PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Microsoft Corp.** a corporation; and **Activision Blizzard, Inc.,** a corporation.	**Docket No. 9412**

COMPLAINT COUNSEL'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PUTATIVE PROCOMPETITIVE EFFECTS OF RESPONDENTS' AGREEMENTS WITH THIRD PARTIES

Pursuant to 16 C.F.R. § 3.22 and the December 15, 2023, Third Revised Scheduling Order in this matter, Complaint Counsel respectfully moves the Court to exclude evidence of any putative procompetitive effects of Respondents' agreements with third parties, including Ubisoft Entertainment SA ("Ubisoft"), Sony Interactive Entertainment, LLC ("Sony"), Nintendo Co., Ltd. ("Nintendo"), Boosteroid Ukraine, Nvidia Corporation ("Nvidia"), Cloudware S.L. ("Nware"), and Ubitus KK. As explained in the attached Memorandum, Respondents should be precluded from introducing such evidence for several independent reasons. First, Respondents have claimed both that no analysis of the agreements' effects exists but also that any such analysis is privileged. If no analysis of the agreements' effects exists, then any testimony from Respondents' executives alleging the agreements will restore any lost competition would be

unreliable, lacking foundation, and speculative. If such analyses do exist, Respondents cannot selectively waive the privilege to introduce evidence about such effects. Second, it would be unfair to allow testimony about the effects of the agreements with Ubisoft and Sony from executives named on Respondents' witness list because Respondents refused to make those witnesses available for depositions on those agreements. Third, the Court should exclude as irrelevant all evidence of Respondents' agreements with entities that do not offer services in the United States.

Dated: February 5, 2024

Respectfully submitted,

s/ James H. Weingarten

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In the Matter of **Microsoft Corp.** a corporation; and **Activision Blizzard, Inc.,** a corporation.	**Docket No. 9412**

[PROPOSED] ORDER

Upon consideration of Complaint Counsel's Motion in Limine to Exclude Evidence of Putative Procompetitive Effects of Respondents' Agreements with Third Parties (the "Motion"), and any papers and argument in support of or in opposition to the Motion, it is hereby:

ORDERED that the Motion is GRANTED;

FURTHER ORDERED that any evidence of the purported procompetitive benefits of Respondents' agreements with third parties—including Respondents' agreements with Ubisoft Entertainment SA, Sony Interactive Entertainment, LLC, Nintendo Co., Ltd., Boosteroid Ukraine, Nvidia Corporation, Cloudware S.L. ("Nware"), and Ubitus KK—is inadmissible;

FURTHER ORDERED that executives named on Respondents' witness list are precluded from testifying about the effects of the agreements with Ubisoft and Sony;

FURTHER ORDERED that Respondents' agreements with firms that do not offer services in the United States are inadmissible; and

FURTHER ORDERED that Respondents may not introduce any such evidence at the evidentiary hearing of this matter.

Dated:

_____
D. Michael Chappell
Chief Administrative Law Judge

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OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Microsoft Corp.** a corporation; and **Activision Blizzard, Inc.,** a corporation.	**Docket No. 9412**

MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PUTATIVE PROCOMPETITIVE EFFECTS OF RESPONDENTS' AGREEMENTS WITH THIRD PARTIES

This case is about whether the combination of Respondent Microsoft Corporation ("Microsoft") and Activision Blizzard, Inc. ("Activision") will create a company with the ability and incentive to withhold Activision video game content and thereby harm competition and consumers in multiple markets. In hopes of receiving regulatory approval, Microsoft executed agreements with third parties that Respondents assert are procompetitive because they will make Activision games more widely available to consumers. Discovery revealed that these agreements suffer from many defects and supports excluding evidence that these agreements supposedly benefit competition.

First, after repeated inquiries, Respondents adamantly stated that no analysis of these agreements' effects on competition was undertaken or, if any analysis was done, it is privileged

and undiscoverable. If Respondents never analyzed the agreements' effects, then any testimony from their witnesses about such effects would be unreliable, lacking foundation, and speculative. If analyses exist, then the sword/shield doctrine precludes Respondents from selectively waiving privilege and introducing evidence of the agreements' supposed procompetitive effects.

Second, testimony from Respondents' executives about their agreement with Ubisoft Entertainment SA ("Ubisoft") and Microsoft's executed agreement with Sony Interactive Entertainment, LLC ("Sony") should be precluded because Respondents refused to make those executives available for deposition about those agreements.

Third, Boosteroid Ukraine, Cloudware S.L. ("Nware") and Ubitus KK are foreign, and any non-U.S. customers served are irrelevant to deciding how this merger affects American consumers.

