

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

**Microsoft Corporation,
a corporation,**

and

**Activision Blizzard, Inc.,
a corporation.**

DOCKET NO. 9412

**ANSWER AND DEFENSES
OF RESPONDENT ACTIVISION BLIZZARD, INC.**

Pursuant to Rule 3.12 of the Federal Trade Commission’s (the “FTC” or the “Commission”) Rules of Practice for Adjudicative Proceedings (the “Rules”), Respondent Activision Blizzard, Inc. (“Activision”) hereby answers the Administrative Complaint (the “Complaint”) against Microsoft Corp. (“Microsoft”) and Activision, which the FTC filed in relation to Microsoft’s proposed acquisition of Activision (the “Proposed Acquisition” or the “Transaction”), as follows.

INTRODUCTION

This merger will benefit gamers, employees, and competition globally. Yet the FTC persists in its ideologically-fueled effort to ignore settled law and what decades of experience tells us is good for competition. The FTC’s theory rests on the entirely unfounded assumption that, after acquiring Activision, Microsoft’s Xbox division (“Xbox”) will withhold or degrade other gaming platforms’ access to *Call of Duty* games, harming Xbox’s competitors in three alleged relevant markets. Its theory fails on three principal grounds:

- (i) Xbox lacks the ability, let alone the incentive, to foreclose its competitors from *Call of Duty*. The FTC's conclusory allegations to the contrary ignore all available real-world evidence, resting instead on a purely hypothetical "but for" world that has no basis in reality;
- (ii) The FTC's theory assumes that a gaming platform cannot succeed without *Call of Duty*. The notion that a single game or franchise is the key to the continued competitive vigor of the highly dynamic video game industry is facially absurd and contradicted by the plain facts; and
- (iii) The FTC's alleged relevant markets are made up for this litigation and are entirely nonsensical.

The Complaint, and the misstatements of fact and misapplications of the law reflected therein, do not pass muster.

First, taking *Call of Duty* exclusive would be disastrous for Xbox. If Xbox withheld *Call of Duty* from Sony's PlayStation or other platforms that compete with Xbox, Xbox would immediately forgo billions of dollars in lost game sales and cleave off a massive portion of the gamers that Activision has worked so hard to attract and retain. Not only would Xbox lose players on those other platforms, but this strategy would also destroy the value of the game to Xbox owners: *Call of Duty*'s appeal is in large part due to the investments that Activision has made to allow gamers to play at any time and with anyone they choose, regardless of the platform they or their friends use. Withholding or degrading *Call of Duty* on PlayStation would eliminate this ability to cross-play and destroy the broad *Call of Duty* community that drives the game's success. The player backlash from making the *Call of Duty* franchise Xbox-exclusive would be devastating. It would destroy the trust Xbox has fostered with gamers, leading frustrated gamers to vote with

their wallets and shift their attention away from Xbox offerings. In a world with nearly unlimited gaming alternatives, making *Call of Duty* exclusive is not a plausible outcome.

While these incentives render the FTC's foreclosure strategy wholly implausible, Xbox has additionally already guaranteed that *Call of Duty* will be widely available well into the future by entering into a 10-year agreement with Nintendo to bring *Call of Duty* to the Nintendo Switch and offering a 10-year commitment to Valve to keep *Call of Duty* available on Valve's Steam store. Xbox has publicly offered the same 10-year commitment to Sony [REDACTED]

[REDACTED]. These commitments directly undermine the FTC's supposed concerns and provide complete protection against its alleged theories of harm. For some reason, the FTC refuses to engage on these proposals, other than to accuse Xbox in its Complaint of breaking past promises to the European Commission—an allegation that the European Commission itself publicly refuted the next day.

The FTC's wildest supposition is that Activision content would be available on subscription and cloud gaming services if not for the merger. The FTC alleges that the Transaction would harm Xbox's competitors for multi-game subscription and cloud gaming services because Activision might otherwise one day make its content available to those companies. These allegations are not only facially speculative and conclusory, they are entirely divorced from the facts. Activision's aversion to multi-game subscriptions and cloud gaming is widely known in the industry and is supported by ample testimony and evidence in the investigative record in this case. The only plausible "but for" scenario here is that Activision's new releases would not be available on subscription or cloud gaming services *at all* absent the Transaction, meaning that Xbox's plans to bring Activision games to subscription and cloud can only be viewed as output enhancing and

overwhelmingly procompetitive. A theory premised on the notion that Xbox can withhold from its competitors something they never would have had access to in the first place reeks of desperation and is destined for failure.

