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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

17 DANTE DEMARTINI, CURTIS BURNS JR.,
18 NICHOLAS ELDEN, JESSIE GALVAN,
CHRISTOPHER JOSÉPH GIDDINGS-LAFAYE,
19 STEVE HERRERA, HUNTER JOSEPH
JAKUPKO, DANIEL DERMOT ALFRED
20 LOFTUS, BEOWULF EDWARD OWEN, and
IVAN CALVO-PÉREZ,

21 Plaintiffs,

22 v.

23 MICROSOFT CORPORATION, a Washington
24 corporation,

25 Defendant.

Case No. 3:22-cv-08991

**MOTION FOR PRELIMINARY
INJUNCTION AND ORDER TO SHOW
CAUSE**

Date: January 26, 2023
Time: TBD

1 NOTICE OF MOTION AND MOTION

2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

3 **PLEASE TAKE NOTICE** that on Thursday, January 26, 2022, or as soon thereafter as
4 the Court finds it practical, Plaintiffs will and hereby do move the Court for a preliminary
5 injunction pursuant to Federal Rule of Civil Procedure 65(a), against the proposed acquisition of
6 Activision Blizzard, Inc. by Microsoft Corporation, under Sections 7 and 16 of the Clayton Act,
7 15 U.S.C. §§ 18 and 26. The motion will be made based on this Notice of Motion and Motion, the
8 Memorandum of Points and Authorities, the Declaration of David H. Seidel in support of this
9 Motion and the exhibits attached thereto, the Declarations of Plaintiffs in support of this Motion,
10 any evidence received on this Motion, and the file in this matter.

11 **REQUESTED RELIEF**

12 1. Pursuant to Rule 65(a) and Section 16 of the Clayton Act, 15 U.S.C. § 26, Plaintiffs seek
13 an order from the Court preliminarily enjoining Defendant Microsoft Corporation from acquiring
14 its significant rival Activision Blizzard, Inc., until a trial on the merits may be conducted by the
15 Court to determine whether the combination is unlawful under Section 7 of the Clayton Act, 15
16 U.S.C. § 18.

17 2. Plaintiffs request that the Court order Microsoft to show cause why the merger should
18 not be preliminarily enjoined pending a bench trial on the merits.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Pursuant to Federal Rule of Civil Procedure 65(a), Plaintiffs seek a preliminary injunction
4 to temporarily stop the acquisition of Activision Blizzard by Microsoft Corporation, until the
5 parties can have an accelerated trial on the merits. By stopping the merger until an accelerated
6 trial, the Court will ensure that the status quo is maintained and prevent irreparable harm to
7 competition and to the Plaintiffs before Plaintiffs can demonstrate that the acquisition is unlawful
8 under Section 7 of the Clayton Act. 15 U.S.C. §18. Because Plaintiffs are likely to establish that
9 the merger is unlawful and are threatened with irreparable harm if the merger proceeds, the
10 Court should grant the motion. Microsoft is one of the dominant firms in the gaming industry.
11 Activision Blizzard is one of Microsoft’s chief rivals and a major firm in the creation and
12 publishing of gaming content. Microsoft’s offer to pay \$68.7 billion for Activision Blizzard would
13 be the largest merger of technologies companies in history. The combination will eliminate an
14 independent competitor, likely lessening competition.

15 Through Section 7 of the Clayton Act, Congress prohibited all mergers and acquisitions in
16 which the effect “may be substantially to lessen competition, or to tend to create a monopoly.” 15
17 U.S.C. § 18. The history of the Clayton Act, as explained by numerous Supreme Court cases,
18 shows without question that Congress meant to vigorously clamp down on the trend towards
19 market concentration through mergers and acquisitions. The Supreme Court has repeatedly
20 affirmed that Congress specifically intended the Act’s broad language, requiring that a Plaintiff
21 only show that a merger has a reasonable probability of lessening competition or tending to create
22 a monopoly for it to be unlawful. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 317
23 (1962). Under this standard, Congress meant to stop market concentration in its incipiency, based
24 on a simple but powerful policy judgment: that in the United States, internal expansion through
25 competition is inherently preferred over concentration through mergers and acquisitions, and that
26 concentration must be stopped long before it reaches monopolistic levels.

1 As part of Congress' statutory plan to prevent market concentration in its incipiency,
2 Congress enshrined the individual right of action as part of its enforcement scheme. Congress
3 authorized private Plaintiffs threatened with loss or harm from the loss of competition, to seek
4 and obtain injunctive relief. As the Supreme Court has explained, "[p]rivate enforcement of the
5 [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for
6 protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 275 (1990). Section 16 and
7 other provisions of the Clayton Act "manifest a clear intent to encourage vigorous private
8 litigation against anti-competitive mergers," and "subject mergers to searching scrutiny." *Id.*

9 As this motion shows, Microsoft's acquisition of Activision Blizzard readily satisfies the
10 Section 7 standard. Given Congress' clear mandate to prohibit all mergers and acquisition the
11 effect of which "may be substantially to lessen competition, or to tend to create a monopoly," 15
12 U.S.C. § 18, the Supreme Court has repeatedly struck down mergers with far less risk of lessening
13 competition than is the case here. Under the Supreme Court's controlling authority, Microsoft's
14 proposed \$68.7 billion acquisition of Activision Blizzard is without question unlawful and must be
15 enjoined. To prevent the irreparable harm to competition and to Plaintiffs that will ensue if the
16 merger is allowed to be consummated but then ultimately found to be unlawful, the Court should
17 preliminarily enjoin the merger from consummating until after an accelerated trial on the merits.

18 **II. FACTUAL BACKGROUND**

19 The video game industry is a fast-evolving, and expanding modern industry. Revenue in
20 the video game industry is projected to reach \$197 billion this year and \$285 billion by 2027. Pls'
21 Compl. ¶ 57.¹ This growth has been recently spurred, in part, by the Covid-19 pandemic, seeing a
22 30% increase in the U.S. population that plays video games. In 2021, a total estimated 3.24 billion
23 consumers played video games globally (roughly half the world's population). That year,
24 approximately 226.6 million people in the United States played video games (roughly 68% of the
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27 ¹ *Video Games - Worldwide*, Statista, available at <https://www.statista.com/outlook/dmo/digital-media/video-games/worldwide> (last visited Dec. 16, 2022).
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1 U.S. population). *Id.* ¶¶ 58-59.² Video gaming is one of the largest entertainment sectors in the
2 United States and the world. For example, the 2019 reboot of *Call of Duty: Call of Duty: Modern*
3 *Warfare*, earned \$600 million in three days.³

4 The marketing and distribution of video games to consumers requires game developers,
5 publishers, and distributors. *Id.* ¶ 123. Video game developers are the persons and entities that
6 create and design video games, referred to as “gaming content.” *Id.* ¶ 124. Video game publishers
7 are those that market, monetize, and produce gaming content for mass distribution. Developers
8 and publishers are often combined in a single entity or work together in creating gaming content.
9 *Id.* ¶ 128. Video game distributors occupy the final step of distributing gaming content to
10 consumers. *Id.* ¶ 129. Distribution of gaming content was initially the province of brick and motor
11 retail stores. By 2018, however, 83% of all video games were sold through digital stores, allowing
12 consumers to directly download games to the device on which they play. *Id.*; Declaration of David
13 H. Seidel (“Seidel Decl.”) Ex. B at 4 [Congressional Research Service Report August 3, 2022]. A
14 new form of distribution has also recently emerged in which companies offer multi-game
15 subscription services, like Microsoft’s immensely popular Game Pass, that allows consumers to
16 have access to large libraries of video games for monthly subscription fees. *Id.* ¶ 46.⁴ At all levels,
17 there is substantial competition to provide consumers with the best video games at the lowest
18 possible price.