FACTUAL BACKGROUND

A. Respondents' Side Agreements with Third Parties

Microsoft announced its proposed acquisition of Activision on January 18, 2022 (the "Acquisition"). Nearly one year into the antitrust regulatory review, Microsoft hastily cobbled together side agreements with some of its competitors in an attempt to blunt regulators' concerns about the Acquisition.

On December 7, 2022, the day before the Commission issued a complaint to challenge the Acquisition in this Court, Microsoft signed a letter of intent purporting to bring some future Activision *Call of Duty* games to Nintendo. On February 10, 2023, Microsoft and Nintendo signed a definitive agreement. Both the December 6, 2022 Letter of Intent and the February 10, 2023 agreement constitute the "Nintendo Agreement" that is the subject of this motion.

On February 20, 2023, the day before Microsoft appeared before the European Commission at a hearing on the Acquisition, Microsoft signed an agreement purporting to bring Activision games to Nvidia's GeForce Now cloud gaming service ("Nvidia Agreement").

Microsoft subsequently entered into agreements purporting to bring Activision games to foreign cloud-gaming providers Boosteroid Ukraine,[1] Ubitus KK,[2] and Nware,[3] which are not amenable to service of process in the United States. {[redacted]}[4] and other record evidence indicates their U.S. market presence (if any) is de minimis. Microsoft's own executives and hired economic expert are unaware of these firms' locations, services offered, or number of users.[5]

On July 15, 2023, Microsoft executed an agreement with Sony that purports to keep some of Activision's content on Sony's video game consoles for a period of time ("Sony Agreement"). However, even now, Microsoft and Sony {[redacted]}

On August 21, 2023, in response to a United Kingdom order effectively blocking this merger as anticompetitive, Respondents executed a set of agreements with Ubisoft, a French

[1] Signed March 9, 2023.
[2] Signed March 11, 2023.
[3] Signed April 27, 2023.
[4] Exhibits P-S.
[5] *See, e.g.*, Exhibit A, PX7028 at 236:19-24 {[redacted]}; Exhibit B PX7050 at 53:2-7 {[redacted]} Exhibit C PX7055 at 139:22-140:14-21, 200:9-14; Exhibit D PX7067 at 182:6-7; Exhibit E PX7071 at 894:17-896:3 (Microsoft expert not aware that Boosteroid is located in Ukraine, Ubitus is located in Taiwan, or Nware is located in Spain, and did not take locations into consideration in expert opinion).

video game maker. Pursuant to these agreements (collectively, "Ubisoft Agreement"), Respondents transferred the cloud-streaming rights to certain Activision games to Ubisoft for a limited period of time.

On October 10, 2023, Complaint Counsel moved the Court to reopen fact discovery to allow discovery about the Ubisoft Agreement and Sony Agreement. Respondents opposed, arguing that Complaint Counsel should be permitted to depose only a Rule 3.33(c) corporate designee and none of Microsoft's or Activision's executives in their individual capacity.[6] The Court reopened discovery and agreed with Respondents that Complaint Counsel could depose only Respondents' corporate designees.

B. Respondents Asserted Privileges to Thwart Discovery of Analyses of the Side Agreements

Complaint Counsel repeatedly sought written discovery and testimony about the competitive effects of the agreements. In response, Respondents asserted privilege regarding any analysis of these agreements' effects. Respondents have claimed privilege over discussions related to {[redacted]}

Respondents used privilege to shield against discovery requests, and then represented to Complaint Counsel[7] in this proceeding and in the district court case that no analysis exists.[8]

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[6] *See* Respondents' Opposition to Complaint Counsel's Motion to Extend Fact Discovery, at 3-4.
[7] Exhibit F, K. Gostin to N. Callan (Dec. 5, 2023) ("[T]his [Microsoft] email confirms our previous representations regarding the non-existence of business analyses about Microsoft's cloud agreements with Ubitus, Nintendo, Nvidia, and Boosteroid."); Exhibit G, A. Pastan to M. Cirincione (June 20, 2023) ("[T]here were in fact no business analyses subject to the privilege done regarding the third party agreements," and that "[t]o the extent there was any invocation of privilege, it was inadvertently made, because no such analysis was done.").
[8] Exhibit H, PX7069 at 29:3-5; 10-11 (Complaint Counsel: "What we are saying is . . . they either need to show their work or not testify about the effects of those side agreements." Respondents' Counsel: "Just to clarify Your Honor, they didn't do the work."); Exhibit L,

Respondents' corporate designees testified {[redacted]} Likewise, {[redacted]}[11]

ARGUMENT

Respondents should be precluded from introducing evidence that their agreements with third parties are procompetitive, after admitting no analysis was conducted or it is privileged. Additionally, Respondents should be precluded from eliciting executive testimony about the Ubisoft Agreement and executed Sony Agreement after Respondents blocked Complaint Counsel from deposing their executives about those agreements. Finally, the procompetitive effects of agreements with Boosteroid Ukraine, Nware and Ubitus KK should be excluded because Respondents have failed to provide record evidence confirming these companies offer services that affect U.S. competition.

