a sufficiently separate part of the trade or  
2 commerce to constitute the relevant market.”); *Whole Foods Mkt., Inc.*, 548 F.3d at 1032  
3 (endorsing viability of submarket for “premium, natural, and organic supermarkets”);  
4 *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 995 (N.D. Cal. 2010)  
5 (finding plausible an alleged relevant market that included only Microsoft’s and Sony’s  
6 gaming consoles, and excluded Nintendo’s console).

7 49. A product market’s “outer boundaries” are determined by the “reasonable  
8 interchangeability of use or the cross-elasticity of demand between the product itself and  
9 substitutes for it.” *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 198 (D.D.C. 2018) (quoting  
10 *Brown Shoe Co. v. United States*, 370 U.S. 194, 325 (1962)).

11 50. Even at the merits stage, “[r]elevant markets need not have precise metes and bounds.”  
12 *Pac. Steel Grp. v. Comm. Metals Co.*, No. 20-CV-07683, 600 F. Supp. 3d 1056, 1070  
13 (N.D. Cal. 2022).

14 51. “[E]ven if alternative submarkets exist . . . or if there are broader markets that might be  
15 analyzed, the viability of such additional markets does not render the one identified by the  
16 government unusable.” *United States v. Bertelsmann SE & Co.*, No. 21-2886-FYP, 2022  
17 WL 16949715, at \*14 (D.D.C. 2022); *see also Newcal Indus., Inc. v. Ikon Office Sol’n*,  
18 513 F.3d 1038, 1045 (9th Cir. 2008). “[E]numerating other markets or submarkets in  
19 which competition would *not* be harmed by the merger” is a non sequitur. *Bertelsmann*  
20 *SE & Co.*, No. 21-2886-FYP, at \*14 (emphasis added).

21 52. Whether a market can be characterized as “nascent” or “emerging” bears “limited weight”  
22 on whether it constitutes a relevant market. *See FTC v. Meta Platforms Inc.*, No. 5:22-  
23 CV-04325-EJD, 2023 WL 2346238, at \*19 (N.D. Cal. Feb. 3, 2023).

24 53. To determine the validity of a relevant antitrust market definition, courts generally look  
25 to two types of evidence: “the ‘practical indicia’ set forth by the Supreme Court in *Brown*  
26 *Shoe* and testimony from experts in the field of economics” regarding the Hypothetical  
27 Monopolist Test (“HMT”). *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 27 (D.D.C. 2015).

- 1 54. There is “no requirement to use any specific methodology in defining the relevant  
2 market.” *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., Ltd.*, 20 F.4th 466, 482 (9th  
3 Cir. 2021). As such, courts have determined relevant antitrust markets using, for example,  
4 only the *Brown Shoe* factors, or a combination of the *Brown Shoe* factors and the HMT.  
5 *See, e.g., Lucas Auto. Eng., Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766–68 (9th  
6 Cir. 2001) (relying on *Brown Shoe* factors alone in review of district court’s determination  
7 of relevant market); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 20–21 (D.D.C. 2017)  
8 (using HMT and *Brown Shoe* factors to analyze relevant market).
- 9 55. In a § 13(b) proceeding, the Government’s burden is only to “rais[e] some question of  
10 whether” a market is “well-defined.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1037  
11 (D.C. Cir. 2008). Here, under both the *Brown Shoe* practical indicia, *infra* Conclusions of  
12 Law § V.B.1, and the HMT, *infra* Conclusions of Law § V.B.2, the relevant markets are  
13 High-Performance Consoles, Multi-game Content Library Subscription Services, and  
14 Cloud Gaming Subscription Services. Harm is also likely to occur in broader relevant  
15 product markets. *Infra* Conclusions of Law § V.B.3.
- 16 56. Defendants miscite *Pistacchio v. Apple Inc.*, 2021 WL 949422 (N.D. Cal. 2021) and *Reilly*  
17 *v. Apple Inc.*, 578 F. Supp. 3d 1098 (N.D. Cal. 2022). In both cases, the plaintiff made  
18 insufficient allegations of a single-brand product market. *Pistacchio*, 2021 WL 949422,  
19 at \*1-2; *Reilly*, 578 F. Supp. 3d at 1107. The court found in each case that the plaintiff’s  
20 allegations failed to account for the exclusion of similar products (of different brands)  
21 from their proposed market definition. *Id.* Moreover, neither *Pistacchio* nor *Reilly*  
22 categorically ruled out a subscription-based payment market could be a relevant market  
23 for the purposes of Clayton § 7. Here, the FTC does not allege a single-brand market and  
24 has proffered economic analyses based on the practical indicia set forth in *Brown Shoe*  
25 and the Hypothetical Monopolist Test.
- 26  
27  
28

### 1. The Relevant Markets Satisfy the *Brown Shoe* Practical Indicia

- 1
- 2 57. In *Brown Shoe*, the Supreme Court identified a series of “practical indicia” courts may
- 3 consider in determining the relevant product market. The indicia include “industry or
- 4 public recognition of the [market] as a separate economic entity, the product’s peculiar
- 5 characteristics and uses, unique production facilities, distinct customers, distinct prices,
- 6 sensitivity to price changes, and specialized vendors.” *Brown Shoe v. United States*, 370
- 7 U.S. 294, 325 (1962); *see also Otto Bock*, 2019 WL 2118886, at \*5 (Chappell, A.L.J.);
- 8 *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017); *United States v. H&R*
- 9 *Block, Inc.*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011).
- 10 58. Relevant markets “can exist even if only some of these [*Brown Shoe*] factors are present.”
- 11 *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997); *Illumina, Inc., & Grail, Inc.*,
- 12 No. 9401, 2023 WL 2823393, at \*33 (F.T.C. Mar. 31, 2023); *Beatrice Foods Co. v. FTC*,
- 13 540 F.2d 303, 308-309 (7th Cir. 1976); *see Int’l T. & T. Corp. v. Gen. T. & E. Corp.*, 518
- 14 F.2d 913, 932–33 (9th Cir. 1975) (“These indicia were listed with the intention of
- 15 furnishing practical aids in identifying zones of actual or potential competition rather than
- 16 with the view that their presence or absence would dispose, in talismanic fashion, of the
- 17 submarket issue.”).
- 18 59. The market for High Performance Consoles satisfies sufficient *Brown Shoe* indicia
- 19 factors, including industry and public recognition; characteristics and uses; sensitivity to
- 20 price changes; distinct prices; and distinct customers. *See* Plaintiff’s Pre-trial Findings of
- 21 Fact (“PPFF”) § II.A.
- 22 60. The market for Multi-Game Content Library Subscription Services satisfies sufficient
- 23 *Brown Shoe* indicia factors, including industry and public recognition; benefits,
- 24 characteristics and uses; sensitivity to price changes; distinct pricing and marketing; and
- 25 distinct customers. *See* PPFF § II.C.
- 26 61. The market for Cloud Gaming Subscription Services satisfies the *Brown Shoe* indicia
- 27 factors, including industry and public recognition, characteristics and uses, unique
- 28

1 production facilities, distinct pricing and marketing, and distinct customers. *See* PPF §  
2 II.D.