19 Where and how people play video games has also expanded in recent years. Initially,
20 during the days of *Pacman*, *Asteroids*, *Galaga*, and the original *Donkey Kong*, consumers played
21 video games in arcades. Today, most gamers play video games on gaming consoles, like the Xbox
22

23 ² See Emma Bliznovska, *How Many People Play Video Games?*, available at
24 <https://websitebuilder.org/blog/how-many-people-play-video-games/>.

25 ³ Paul Tassi, Forbes, *Call of Duty: Modern Warfare Sales Top \$600 Million in Three Days*, October
26 30, 2019, available at <https://www.forbes.com/sites/paultassi/2019/10/30/call-of-duty-modern-warfare-sales-top-600-million-in-three-days/?sh=6d01a04d7956>.

27 ⁴ See Ben Gilbert, *Microsoft is quietly bringing in billions from its Netflix-like Game Pass service as*
28 *subscribers top 25 million*, BUSINESS INSIDER, Jan 18, 2022 (available at
<https://www.businessinsider.com/xbox-game-pass-to-make-billions-in-2022-2022-1>).

1 or PlayStation they purchase, as well as on other personal devices like Personal Computers
2 (“PCs”), smartphones, or other mobile devices. Recently the possibilities have been expanded
3 through the development of a new market for cloud-based gaming, in which games are streamed
4 directly to a user’s device. *Id.* ¶¶ 81-122. Each of these platforms differ from each other, in
5 method of control, specific games available, marketing, and ease of use. Gaming content is
6 developed for these platforms specifically, taking advantage of differences among them. *Id.*

7 Microsoft and Activision Blizzard are two titans in the gaming industry. Microsoft is a
8 massive game developer and publisher of gaming content in the United States. Microsoft has
9 acquired numerous other prestigious game development and publishing studios, currently owning
10 23 different game development studios. *Id.* ¶ 42. Microsoft is the largest game publisher in the
11 United States. Microsoft is also a leading game distributor through its online Microsoft store. *Id.*
12 ¶¶ 44, 45. Microsoft owns some of the most successful game content franchises, including
13 *Minecraft*, *Halo*, *Fallout*, *DOOM*, and others. *Id.* ¶ 42. Microsoft also sells its Xbox console
14 system, which competes against Sony’s PlayStation, the other high-end gaming console.
15 Microsoft’s Xbox also competes with the only other console system, Nintendo. *Id.* ¶¶ 87.
16 Microsoft also develops and owns the ubiquitous Windows operating system, which is the
17 operating system for 90% of the PC gaming market. *Id.* ¶ 101; Seidel Decl. Ex. A at ¶ 260
18 [Competition & Market’s Authority Phase 1 Decision]. Microsoft also dominates the video games
19 subscription market, with its massively successful Game Pass program. Game Pass accounts for
20 about 60% of the multi-game subscription market. Pls’ Compl. ¶ 47.⁵ By establishing Game Pass,
21 which includes cloud-based gaming, Microsoft hoped to establish another gaming platform,
22 which operates in connection with other platforms Microsoft controls: Xbox (game consoles);
23 Windows (operating system); and Azure (cloud). Microsoft therefore operates at all levels of the
24 video game industry and possesses high market shares in each. These market actors interact with
25
26

27 ⁵ See Stephen Totilo, *Gaming’s Netflix or Spotify Moment Is Still a Long Way Off*, Axios, March 28,
28 2022, at <https://www.axios.com/2022/03/28/video-game-subscriptions-xbox-game-pass-netflix>.

1 one another and are intrinsically interlinked. These connections form an ecosystem, a continuous
2 loop of interaction and commerce. Microsoft seeks to control and dominate that ecosystem.

3 Activision Blizzard is a gaming content developer, publisher, and distributor that is
4 responsible for several of the most popular game franchises in history, including *Call of Duty*,
5 *World of Warcraft*, *StarCraft*, *Overwatch*, *Diablo*, and *Candy Crush*. *Id.* ¶ 69. *Call of Duty*, in
6 particular, is considered one of the most important gaming franchises, and is the single largest
7 franchise measured by user base and revenue. *Id.* ¶¶ 70-71; Seidel Decl. Ex. A at ¶¶ 14-15, 148(c),
8 151[Competition & Market’s Authority Phase 1 Decision]. After Microsoft, Activision Blizzard is
9 the second largest video game publisher in the United States. Activision is one of only a few
10 independent game publishers that are capable of making the highest production value, most-
11 graphically advanced, and most marketed and popular video games (“Triple-A” games). Pls’
12 Compl. ¶¶ 75-76.⁶ Through their own distribution platform and digital store front,
13 www.battle.net, Activision Blizzard directly distributes its own gaming content to consumers,
14 competing with Microsoft in distribution. *Id.* ¶ 77. Absent the merger, Microsoft and Activision
15 Blizzard directly compete in the game development, publishing, and distribution markets.

16 On January 18, 2022, Microsoft announced plans to acquire Activision Blizzard. *Id.* ¶ 2.
17 Microsoft agreed to pay \$68.7 billion (\$68,700,000,000), in an all-cash transaction to acquire the
18 stock of Activision Blizzard. *Id.* According to the plan Activision Blizzard would be wholly owned
19 by Microsoft. *Id.* If the acquisition is allowed to proceed, it would be the largest merger of
20 technologies companies ever—and by far the largest in the video game industry—and is likely to
21 significantly harm competition across the entire gaming industry and its related markets.

22 III. LEGAL STANDARD

23 The Court may grant a preliminary injunction under Federal Rule of Civil Procedure 65(a)
24 and under Section 16 of the Clayton Act, 15 U.S.C. §26. In deciding whether to grant a
25 preliminary injunction, courts must consider four factors: (1) the movant’s likelihood of success
26

27 ⁶ See T.C., *Why are video games so expensive to develop*, THE ECONOMIST, Sep 25, 2014 (available at
28 <https://www.economist.com/the-economist-explains/2014/09/24/why-video-games-are-so-expensive-to-develop>).