A. Testimony from Respondents' Executives about the Side Agreements Effects is Inadmissible.

Respondents' executives testified—and Respondents' counsel represented in court—that Respondents did not analyze the side agreements' effects on competition.[12] Nevertheless,

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Defendants Findings of Fact and Conclusions of Law, ¶137, p. 127 ("[T]here ***were no such financial analyses***, and as such, ***nothing*** has been withheld as privileged.") (emphasis in original).

[9] Exhibit I, PX7081 at 37:17-25 [redacted]

Exhibit J, PX7080 at 134:23-135:4 [redacted]

[11] Exhibit K, PX7082 at 184:3-185:24.

[12] *See supra* Notes 7-10.

Respondents intend to elicit testimony about their executives' "subjective" views that the side agreements are procompetitive.[13]

Courts routinely caution in antitrust cases about the unreliability of executives' ex post testimony that lacks any support in contemporaneous, ordinary course business documents. "Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986); *cf. FTC v. Meta Platforms, Inc.*, 654 F. Supp. 3d 892, 927-28, 932 (N.D. Cal. 2023) (ruling that, even though theory of harm to competition required consideration of both objective and subjective evidence, court would accord little weight to statements made during course of litigation and would "refer primarily to contemporaneous statements"); *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 894-95 (E.D. Mo. 2020) (recognizing "risk of relying on . . . testimony . . . when it comes from Defendants' employees," but relying on such testimony when it is "reflected" in "Defendants' ordinary course documents.").

If no contemporaneous analysis exists, then Respondents' executives' made-for-litigation testimony about such effects will be solely uncorroborated speculation and supposition. This Court should exclude such testimony as inherently unreliable, lacking foundation, and speculative. *See* 16 C.F.R. § 3.43(b) ("[U]nreliable evidence shall be excluded."); Jan. 4, 2023 Scheduling Order ¶¶ 21-22 (citing F.R.E. 602, 701).

B. The Sword/Shield Doctrine Precludes Respondents from Introducing Evidence of the Side Agreements' Procompetitive Effects

Having invoked privilege to shield their analyses (if any exist) of the agreements' effects on competition, Respondents cannot introduce evidence about such effects. "To require a party

[13] *See* Exhibit L, Defendants' Proposed Post-Trial Findings of Fact and Conclusions of Law, ⁋140, p. 129.

to defend against evidence that the party has not been able to sufficiently examine or test is prejudicial." *In re Altria Grp. & Juul Labs., Inc.*, No. 9393, 2021 WL 1922274, at *3 (FTC May 5, 2021).

"The sword and shield theory applies to a litigant that seeks to use information as a 'sword,' in furtherance of a claim or defense, but at the same time 'shields' such information from discovery by invoking a privilege." *In re McWane, Inc. & Star Pipe Prod.*, No. 9351, 2012 WL 3057728, at *4 (FTC July 13, 2012). "A litigant cannot use a privilege as both a 'sword' and a 'shield' by selectively using privileged information to make a point in litigation, but then invoking privilege to prevent its opponent from challenging the assertion." *In re 1-800 Contacts*, No. 9372, 2017 FTC LEXIS 54, at *6 (FTC April 3, 2017). "In *McWane*, the respondent was precluded from offering any evidence at trial that was withheld in discovery on privilege grounds." *Id*.

Here, Respondents wish to use the agreements as a "sword" to show their merger's procompetitive effects and simultaneously use privilege to "shield" the very information needed to evaluate these agreements' effects. Complaint Counsel repeatedly attempted to obtain relevant information from Microsoft on these agreements through requests for admission[14] and testimony but was stymied by privilege claims. This is the exact same litigation strategy that this Court has previously admonished. *McWane,* 2012 WL 3057728, at *4-5.

Respondents claimed privilege over key information underlying the agreements. For example, Respondents claimed privilege over internal documents and testimony discussing {[redacted]

[14] Exhibit M, at 4-5.

[redacted]}[18] of the agreements with Nintendo and Nvidia. {[redacted]}[19] Most recently, Microsoft claimed privilege over {[redacted]}[20] and Activision claimed privilege over {[redacted]}[21]

Respondents claimed privilege over {[redacted]}[22] and {[redacted]}[23] The sword/shield doctrine precludes Respondents from offering evidence of procompetitive effects without Complaint Counsel and this Court having access to a full picture of the evidence.

