

1 Beth Wilkinson (*pro hac vice*)
 Rakesh Kilaru (*pro hac vice*)
 2 Kieran Gostin (*pro hac vice*)
 Grace Hill (*pro hac vice*)
 3 Anastasia Pastan (*pro hac vice*)
 Sarah Neuman (*pro hac vice*)
 4 WILKINSON STEKLOFF LLP
 2001 M Street NW, 10th Floor
 5 Washington, DC 20036
 Telephone: (202) 847-4000
 6 Facsimile: (202) 847-4005
 bwilkinson@wilkinsonstekloff.com
 7 rkilaru@wilkinsonstekloff.com
 kgostin@wilkinsonstekloff.com
 8 ghill@wilkinsonstekloff.com
 apastan@wilkinsonstekloff.com
 9 sneuman@wilkinsonstekloff.com

10 Bambo Obaro (Bar No. 267683)
 Weil, Gotshal and Manges
 11 201 Redwood Shores Parkway
 Redwood Shores, CA 94065
 12 Telephone: (650) 802-3083
 Facsimile: (650) 802-3100
 13 bambo.obaro@weil.com

14 *Counsel for Defendant Microsoft Corp.*

15 **UNITED STATES DISTRICT COURT**
 16 **NORTHERN DISTRICT OF CALIFORNIA**
 17 **SAN FRANCISCO DIVISION**

18 **FEDERAL TRADE COMMISSION,**

19 Plaintiff,

20 v.

21 **MICROSOFT CORP., et al.,**

22 Defendants.

Case No. 3:23-cv-02880-JSC

**JOINT OPPOSITION TO PLAINTIFF'S
MOTION FOR PROTECTIVE ORDER**

The Honorable Jacqueline Scott Corley

1 “involved in ‘competitive decisionmaking;’ that is, advising on decisions about pricing or design
2 made in light of similar or corresponding information about a competitor.” *Id.* at 1470.

3 ARGUMENT

4 The FTC speculates that granting Defendants’ in-house litigation counsel access to trial
5 exhibits *could* result in the disclosure of Confidential information to competitive decisionmakers
6 at the company. But Defendants’ proposed protective order, Ex. A ¶ 8, expressly contemplates
7 that the individuals given access to Confidential trial exhibits are not and will not be involved in
8 competitive decision-making, and that these individuals would view the exhibits either at outside
9 counsel’s trial site or in a secure data room and sign an agreement to be bound by the protective
10 order’s terms. *See Wisk Aero LLC v. Archer Aviation Inc.*, No. 3:21-CV-02450-WHO, 2022 WL
11 6251010, at *2 (N.D. Cal. Sept. 16, 2022) (in-house counsel access permissible where, among
12 other things, the protective order contained safeguards). As set out in the attached declarations,
13 Exs. B–F, Defendants’ five designated in-house counsel have no involvement in competitive
14 decision-making and are the day-to-day managers of this litigation and legal advisors to their
15 company on the issues in this litigation. Their job responsibilities involve responding to regulatory
16 inquiries, overseeing litigation, supervising outside counsel, and managing compliance with
17 competition laws and regulations for Microsoft and Activision worldwide. These individuals
18 require access to Confidential material on the parties’ exhibits to meaningfully direct outside
19 counsel and manage this preliminary injunction proceeding.

20 The FTC’s position is especially untenable given that the FTC frequently stipulates to
21 protective orders that provide in-house litigation counsel some access to Confidential material.
22 *See, e.g., FTC v. Meta Platforms, Inc.*, No. 1:20-cv-03590-JEB, ECF No. 134 at 13 (Mar. 25, 2022)
23 (permitting disclosure of highly confidential information to two in-house counsel “with
24 responsibilities for the litigation”); *FTC v. Staples Inc.*, No. 1:15-cv-02115-EGS, ECF 63 at 4
25 (D.D.C. Jan. 10, 2016) (permitting disclosure of confidential information to designated in-house
26 counsel). Indeed, mere months ago, the FTC signed onto a protective order allowing access to
27 three in-house counsel “with responsibilities for litigation of th[e] action” in a preliminary
28 injunction proceeding in the Northern District of California. *FTC v. Meta Platforms, Inc.*, No.

1 5:22-cv-04325-EJD, ECF No. 80 at 5 (Aug. 24, 2022). Defendants modeled their proposed
2 protective order on the *Meta* order, and the FTC offered no explanation whatsoever during the
3 parties' meet and confer or in its motion as to how this matter is distinguishable. That is because
4 no principled distinction exists.