### 3 **2. The Relevant Markets Satisfy the HMT**

4 62. Courts and the Commission may, alternatively or in addition, use the Hypothetical  
5 Monopolist Test to assess the relevant product market. *See FTC v. Advocate Health Care*  
6 *Network*, 841 F.3d 460, 468–69 (7th Cir. 2016) (applying the HMT to define a relevant  
7 geographic market); *see also FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338  
8 (3d Cir. 2016); *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 167 (3d Cir.  
9 2022) (“Courts and the FTC frequently use the hypothetical monopolist test to determine  
10 the relevant geographic market”); *Horizontal Merger Guidelines* § 4.1.1.

11 63. Under the HMT, a candidate market constitutes a relevant antitrust market if a  
12 hypothetical monopolist could profitably impose a “small but significant and non-  
13 transitory increase in price” (“SSNIP”), or a reduction in product quality or service, on at  
14 least one product of the merging parties in the candidate market. The candidate market  
15 does not satisfy the HMT if customers switching to alternative products would make such  
16 a price increase unprofitable. *See Horizontal Merger Guidelines* §§ 4, 4.1.1; *see also*  
17 *Sidibe v. Sutter Health*, No. 12-CV-04854-LB, 2019 WL 2078788, at \*4 (N.D. Cal. May  
18 9, 2019); *United States v. Bazaarvoice, Inc.*, No. 13-CV-00133-WHO, 2014 WL 203966,  
19 at \*28 (N.D. Cal. Jan. 8 2014).

20 64. The market for High Performance Consoles satisfies the HMT. *See* PPF § II.A.

21 65. The market for Multi-Game Content Library Subscription Services satisfies the HMT. *See*  
22 PPF § II.C.

23 66. The market for Cloud Gaming Subscription Services satisfies the HMT. *See* PPF § II.D.

### 24 **3. Harm is Also Likely to Occur in Broader Relevant Product Markets**

25 67. “[E]ven if alternative submarkets exist . . . or if there are broader markets that might be  
26 analyzed, the viability of such additional markets does not render the one identified by the  
27 government unusable.” *United States v. Bertelsmann SE & Co.*, No. 21-2886-FYP, 2022  
28 WL 16949715, at \*14 (Nov. 15, 2022 D.D.C. 2022).

1 68. High-Performance Consoles are a relevant product market for evaluating the likely  
2 competitive effects of the Proposed Acquisition. *Supra* Conclusions of Law § V.B.1 & §  
3 V.B.2.; *see* PPF § II.A.

4 69. The anticompetitive effects of the Proposed Acquisition are also reasonably likely to occur  
5 in a broader market for gaming consoles that includes High-Performance Consoles and  
6 the highly differentiated Nintendo Switch. *See* PPF § II.B.

7 70. Multi-Game Content Library Subscription Services are a relevant product market for  
8 evaluating the likely competitive effects of the Proposed Acquisition. *Supra* Conclusions  
9 of Law § V.B.1. & § V.B.2.; *see* PPF § II.C.

10 71. Cloud Gaming Subscription Services are a relevant product market for evaluating the  
11 likely competitive effects of the Proposed Acquisition. *Supra* Conclusions of Law §  
12 V.B.1. & § V.B.2.; *see* PPF § II.D.

13 72. The anticompetitive effects of the Proposed Acquisition are also likely to occur in any  
14 relevant antitrust market that contains Cloud Gaming Subscription Services, including a  
15 combined Multi-Game Content Library and Cloud Gaming Subscription Services market.  
16 *See* PPF § II.E.

17 **C. The United States is the Relevant Geographic Market**

18 73. The relevant market in which to assess the anticompetitive harms of the Acquisition  
19 necessarily includes the relevant geographic market, or the area of competition affected  
20 by the merger. *See Sysco Corp.*, 113 F. Supp. 3d 1, 48 (D.D.C. 2015) (“[T]he proper  
21 question to be asked . . . [is] where, within the area of competitive overlap, the effect of  
22 the merger on competition will be direct and immediate.” (quoting *United States v. Phila.*  
23 *Nat’l Bank*, 374 U.S. 321, 357 (1963)); *see also Advocate Health Care Network*, 841 F.3d  
24 at 476 (citing *Phila. Nat’l Bank*, 374 U.S. at 357) (relevant geographic market is “the place  
25 where the ‘effect of the merger on competition will be direct and immediate’”); *see also*  
26 *Horizontal Merger Guidelines* § 4.2.

1 74. The relevant geographic market is the region in “which consumers can practically turn for  
2 alternative sources of the product and in which the antitrust defendant faces competition.”  
3 *FTC v. Staples Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997).

4 75. As the Supreme Court has explained, the relevant geographic market must “correspond to  
5 the commercial realities of the industry” as determined by a “pragmatic, factual,  
6 approach.” *Brown Shoe v. United States*, 370 U.S. 294, 336 (1962).

7 76. Here, the United States is the relevant geographic market in which to analyze the effects  
8 of the Proposed Acquisition. *See* PPF § II.F.

9 77. Under Section 7 of the Clayton Act, 15 U.S.C. § 18, the government need only show a  
10 substantial lessening of competition in “any section of the country.” Sales into the United  
11 States is a “section of the country.” *See United States v. Marine Bancorporation, Inc.*, 418  
12 U.S. 602, 620–21 & n.20 (1974) (finding “section of the country” to be synonymous with  
13 “relevant geographical market,” which can be the United States as a whole.)

14 78. The Clayton Act does not require analysis of whether a transaction results in  
15 anticompetitive effects in products sold outside the United States. 15 U.S.C. § 18.

16  
17 **D. Activision’s Gaming Content Is a Related Product to the Relevant Markets**

18 79. In vertical transactions, upstream inputs to downstream products in a relevant product  
19 market are referred to as “related products.” *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023  
20 WL 2823393, at \*28 (F.T.C. Mar. 31, 2023).

21 80. The Government need not prove that the related product constitutes a relevant antitrust  
22 market. *See Brown Shoe v. United States*, 370 U.S. 294, 325–26, 344 (1962) (finding a  
23 Section 7 violation when only a relevant product market was shown); *United States v. E.I.*  
24 *du Pont de Nemours & Co.*, 353 U.S. 586, 593–97, 607 (1957) (same).

25 81. No court has held that the government must prove monopoly power in a related product  
26 market to prove that a merger violates the Clayton Act. Instead, the proper inquiry here is  
27 whether Activision supplies related products on which Microsoft’s rivals rely. *See United*  
28 *States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (accepting the district court’s

1 finding of a relevant antitrust product market for downstream multichannel video  
2 distribution in which alleged harm from transaction would occur, but not requiring  
3 definition of an antitrust product market around the related product of upstream  
4 programming).

