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15		FRANCISCO DIV		
16				
17	FEDERAL TRADE COMMISSION	[,		
18	Plaintiff,			
19	V.	Case N	Case No. 3:23-cv-2880 PLAINTIFF FEDERAL TRADE COMMISSION'S BENCH BRIEF REGARDING DEFENDANTS' PROFFERED TESTIMONY REGARDING MICROSOFT'S	
20	MICROSOFT CORP.			
21	and	REGA		
22				
	ACTIVISION BLIZZARD, INC.,	REGA	ARDING MICRC	50FT 5
23	ACTIVISION BLIZZARD, INC., Defendants.		ARDING MICRO CEMENTS	<b>JSOFT 5</b>
	ACTIVISION BLIZZARD, INC., Defendants.			50F1 <sup>-</sup> 5
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Defendants intend to offer fact and expert witness testimony that certain Microsoft agreements will benefit consumers even though Defendants claimed privilege over evidence of the bases for those witnesses' opinions. The FTC is not requesting a finding of waiver or to pierce the privilege, which may indeed have been properly asserted. Fairness, however, requires precluding Defendants from eliciting testimony now that elaborates on topics over which they previously claimed privilege.

Shortly before the Federal Trade Commission (the "FTC") brought its administrative challenge to Microsoft's proposed acquisition of Activision, Microsoft hastily sought agreements with some of its competitors as part of an eleventh-hour attempt to assuage the concerns of regulators. Microsoft signed side deals with Nintendo, Nvidia, and foreign cloud providers and proposed an agreement to Sony (collectively, the "Agreements"). Although the Agreements' terms and conditions differ, they all purport to bring Activision content to rivals' platforms contingent on the consummation of the Proposed Acquisition. Defendants intend to make the Agreements central to their defense. *See, e.g.*, Defs.' Conclusions of Law at ¶ 76 ("The FTC must account for the 'economic reality' of these existing contracts as part of its burden...."); Defs.' Findings of Fact at ¶ 137 ("Post-transaction (and post-porting), approximately 100 million gamers would be able to play Call of Duty on their existing Nintendo devices for the first time in many years."); Defs.' Mem. Of Law in Opp. to Mot. for Prelim. Inj. (ECF 108) at 22 ("FTC does not even try to make that showing, nor could it—particularly in light of the binding contracts Microsoft has already struck with Nvidia and other cloud providers.").

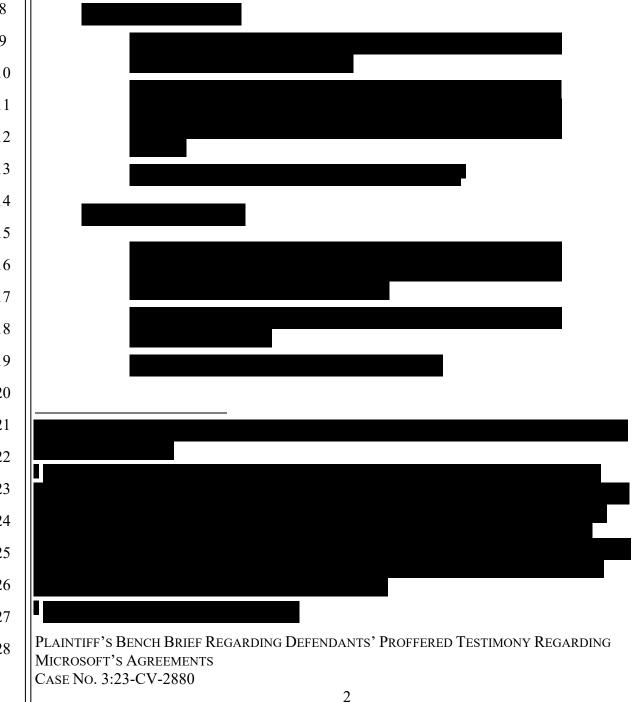
The Agreements, however, are filled with loopholes<sup>1</sup> and speculative commitments.<sup>2</sup>

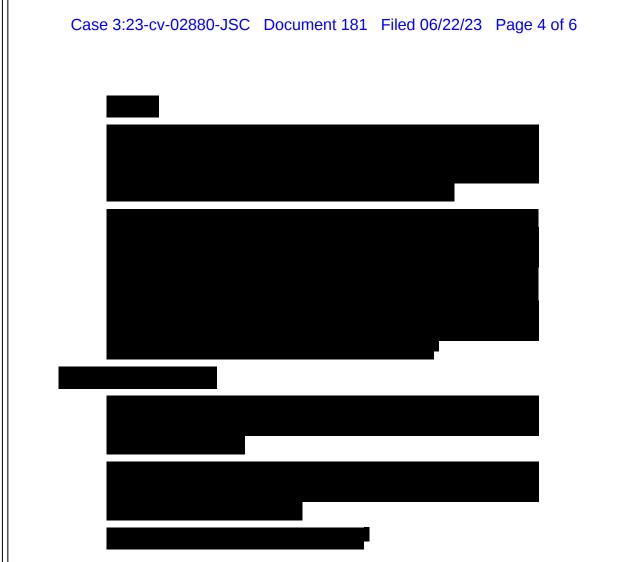
<sup>1</sup> Paragraph 7.4 of the Nvidia agreement, "Unanticipated and Unforeseeable Future Events," allows Microsoft to renegotiate its agreement with Nvidia if Microsoft *unilaterally* decides that existing terms would be "impracticable, unduly onerous, or uneconomic."