1 on the merits; (2) the movant’s likelihood of irreparable harm if the preliminary injunction is not
2 issued; (3) a balancing of the equities; and (4) the public interest. *See, e.g., All. for the Wild Rockies*
3 *v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *United States v. Trib. Publ’g Co.*, 2016 WL 2989488,
4 at *2 (C.D. Cal. Mar. 18, 2016). In the Ninth Circuit, courts engage in a sliding scale approach, in
5 which “the elements of the preliminary injunction test are balanced, so that a stronger showing of
6 one element may offset a weaker showing of another.” *All. for the Wild Rockies*, 632 F.3d at 1131.
7 One common iteration of this approach, the “serious questions” test, recognizes that a stronger
8 showing of the balancing of hardships factor lessens the burden for likelihood of success on the
9 merits. *Id.* Under the serious questions test, a preliminary injunction is proper upon a showing of
10 “serious questions going to the merits,” so long as the balance of hardships “tips sharply in
11 [plaintiff’s] favor.” *Id.*

12 In *All. For the Wild Rockies*, for example, the leading Ninth Circuit case addressing
13 preliminary injunctions generally, an environmental group sought a preliminary injunction to stop
14 the U.S. Forest Service from commencing a forestry project within a portion of a national forest
15 in Montana. The group alleged that the grounds that the Forest Service’s commencement of the
16 project was in violation of certain statutes, and that its members would be irreparably harmed by
17 losing the ability to “view, experience, and utilize the areas in their undisturbed state.” *Id.* at 1135.
18 The Ninth Circuit reversed the lower court’s denial of plaintiff’s motion for preliminary
19 injunction because it found there were at least “serious questions” going to the merits, and the
20 balance of hardships tipped sharply in the plaintiff’s favor. Plaintiffs had shown they would
21 permanently lose the ability to enjoy that portion of the forest in its unaltered state. In contrast,
22 the Forest Service did not show it would lose the opportunity to perform the project’s important
23 work at a later date, if the plaintiff ultimately lost on the merits. Because the project could be
24 undertaken in the future, the Ninth Circuit held the requirements of Rule 65 were satisfied and
25 ordered the preliminary injunction should issue.

1 **IV. ARGUMENT**

2 **A. Plaintiffs Are Likely to Succeed on the Merits**

3 This lawsuit ultimately presents the Court with a singular issue. The Clayton Act outlaws
4 all mergers and acquisitions where “the effect of such acquisition may be substantially to lessen
5 competition or to tend to create a monopoly.” 15 U.S.C. § 18. Under the Supreme Court’s
6 binding precedent, Congress’ use of this expansive definition was meant to ensure that any
7 growing trend towards concentration in markets was stopped in its incipiency, even before it was
8 clear whether a merger would—or did in fact—lessen competition, reflecting a policy judgment
9 that competition among numerous market participants is preferable to concentrating markets
10 through mergers and acquisitions. *See, e.g., Am. Stores*, 495 U.S. at 275; *United States v. Von’s*
11 *Grocery Co.*, 384 U.S. 270, 274 (1966); *Brown Shoe*, 370 U.S. at 317. Here, after years of unchecked
12 concentration in the video game industry, Microsoft, as the largest publisher of gaming content in
13 the United States, has announced it will eliminate a significant rival by acquiring Activision
14 Blizzard, the second largest publisher of gaming content in the United States. Both companies are
15 among only a handful of companies able to produce top-quality gaming content. Through the
16 merger, the post-acquisition entity will have the ability and incentive to foreclose Activision
17 Blizzard’s significant portion of top gaming content to rival producers of gaming platforms and
18 subscription services. Might this merger substantially lessen competition or tend to create a
19 monopoly?

20 At the preliminary injunction stage, Plaintiffs need only show a likelihood of prevailing on
21 the merits. And given that the balance of hardships tips sharply in Plaintiffs’ favor here, *see infra*
22 Section IV.C, Plaintiffs need only show that there are “serious questions” as to whether this
23 acquisition might substantially lessen competition or tend to create a monopoly. *See All. For the*
24 *Wild Rockies*, 632 F.3d at 1131. Given that the merger will eliminate the substantial and direct
25 competition between Microsoft and Activision Blizzard, and has enormous potential for further
26 anticompetitive effects, at trial, Plaintiffs will go far beyond their required burden and show that
27
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1 the merger will lessen competition and will tend to create a monopoly. Even at this stage, it clear
2 that this merger is unlawful.

3 **1. The Clayton Act Codifies Congress' Intent to Prohibit Mergers**
4 **Through Direct Private Actions Such as This**

5 As part of Congress' statutory scheme to prohibit all mergers and acquisitions that may
6 substantially lessen competition, Congress established a private right of action as an important
7 means to stop anticompetitive mergers that, through incremental combinations and
8 concentrations, slowly but surely destroy competition and tend to lead to monopolies and
9 oligopolies. Section 16 of the Clayton Act provides in relevant part that "[a]ny person . . . shall be
10 entitled to sue for and have injunctive relief . . . against threatened loss or damage" from an
11 unlawful merger or acquisition. 15 U.S.C. § 26. As explained in *California v. American Stores*, the
12 Clayton Act's provisions "manifest a clear intent to encourage vigorous private litigation against
13 anti-competitive mergers." 495 U.S. 271, 275 (1990). By encouraging vigorous private litigation to
14 police unlawful mergers, Congress sought to "subject mergers to searching scrutiny" through
15 private lawsuits such as this. *Id.* Indeed, "[p]rivate enforcement of the [Clayton] Act was in no
16 sense an afterthought; it was an integral part of the congressional plan for protecting
17 competition." *Id.*

18 Congress understood the broad and pervasive harms inherent in economic concentration
19 through mergers and acquisitions. *See Brown Shoe*, 370 U.S. at 317 ("[A] keystone in the erection
20 of a barrier to what Congress saw was the rising tide of economic concentration, was its provision
21 of authority for arresting mergers at a time when the trend to a lessening of competition in a line
22 of commerce was still in its incipiency."). Congress therefore "sought to assure . . . the courts the
23 power to brake this force at its outset and before it gathered momentum." *Id.* at 317-18. Through
24 these provisions, the Clayton Act codifies Congress' intent to arrest the trend of economic
25 concentration by encouraging private litigants to sue for injunctive relief to prevent the merger or
26 acquisition as Plaintiffs seek here. Through an injunction, Congress intended that illegal mergers
27 be stopped before they happen.
28

2. Plaintiff's Burden Under Section 7 Is Exceptionally Low

To effectuate the Clayton Act's statutory scheme to stop economic concentration through merger and thereby "preserve competition among many small businesses," Congress enshrined an expansive definition of unlawful acquisitions. *Von's Grocery*, 384 U.S. at 277. Section 7 makes unlawful all mergers and acquisitions, the effect of which "may be substantially to lessen competition or tend to create a monopoly." 15 U.S.C. § 18. Congress' use of the term "may" in Section 7 was meant to ensure that litigants would not need to prove anticompetitive effects but would merely need to show a "reasonable probability" that competition would be lessened. *See Brown Shoe*, 370 U.S. at 323. Outlawing all mergers with merely a reasonable probability of lessening competition was a "necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." *Id.* at 323 n.39. Indeed, requiring a Clayton Act Plaintiff of showing "certainty and actuality of injury to competition" would be "incompatible" with Section 7's aim to go beyond liability under the Sherman Act "by reaching incipient restraints." *Id.* That is why Section 7 ultimately requires merely a "prediction" as to whether competition may be lessened, and "doubts are to be resolved against the transaction." *F.T.C. v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989).