5 The FTC's arguments are unavailing or beside the point. *First*, Defendants' in-house
6 litigation counsel are not permitted to see Confidential material in the Part 3 proceeding because
7 under FTC rules, "the Administrative Law Judge *shall issue* a protective order as set forth in the
8 appendix to this section," and the Appendix is the "Standard Protective Order" that disallows in-
9 house counsel access to Confidential information. 16 C.F.R. § 3.31(d) (emphasis added).
10 Obviously, no such rule applies in federal court, and federal judges routinely recognize the need
11 for in-house counsel to obtain access to confidential materials to direct the litigation. *See, e.g.,*
12 *MedImpact Healthcare Sys., Inc. v. IQVIA Inc.*, No. 19-CV-1865-GPC (DEB), 2021 WL 389820,
13 at *4 (S.D. Cal. Feb. 4, 2021) ("Because they are not competitive decisionmakers, and because
14 they have safeguards in place to protect against further disclosure of Plaintiffs' trade secrets and
15 source codes, the Court finds that the *Brown Bag* factors do not support denying Ms. Nakly,
16 Kibbe, or Katz access to any of the discovery generated in this case."); *U.S. Steel Corp. v. United*
17 *States*, 730 F.2d 1465, 1469 (Fed. Cir. 1984) (seminal case holding that "status as in-house counsel
18 cannot alone create that probability of serious risk to confidentiality and cannot therefore serve as
19 the sole basis for denial of access"). Indeed, another district court has granted in-house counsel
20 access to all Confidential evidence in an FTC proceeding because "[i]t would be unfair. . . for the
21 government to attempt to prevent a private business transaction based, even in part, on evidence
22 that is withheld from the actual Defendants (as distinct from their outside counsel)." *See FTC v.*
23 *Sysco*, 83 F. Supp. 3d 1, 4 (D.D.C. 2015). The same is true here.

24 *Second*, without even knowing the identities of Defendants' proposed designees, the FTC
25 argues that Defendants' in-house counsel are "high-ranking" and cites to inapposite caselaw
26 denying access to a chief legal officer and executive vice president. Defendants are not proposing
27 to designate for access its chief legal officer or any comparably senior in-house lawyer but instead
28 is proposing to grant access to the lawyers who manage the litigation.

1 Dated: June 19, 2023

By: /s/ Beth Wilkinson

2
3 Jack DiCanio (Bar No. 138782)
4 Caroline Van Ness (Bar No. 281675)
5 SKADDEN, ARPS, SLATE, MEAGHER &
6 FLOM LLP
7 525 University Avenue
8 Palo Alto, California 94301
9 Telephone: (650) 470-4500
10 Facsimile: (213) 621-5430
11 Email: jack.dicanio@skadden.com
12 Email: caroline.vanness@skadden.com

Beth Wilkinson (*pro hac vice*)
Rakesh Kilaru (*pro hac vice*)
Kieran Gostin (*pro hac vice*)
Grace Hill (*pro hac vice*)
Anastasia Pastan (*pro hac vice*)
Sarah Neuman (*pro hac vice*)
WILKINSON STEKLOFF LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
Telephone: (202) 847-4000
Facsimile: (202) 847-4005
bwilkinson@wilkinsonstekloff.com
rkilaru@wilkinsonstekloff.com
kgostin@wilkinsonstekloff.com
ghill@wilkinsonstekloff.com
apastan@wilkinsonstekloff.com
sneuman@wilkinsonstekloff.com

13 Steven C. Sunshine (*pro hac vice*)
14 Julia K. York (*pro hac vice*)
15 SKADDEN, ARPS, SLATE, MEAGHER &
16 FLOM LLP
17 1440 New York Avenue, N.W.
18 Washington, DC 20005-2111
19 Telephone: (202) 371-7000
20 Facsimile: (202) 393-5760
21 Email: steven.sunshine@skadden.com
22 Email: julia.york@skadden.com

Bambo Obaro (Bar No. 267683)
Weil, Gotshal and Manges
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Telephone: (650) 802-3083
Facsimile: (650) 802-3100
bambo.obaro@weil.com

23 Maria Raptis (*pro hac vice*)
24 Matthew M. Martino (*pro hac vice*)
25 Michael J. Sheerin (*pro hac vice*)
26 Evan R. Kreiner (*pro hac vice*)
27 Bradley J. Pierson (*pro hac vice*)
28 Jessica R. Watters (*pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
1 Manhattan West
New York, NY 10001

Michael Moiseyev (*pro hac vice*)
Megan A. Granger (*pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
2001 M Street, NW
Suite 600
Washington, DC 20036
Telephone: (202) 682-7000
Facsimile: (202) 857-0940
michael.moiseyev@weil.com
megan.granger@weil.com

Telephone: (212) 735-3000
Fax: (212) 735-2000
Email: maria.raptis@skadden.com
Email: matthew.martino@skadden.com
Email: michael.sheerin@skadden.com
Email: evan.kreiner@skadden.com
Email: bradley.pierson@skadden.com
Email: jessica.watters@skadden.com

Counsel for Defendant Microsoft Corp.

Counsel for Defendant Activision Blizzard, Inc