(Continued...)

PLAINTIFF'S BENCH BRIEF REGARDING DEFENDANTS' PROFFERED TESTIMONY REGARDING MICROSOFT'S AGREEMENTS CASE NO. 3:23-CV-2880

There are fundamental misunderstandings between the counterparties.<sup>3</sup> Accordingly, the FTC sought discovery into these Agreements and deposed Microsoft executives regarding the business rationale, financial analyses, technical analyses, terms and conditions, and any internal concerns. The FTC sought this testimony to test the basis of Defendants' employees' claims regarding the supposed real-world benefits of the Agreements. Uniformly, Microsoft asserted privilege over the underlying business premises of how they reached the terms of these Agreements:





Defense counsel has asserted that no analyses were withheld from the FTC and have cited witness testimony to this effect. Exhibit A (FW: Meet and Confer Email). As the above passages show, however, Defendants omit a critical detail: Microsoft witnesses claimed to be unaware of *non-privileged* analyses.

Attorney-client privilege "may not be used both as a sword and a shield." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1295 (2d Cir. 1991). Here, the FTC expects that Microsoft executives will continue to

PLAINTIFF'S BENCH BRIEF REGARDING DEFENDANTS' PROFFERED TESTIMONY REGARDING MICROSOFT'S AGREEMENTS CASE NO. 3:23-CV-2880 testify about the Agreements' purported benefits despite having wielded the privilege as a shield to withhold information relevant to testing those purported benefits.

Defendants are incorrect that the FTC has been dilatory because it did not move to challenge the privilege claims and compel testimony. Defendants protected this evidence from discovery on grounds of attorney-client privilege, which the FTC assumed was made in good faith and had no reason to contest at the time. See Vital Pharmaceuticals v PHD Marketing, Inc., 2022 WL 2284544 at \*3 (C.D. Cal. April 15, 2022) ("Defendants' repeated assertion of the attorney-client privilege over communications concerning this lawsuit...made it reasonable for Plaintiffs to avoid inquiring further into these discussions."). The FTC had no basis to compel protected attorney-client information, but the FTC is entitled to prevent Defendants from selectively waiving that privilege to (1) elicit testimony as to the beneficial effects of the Agreements and/or (2) allow Dr. Carlton, one of their experts, to base his opinions regarding the procompetitive effects of witnesses whose foundation is locked behind privilege.

The same privilege issues taint Microsoft's arguments related to the purported benefits of its international remedies. As counsel for Microsoft explained at the June 21 conference with the Court,<sup>7</sup> Defendants claimed privilege over information related to remedies Microsoft offered to the European Commission. Yet, Microsoft's Pre-Trial Findings of Fact prominently feature these remedies as evidence against the alleged anticompetitive harms.

In any event, neither the Agreements nor the international remedies have a place in this proceeding. The narrow purpose of a \$13(b) proceeding does not extend even to the initial question of liability, FTC v. Warner Commc 'ns Inc., 742 F.2d 1156, 1164 (9th Cir. 1984), let alone to the subsequent question of what remedy might be appropriate if the administrative proceeding ultimately yields a finding of liability. See FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1345 (4th Cir. 1976) (holding FTC was "entitled to preserve the status quo pending

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<sup>&</sup>lt;sup>7</sup> Case Management Conference, FTC v. Microsoft, 3:23-CV-2880 (N.D. Cal. June 21, 2023)

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adjudication" regardless of what "ultimate remedy" might eventually be deemed appropriate).

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3 4 Respectfully submitted, 5 6 /s/ James H. Weingarten James H. Weingarten 7 Peggy Bayer Femenella James Abell 8 Cem Akleman J. Alexander Ansaldo 9 Michael T. Blevins Amanda L. Butler 10 Nicole Callan Maria Cirincione 11 Kassandra DiPietro Jennifer Fleury 12 Michael A. Franchak James Gossmann 13 Ethan Gurwitz Meredith R. Levert 14 David E. Morris Merrick Pastore 15 Stephen Santulli 16 Federal Trade Commission 600 Pennsylvania Avenue, NW 17 Washington, DC 20580 Tel: (202) 326-3570 18 Erika Wodinsky 19 Federal Trade Commission 90 7th Street, Suite 14-300 20 San Francisco, CA 94103 21 Counsel for Plaintiff Federal Trade Commission 22 23 24 25 26 27 PLAINTIFF'S BENCH BRIEF REGARDING DEFENDANTS' PROFFERED TESTIMONY REGARDING 28 **MICROSOFT'S AGREEMENTS** CASE NO. 3:23-CV-2880 5