Congress's expansive definition of unlawful mergers was not made by chance. It was no linguistic accident. Congress meant to "clamp down with vigor on mergers." *Von's Grocery*, 384 U.S. at 276. The very objective of Section 7 of the Clayton Act was to "prevent accretions of power," even those "which 'are individually so minute as to make it difficult to use the Sherman Act test against them.'" *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964). That is why the Supreme Court has reiterated that a plaintiff's burden under Section 7 is particularly low. *See Am. Stores*, 495 U.S. at 275. It is also why Supreme Court case after Supreme Court case has prohibited mergers with far less potential harm to competition than here.

In *Brown Shoe*, for example, the Court prohibited a merger between the third and eighth-largest shoe sellers in the United States, where the eighth-largest manufactured less than 0.5% and

1 retailed less than 2% of shoes. 370 U.S. 294, 298 (1962). The Court held that it could not “avoid
2 the mandate of Congress that tendencies toward concentration in industry are to be curbed in
3 their incipiency.” *Id.* at 345. In *United States v. Cont’l Can Co.*, the Court prohibited an
4 acquisition of the sixth-largest competitor by the second largest, where the acquisition would
5 increase the acquiring entity’s market share from 21.9% to 25%. 378 U.S. 441, 461 (1964). In
6 *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280–81 (1964), the Court prohibited the
7 acquisition of the ninth-largest producer of aluminum conductor, which held only 1.3% of the
8 market, by the largest producer of aluminum conductor, which held 27.8% of the market. The
9 Court held that “[p]reservation of [the ninth-largest producer], rather than its absorption by one
10 of the giants, will keep it ‘as an important competitive factor,’” and thus, the small aluminum
11 conductor producer with only 1.3% market share “seems to us the prototype of the small
12 independent that Congress aimed to preserve” through Section 7. *Aluminum Co. of Am.*, 377 U.S.
13 at 281. In *Von’s Grocery*, the Court prohibited the merger of two grocery store chains, each with
14 less than 5% of the market. Based solely on the market shares of the merging grocery store chains
15 and the growing trend toward concentration in the market, the Court held that “these facts alone
16 are enough to cause us to conclude . . . that the [merger] did violate §7.” *Von’s Grocery*, 384 U.S.
17 at 274. And in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), the Court held unlawful the
18 acquisition of the eighteenth largest brewer by the 10th largest brewer, which when combined,
19 became the fifth-largest brewer with a combined market share of only 4.49%.

20 This long line of Supreme Court cases is clear. Section 7 of the Clayton Act means exactly
21 what Congress enacted—concentration in economic markets through mergers and acquisitions is
22 precisely what Congress aimed to stop. All mergers and acquisitions that may substantially lessen
23 competition or tend to create a monopoly are unlawful. The Clayton Act enshrined into law a
24 policy that unilateral expansion through competition is inherently preferable to expansion
25 through mergers and acquisitions. The Supreme Court held:

26 “A company’s history of expansion through mergers presents a different
27 economic picture than a history of expansion through unilateral growth. Internal
28 expansion is more likely to be the result of increased demand for the company’s
 products and is more likely to provide increased investment in plants, more jobs
 and greater output. Conversely, expansion through merger is more likely to reduce

1 available consumer choice while providing no increase in industry capacity, jobs or
2 output. It was for these reasons, among others, Congress expressed its disapproval
3 of successive acquisitions. Section 7 was enacted to prevent even small mergers
4 that added to concentration in an industry.” [citing congressional record].

5 *Brown Shoe*, 370 U.S. at 346 n.72 (1962).

6 Judge Posner, recognizing the very low threshold for unlawfulness, summarized the
7 Supreme Court precedent interpreting Section 7 of the Clayton Act: “[T]aken as a group,” the
8 Supreme Court cases seemed “to establish the illegality of any nontrivial acquisition of a
9 competitor, whether or not the acquisition was likely either to bring about or shore up collusive or
10 oligopoly pricing.” *Hosp. Corp. of Am. v. F.T.C.*, 807 F.2d 1381, 1385 (7th Cir. 1986). “The
11 elimination of a significant rival was thought by itself to infringe the complex of social and
12 economic values conceived by a majority of the Court to inform the statutory words ‘may . . .
13 substantially . . . lessen competition.’” *Id.* And “[n]one of these decisions has been overruled.” *Id.*

14 **3. Plaintiff’s Need Only Show a Reasonable Probability of Lessening of
15 Competition in a Single Product Market; Defendants Must Establish
16 There Will Be No Lessening of Competition in Any Market**

17 Section 7 of the Clayton Act requires merely the reasonable probability of lessening of
18 competition “in any line of commerce” or “in any activity affecting commerce” anywhere in the
19 country. 15 U.S.C. § 18. The Supreme Court has recognized that an unlawful merger or
20 acquisition might affect multiple relevant markets. Courts must consider whether the merger
21 might lessen competition **in any one of them**, and if so, “the merger is proscribed.” *Brown Shoe*,
22 370 U.S. at 325–28 (assessing whether merger might lessen competition in men’s, women’s, and
23 children’s shoes); *see also Cont’l Can*, 378 U.S. at 457–58 (“That there may be a broader product
24 market made up of metal, glass and other competing containers does not necessarily negative the
25 existence of submarkets of cans, glass, plastic or cans and glass together, for ‘within this broad
26 market, well-defined submarkets may exist which, in themselves, constitute product markets for
27 antitrust purposes.’”); *Aluminum Co. of Am.*, 377 U.S. at 276 (recognizing submarkets for both
28 aluminum conductor and copper conductor, and finding merger might substantially lessen
competition in aluminum conductor market); *Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1304 (9th Cir.
1993) (“Even accepting [Defendant’s] argument that there is a relevant market comprised of all

1 pool sanitizers, this does not preclude identification of a relevant submarket comprised solely of
2 dry sanitizers.”).

3 Therefore, Microsoft may not defeat a showing that the merger may substantially lessen
4 competition in one market, by showing a potential increase in competition in another market. *See*
5 *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 370 (1963) (holding that “anticompetitive effects
6 in one market” cannot be justified by “procompetitive consequences in another”). So long as
7 Plaintiffs can identify a single product market in which competition might be substantially
8 lessened, Plaintiffs must prevail. *Id.* Thus, Microsoft must establish that there is no reasonable
9 probability that the merger might lessen competition in each of the relevant product markets.

10 **4. The Merger May Substantially Lessen Competition in Numerous** 11 **Markets**

12 At the hearing on Plaintiffs’ motion for preliminary injunction, Plaintiffs will establish that
13 competition will be lessened in a number of relevant markets.

14 **a. Relevant Geographic Market**

15 As a threshold matter, the relevant geographic market for assessment in this case is the
16 United States. “Congress prescribed a pragmatic, factual approach to the definition of the
17 relevant market and not a formal, legalistic one.” *Brown Shoe*, 370 U.S. at 336. The proper
18 geographic market must “correspond to the commercial realities of the industry and be
19 economically significant.” *Id.* at 336-37 (citations omitted). The relevant geographic market is the
20 “area of effective competition where buyers can turn for alternate sources of supply.” *Saint*
21 *Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015).
22 In other words, the relevant geography is where the group of sellers or producers “have the actual
23 or potential ability to deprive each other of significant levels of business.” *Id.*

24 Prices of video games in the United States are generally not constrained by the prices of
25 video games in other countries. Pls’ Compl. ¶ 205. Gamers are unable to take advantage of lower
26 prices in different countries, instead bound by the prices in the United States. *Id.* Digital
27 purchases, increasingly the primary form of game distribution, prevent consumers from
28 purchasing another countries’ version of the same game. *Id.* ¶ 207. Language barriers further

1 prevent consumers from purchasing video games from other countries. *Id.* ¶ 210. Thus, gamers
2 are confined to the United States to purchase games, and the actual or potential ability of
3 competitors to deprive each other of business occurs within the United States. The United States
4 thus constitutes a relevant geographic market for analyzing the proposed merger.