C. Testimony from Respondents' Executives about The Ubisoft and Executed Sony Agreements is Inadmissible for an Additional Reason

[15] Exhibit T, PX7034, 227:17-228:12.
[16] Exhibit M at 4-5.
[17] Exhibit N (PX7057), 28:19-29:20; Exhibit O (PX7040), 379:10-383:8; 385:25-388:16.
[18] Exhibit O (PX7040), 377:13-379:9.
[19] Exhibit A (PX7028) 178:5-182:21.
[20] Exhibit I, PX7081 at 36:9-21, 37:14-17.
[21] Exhibit J, PX7080 at 45:13-46:21.
[22] Mysteriously, Microsoft witnesses—while asserting privilege over {[redacted]} Exhibit A (PX7028), 182:22-183:15. Nevertheless, Microsoft also asserted [redacted]}; Exhibit A, (PX7028) at 182:12-21.
[23] Exhibit O PX7040 at 378:9-23, 379:24-380:10, 383:15-384:14, 384:24-385:22, 386:8-387:11, 387:17-388:16.

Respondents' executives should be barred from testifying about the Ubisoft and executed Sony Agreements for an additional reason. Respondents successfully objected to providing testimony on these agreements from company executives named on Respondents' witness list. Complaint Counsel had no opportunity to depose Respondents' executives about their personal knowledge (if any) about the Ubisoft or executed Sony Agreements. It would be fundamentally unfair to allow those same executives to testify about these agreements at the evidentiary hearing. *Cf. Altria*, 2021 WL 1922274 at *1 (granting motion in limine and precluding complaint counsel from offering testimony of a witness Respondents had no opportunity to depose).

D. Evidence about Agreements that do not affect Competition in the United States is Inadmissible

Complaint Counsel alleges that the relevant geographic market for analyzing Respondents' merger is the United States. Compl. ¶ 92. Putative procompetitive effects that may manifest outside of the United States are irrelevant. *See, e.g.*, *Food Lion, LLC v. Dean Foods Co.*, No. 2:07-CV-188, 2017 WL 11681054, at *3 (E.D. Tenn. Mar. 15, 2017) (excluding evidence because, *inter alia*, it was "from outside the alleged relevant product or geographic market"); *Apotex, Inc. v. Cephalon, Inc.*, No. 2:06-cv-2768, 2017 WL 10963610, at *2 (E.D. Pa. May 24, 2017) (granting motion in limine to exclude evidence and testimony regarding alleged procompetitive effects in markets unrelated to the alleged product market). "[I]rrelevant . . . evidence shall be excluded." 16 C.F.R. § 3.43(b).

Respondents intend to introduce into evidence agreements with Boosteroid Ukraine, Nware, and Ubitus KK, firms that {[redacted]}.[24] As the record shows, cloud gaming providers need servers in the U.S. (and usually

[24] *See supra* Note 4.

much closer) to reach U.S. customers.[25] There is no record evidence that these firms have *any* effect on U.S. competition, let alone a material effect. These agreements, therefore, are irrelevant and inadmissible.

CONCLUSION

For the foregoing reasons, Respondents should be precluded from introducing: (1) any evidence of putative procompetitive effects of their side agreements with third parties; (2) testimony of their executives about the Ubisoft and executed Sony Agreements; and (3) the agreements with Boosteroid Ukraine, Nware, and Ubitus KK.

Dated: February 5, 2024

Respectfully submitted,

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[25] Exhibit U, PX7068 468:23-470:6; Exhibit B, PX7050 153:24-155:20.

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COMPLAINT COUNSEL'S MEET AND CONFER STATEMENT

Pursuant to the December 15, 2023, Third Revised Scheduling Order, Complaint Counsel submit this statement in support of their Motion in Limine to Exclude Evidence of Putative Procompetitive Effects of Respondents' Agreements with Third Parties. Complaint Counsel conferred with Respondents in good faith and did not reach agreement. Complaint Counsel first corresponded regarding this issue on June 19, 2023.[1] On June 20, 2023, Complaint Counsel and Respondents met and conferred regarding Respondents' intent to offer the Nvidia and Nintendo agreements into evidence. That same day, Respondents confirmed by email that they did not agree with Complaint Counsel's position, and they stated their position that they would not

[1] Exhibit G.

refrain from offering those agreements. On November 22, 2023, Complaint Counsel again raised points with Respondents in support of their position, specifically relating to Respondents' cloud streaming agreements.[2] On December 5, 2023, Respondents replied, reiterating their position. On February 2, 2024, Complaint Counsel further corresponded by email with Respondents regarding their intent to file the instant Motion and requesting Respondents' position. That same day, Respondents informed Complaint Counsel that they intend to oppose the Motion.

Dated: February 2, 2024

Respectfully submitted,

By: *s/ James H. Weingarten*

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Counsel Supporting the Complaint

[2] Exhibit F.

PUBLIC

EXHIBIT A - U

CONFIDENTIAL – REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2024, 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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I also certify that I caused the foregoing document to be served via email to:

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