5 82. Activision’s gaming content is a related product to High-Performance Gaming Consoles,  
6 Multi-Game Content Subscription Services, Cloud Gaming Subscription services, and the  
7 broader markets discussed above, serving as a substantially important input for the  
8 Relevant Markets. *See* PPF § III.

9 **E. The Proposed Acquisition Has a Reasonable Probability of Substantially  
10 Lessening Competition in the Relevant Markets**

11 **1. Foreclosure of Microsoft’s Rivals in the Relevant Markets**

12 83. As the Supreme Court has explained, “[t]he primary vice of a vertical merger . . . is that,  
13 by foreclosing the competitors of either party from a segment of the market otherwise  
14 open to them, the arrangement may act as a clog on competition, which deprives rivals of  
15 a fair opportunity to compete.” *Brown Shoe v. United States*, 370 U.S. 294, 323–24 (1962)  
16 (cleaned up).

17 84. Foreclosure in the vertical merger context can mean either “foreclosing competitors of  
18 [one party] from access to a potential source of supply, or from access on competitive  
19 terms.” *Yankees Entm’t & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp.  
20 2d 657, 673 (S.D.N.Y. 2002); *see also Sprint Nextel Corp. v. AT&T, Inc.*, 821 F. Supp. 2d  
21 308, 330 (D.D.C. 2011) (explaining rivals “paying more to procure necessary inputs” is  
22 the type of injury “that the antitrust laws were designed to prevent”).

23 85. Importantly, the Clayton Act does not require that there be complete foreclosure to run  
24 afoul of antitrust laws. *See Brown Shoe v. United States*, 370 U.S. 294, 323 n.39 (1962)  
25 (citing S. Rep. No. 81-1775, at 4298 (1950)) (explaining that the goal of Section 7 is “to  
26 arrest restraints of trade in their incipiency and before they develop into full-fledged  
27 restraints violative of the Sherman Act.”); *Brown Shoe v. United States*, 370 U.S. 294,  
28 328–29 (1962) (“[T]he tests for measuring the legality of any particular economic

1 arrangement under the Clayton Act are to be less stringent than those used in applying the  
2 Sherman Act.”).

3 86. “Such foreclosure may be achieved by increasing prices, withholding or degrading access,  
4 reducing service or support, or otherwise increasing the costs or reducing the efficiency  
5 or efficacy” of rival products. *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393,  
6 at \*32 (F.T.C. Mar. 31, 2023); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S.  
7 586, 605 (1957) (finding vertical foreclosure in violation of § 7 although competitors “did  
8 obtain higher percentages of the General Motors business in later years”).

9 87. “Case law provides two different . . . standards for evaluating the likely effect of a vertical  
10 transaction.” *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at \*32 (F.T.C.  
11 Mar. 31, 2023). Harm can be proven through a showing that the combined firm would  
12 have the ability and incentive to foreclose competition and/or through a *Brown Shoe*  
13 vertical multifactor analysis. *Brown Shoe v. United States*, 370 U.S. 294, 328–29 (1962);  
14 see *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (examining the  
15 district court’s analysis under an ability-and-incentive framework).

16 88. The Supreme Court in *Brown Shoe* set forth a multifactor analysis for assessing liability  
17 in the context of vertical mergers. *Brown Shoe v. United States*, 370 U.S. 294, 328–34  
18 (1962). These factors include: “the size of the share of the market foreclosed,” the “nature  
19 and purpose of the arrangement,” any “trend toward concentration in the industry,” and  
20 entry barriers, among others. *Brown Shoe v. United States*, 370 U.S. 294, 328–34 (1962);  
21 *Ford Motor Co. v. United States*, 405 U.S. 562, 566–70 (1972); see also *Illumina, Inc., &*  
22 *Grail, Inc.*, No. 9401, 2023 WL 2823393, at \*33 (F.T.C. Mar. 31, 2023).

23 89. The multifactor analysis of *Brown Shoe* and progeny is not a “precise formula[,]” and not  
24 every factor must be present or even considered to support a finding of liability. *Illumina,*  
25 *Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at \*32 (F.T.C. Mar. 31, 2023) (finding  
26 liability when four *Brown Shoe* liability factors were met). In *Ford Motor*, for example,  
27 the Supreme Court affirmed that a vertical merger was illegal after considering “the effect  
28

1 of raising barriers to entry,” “the number of competitors in the . . . industry,” and the  
2 amount of foreclosure.) *Ford Motor Co. v. United States*, 405 U.S. 562, 566–70 (1972).

3 90. The ability and incentive analysis focuses “on whether a transaction is likely to increase  
4 the ability and/or incentive of the merged firm to foreclose rivals.” *Illumina, Inc., & Grail,*  
5 *Inc.*, No. 9401, 2023 WL 2823393, at \*33 (F.T.C. Mar. 31, 2023); *Union Carbide Corp.*,  
6 59 F.T.C. 614, 1961 WL 65409, at \*34–35 (1961) (finding anticompetitive harm where  
7 the merged firm has the power to exclude competing producers from a segment of the  
8 market).

9 91. While “it is the power [to harm competitors] that counts, not its exercise,” *Union Carbide*  
10 *Corp.*, 59 F.T.C. 614, 1961 WL 65409, at \*19 (1961) (Lipscomb, A.L.J.), courts may  
11 examine a merged firm’s incentives to foreclose the relevant market when considering  
12 whether there is the potential for competitive harm. *See, e.g., Ford Motor Co. v. United*  
13 *States*, 405 U.S. 562, 571 (1972) (finding that because Ford “made the acquisition in order  
14 to obtain a foothold” in the aftermarket spark plug market, “it would have every incentive  
15 to . . . maintain the virtually insurmountable barriers to entry” in that market through  
16 foreclosure); *see also United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019)  
17 (examining the district court’s analysis under an ability and incentive framework).

18 92. Satisfying either the *Brown Shoe* framework or the ability and incentive standard is  
19 enough for the plaintiff to carry its initial burden on liability. *Illumina, Inc., & Grail, Inc.*,  
20 No. 9401, 2023 WL 2823393, at \*33 (F.T.C. Mar. 31, 2023).

21 93. But here, Plaintiff has satisfied its burden as required for a §13(b) preliminary injunction  
22 and has shown a likelihood of success in the administrative proceeding under both the  
23 *Brown Shoe* and the ability and incentive standards. *Infra* Conclusions of Law at § E.E.1.

24 94. Plaintiff has established *Brown Shoe* functional liability factors sufficient to warrant  
25 temporary § 13(b) relief. *See* PPF § IV.