5 **b. Relevant Product Markets**

6 In order to assess whether the merger might lessen competition in a product market, all
7 relevant product markets that may be affected must first be identified. The Clayton Act prohibits
8 mergers which may substantially lessen competition in “in any line of commerce.” 15 U.S.C. § 18.
9 Thus, the effects of a merger are reviewed in each economically significant market or submarket
10 to determine if there is a reasonable possibility the merger will lessen competition. *See Brown*
11 *Shoe*, 370 U.S. at 325. “[I]f such a probability is found to exist, the merger is proscribed.” *Id.* As
12 discussed in *Brown Shoe*, the “outer boundaries of a product market are determined by the
13 reasonable interchangeability of use . . . between the product itself and substitutes for it.” *Id.* But
14 within a broad market, “well-defined submarkets may exist which, in themselves, constitute
15 product markets for antitrust purposes.” *Id.* To determine whether a product market constitutes a
16 relevant product market for antitrust purposes, courts examine “such practical indicia as industry
17 or public recognition of the submarket as a separate economic entity, the product’s peculiar
18 characteristics and uses, unique production facilities, distinct customers, distinct prices,
19 sensitivity to price changes, and specialized vendors.” *Id.*; *see also Olin Corp.*, 986 F.2d at 1299.

20 Applying the practical indicia set forth in *Brown Shoe*, the relevant product markets that
21 may be affected by the Microsoft Acquisition merger are the following. Within the video game
22 content market, there are relevant markets for (1) console gaming (*see* Pls’ Compl. ¶¶ 134-143);
23 (2) PC gaming (*see* Pls’ Compl. ¶¶ 144-154); (3) Mobile gaming (*see* Pls’ Compl. ¶¶ 155-164); (4)
24 Triple-A video games (*see* Pls’ Compl. ¶¶ 165-170); and (5) multi-game library subscription
25 services (*see* Pls’ Compl. ¶¶ 171-176). Within the gaming platform or systems market, there are
26 relevant product markets of (6) the sale of game console systems (*see* Pls’ Compl. ¶¶ 177-179); (8)
27 the sale of high-end game console systems (*see* Pls’ Compl. ¶¶ 180-189); (9) the sale of PC
28

1 operating systems (*see* Pls’ Compl. ¶¶ 190-195); and (10) cloud-based gaming services (*see* Pls’
2 Compl. ¶¶ 196-203).

3 **c. The Merger May Substantially Lessen Competition in Each of**
4 **the Relevant Product Markets**

5 If this Court were to allow Microsoft to acquire and merge with Activision Blizzard,
6 competition within numerous relevant product markets in the United States may substantially
7 lessen. “[I]t is necessary to examine the effects of a merger in each such economically significant
8 submarket to determine if there is a reasonable probability that the merger will substantially
9 lessen competition. If such a probability is found to exist, the merger is proscribed.” *Brown Shoe*,
10 370 U.S. at 325. At the hearing on Plaintiffs’ motion for preliminary injunction, Plaintiffs will
11 show far beyond their minimal burden that competition will be lessened in the relevant markets.

12 **i. The Markets for Gaming Content for Consoles and PCs**

13 The electronic-gaming industry revolves around gaming content. It is the creation and
14 sale of video game content that provides users with the gaming experience they seek. Gaming
15 platforms merely provide the technology to run and deploy those games. Microsoft and
16 Activision Blizzard are two of the largest game developers and publishers of gaming content in the
17 industry, and they are horizontal competitors, directly competing against one another to develop,
18 publish, and distribute gaming content to consumers in the console and PC gaming markets.
19 Through Microsoft’s acquisition of Activision Blizzard, the competition for the development,
20 publishing, and sale of gaming content between these two market leaders will be eliminated.
21 Under the Supreme Court’s prior Section 7 cases, this alone is more than sufficient to show
22 beyond a doubt that the merger will substantially lessen competition, let alone “may.”

23 According to a report prepared by the Congressional Research Service, Microsoft is the
24 largest publisher of gaming content in the United States, with a market share of 23.9%. *See* Seidel
25 Decl. Ex. B at 4. Since 2014, Microsoft has been involved in numerous significant mergers and
26 acquisitions of video game developers and publishers. *See* Pls’ Compl. ¶ 220. Microsoft owns
27 through acquisition former competitors such as ZeniMax Media Inc., the parent company of
28 Bethesda, a popular Triple-A video game developer and publisher responsible for popular

1 franchises such as *The Elder Scrolls*, *Fallout*, *Wolfenstein*, and others. *Id.* Microsoft also owns other
2 massive video game franchises, such as *Minecraft*, *Halo*, and *Gears of War*. Microsoft continues to
3 develop and publish gaming content.

4 Activision Blizzard is the second largest publisher of gaming content in the United States
5 with a market share of 10%. *See* Seidel Decl. Ex. B at 5. Since 1997 Activision Blizzard has been
6 involved in several significant mergers and acquisitions of video game developers. Pls' Compl., at
7 ¶ 222. Activision Blizzard now owns a number of former competitors such as Treyarch Invention
8 LLC and Infinity Ward Inc., that work on the immensely popular *Call of Duty* franchise. *Id.*, ¶¶
9 222(b)- (c). Activision Blizzard is responsible for developing or publishing some of the most
10 successful video games of all time, such as *Call of Duty*, *World of Warcraft*, *StarCraft*, *Diablo*,
11 *Overwatch*, and *Candy Crush*. Activision Blizzard continues to develop and publish gaming
12 content.

13 These market share statistics alone are more than sufficient to conclude that the merger is
14 unlawful under Section 7. Through the acquisition, Microsoft will add 10% of the market to its
15 current control of roughly 24%, for a combined total of roughly 34% of the market. *See* Seidel Decl.
16 Ex. B at 4–5. This is far in excess of market concentration the Supreme Court has previously held
17 unlawful. *See, e.g., Von's Grocery*, 384 U.S. at 272–74 (holding unlawful the merger of two grocery
18 store chains, with a combined total of 7.5% of the market); *Cont'l Can*, 378 U.S. at 461 (holding
19 unlawful an acquisition that would increase the acquiring entity's market share from 21.9% to
20 25%.); *Aluminum Co. of Am.*, 377 U.S. at 280–81 (holding unlawful an acquisition of an entity with
21 1.3% of the market share by a company with 27.8% of the market); *Pabst Brewing Co.*, 384 U.S. at
22 550 (holding unlawful the acquisition of two brewers with a combined market share of only
23 4.49%). Moreover, these cases did not turn on complicated econometric or statistical analyses.
24 Instead, these cases turned simply on the market share statistics of the merging entities in
25 combination with a trend towards concentration in the markets, and the elimination of a
26 significant competitor through a non-trivial transaction. *See, e.g., Von's Grocery*, 384 U.S. at 278
27 (“It is enough for us that Congress feared that a market marked at the same time by both a
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1 continuous decline in the number of small businesses and a large number of mergers would slowly
2 but inevitably gravitate from a market of many small competitors to one dominated by one or a
3 few giants, and competition would thereby be destroyed.”).