Second, the FTC’s assertion that *Call of Duty* games are a “powerful influence” on platform adoption is baseless, contrived, and lacking in any legal significance. Courts have long held that a vertical merger can only cause anticompetitive harm when the acquired input is “essential.” *Call of Duty* is a popular and successful game franchise, but it is far from being “essential” or even a “powerful influence” on consumer behavior, as the FTC contends. Indeed, no game or franchise is important enough to make or break a gaming platform. *Call of Duty* games offered on consoles, PCs, and mobile devices face intense competition from games across all types and genres, and new hit games developed by small studios regularly skyrocket to success seemingly out of nowhere. This highly dynamic environment provides consumers with infinite choices beyond *Call of Duty*. In particular, China-based gaming companies have been aggressively expanding in the U.S. by investing in U.S. gaming companies (*e.g.*, Tencent’s 40% stake in Epic Games, developer of *Fortnite*) and funding start-up gaming studios, all while enjoying protected access to the largest revenue opportunity in gaming at home in China. If Xbox were to cut off any of its platform competitors from *Call of Duty*, gamers using those platforms would simply move to alternative games instead. What’s more, Sony has many high-quality existing games and an unrivaled war chest of intellectual property spanning movies, television, and music, upon which it can draw to develop even more games and franchises. If Xbox were to remove *Call of Duty* from PlayStation, Sony has more than enough weapons in its arsenal to continue to compete effectively.

Third, the FTC’s made-for-litigation markets defy economic reality. The FTC has invented highly gerrymandered relevant product markets—including a “high-performance console” market limited to Xbox and PlayStation consoles, as well as individual markets for multi-game subscriptions and cloud gaming—in an attempt to support its conclusory theories of harm. But even a cursory view of well-established facts demonstrates that these markets are entirely artificial. For example, the concept of a “high-performance console” market that excludes the Nintendo Switch is patently ridiculous. Nintendo competes directly with PlayStation and Xbox, offering many of the same games and targeting the same gamer demographics. Indeed, [REDACTED]

[REDACTED]

[REDACTED]. Different strategies of competing for consumer spend, like the Switch’s innovative mobile capability, do not define a separate relevant market, despite the FTC’s misguided attempts to claim otherwise.

The FTC’s alleged relevant multi-game subscription and cloud gaming markets are similarly unfounded. Multi-game subscription services do not exist in a market unto themselves, but rather are simply another way for gamers to pay for and access games. The investigative record is chock-full of evidence that gamers frequently switch between multi-game subscriptions and other methods of purchasing and downloading games. Indeed, Activision’s aversion to subscription is driven in no small part by the substantial cannibalization effect that multi-game subscriptions have on full game sales—*i.e.*, gamers can and do directly substitute game purchases for subscription access. The FTC’s contrived cloud gaming market suffers a similar flaw: cloud gaming is simply a new—and still lacking in technological capability, commercial feasibility, and user adoption—gaming feature that aims to offer a different way to access content, not a separate market.

Courts regularly reject highly artificial, deliberately drawn markets such as those put forward here, and this case will prove no exception.

* * *

The FTC ignores the significant benefits of the Transaction in favor of a warped attempt to ignore the facts and rewrite antitrust law and settled precedent to protect Xbox's competitors from hypothetical harm that has no basis in marketplace realities. Adding Activision's content to multi-game subscription and cloud gaming, where it would not have been available otherwise, is plainly output enhancing and gives gamers more options on how and where to engage with Activision content. Activision, and particularly its King division, will also enable the acceleration of Xbox's nearly non-existent mobile gaming business, which would enhance competition in the fastest growing segment of gaming. And the Transaction will ultimately expand the capital support and talent available to Activision's game development studios, driving further innovation in new games and technologies.

The FTC's disregard for these benefits to consumers and focus on supposed harms to Xbox's deep-pocketed competitors betrays a fundamental disconnect between the FTC's theories and the antitrust laws' underlying purpose, which is to protect competition, *not* competitors. The FTC is asking this Court to protect the world's largest gaming companies from further competition from Xbox, and thereby turning antitrust on its head. Blinded by ideological skepticism of high-value technology deals and by complaints from competitors, the FTC has not only lost sight of the realities of the intensely competitive gaming industry, but also the guiding principles of our nation's antitrust laws.

GENERAL RESPONSE TO THE COMMISSION'S ALLEGATIONS

Each numbered paragraph below corresponds to the same-numbered paragraph in the Complaint. All allegations not expressly admitted herein are denied. Use of headings and subheadings from the Complaint is solely for the benefit of the reader. Activision does not interpret the headings and subheadings throughout the Complaint as well-pleaded allegations to which any response is required. To the extent such a response is required, Activision denies all allegations of the headings and subheadings of the Complaint.

Further, use of certain terms or phrases defined in the Complaint is not an acknowledgement or admission of any characterization the Commission may ascribe to the defined terms. Unless otherwise defined, capitalized terms shall refer to the capitalized terms defined in the Complaint, but any such use is not an acknowledgement or admission of any characterization the Commission may ascribe to the capitalized terms. Activision additionally does not concede the truthfulness of third-party articles and news sources quoted or referenced in the Complaint. To the extent that a response is required, Activision denies all allegations of the third-party articles and news sources quoted in or referenced in the Complaint.