26 95. The Proposed Acquisition’s “nature and purpose” is anticompetitive. *Brown Shoe v.*  
27 *United States*, 370 U.S. 294, 329–30 (1962). The Proposed Acquisition’s purpose is to  
28 transform an independent, “platform-agnostic” source of supply into a captive one

1 controlled exclusively by Microsoft. *See* PPF § IV.A. & IV.B. The nature and purpose  
2 of the Proposed Acquisition is also anticompetitive because the Proposed Acquisition is a  
3 response to other vertical mergers and would in turn contribute to further vertical  
4 consolidation of the industry. *United States v. Sybron Corp.*, 329 F. Supp. 919, 929 (E.D.  
5 Pa. 1971); PPF § I.E.1. Finally, the acquirer’s past conduct following similar transactions  
6 also demonstrates its likely anticompetitive nature. *See* PPF § I.H., IV.C; *see also*  
7 *Warner Commc’ns Inc.*, 742 F.2d at 1162-63 (identifying “prior mergers by the firms in  
8 question” as a factor to consider when analyzing likelihood of success).

9 96. Here, there is also a “trend toward [further] concentration in the industry.” *Brown Shoe v.*  
10 *United States*, 370 U.S. 294, 332-33 (1962); *see also Warner Commc’ns Inc.*, 742 F.2d at  
11 1162-63 (identifying “industry trends toward concentration” as a “[f]actor[] to consider  
12 when determining the impact on competition”). *See* PPF § I.E.1. Post-acquisition, this  
13 trend towards concentration may accelerate as future entrants must either “ante up the  
14 additional capital to vertically integrate or face a number of increased market perils.” *U.S.*  
15 *Steel Corp. v. FTC*, 426 F.2d 592, 605 (6th Cir. 1970).

16 97. Defendants argue that foreclosure of Activision content from rivals in the Relevant  
17 Markets could cause competitive responses by the few existing competitors. But  
18 “remaining vigor cannot immunize a merger if the trend in that industry is toward  
19 oligopoly.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 333 (1962).

20 98. The Proposed Acquisition would also increase entry barriers in the Relevant Markets, yet  
21 another factor that weighs against it. *See Ford Motor Co. v. United States*, 405 U.S. 562,  
22 568-72 (1972) (explaining that, after Ford made its vertical acquisition, “it would have  
23 every incentive to . . . maintain the virtually insurmountable barriers to entry to the  
24 aftermarket”) (citing *Brown Shoe v. United States*, 370 U.S. 294, 323-24 (1962)). *See*  
25 PPF § I.E-G., III., IV.B.

26 99. Courts—including the Supreme Court—have held that the creation or increase of entry  
27 barriers militates in favor of prohibiting a vertical merger. *See Ford Motor Co. v. United*  
28 *States*, 405 U.S. 562, 568-71 (1972); *U.S. Steel*, 426 F.2d at 605. Such barriers can include

1 “possible reliance on suppliers from a vertically integrated firm with whom [a new entrant  
2 in the relevant market] is also competing” and “the psychological ‘fears’ of smaller rivals  
3 competing with large integrated concerns.” *U.S. Steel Corp.*, 426 F.2d at 605 (citing  
4 *Procter & Gamble*, 386 U.S. at 578).

5 100. Microsoft’s past behavior following its acquisition of ZeniMax, another upstream  
6 publisher of AAA video gaming content shows that Microsoft has the strong incentive to  
7 foreclose Activision content from its rivals and substantially lessen competition. *Brown*  
8 *Shoe Co. v. United States*, 370 US. 294, 332 (1962) (“[I]t is apparent both from past  
9 behavior of Brown and from the testimony of Brown’s President, that Brown would use  
10 its ownership of Kinney to force Brown shoes into Kinney stores.”); *U.S. v. Joseph Schlitz*  
11 *Brewing Co.*, 253 F. Supp. 129, 149 (N.D. Cal. 1966).

12 101. Despite Defendants’ insistence that the Multi-Game Content Subscription Services and  
13 Cloud Gaming Subscription Markets are not “markets” due to their relatively small size  
14 compared to gaming more generally, the Clayton Act prohibits transactions that would  
15 substantially lessen competition within “in any line of commerce” regardless of size.  
16 *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 812 (9th Cir. 1961) (“In the statutory  
17 phrase, ‘in any line of commerce,’ the word entitled to emphasis is ‘any’...The line of  
18 commerce need not even be a large part of the business of any of the corporations  
19 involved.”).

20 102. Microsoft has the ability and incentive to use control of Activision content to weaken its  
21 rivals in the Relevant Markets. *See* PPF § IV.A.–D.

22 103. The Government will be able to carry its burden in the merits proceeding without  
23 necessarily specifying the precise actions Microsoft would take to weaken its rivals in the  
24 Relevant Markets. *E.g., United States v. Sybron Corp.*, 329 F. Supp. 919, 928–29 (E.D.  
25 Pa. 1971) (observing that even if “absolute foreclosure” would be unlikely, “there are  
26 many more subtle avenues available”).

27 104. Microsoft has the ability to control access to Activision content in many ways. PPF §  
28 IV. A.

1 105. The evidence, including as to Microsoft’s past behavior after its acquisition of ZeniMax,  
2 demonstrates Microsoft has incentive to foreclose its rivals. *See* PPF §§ IV.B., IV.C.

3 106. Plaintiff has also established that Microsoft has the incentive and ability to foreclose its  
4 rivals in the Relevant Markets, *see* PPF §§ IV.A-C.

5 **2. Harm to Innovation in the Relevant Markets**

6 107. Cognizable anticompetitive harm under Section 7 includes harm to innovation. *See Otto*  
7 *Bock*, 2019 WL 5957363, at \*2 (finding that the acquisition “is likely to cause future  
8 anticompetitive effects in the form of higher prices and less innovation”); *Polypore Int’l,*  
9 *Inc.*, 2010 FTC LEXIS 17, at \*281–82, 552 (F.T.C. Mar. 1, 2010) (Chappell, A.L.J.)  
10 (finding that in one market “innovation competition has been eliminated post-acquisition”  
11 and that innovation had been impacted in another); *R.R. Donnelley & Sons Co.*, No. 9243,  
12 1995 WL 17012641, at \*73 (F.T.C. July 21, 1995) (recognizing that competitive harm  
13 under Section 7 may “include a prediction of adverse effects in competitive dimensions  
14 other than price—reductions in output, product quality, or innovation”); *see also*  
15 *Horizontal Merger Guidelines* § 6.4 (explaining that harm to innovation can be an  
16 anticompetitive effect of a merger). In fact, in *United States v. AT&T, Inc.*, the D.C. Circuit  
17 made clear that it “d[id] not hold that quantitative evidence of price increase is required  
18 in order to prevail on a Section 7 challenge. Vertical mergers can create harms beyond  
19 higher prices for consumers, including decreased product quality and reduced  
20 innovation.” 916 F.3d 1029, 1045–46 (D.C. Cir. 2019).

21 108. In addition, the Federal Trade Commission has long recognized the special importance of  
22 protecting competition in nascent markets, much like the relevant market for Cloud Game

23 Subscription Services here:

24 While monopolies are to be abhorred wherever they appear, it is of particular importance  
25 that they be arrested in an infant industry which appears destined for far greater  
26 expansion and growth. Strong and vigorous competition is the catalyst of rapid  
27 economic progress. Any lessening of competition is therefore doubly harmful in a  
28 new industry since its inevitable effect is to slow down the growth rate of the  
industry. *Union Carbide Corp.*, 59 F.T.C. 614, 1961 WL 65409, at \*35 (Sept. 25,  
1961).