4 Indeed, in *Philadelphia National Bank*, 374 U.S. at 364, the Court held that any
5 combination which would raise the post-merger entity to more than 30% was a clear *per se* prima
6 facie showing of unlawfulness under Section 7. The Court held that “[w]ithout attempting to
7 specify the smallest market share which would still be considered to threaten undue
8 concentration, we are clear that 30% presents that threat,” and therefore established “prima facie
9 unlawfulness.” 374 U.S. at 364 & n.41. Here, Microsoft’s acquisition of Activision Blizzard will
10 raise Microsoft’s market share in the video game publishing market well beyond the small
11 concentration rates already deemed unlawful by numerous Supreme Court cases, and beyond the
12 30% presumption declared under *Philadelphia National Bank*.

13 The significant concentration in the game development and publishing markets that will
14 result from this acquisition is particularly pronounced, given the recent and steady trend towards
15 concentration in the industry. As the Supreme Court has held, Section 7 was specifically intended
16 to prevent a lessening of competition in its incipiency. Thus, whether a market is trending
17 towards concentration is highly relevant in determining whether a particular merger might lessen
18 competition or tend to create a monopoly. *In Von’s Grocery*, the Court held: “Congress sought to
19 preserve competition among many small businesses by arresting a trend toward concentration in
20 its incipiency before that trend developed to the point that a market was left in the grip of a few
21 big companies. Thus, where concentration is gaining momentum in a market, we must be alert to
22 carry out Congress’ intent to protect competition against ever increasing concentration through
23 mergers.” 384 U.S. at 277; *see also Pabst Brewing Co.*, 384 U.S. at 552–53 (“We hold that a trend
24 toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding
25 how substantial the anti-competitive effect of a merger may be.”). Here, as alleged in the
26 Complaint, and as Plaintiffs will establish at trial, both Microsoft and Activision Blizzard became
27 the giants that they are through numerous mergers, in an industry characterized by substantial
28

1 and increasing concentration. Pls' Compl. ¶¶ 219-222. The trend towards consolidation in the
2 game development and publishing markets further supports finding that Microsoft's proposed
3 acquisition, which would eliminate one of Microsoft's significant horizontal competitors, is *per se*
4 unlawful under Section 7.

5 The merger's elimination of a significant rival in the game development and publishing
6 markets for console and PC gaming is even worse because both Microsoft and Activision Blizzard
7 are two of only a handful of publishers capable of producing Triple-A games. As alleged in the
8 complaint and recognized in the industry, Triple-A games are the most important gaming
9 content, having the highest game production value, and generally employ the most cutting-edge
10 graphics technologies. They are the most heavily marketed and are the most highly anticipated
11 and popular games. Pls' Compl. ¶¶ 165-169. They thus command the highest prices. Pls' Compl.
12 ¶ 166. Triple-A games constitute an even more concentrated relevant product market. There are
13 only six or seven publishers capable of producing such high-production and heavily marketed
14 games, and only four or five independent Triple-A publishers, not including Microsoft or Sony.
15 *Id.* ¶¶ 76, 165. Microsoft and Activision Blizzard are two of the largest Triple-A publishers, along
16 with Electronic Arts, Take-Two, Ubisoft, Sony, and in some cases Epic. *Id.* ¶ 76 Microsoft and
17 Activision Blizzard directly compete with one another with respect to the development and
18 publishing of these critically important Triple-A games, in an already highly concentrated market.
19 The acquisition here, which would combine the largest and second-largest publishers and
20 eliminate the competition between them is unlawful under Section 7.

21 **ii. The Markets for Gaming Platforms, such as Console**
22 **and High-End Console Systems, PC Operating Systems,**
23 **and Cloud-based gaming**

24 Microsoft has become a giant in the video game industry, controlling an integrated and
25 interconnected gaming ecosystem. It competes in numerous gaming markets. Microsoft sells the
26 Xbox, a high-end gaming console. Pls' Compl. ¶ 7. It sells games. Pls' Compl. ¶ 45-46. It owns
27 and operates Azure, a cloud server infrastructure for numerous products and services, including
28 gaming. Pls' Compl. ¶¶ 53-55. It sells the Windows operating system, which owns around 90% of

1 the PC gaming market. Pls' Compl. ¶¶ 39, 101; Seidel Decl. Ex. A at ¶ 260. It sells a multi-game
2 subscription service for Xbox and PC, Game Pass, which controls roughly 60% of the game
3 subscription market. Pls' Compl. ¶ 47; Seidel Decl. Ex. A. at ¶ 210. And it also sells a cloud-based
4 gaming service. Pls' Compl. ¶¶ 50, 310.

5 The merger has the potential to and will likely substantially lessen competition in the
6 markets for gaming platforms, including consoles, PC, and cloud-based gaming, because the
7 merger will give Microsoft control over an outsized portion of top gaming content and Triple-A
8 games. This top gaming content is a critical input to rival platform manufacturers, and Microsoft
9 will be able to foreclose this gaming content to rival platform manufacturers, including consoles,
10 PC operating systems, and cloud-based gaming, to harm competition.

11 As described in the complaint, the video game industry is characterized by high network
12 effects and barriers to entry. *See* Pls' Compl. at ¶¶ 231-251; *see also* Seidel Decl. Ex. A at ¶¶ 130,
13 297. Gaming platforms are reliant on gaming content producers developing and publishing
14 gaming content for the platform. Without adequate gaming content available for a given platform,
15 the platform will not be successful. Consumers choose gaming platforms in large part on the
16 quality and quantity of available games for the platform. Game developers seek to develop games
17 for popular game platforms to reach as many consumers as possible, thereby reinforcing network
18 effects and increasing barriers to entry. Gamers are also incentivized to play popular games so
19 that they can find other gamers online and play with friends.

20 If permitted, the merger will give Microsoft further control over Triple-A gaming content.
21 The merger would provide Microsoft with the means and further incentive to foreclose
22 Activision Blizzard's important gaming catalog and future releases from rival gaming platform
23 providers. For example, in the console gaming market, Microsoft will be able to make Activision
24 Blizzard's current and forthcoming game titles—along with Microsoft's own substantial gaming
25 content—exclusive to its Xbox system, precluding Microsoft's Xbox rivals from access to this
26 critical source of gaming content. The same is true with respect to PC gaming and cloud-based
27 gaming services, as Microsoft could make Activision Blizzard's current and forthcoming game
28

1 content exclusive to the Windows operating system and Microsoft cloud-based gaming offerings,
2 maintaining its monopoly position in the PC gaming market and foreclosing rivals. Indeed,
3 Microsoft has already engaged in this anticompetitive practice when it has acquired game
4 developers and publishers in the past. Pls' Compl. at ¶¶ 301-305; Seidel Decl. Ex. A at ¶ 192;
5 Seidel Decl. Ex. B at 5.