The Commission's unnumbered introductory paragraph characterizes this action and asserts legal arguments and conclusions to which no response is required. To the extent such a response is required, Activision denies the allegations of the Commission's unnumbered introductory paragraph. Activision additionally denies that the Commission is entitled to any of the relief sought in the Notice of Contemplated Relief on page 23 of the Complaint.

Activision reserves the right to amend and/or supplement this answer at a later stage of the proceedings as permitted by the Rules.

SPECIFIC RESPONSES TO THE COMMISSION'S ALLEGATIONS**NATURE OF THE CASE**

1. Activision denies the allegations of the first, second, third, and fifth sentences of Paragraph 1, except to admit that Microsoft proposes to acquire Activision in a vertical merger that is currently valued at approximately \$68.7 billion. As to the allegations of the second sentence of Paragraph 1, Activision specifically denies that only a small group of firms are capable of developing standout video games for video game consoles. On the contrary, many video game companies other than Microsoft and Activision have published and/or developed highly anticipated and financially successful video games over the past 20 years. The barriers to developing a standout game are low, as there are numerous examples of standout games developed by small and even new studios with tiny budgets and just a small number of developers. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the fourth sentence of Paragraph 1 and denies them on that basis. The remaining allegations of Paragraph 1 set forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the remaining allegations of Paragraph 1.

2. Activision denies the allegations of the first sentence of Paragraph 2, except to admit that Microsoft develops and sells Xbox video game consoles. Activision lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 2 and denies them on that basis, except to admit that Microsoft develops and publishes video game titles such as titles in the *Halo* franchise, that Microsoft offers a video game subscription service through Xbox Game Pass, and that the Xbox Game Pass Ultimate tier of that service includes a “cloud gaming” feature, which aims to enable subscribers to stream certain games across devices such as PCs, tablets, and mobile phones.

3. Activision denies the allegations of Paragraph 3, except to admit that Activision develops and publishes high-quality video games for multiple devices (including video game consoles, PCs, and mobile devices), including games that some industry participants refer to as “AAA”—a subjective term that is not defined by any industry consensus.

4. Activision denies the allegations of Paragraph 4, except to admit that Activision develops *Diablo*, *Overwatch*, and *Call of Duty* video game titles.

5. Activision denies the allegations of Paragraph 5, except to admit that *Diablo* and *Overwatch* video game titles, among other Activision video game titles, have earned more than ██████████ ██████████ in lifetime revenues, that *Overwatch* has been active since 2016, that *Overwatch 2* was released in 2022 and is available to play on Microsoft’s Xbox Series X and Series S consoles (together, “Xbox Series X|S”), Nintendo Switch, Sony PlayStation 5, and PCs, that *Diablo* has been active since the 1990s—including the releases of *Diablo II Resurrected* on the Xbox Series X|S, Nintendo Switch, PlayStations 4 and 5, and PCs, and *Diablo III* on the Xbox One, PlayStation 4, Nintendo Switch, and PCs—and that *Diablo IV* is currently anticipated to be released in 2023.

6. To the extent the allegations of the first sentence of Paragraph 6 refer to Activision, Activision admits that it recognizes that *Call of Duty* is one of its “key product franchises” with respect to its own overall business, along with *Candy Crush* and *World of Warcraft*. To the extent the allegations of the first sentence of Paragraph 6 concern parties other than Activision, Activision lacks knowledge or information sufficient to form a belief as to their truth and denies them on that basis. Activision denies the allegations of the second sentence of Paragraph 6, except to admit that it released the first entry in the *Call of Duty* franchise in 2003 and that it has released at least one installment in the *Call of Duty* franchise every year since 2003. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of

Paragraph 6 and denies them on that basis, including because the term “substantial resources” is vague and undefined. To the extent the allegations of the fourth sentence of Paragraph 6 refer to Activision, Activision denies them, except to admit that [REDACTED] Activision studio is generally working on a given entry in the *Call of Duty* franchise at the same time. To the extent the allegations of the fourth sentence of Paragraph 6 concern parties other than Activision, Activision lacks knowledge or information sufficient to form a belief as to their truth and denies them on that basis.