1 109. That the market may be an emerging one poised for rapid growth can make it particularly  
2 susceptible to antitrust harm. *Bazaarvoice*, 2014 WL 203966 at \*76 (“[R]apid  
3 technological progress may provide a climate favorable to increased concentration of  
4 market power rather than the opposite.”) (quoting *Greyhound Computer Corp., Inc. v.*  
5 *IBM Corp.*, 559 F.2d 488, 497 (9th Cir. 1977)).

6 110. The Proposed Acquisition has a reasonable probability of harming innovation competition  
7 in the Relevant Markets. *See* (PPFF § IV.D.3.)

8 **F. Defendants Fail to Meet their Burden to Show Entry Will Be Timely, Likely,**  
9 **and Sufficient to Counteract the Competitive Harm from the Proposed**  
10 **Acquisition**

11 111. At the administrative merits hearing, Defendants will bear the burden of providing  
12 evidence that “ease of entry” rebuts Plaintiff’s *prima facie* case. *Otto Bock*, 2019 WL  
13 5957363, at \*12 (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 n.7 (D.C. Cir. 2001);  
14 *see also H&R Block*, 833 F. Supp. 2d at 73 (noting that defendants “carry the burden to  
15 show” that entry or expansion is sufficient “to fill the competitive void” that would result  
16 from the merger) (internal quotations omitted).

17 112. At this preliminary stage, Defendants would need to go further and leave “no doubt.”  
18 *Whole Foods Mkt.*, 548 F.3d at 1035.

19 113. “The mere existence of potential entrants does not by itself rebut the anti-competitive  
20 nature of an acquisition.” *Chi. Bridge & Iron Co N.V. v. FTC*, 534 F.3d 410, 436 (5th Cir.  
21 2008).

22 114. Entry or expansion must be “‘timely, likely, and sufficient in its magnitude, character, and  
23 scope’ to counteract a merger’s anticompetitive effects.” *United States v. Anthem, Inc.*,  
24 236 F. Supp. 3d 171, 222 (D.D.C. 2017) (citations omitted).

25 115. In assessing whether entry is likely, courts often look to the history of entry, including the  
26 “inability of new firms to gain traction,” to assess “how difficult it is for new entrants to  
27 compete on the same playing field as the merged firm.” *Anthem*, 236 F. Supp. 3d at 222–  
28

24 (dismissing an expert’s “breezy assurances” that developing a provider network is “not a big barrier to entry or expansion”) (citations and quotation marks omitted).

116. Defendants have not shown that entry is timely, likely, and sufficient and thus, fail to demonstrate that it would counteract the competitive harm from the Proposed Acquisition. *See* PPF § IV.E.1.

**G. Defendants Fail to Meet their Burden to Demonstrate That Their Proposed Efficiencies and Any Other Alleged Procompetitive Benefit Offset the Competitive Harm**

117. In the merits proceeding, the stronger the *prima facie* case “the greater [Defendants’] burden of production on rebuttal.” *Polypore*, 2010 WL 9549988 at \*9; *see also* *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001); *Baker Hughes*, 908 F.2d at 991.

118. “The Supreme Court has never expressly approved an efficiencies defense to a § 7 claim.” *Saint-Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 788–89 (9th Cir. 2015). To the contrary, the Court has repeatedly “cast doubt” on such a defense. *Saint-Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 788–89 (9th Cir. 2015). And this Circuit “remain[s] skeptical about the efficiencies defense in general and about its scope in particular.” *Saint-Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015).

119. To the extent they are valid at all, efficiencies cannot be based on self-serving testimony or the estimates of business executives but must be “reasonably verifiable by an independent party.” *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at \*59 (F.T.C. Mar. 31, 2023) (citing *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 72–73 (D.D.C. 2018)); *see also* *United States v. Bertelsmann SE & Co. KGaA*, No. CV 21-2886-FYP, 2022 WL 16949715, at \*35 (D.D.C. Nov. 15, 2022) (finding “defendants had failed to verify the efficiencies” and therefore the court did not consider the evidence).

120. Even assuming the validity of the efficiencies defense, Defendants bear the burden of producing “clear evidence showing that the merger will result in efficiencies that will

1           offset the anticompetitive effects and ultimately benefit consumers.” *Otto Bock*, 2019 WL  
2           2118886, at \*50 (Chappell, A.L.J.) (citing *Penn State Hershey*, 838 F.3d at 350) (emphasis  
3           added); *see also FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 175–76 (3d Cir.  
4           2022). In assessing such efficiency claims, courts have applied strict standards in their  
5           review. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720–21 (D.C. Cir. 2001); *H&R Block*, 833  
6           F. Supp. 2d at 89.

7           121. No court has held that efficiencies could immunize an otherwise anticompetitive merger  
8           from a §13(b) preliminary injunction. *See Otto Bock Healthcare North America, Inc.*, Dkt.  
9           No. 9378, 2019 WL 2118886, at \*50 (F.T.C. May 6, 2019) (Chappell, A.L.J.) (observing  
10           that “[r]esearch does not reveal a case that permitted an otherwise unlawful transaction to  
11           proceed based on claimed efficiencies.”); *United States v. Anthem*, 855 F.3d 345, 353  
12           (D.C. Cir. 2017) (“[I]t is not at all clear that [efficiencies] offer a viable legal defense to  
13           illegality under Section 7.”) (citing *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580,  
14           (1967) (“Possible economies cannot be used as a defense to illegality.”)); *FTC v. Penn  
15           State Hershey*, 838 F.3d 327, 347–48 (3rd Cir. 2016) (“Contrary to endorsing [an  
16           efficiencies] defense, the Supreme Court has instead, on three occasions, cast doubt on its  
17           availability . . . . Based on [the Supreme Court’s past statements] and on the Clayton Act’s  
18           silence on the issue, we are skeptical that such an efficiencies defense even exists.”)  
19           (citations omitted); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 91 (D.D.C.  
20           2011) (“The difficulty in substantiating efficiency claims in a verifiable way is one reason  
21           why courts ‘generally have found inadequate proof of efficiencies to sustain a rebuttal of  
22           the government’s case.’”).

23           122. Courts that do assess such efficiency claims, have applied strict standards in their review.  
24           *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720–21 (D.C. Cir. 2001); *H&R Block*, 833 F. Supp.  
25           2d at 890. Specifically, “the court must undertake a rigorous analysis of the kinds of  
26           efficiencies being urged by the parties in order to ensure that those ‘efficiencies’ represent  
27           more than mere speculation and promises about post-merger behavior.” *FTC v. H.J. Heinz  
28           Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001); *see also FTC v. Wilh. Wilhelmsen Holding ASA*,

1 341 F. Supp. 3d 27, 72 (D.D.C. 2018); *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26,  
2 72–73 (D.D.C. 2009).