6 As held in *Brown Shoe*, an arrangement, which “forces the customer to take a product or
7 brand he does not necessarily want in order to secure one which he does desire,” is “inherently
8 anticompetitive.” 370 U.S. at 330. *Brown Shoe* thus held that “its use by an established company is
9 likely ‘substantially to lessen competition’ even if “only a relatively small amount of commerce is
10 affected.” *Id.* In *Brown Shoe*, the issue was whether a shoe company that owned both shoe
11 manufacturing and retail shoe stores could lawfully acquire a shoe company with numerous shoe
12 retail stores. The court noted that if the shoe manufacturer were to fill the newly acquired shoe
13 stores with its own manufactured shoes, that action would foreclose those retail outlets to other
14 shoe manufacturers. The Court analogized vertical acquisitions for the purpose of making one
15 product exclusive to the other as an inherently anticompetitive tying arrangement. *Id.* at 329–32.

16 The same applies here. If Microsoft were to make Activision Blizzard’s current or
17 forthcoming gaming content exclusive or partially exclusive to Microsoft’s Xbox, the Windows
18 Operating system, or its cloud-gaming service, the merger would be inherently anticompetitive
19 just as it was in *Brown Shoe*. *Id.* If Microsoft were to make Activision Blizzard’s gaming content
20 exclusive, it would further harm competition through “foreclosure of a share of the market
21 otherwise open to competitors,” *id.* at 328, by forcing consumers to purchase, for example, an
22 Xbox—regardless of the merits of the Xbox system over the PlayStation system—if the consumer
23 wished to play Activision Blizzard’s particularly popular gaming content. The same for
24 Microsoft’s other gaming platforms.

25 Microsoft already owns numerous gaming franchises that it has made exclusive to the
26 Xbox or the Windows operating system, and to its Game Pass game subscription service. And
27 when Microsoft acquired the game developer and publisher ZeniMax Media, the parent company
28

1 to Triple-A game developer and publisher Bethesda Softworks LLC (“Bethesda”), in March
 2 2021, Microsoft assured the European Commission it did not have the incentive to withhold
 3 gaming content from rival platforms. According to the European Commission, Microsoft
 4 submitted that post-transaction, “Microsoft would not have the incentive to cease or limit
 5 making ZeniMax games available for purchase on rival consoles.” *See* Pls’ Compl. ¶ 302.⁷ Shortly
 6 after the merger was cleared by the European Commission, Microsoft made public its decision to
 7 make several of ZeniMax’s games Microsoft-exclusive titles, including *Starfield*, *Redfall*, and
 8 *Elder Scrolls VI*. Pls’ Compl. ¶¶ 303-305;⁸ Seidel Decl. Ex. A ¶¶ 192-194; Seidel Decl. Ex. B at 5-
 9 6.

10 Acknowledging that exclusivity of Activision Blizzard’s game is a real possibility,
 11 Microsoft has attempted to disclaim any intention or incentive to make Activision Blizzard’s
 12 games exclusive to Microsoft’s platforms. Pls’ Compl. ¶ 306.⁹ But regardless of what Microsoft
 13 may say to obtain approval of this massive acquisition, the merger would, as Microsoft admits,
 14 give Microsoft the ability to foreclose rivals from this important gaming content. Microsoft has
 15 already demonstrated it has the incentive, as well as the willingness to make games exclusive, as it
 16 did when it acquired ZeniMax games.¹⁰

17 **iii. The Markets for Game Distribution Channels,
 18 Including Multi-Game Library Subscription Services**

19 Microsoft also operates game distribution channels, including its multi-game library
 20 subscription services product, Game Pass, and its online digital game store, the Microsoft Store.

21 _____
 22 ⁷ *See* European Commission Decision, Case M.10001, May 3, 2021, available at
https://ec.europa.eu/competition/mergers/cases1/202124/m10001_438_3.pdf.

23 ⁸ *See* Sam White, *How Xbox Outgrew the Console: Inside Phil Spencer’s Multi-Billion Dollar Gamble*,
 24 November 15, 2021, available at <https://www.gq-magazine.co.uk/culture/article/xbox-phil-spencer-todd-howard-interview>.

25 ⁹ *See, e.g.*, Matthew Humphries, *Phil Spencer Says Sony Is the Only “Major Opposer” to Activision
 26 Blizzard Deal*, PC Mag, December 12, 2022 available at <https://www.pcmag.com/news/phil-spencer-says-sony-is-the-only-major-opposer-to-activision-blizzard>.

27 ¹⁰ “[S]ize carries with it an opportunity for abuse that is not to be ignored when the opportunity
 28 is proved to have been utilized in the past.” *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932)
 (Cardozo, J.).

1 Under Game Pass, Microsoft offers players an entire library of games for the Xbox and Windows
2 operating systems at a flat monthly fee. In this way, players can subscribe to an entire collection of
3 games, rather than purchasing games individually. The multi-game library subscription service is
4 a new game distribution market, and Microsoft is incentivized to make Activision Blizzard's game
5 exclusive to Game Pass, thereby foreclosing rival and nascent game subscription services from
6 Activision Blizzard's important gaming content and increasing barriers to entry. Just as with
7 Microsoft's likely exclusion of gaming content with respect to rival gaming platforms, this court
8 need only find a reasonable probability that Microsoft will make Activision Blizzard's gaming
9 content exclusive to Game Pass to find the merger unlawful under Section 7.

10 **iv. The Labor Market for Talented Game Content Creators**

11 The merger is also reasonably likely to reduce competition among Triple-A game
12 publishers and developers to hire and retain the labor talent needed to create and publish high-
13 end gaming content. Microsoft and Activision Blizzard are both huge video game industry
14 employers in the United States, and the merger stands to substantially lessen competition in the
15 labor market. The talent necessary to develop, design, program, produce, and publish video
16 games is highly technical and specialized. Pls' Compl. ¶ 277. There are already a limited number
17 of large employers, such as Microsoft and Activision Blizzard, in the United States who hire the
18 highly skilled, technical, and specialized employees in the gaming content fields. *Id.* ¶ 277. Given
19 the limited number of large employers that hire and retain game content talent, Microsoft and
20 Activision Blizzard actively recruit each other's employees. Pls' Compl. ¶ 278. The merger would
21 lessen competition for labor by thinning the already sparse employment pool by combining two of
22 the largest competitors in the space.

23 The loss of competition in the labor market has the potential to further limit employees'
24 negotiating power and ability to change employers for improved working environments and
25 compensation. *Id.* ¶¶ 224-229. The loss of competition in the labor market is especially
26 concerning given that Activision Blizzard is currently a defendant in multiple lawsuits from
27 employees and from the California Department of Fair Employment and Housing due to
28

1 allegations of widespread gender discrimination and sexual harassment. Fewer employment
2 options available to employees necessarily limits employee’s mobility, including leaving
3 undesirable working conditions for better employers. The proposed merger would eliminate the
4 competition between two of the largest employers in the market for video game content labor
5 talent, reducing compensation, employee negotiating power, and the ability to change employers
6 for improved working environments.