7. Activision denies the allegations of the first, second, and third sentences of Paragraph 7, except to admit that *Call of Duty* is a successful game franchise, that the first entry in the *Call of Duty* franchise launched in 2003, and that the *Call of Duty* franchise generated approximately \$27 billion in revenue from 2003 through 2020. Activision admits that the fourth sentence of Paragraph 7 purports to reference an internal Activision strategy document. Activision refers to that document, to the extent it exists, for its contents and context and denies any characterization thereof, including because FTC’s reference to [REDACTED]

[REDACTED]. Activision denies the remaining allegations of Paragraph 7, except to admit that *Call of Duty: Black Ops II* was released on November 12, 2012 and grossed \$1 billion in retail sales within 15 days of its release, and that *Call of Duty: Modern Warfare II* was released on October 28, 2022 and grossed \$1 billion in retail sales within 10 days of its release.

8. To the extent the allegations of the first sentence of Paragraph 8 suggest that Activision’s content is “extremely important for” video game consoles, Activision lacks

knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of Paragraph 8 and denies them on that basis, including because the phrase “extremely important for” is vague and undefined. Activision otherwise denies the remaining allegations of Paragraph 8, including because there is no evidence to suggest that Activision’s content drives adoption of video game consoles or video game platforms more generally. For example, Activision has not released any *Call of Duty* titles on Nintendo’s Switch video game console, yet the Switch has experienced widespread success. As an additional example, Activision made *Call of Duty* for PC exclusive to its Battle.net platform from 2018 to 2022, and during that period, [REDACTED]. Meanwhile, Valve’s Steam platform continued to thrive during that period, growing from 90 million monthly active users in 2018 to over 120 million in 2022.

9. Activision admits the allegations of the first sentence of Paragraph 9. Activision lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 9 and denies them on that basis.

10. Paragraph 10 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 10.

11. Activision denies the allegations of Paragraph 11.

12. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12 and denies them on that basis, except to admit that Microsoft acquired ZeniMax Media Inc. (“ZeniMax”) in March 2021, that ZeniMax is the parent company of a game developer, and that Microsoft has publicly announced that it may make some future single-player ZeniMax games exclusive to Xbox and PC when they are initially released.

13. Activision admits that the first sentence of Paragraph 13 purports to quote from one or more unidentified sources. Activision refers to any such source, to the extent it exists, for its

contents and context and denies any characterization thereof. Activision denies the allegations of the second sentence of Paragraph 13, except to admit that Activision has financial, reputational, and other incentives to offer its titles broadly across multiple platforms because doing so drives user adoption of Activision's products and user engagement with those products, which in turn also improves the user experience on those games, and that those financial, reputational, and other incentives will remain regardless of who owns Activision's content. The remaining allegations of Paragraph 13 set forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the remaining allegations of Paragraph 13.

14. Paragraph 14 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 14.

JURISDICTION

15. Paragraph 15 sets forth legal conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 15.

16. Paragraph 16 sets forth legal conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 16.

17. Paragraph 17 sets forth legal conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 17.

RESPONDENTS AND THE PROPOSED ACQUISITION

18. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 18 and denies them on that basis, except to admit that Microsoft is a publicly traded technology company that is incorporated in the State of Washington and headquartered in Redmond, Washington.

19. Activision admits the allegations of Paragraph 19.

20. Activision admits the allegations of Paragraph 20.

BACKGROUND

21. Activision denies the allegations of the first sentence of Paragraph 21. The second sentence of Paragraph 21 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of the second sentence of Paragraph 21.

22. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 22 and denies them on that basis.

23. Activision denies the allegations of the first sentence of Paragraph 23, except to admit that the popularity of gaming is expected to continue, particularly on mobile devices. Activision lacks knowledge or information sufficient to form a belief as to the allegations of the second and third sentences of Paragraph 23 and denies them on that basis.

24. Activision denies the allegations of Paragraph 24, except to admit that video game content can be played on consoles, PCs, and mobile devices.

25. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 25 and denies them on that basis, except to admit that consumers consider a variety of factors in deciding whether to purchase a specific video game console.

26. Activision denies the allegations of Paragraph 26, except to admit that Microsoft, Sony, and Nintendo have each manufactured popular video game consoles for over two decades and that they currently manufacture the Xbox Series X|S, PlayStation 5, and Switch video game consoles, respectively.

27. Activision denies the allegations of Paragraph 27, except to admit that video game console makers have periodically released new video game consoles since the 1970s and that there

has been vigorous competition in the gaming industry for decades, including competition among video game console makers.

28. Activision denies the allegations of Paragraph 28, except to admit that Microsoft, Sony, and Nintendo all currently offer competing gaming consoles, that Microsoft launched the Xbox Series X and Series S consoles in November 2020, that Sony launched the PlayStation 5 and PlayStation 5 Digital Edition consoles in November 2020, and that Nintendo launched the Switch console in March 2017.

29. Activision denies the allegations of the first sentence of Paragraph 29, except to admit that the Xbox Series X|S are two Xbox consoles offered by Microsoft. Activision lacks knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 29 and denies them on that basis.

30. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 30 and denies them on that basis.