3 123. Assuming *arguendo* that the efficiency defense is even potentially available, Defendants  
4 would bear the heavy burden to show that their efficiencies claims are cognizable,  
5 meaning that they are “merger-specific efficiencies that have been verified and do not  
6 arise from anticompetitive reductions in output or service.” *Horizontal Merger Guidelines*  
7 § 10 (“Efficiency claims will not be considered if they are vague, speculative, or otherwise  
8 cannot be verified by reasonable means.”); *see also FTC v. Hackensack Meridian Health,*  
9 *Inc.*, 30 F.4th 160, 176 (3d Cir. 2022); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C.  
10 Cir. 2001); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 137 n.15 (D.D.C. 2016); *Sysco*  
11 *Corp.*, 113 F. 3d Supp. 1, 81–82 (D.D.C. 2015).

12 124. To substantiate each efficiency, Defendants would be required to demonstrate that “it is  
13 possible to ‘verify by reasonable means the likelihood and magnitude of each asserted  
14 efficiency, how and when each would be achieved (and any costs of doing so), how each  
15 would enhance the merged firms’ ability and incentive to compete, and why each would  
16 be merger specific.” *Otto Bock*, 2019 WL 2118886, at \*50 (Chappell, A.L.J.) (citing *H&R*  
17 *Block*, 833 F. Supp. 2d at 89); *see also Hackensack*, 30 F.4th 166-67; *Horizontal Merger*  
18 *Guidelines* § 10.

19 125. To demonstrate merger specificity, Defendants would need to show that the claimed  
20 efficiencies “represent a type of cost saving that could not be achieved without the  
21 merger.” *Wilhelmsen*, 341 F. Supp. at 72; *see also Hackensack*, 30 F.4th at 176 (“*i.e.*, the  
22 efficiencies cannot be achieved by either party alone”).

23 126. Even verifiable, merger-specific, efficiencies are no defense absent “clear evidence” that  
24 they “will offset the anticompetitive effects and ultimately benefit consumers.” *Otto Bock*,  
25 2019 WL 2118886, at \*50 (Chappell, A.L.J.) (citing *Penn State Hershey*, 838 F.3d at 350).  
26 “The critical question raised by the efficiencies defense is whether the projected savings  
27 from the mergers are enough to overcome the evidence that tends to show that possibly  
28 greater benefits can be achieved by the public through existing, continued competition.”

1 *Cardinal Health*, 12 F. Supp. 2d at 63; *see also Anthem*, 855 F.3d at 355–56 (affirming  
2 district court’s rejection of the efficiencies defense “because the amount of cost saving  
3 that is both merger-specific and verifiable would be insufficient to offset the likely harm  
4 to competition”); *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 918 (E.D. Mo.  
5 2020) (“[E]ven granting Defendants every dollar of their claimed efficiencies . . . and  
6 making the implausible assumption that they would pass every penny of those efficiencies  
7 on to their customers, Defendants’ claimed efficiencies still would not offset the likely  
8 competitive harm to those same customers.”).

9 127. Whether characterized as an efficiency defense or some other type of procompetitive  
10 benefit, defendants must offset the anticompetitive concerns, be merger specific, be  
11 verifiable and non-speculative, and not arise from anticompetitive reductions in output or  
12 service. *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 176 (3d Cir. 2022)  
13 (rejecting “[Defendants’] claim they are not making an efficiencies defense” and “thus the  
14 stringent standard developed in other circuits need not apply.”).

15 128. In addition, efficiencies must be in the same relevant market as the anticompetitive  
16 practice. *See United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 370 (1963) (“If  
17 anticompetitive effects in one market could be justified by procompetitive consequences  
18 in another, the logical upshot would be that every firm in an industry could, without  
19 violating § 7, embark on a series of mergers that would make it in the end as large as the  
20 industry leader.”); Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust*  
21 *Principles and Their Application* § 972 (“The general argument favoring an efficiency  
22 defense does not justify the merger that is prima facie illegal in one market at the same  
23 that it achieves substantial economies in a different market.”).

24 129. Courts have repeatedly rejected the argument that unlawful transactions should be  
25 permitted because it better enables them to compete against a larger rival within the  
26 market. *United States v. American Airlines Grp. Inc.*, 2023 WL 3560430, at \*39 (D. Mass.  
27 May 19, 2023) (“The defendants’ desire to keep pace with Delta or to replace it as the  
28

1 strongest domestic competitor in the northeast might be ‘procompetitive’ in the business  
2 sense of the word, but it is not on these facts ‘procompetitive’ under the law.’”).

3 130. In the context of procompetitive benefits, expert testimony that “expresses an opinion  
4 about what conduct the antitrust laws should and should not punish” inappropriately  
5 instructs the factfinder and is either excluded or given no weight. *In re Delta/Airtran*  
6 *Baggage Fee Antitrust Litig.*, 245 F. Supp. 3d 1343, 1363 (N.D. Ga. 2017), *aff’d sub nom.*  
7 *Siegel v. Delta Air Lines, Inc.*, 714 F. App’x 986 (11th Cir. 2018); *Arista Networks, Inc.*  
8 *v. Cisco Sys. Inc.*, No. 16-cv-00923-BLF, 2018 WL 8949299, at \*4 (N.D. Cal. June 15,  
9 2018).

10 131. Where, as here, Defendants have failed to produce evidence that merger-specific,  
11 verifiable efficiencies will “neutralize if not outweigh the harm caused by the loss of  
12 competition and innovation,” *Anthem*, 855 F.3d at 369 (Millett, J., concurring), the  
13 purported efficiencies defense fails. *See* PPF § IV.E.2.

14 132. Defendants cannot reliably quantify the claimed value of any efficiency resulting from the  
15 Proposed Acquisition. *See* PPF § IV.E.2.

16 133. Defendants have also failed to demonstrate that their claimed efficiencies are merger  
17 specific. *See* PPF § IV.E.2.

18 134. Defendants also have not met their burden to show that efficiencies would be passed  
19 through to consumers. *See* PPF § IV.E.2.

20 135. Defendants have failed to demonstrate efficiencies would offset the harm from this  
21 anticompetitive acquisition. *See* PPF § IV.E.2.