31. Activision lacks knowledge or information sufficient to form a belief as to the allegations of the first sentence of Paragraph 31 and denies them on that basis. Activision admits that the second sentence of Paragraph 31 purports to quote from one or more sources. Activision refers to any such source, to the extent it exists, for its contents and context and denies any characterization thereof.

32. Activision admits that the first sentence of Paragraph 32 purports to quote from one or more unidentified sources. Activision refers to any such source, to the extent it exists, for its contents and context and denies any characterization thereof. Activision otherwise lacks knowledge or information sufficient to form a belief as to the allegations of the first sentence of Paragraph 32 and denies them on that basis. Activision lacks knowledge or information sufficient

to form a belief as to the allegations of the second sentence of Paragraph 32 and denies them on that basis.

33. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 33 and denies them on that basis, except to admit that the Nintendo Switch allows portable, handheld use and that the Xbox Series S enables the ability to play the same video games as the Xbox Series X.

34. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 34 and denies them on that basis, except to admit that, for the last several decades, consumers have accessed video games by purchasing physical copies of such games and that, presently, consumers can also access video games by downloading digital copies of such games on their video game consoles, PC, or other devices.

35. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 35 and denies them on that basis, except to admit that certain companies in the video game industry now offer multi-game subscription services that can take a variety of forms but generally allow gamers to access a catalog of games for a fixed period of time, and that Microsoft launched its own multi-game subscription service, Xbox Game Pass, in 2017.

36. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 36 and denies them on that basis, except to admit that Microsoft offers subscription services to consumers that allow consumers to play a catalog of games through its Xbox Game Pass service and that Microsoft also offers users a cloud gaming feature (*i.e.*, a feature that aims to provide users the ability to stream games from an off-site server to certain web-enabled devices) through the Xbox Game Pass Ultimate tier of its Xbox Game Pass service.

37. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 37 and denies them on that basis, except to admit that Sony offers a subscription service that allows consumers to play a catalog of games through its PlayStation Plus service and that Sony offers users a cloud gaming feature through its PlayStation Plus Premium service.

38. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 38 and denies them on that basis, except to admit that Electronic Arts Inc. (“EA”) and Ubisoft Entertainment SA (“Ubisoft”) each offer subscription services that allow consumers to play a catalog of games through their EA Play and Ubisoft+ services, respectively.

39. Activision admits the allegations of the first sentence of Paragraph 39. Activision denies the allegations of the second and third sentences of Paragraph 39, except to admit that cloud gaming technology is designed to be used in certain circumstances to enable players to stream certain games that run on remote hardware without downloading the game locally, and that cloud gaming technology requires complex and demanding cloud computing communications, which, owing to the interactive nature of video games, is significantly more resource intensive than streaming of video alone.

40. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 40 and denies them on that basis.

41. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 41 and denies them on that basis, except to admit that Microsoft offers users a cloud gaming feature through the Xbox Game Pass Ultimate tier of its Xbox Game Pass service.

42. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 42 and denies them on that basis, except to admit that Amazon.com Inc., Nvidia Corporation, and Alphabet Inc. (“Google”) currently offer a cloud gaming feature through their Luna, GeForce NOW, and Stadia services, respectively, and that Google announced that it will discontinue its Stadia service in January 2023.

43. Activision denies the allegations of the first two sentences of Paragraph 43. Activision lacks knowledge or information sufficient to form a belief as to the allegations of the third and fourth sentences of Paragraph 43 and denies them on that basis.

44. Activision lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 44 and denies them on that basis.

45. Activision denies the allegations of Paragraph 45.

46. Activision denies the allegations of Paragraph 46, except to admit that Activision, EA, Take-Two Interactive Software, Inc. (“Take-Two”), and Ubisoft are video game publishers and that Activision publishes video game titles in the *Call of Duty* franchise, EA publishes video game titles in the *FIFA* franchise, Take-Two publishes video game titles in the *Grand Theft Auto* franchise, and Ubisoft publishes video game titles in the *Assassin’s Creed* franchise.

47. Activision denies the allegations of the first sentence of Paragraph 47. Activision lacks knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 47 and denies them on that basis, except to admit that Epic Games is the maker of *Fortnite*, a free-to-play game that is available in the United States and other parts of the world on Microsoft Xbox Series X|S, Nintendo Switch, Sony PlayStation 5, PCs, and other devices.

48. Activision lacks knowledge or information sufficient to form a belief as to the allegations of the first and second sentences of Paragraph 48 and denies them on that basis. Activision denies the allegations of the third sentence of Paragraph 48.

49. Activision denies the allegations of Paragraph 49, except to admit that Microsoft publishes games in the *Elder Scrolls*, *Halo*, and *Forza* franchises and that Sony publishes games in the *God of War*, *MLB The Show*, and *Spider-Man* franchises, among numerous others.

50. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 50 and denies them on that basis, except to admit that *Halo Infinite* is a title from Microsoft's *Halo* franchise, and that Microsoft released *Halo Infinite* in November 2021.

51. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 51 and denies them on that basis.

52. Activision denies the allegations of the first sentence of Paragraph 52. Activision lacks knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 52 and denies them on that basis.

53. Activision denies the allegations of the first sentence of Paragraph 53, except to admit that gaming companies sometimes obtain licenses from third-party game developers to make certain games exclusive to their platform. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the second and third sentences of Paragraph 53 and denies them on that basis.

54. Activision denies the allegations of the first, second, and fourth sentences of Paragraph 54, except to admit that video game platforms sometimes reference the size of their player base and many other factors in negotiations with publishers and developers. Activision

lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of Paragraph 54 and denies them on that basis.

55. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 55 and denies them on that basis.

56. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 56 and denies them on that basis.

57. Activision denies the allegations of the first sentence of Paragraph 57, including because the term “especially valuable” is vague and undefined. Activision admits that the second sentence of Paragraph 57 purports to quote from an investigational hearing. Activision refers to the source for its contents and context and denies any characterization thereof. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of Paragraph 57 and denies them on that basis.

58. Activision denies the allegations of the first and second sentences of Paragraph 58. Activision admits that the third sentence of Paragraph 58 purports to quote from one or more unidentified sources and/or documents. Activision refers to any such source, to the extent it exists, for its contents and context and denies any characterization thereof.

59. Activision denies the allegations of the first sentence of Paragraph 59. Activision admits that the second sentence of Paragraph 59 purports to quote from one or more unidentified sources. Activision refers to any such source, to the extent it exists, for its contents and context and denies any characterization thereof. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of Paragraph 59. Activision admits the allegations of the fourth sentence of Paragraph 59. Activision lacks knowledge or

information sufficient to form a belief as to the truth of the allegations of the fifth sentence of Paragraph 59.

RELEVANT MARKETS

60. Paragraph 60 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 60, except to admit that the Proposed Acquisition will result in a combined firm.

61. Paragraph 61 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 61.

62. Paragraph 62 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 62.

63. Paragraph 63 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 63.

64. Paragraph 64 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 64.

65. Activision denies the allegations of the first sentence of Paragraph 65. The second sentence of Paragraph 65 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of the second sentence of Paragraph 65.

66. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 66 and denies them on that basis, except to admit that Microsoft, Sony, and Nintendo all currently offer competing video game consoles.

(a) Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 66(a) and denies them on that basis.

(b) Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 66(b) and denies them on that basis.

(c) Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 66(c) and denies them on that basis.

(d) Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 66(d) and denies them on that basis.

(e) Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 66(e) and denies them on that basis, except to admit that Microsoft launched the Xbox Series X and Series S consoles in November 2020, that Sony launched the PlayStation 5 and PlayStation 5 Digital Edition consoles in November 2020, and that Nintendo launched the Switch console in March 2017.

67. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of Paragraph 67 and denies them on that basis. Activision admits that the second sentence of Paragraph 67 purports to quote from one or more unidentified sources. Activision refers to any such source, to the extent it exists, for its contents and context and denies any characterization thereof.

68. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 68 and denies them on that basis, except to specifically deny any implication that Nintendo's hardware is reserved for or tends to be used more for "casual" or "family gaming," particularly given that Activision itself has published titles on Nintendo's Switch that could not plausibly be described as "casual" or "family" games. These include titles in the *Overwatch* and *Diablo* franchises that feature "T for Teen" (for gamers aged 13 and up) and "M for Mature" (for gamers aged 17 and up) ratings, respectively, by the Entertainment Software

Review Board. Activision further denies that such distinctions are competitively relevant and denies any implication that Nintendo Switch appeals to a different gaming audience than Microsoft and Sony consoles; in fact, young adults aged 20 to 25 make up the largest share of the Switch's player demographic and adults well into their 40s make up a significant proportion of the Switch's user base.

69. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 69 and denies them on that basis.

70. Paragraph 70 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 70.

71. Activision denies the first and third sentences of Paragraph 71. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the fourth sentence of Paragraph 71 and denies them on that basis. The second and fifth sentences of Paragraph 71 set forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of the second and fifth sentences of Paragraph 71.

72. Paragraph 72 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 72.

73. Paragraph 73 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 73.

74. Paragraph 74 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 74.

75. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 75 and denies them on that basis, except to admit that Microsoft

offers subscription services to consumers that allow consumers to play a catalog of games through its Xbox Game Pass service and that Microsoft also offers users a cloud gaming feature through the Xbox Game Pass Ultimate tier of its Xbox Game Pass service.

76. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 76 and denies them on that basis.

77. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 77 and denies them on that basis.

78. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 78 and denies them on that basis.

79. The first sentence of Paragraph 79 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of the first sentence of Paragraph 79. Activision lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 79 and denies them on that basis.

80. The first sentence of Paragraph 80 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of the first sentence of Paragraph 80. Activision lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 80 and denies them on that basis.

81. The first sentence of Paragraph 81 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of the first sentence of Paragraph 81. Activision lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 81 and denies

them on that basis, except to admit that in some circumstances mobile-native games can have different levels of complexity and game quality than console- and PC-native games.

82. Paragraph 82 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 82.

83. Paragraph 83 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 83.

84. Paragraph 84 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 84.

85. The first sentence of Paragraph 85 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of the first sentence of Paragraph 85. Activision lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 85 and denies them on that basis.

86. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 86 and denies them on that basis.

87. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 87 and denies them on that basis.

88. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 88 and denies them on that basis.

89. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 89 and denies them on that basis.

90. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 90 and denies them on that basis.

91. Paragraph 91 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 91.

92. Paragraph 92 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 92.

93. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the first, third, fourth, and fifth sentences of Paragraph 93 and denies them on that basis. To the extent the allegations of the second sentence of Paragraph 93 refer to Activision, Activision admits that the second sentence of Paragraph 93 purports to reference one or more unidentified Activision sources. Activision refers to any such source, to the extent it exists, for its contents and context and denies any characterization thereof. To the extent the allegations of the second sentence of Paragraph 93 concern parties other than Activision, Activision lacks knowledge or information sufficient to form a belief as to their truth and denies them on that basis.

94. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 94 and denies them on that basis.

95. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 95 and denies them on that basis, except to admit that cloud gaming entails significant technological demands.

ANTICOMPETITIVE EFFECTS

96. Paragraph 96 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 96.

97. Activision denies the allegations of Paragraph 97, except to admit that it is valuable for video game platforms to offer a variety of content, including, but not limited to, some content that some industry participants refer to as “AAA” content. Activision specifically denies that such

“AAA” content is a “substantially important input” for video game platforms, particularly given the success of video game content offered by a wide array of video game publishers and developers over the course of the past 20 years, and because the term “substantially important” is vague and undefined.


98. Activision denies the allegations of Paragraph 98. Activision specifically denies the implication that it is one of only a few developers able to produce high-quality and successful gaming franchises.

99. Activision denies the allegations of Paragraph 99, except to admit that it is valuable for video game platforms to offer a variety of content, including, but not limited to, some content that some industry participants refer to as “AAA” content.

100. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 100 and denies them on that basis.

101. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 101 and denies them on that basis.

102. Activision denies the allegations of the first and second sentences of Paragraph 102, including because the term “powerful influence” is vague and undefined, except to admit that it

. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of Paragraph 102 and denies them on that basis.

103. Activision denies the allegations of Paragraph 103.

104. Activision denies the allegations of Paragraph 104.

105. Activision denies the allegations of Paragraph 105.

106. Activision denies the allegations of the first sentence of Paragraph 106. Activision admits the allegations of the second sentence of Paragraph 106. Activision admits that the third sentence of Paragraph 106 purports to quote from one or more unidentified sources. Activision refers to any such source, to the extent it exists, for its contents and context and denies any characterization thereof. Activision denies the allegations of the fourth sentence of Paragraph 106.

107. Activision admits the allegations of the first and second sentences of Paragraph 107. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third and fourth sentences of Paragraph 107 and denies them on that basis. Activision denies the allegations of the fifth sentence of Paragraph 107.

108. Activision denies the allegations of Paragraph 108, except to admit that gaming is a growing industry.

109. Activision denies the allegations of the first sentence of Paragraph 109, except to admit that Activision has financial incentives to maximize its profits from the sale of its video game titles. Activision denies the allegations of the second and third sentences of Paragraph 109.

110. Activision denies the allegations of Paragraph 110.

111. Activision denies the allegations of the first sentence of Paragraph 111. Activision admits that the second sentence of Paragraph 111 purports to reference a 2019 Activision presentation. Activision refers to that presentation, to the extent it exists, for its contents and context and denies any characterization thereof.

112. Activision denies the allegations of the first and second sentences of Paragraph 112. Activision lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 112 and denies them on that basis.

113. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 113 and denies them on that basis.

114. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 114 and denies them on that basis, except to admit that Microsoft acquired ZeniMax, that ZeniMax is the parent company of a game developer, and that Microsoft has publicly announced that it may make some future single-player ZeniMax games exclusive to Xbox and PC when they are initially released.

115. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 115 and denies them on that basis.

116. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of Paragraph 116 and denies them on that basis. Activision denies the second sentence of Paragraph 116.

117. Activision lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of Paragraph 117 and denies them on that basis. Activision denies the allegations of the second sentence of Paragraph 117.