#### 22 **H. Proposed Remedies Are of Questionable Relevance in a § 13(b) Proceeding**

23 136. “Likelihood of success on the merits” means on the “antitrust merits” in the administrative  
24 proceeding. *See FTC v. Meta Platforms Inc.*, No. 5:22-cv-04325-EJD, 2022 WL  
25 16637996, at \*6 (N.D. Cal. Nov. 2 2022).  
26  
27  
28

- 1 137. Because a 13(b) Proceeding does not reach the ultimate merits of the transaction, it cannot  
2 resolve what the appropriate remedy would be if the Commission were ultimately to find  
3 a violation. *See United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 556 (1971).
- 4 138. The agreements Microsoft signed with third parties in an attempt to allay antitrust  
5 concerns in this matter constitute a proposed remedy. *See Illumina, Inc., & Grail, Inc.*,  
6 No. 9401, 2023 WL 2823393, at \*48–51 (F.T.C. Mar. 31, 2023) (finding an agreement  
7 “cobbled together well after the Acquisition was announced,” contingent on the Proposed  
8 Acquisition closing and unimplemented when the merger was consummated, to be a  
9 proposed remedy “crafted in anticipation of legal concerns about the Acquisition”).
- 10 139. The Supreme Court has indicated that it is proper to consider proposed remedies only after  
11 a finding of liability, at the subsequent remedy stage of a merits proceeding. *See United*  
12 *States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 556 (1971) (observing that the trial  
13 court in a merits proceeding “naturally did not reach the question of remedy” after having  
14 “found no violation of § 7”); *see also Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL  
15 2823393, at \*51, 74 (F.T.C. Mar. 31, 2023).
- 16 140. Even assuming Defendants’ preferred remedy is relevant to analyzing “likelihood of  
17 success” in a § 13(b) proceeding, it would be as part of Defendants’ rebuttal burden, not  
18 part of the FTC’s initial burden. *Cf. Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL  
19 2823393, at \*51 (F.T.C. Mar. 31, 2023) (proceeding, in dicta, to analyze a proposed  
20 remedy at the rebuttal stage). As such, the proposed remedy would need to dispel any  
21 substantial doubts and serious questions about the transaction’s legality. *See Warner*  
22 *Comm’ns*, 742 F.2d at 1162; *Whole Foods Mkt.*, 548 F.3d at 1035.; *FTC v. H.J. Heinz*  
23 *Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001). Defendants have failed to demonstrate their  
24 proposed remedies would offset the harms. *See* PPF § IV.F.
- 25 141. Proposed remedies and their purported benefits that rely upon speculation or self-serving  
26 evidence proffered by defendants are subject to increased scrutiny. *See Hosp. Corp. of*  
27 *Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) (“Post-acquisition evidence that is  
28 subject to manipulation by the party seeking to use it is entitled to little or no weight.”);

- 1 *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 76-77 (D.D.C. 2009) (“The uncertainty  
2 of the public benefit of [Defendants’ claimed] innovative products is too long in coming  
3 and too uncertain in result to hold much weight against the FTC’s interest in enforcing the  
4 antitrust laws.”); *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 913 (E.D. Mo.  
5 2020) (the merging parties’ professed efficiencies must be “more than mere speculation  
6 and promises about post-merger behavior”); *FTC v. Meta Platforms Inc.*, WL 2346238,  
7 at \*29 (N.D. Cal. Feb. 3, 2023) (“subjective corporate testimony is generally deemed self-  
8 serving and entitled to low weight”); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 99  
9 (D.D.C. 2017) (noting that actions taken “to avoid antitrust scrutiny” are given “little  
10 weight in predicting” that company’s future behavior in a post-merger world).
- 11 142. It is well-established that “conduct remedies are disfavored”—like those proposed by  
12 Defendants—even though they may be the “least burdensome to the defendant,” because  
13 they “risk excessive government entanglement in the market.” *Saint Alphonsus Med. Ctr.*  
14 *Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 793 (9th Cir. 2015).
- 15 143. The Supreme Court has instructed that “all doubts as to the remedy are to be resolved in  
16 [the government’s] favor.” *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S.  
17 316, 334 (1961)).
- 18 144. The terms of agreements are critical to understanding the actual effect of those  
19 agreements. *ATA Airlines, Inc. v. Fed. Exp. Corp.*, 665 F.3d 882, 888 (7th Cir. 2011) (“If  
20 someone tells you ‘I promise you X, but don’t hold me to it,’ the promisor is making clear  
21 that he is not inviting reliance.”); *see also id.* (“The doctrine of indefiniteness that makes  
22 a contract unenforceable when it omits a crucial term that cannot be supplied by  
23 interpretation has particular force when the contract is one between sophisticated  
24 commercial entities and involves a great deal of money.”).
- 25 145. *United States v. AT&T* does not support the proposition that behavioral promises can act  
26 to defuse anticompetitive effects of a transaction. In that case, involving a permanent  
27  
28

1 injunction, the plaintiff failed to prove any likelihood of harm, and the evaluation of  
 2 behavioral promises were mere dicta. 310 F. Supp. 3d 161, 241 & n.51 (D.D.C. 2018).  
 3 Here, by contrast, the FTC has raised serious questions whether the transaction poses a  
 4 reasonable probability of harm to competition.

5 146. Neither does *FTC v. Arch Coal* inform the consideration of remedies in this case. 329 F.  
 6 Supp. 2d 109 (D.D.C. 2004). In *Arch Coal*, the defendants had offered a divestiture of a  
 7 fully functioning production facility prior to the issuance of any complaint against the  
 8 transaction. *Id.* at 113,

9  
 10 147. Finally, *United States v. United Health Grp.*, 2022 WL 4365867 (D.D.C. 2022), does not  
 11 offer a coherent framework for evaluating remedies in a merger case. In that matter,  
 12 another permanent injunction case, the district judge did not find any violation but  
 13 nevertheless seemed to order a remedy. 2022 WL 4365867 at \*27 (D.D.C. 2022).  
 14 Ordinarily, a judge cannot impose an order on a defendant after a finding of no liability.

15  
 16 **I. Temporary Relief to Preserve the Status Quo is in the Public Interest**

17 148. “When the Commission demonstrates a likelihood of ultimate success, a countershooting  
 18 of private equities alone does not justify denial of a preliminary injunction.” *FTC v. Warner*  
 19 *Comm’ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984) (citing *FTC v. Weyerhaeuser Co.*,  
 20 665 F.2d 1072, 1083 (D.C. Cir. 1981)); *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-cv-  
 21 00047, 2011 WL 1219281, at \*60 (“[P]ublic equities are paramount”).