118. Paragraph 118 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 118.

119. Paragraph 119 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 119.

ABSENCE OF COUNTERVAILING FACTORS

120. Paragraph 120 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 120.

121. Paragraph 121 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 121.

VIOLATION

122. Activision states that, to the extent a separate response is required as to Paragraph 122, Activision incorporates the responses to Paragraphs 1 through 121 as though fully stated herein.

123. Paragraph 123 sets forth legal arguments and conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 123.

124. Paragraph 124 sets forth legal conclusions to which no response is required. To the extent a response is required, Activision denies the allegations of Paragraph 124.

AFFIRMATIVE AND OTHER DEFENSES

Activision asserts the following defenses with respect to the causes of action alleged in the Complaint, without assuming the burden of proof or persuasion where such burden rests on the Commission. Activision has not knowingly or intentionally waived any applicable defenses, and it reserves the right to assert and rely upon other applicable defenses that may become available or apparent throughout the course of the action. Activision reserves the right to amend, or seek to amend, its answer or affirmative defenses.

1. The Complaint fails to state a claim upon which relief can be granted.
2. The Complaint fails to allege a plausible relevant product market or markets.
3. The Complaint fails to allege a plausible relevant geographic market.
4. The Complaint fails to allege undue share in any plausibly defined relevant market.
5. The Complaint fails to allege any harm to competition.
6. The Complaint fails to allege any harm to consumers or consumer welfare.

7. The combination of Microsoft's gaming business with Activision's business will be procompetitive. The Transaction will result in substantial acquisition-specific efficiencies, synergies, and other procompetitive effects that will directly benefit consumers. These benefits will greatly outweigh any and all proffered anticompetitive effects.

8. There will be no harm to competition, consumers, or consumer welfare because there is, and will continue to be, entry and expansion by competitors, which is timely, likely, and sufficient.

9. The alleged harm to potential competition is not actionable.

10. The Commission cannot provide clear proof that the combination of Microsoft's gaming business and Activision's business would restrain trade in the alleged markets for "multi-game content library subscription services" or "cloud gaming subscription services" because but for the Transaction, Activision's games would not be available on any such service.

11. The Commission fails to allege a time frame for the alleged anticompetitive effects.

12. The Commission is not entitled to relief because none of Activision's conduct identified in the Complaint is actionable—independently or in the aggregate—under the antitrust laws.

13. Microsoft's offers of binding contractual commitments to continue to offer certain titles like *Call of Duty* to other gaming companies, including Nintendo and Sony, for at least ten years address all of the alleged anticompetitive effects in the alleged markets and ensure that there will be no harm to competition or consumers.

14. The Commission's claims are too speculative to support any claim on which relief can be granted.

15. Neither the filing of this administrative action nor the contemplated relief is in the public interest, pursuant to 15 U.S.C. § 45.

16. The Complaint reflects improper selective enforcement of the antitrust laws.

17. These proceedings are invalid because the structure of the Commission as an independent agency that wields significant executive power, and the associated constraints on removal of the Commissioners and other Commission officials, violates Article II of the U.S. Constitution and the separation of powers.

18. These proceedings are invalid because adjudication of the Commission's Complaint by the Administrative Law Judge and the Commission violates Article III of the U.S. Constitution and the separation of powers.

19. The Commission's procedures arbitrarily subject Activision to administrative proceedings rather than to proceedings before an Article III judge in violation of Activision's right to Equal Protection under the Fifth Amendment.

20. The Commission's procedures violate Activision's right to procedural due process under the Due Process Clause of the Fifth Amendment.

21. The structure of these administrative proceedings, in which the Commission both initiates and finally adjudicates the Complaint against Activision, violates Activision's Fifth Amendment Due Process right to adjudication before a neutral arbiter.

22. These administrative proceedings violate Activision's Fifth Amendment Due Process right to adjudication before a neutral arbiter as applied to Activision because the Commission has prejudged the merits of the instant action.

23. The Commission's charges under Section 5 of the Federal Trade Commission Act are unlawful to the extent the Commission purports to apply Section 5 beyond the metes and bounds of the Sherman Act and the Clayton Act.

NOTICE OF CONTEMPLATED RELIEF

WHEREFORE, Activision Blizzard, Inc. requests that the Commission enter judgment in its favor and enter an order:

1. Denying the FTC's contemplated relief;
2. Dismissing the Complaint in its entirety with prejudice;
3. Awarding Activision its costs of suit, including expert fees and reasonable attorneys' fees, as may be allowed by law; and
4. Awarding such other and further relief as the Administrative Law Judge may deem proper.

DATED: December 22, 2022

By: /s/ Steven C. Sunshine

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I further certify that I caused to be delivered via electronic mail a copy of the foregoing document to:

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