22  
 23 149. “Section 13(b) itself embodies congressional recognition of the fact that divestiture is an  
 24 inadequate and unsatisfactory remedy in a merger case, a point that has been emphasized  
 25 by the United States Supreme Court.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C.  
 26 Cir. 2001) (citation omitted). Defendants’ speculation that divestiture may still be  
 27 “possible” after the administrative proceeding, *Oppo Br.* at 4, is a non sequitur. *See*  
 28

- 1            *Warner Commc'ns Inc.*, 742 F.2d at 1165 (rejecting defendants' argument "that effective  
2 relief would still be possible" following the administrative proceeding).
- 3 150. As there are "substantial doubts" regarding the Proposed Acquisition's legality, *FTC v.*  
4 *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008), the Government has  
5 demonstrated a likelihood of ultimate success. As a result, the public interest favors  
6 granting temporary relief under § 13(b) to preserve the status quo pending the  
7 administrative adjudication. *E.g., Staples, Inc.*, 970 F. Supp. at 1091.
- 8
- 9 151. Public equities include "effective enforcement of the antitrust laws" and ensuring the  
10 Commission's ability to obtain adequate relief if it ultimately prevails on the merits. *FTC*  
11 *v. Univ. Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991). "[T]he preservation of  
12 competition is always in the public interest." *United States v. Tribune Publ'g Co.*, No. CV  
13 16-01822-AB, 2016 WL 2989488, at \*5 (C.D. Cal. Mar. 18, 2016). This includes the  
14 potential for "any new competition that would have occurred, absent the merger." *Staples,*  
15 *Inc.*, 970 F. Supp. at 1091.
- 16 152. In weighing the equities under § 13(b), "public equities receive far greater weight." *FTC*  
17 *v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984). *See also United States v.*  
18 *Tribune Publ'g Co.*, No. CV 16-01822-AB, 2016 WL 2989488, at \*5 (C.D. Cal. Mar. 18,  
19 2016). ("That the government enforces antitrust law on behalf of the public interest  
20 necessarily weighs heavily in the balance-of-hardships calculus."); *FTC v. Meta Platforms*  
21 *Inc.*, No. 5:22-cv-04325-EJD, 2022 WL 16637996, at \*6 (N.D. Cal. Nov. 2, 2022)  
22 ("Public equities, which include 'economic effects and pro-competitive advantages for  
23 consumers and effective relief for the commission,' are accorded greater weight than  
24 private equities.") (quoting *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th  
25 Cir.1989); *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-cv-00047, 2011 WL 1219281,  
26 at \*60 ("[P]ublic equities are paramount").
- 27 153. In a merger case—whether horizontal or vertical—the public interest in ordering a  
28 preliminary injunction is particularly strong due to the difficulty of implementing a post-

1 acquisition divestiture that would effectively restore lost competition. *FTC v. Dean Foods*  
2 *Co.*, 384 U.S. 597, 606 (1966) (“Administrative experience shows that the Commission’s  
3 inability to unscramble merged assets frequently prevents entry of an effective order of  
4 divestiture.”); *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 217 (D.D.C. 2018) (“Divestitures  
5 may not succeed at restoring competition to the post-merger market.”); *FTC v. Advoc.*  
6 *Health Care*, No. 15-cv-11473, 2017 WL 1022015, at \*16 (N.D. Ill. Mar. 16, 2017) (“[I]f  
7 the Court does not enter an injunction and allows the parties to merge, then it may be more  
8 difficult to order effective relief after a trial on the merits by unscrambling merged assets  
9 to recreate pre-merger competition.”) (internal quotations omitted); *FTC v. Sysco Corp.*,  
10 113 F. Supp. 3d 1, 87 (D.D.C. 2015) (finding that a preliminary injunction appropriate  
11 because “the merging parties would have already combined their operations and they  
12 would be difficult to separate, even by a subsequent divestiture order”).

13 154. “[I]f [any] benefits of a merger [would still be] available after the trial on the merits, they  
14 do not constitute public equities weighing against a preliminary injunction.” *ProMedica*  
15 *Health Sys., Inc.*, 2011 WL 1219281, at \*80; *see also H.J. Heinz Co.*, 246 F.3d at 726.

16 155. To the extent private equities are considered, the court “must afford such concerns little  
17 weight,” to avoid “undermin[ing] section 13(b)’s purpose of protecting the ‘public-at-  
18 large, rather than individual private competitors.’” *Univ. Health, Inc.*, 938 F.2d at 1225  
19 (quoting *Nat’l Tea Co.*, 603 F.2d at 697 n.4).

20 156. Defendants’ assertion “that a preliminary injunction would force them to abandon” their  
21 proposed transaction is a private equity at best, and “private equities alone do not outweigh  
22 the Commission’s showing of likelihood of success.” *FTC v. Warner Commc’ns, Inc.*, 742  
23 F.2d 1156, 1165 (9th Cir. 1984); *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 790-1 (N.D.  
24 Ill 1978) (finding executive statements on the record in court that the acquisition will be  
25 abandoned if a preliminary injunction is issued, and the loss of potential procompetitive  
26 benefits as a result, an insufficient private equity to overcome the private equities  
27 contemplated in Section 13(b)).  
28

1 157. The merger agreement does not terminate on July 18, 2023 unless one of the Defendants  
 2 chooses to terminate it. Consequently, the dissolution of the deal would be entirely the  
 3 result of Defendants’ own choice. Such a choice cannot be the basis for a private equity.  
 4 ECF 177 (Defendants’ Proposed Finding of Fact ¶ 8). “[A]lthough the court recognizes  
 5 the time, resources, and effort that Defendants have put into planning this transaction, the  
 6 parties’ stated intention to abandon the transaction prior to the merits proceeding is a  
 7 private equity and cannot on its own overcome the public equities that favor the FTC.”  
 8 *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 73–74 (D.D.C. 2018); *FTC*  
 9 *v. Heinz*, 246 F.3d 708, 727 (D.C. Cir. 2001); see also *FTC v. Whole Foods Mkt.*, 548 F.  
 10 3d 1028, 1041 1042 (D.C. Cir. 2008) (remanding to district court to determine the equities  
 11 but instructing the court to “remember that a ‘risk that the transaction will not occur at  
 12 all,’ by itself, is a private consideration that cannot alone defeat the preliminary  
 13 injunction”); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001) (reversing the  
 14 district court’s finding that a preliminary injunction would cause abandonment of the  
 15 merger because “[i]f the merger makes economic sense now, the appellees have offered  
 16 no reason why it would not do so later”); *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 218  
 17 (D.D.C. 2018) (ordering injunctive relief despite “additional time and resources” spent by  
 18 defendants to litigate the proposed transaction”); *FTC v. Food Town Stores, Inc.*, 539 F.2d  
 19 1339, 1345–46 (4th Cir. 1976); *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 791 (N.D. Ill.  
 20 1978).

21 158. Congress intended temporary relief under § 13(b) to be “readily available to preserve the  
 22 status quo while the FTC develops its ultimate case.” *FTC v. Whole Foods Mkt. Inc.*,  
 23 548 F.3d 1028, 1036 (D.C. Cir. 2008). It is appropriate here.

24 Dated: June 30, 2023

Respectfully submitted,

26 /s/ James H. Weingarten

James H. Weingarten  
 Peggy Bayer Femenella  
 James Abell  
 Cem Akleman  
 J. Alexander Ansaldo

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Michael T. Blevins  
Amanda L. Butler  
Nicole Callan  
Maria Cirincione  
Kassandra DiPietro  
Jennifer Fleury  
Michael A. Franchak  
James Gossmann  
Ethan Gurwitz  
Meredith R. Levert  
David E. Morris  
Merrick Pastore  
Stephen Santulli  
Edmund Saw

Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Tel: (202) 326-3570

Erika Wodinsky

Federal Trade Commission  
90 7th Street, Suite 14-300  
San Francisco, CA 94103

*Counsel for Plaintiff Federal Trade  
Commission*