7 **v. Nascent Competition Will Be Substantially Lessened**

8 In addition, Microsoft’s acquisition of Activision Blizzard may, and is likely to,
9 substantially lessen competition by eliminating Activision Blizzard as a nascent or potential
10 competitor. In *United States. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the Supreme Court
11 reversed a lower court decision on the ground that it “failed to give separate consideration to
12 whether” one of the merging parties “was a potential competitor in the sense that it was so
13 positioned on the edge of the market that it exerted beneficial influence on competitive conditions
14 in that market.” *Id.* at 532–33. “The specific question . . . is not what [Defendant’s] internal
15 company decisions were but whether, given its financial capabilities and conditions in the
16 [market], it would be reasonable to consider it a potential entrant into that market.” *Id.* at 533.

17 Here, Activision Blizzard is one of the most successful video game content producers of
18 all time. It owns, and continues to develop and publish, numerous of the most successful and
19 popular games across numerous platforms and gaming genres. Activision Blizzard has the
20 financial capabilities and the incentive to enter new markets, including markets in which it would
21 compete with Microsoft, such as multi-game subscription services, or cloud-based gaming.
22 Indeed, Activision Blizzard has already demonstrated it has the incentive and means to enter new
23 markets. In 2017, Activision Blizzard announced it was creating a new consumer products
24 division, and hired veteran Mattel and Disney executive Tim Kilpin to lead the new division. Pl.
25 Compl. ¶¶ 324–28. By acquiring Activision Blizzard, Microsoft will forever close the door to any
26 competition from Activision Blizzard entering new markets in which Microsoft competes. This is
27 yet another basis, sufficient alone under *Falstaff Brewing*, to hold the merger unlawful.

B. Plaintiffs Are likely to Suffer Irreparable Harm Without Preliminary Relief

1 Plaintiffs will suffer irreparable harm if the combination is allowed to proceed. Each of the
2 ten Plaintiffs seeking to stop Microsoft's merger is a passionate video game player. Plaintiffs all
3 rely on gaming as a significant source of entertainment, recreation, and socializing with friends.
4 Indeed, the enjoyment and social connections they gain from this rapidly growing industry is a
5 meaningful part of their identities, and they are invested in their gaming communities. *See*
6 *generally* Pls' Declarations in Support. Given that the merger may, and most likely will, lessen
7 competition in the gaming industry, Plaintiffs are threatened with the potential harm that comes
8 from reduced competition, including their ability to experience the most innovative, entertaining,
9 and highest-quality gaming content on the widest range of platforms, at competitive prices.
10

11 Under Section 16 of the Clayton Act, plaintiffs are entitled to injunctive relief to prevent
12 "threatened loss or damage by a violation of the antitrust laws," including the possible lessening
13 of competition in a relevant market under Section 7. The Supreme Court has held that the
14 "lessening of competition 'is precisely the kind of irreparable injury that injunctive relief under
15 Section 16 of the Clayton Act was intended to prevent.'" *Am. Stores*, 492 U.S. at 1304; *see also*
16 *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) ("A lessening of competition
17 constitutes an irreparable injury under our case law."). Thus, because Microsoft's acquisition
18 may substantially lessen competition in the relevant markets, Plaintiffs have shown threatened
19 irreparable harm and are entitled to injunctive relief under Section 16.

C. The Balance of Equities Tips in Plaintiffs' Favor and Preliminary Relief Is in the Public Interest

20 The balance of equities tips sharply in Plaintiffs' favor because if a preliminary injunction
21 is denied and the merger were allowed to proceed, yet Plaintiffs ultimately prevail at trial and
22 divestiture must then be attempted, Plaintiffs will be irreparably harmed during the pendency of
23 this case and competition within these important markets across the United States will be
24 irretrievably lost. Indeed, given Microsoft's demonstrated prior strategy of acquiring important
25 gaming developers and publisher and then making their gaming content exclusive to Microsoft's
26 own gaming platforms, the damage done to competition will likely be extensive, immediate, and
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1 irreversible. Similarly, the loss in competition that currently exists between Microsoft and
2 Activision Blizzard in the production of gaming content will necessarily be lost. On the other
3 hand, if the Court issues a preliminary injunction merely until an accelerated trial on the merits is
4 heard, yet the Plaintiffs ultimately lose on the merits, Microsoft will only face possible delay of its
5 acquisition. It is much less disruptive of the industry and less harmful to competition to maintain
6 the status quo and delay an acquisition, than to allow a merger to proceed only to later seek
7 divestiture to undue the unlawful merger. *See, e.g., Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011,
8 1023 (9th Cir. 2016). Breaking up a consummated merger is difficult if not impossible. Among
9 other things, civil litigation seeking divestiture and damages from a consummated merger can
10 take years to resolve, which makes efforts to “unscramble” the “eggs” impractical.¹¹

11 Further, given Plaintiffs demonstration of likely success on the merits, a preliminary
12 injunction is in the public interest. As the Ninth Circuit has held, “the central purpose of the
13 antitrust laws, state and federal, is to preserve competition,” which is “vital to the public
14 interest.” *Id.* at 1024. Indeed, the antitrust laws were established in part to ensure that no
15 economic forces grew so large and so powerful that they could grossly tilt the economic playing
16 field further in their favor. They recognized that allowing economic power to concentrate in the
17 hands of too few corrupted all facets of society. Justice Thurgood Marshall captured this
18 fundamental premise succinctly: “Antitrust laws . . . are the Magna Carta of free enterprise. They
19 are as important to the preservation of economic freedom and our free-enterprise system as the
20 Bill of Rights is to the protection of our fundamental personal freedoms.” *United States v. Topco*
21 *Assocs., Inc.*, 405 U.S. 596, 610 (1972). Plaintiffs will show that Microsoft’s \$69 Billion acquisition
22 of the second largest gaming publisher and content creator in the United States will lessen
23 competition and give Microsoft outsized power to further harm competition, foreclose rivals, and
24
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26 ¹¹ *See generally*, William J. Baer, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-*
27 *Rodino Act*, October 31, 1996, available at [https://www.ftc.gov/news-](https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act)
28 [events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act](https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act)
(discussing how mergers cannot be “unscrambled” after they are consummated).

1 raise further barriers to entry. Prohibiting this merger from proceeding and maintaining the status
2 quo until Plaintiffs can prevail on the merits is in the public interest.

3 **D. A Bond Should Not be Required**

4 A bond is not mandatory under Fed. R. Civ. P. 65(c) but is within the discretion of the
5 District Court. *Barahona-Gomez v. Reno* 167 F.3d 1228 (9th Cir. 1999); *Moltan Co. v. Eagle-Picher*
6 *Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (district court has discretion to require posting of
7 security). In holding that no bond was required in *Reno*, the Court recognized the importance of
8 the public interests underlying the suit and “the unremarkable financial means of the [Plaintiffs]
9 as a whole.” *Id.* The Sixth Circuit, cited to with approval in *Reno*, is in accord. In *Moltan v. Eagle-*
10 *Picher*, the court held that the posting of security under Rule 65(c) was not required due to (1) the
11 strength of the plaintiffs’ case and (2) the strong public interests involved. 55 F.3d at 1176.

12 Just as in *Reno* and *Moltan*, the Court should waive the requirement of a bond. Plaintiffs
13 do not have the financial means to post security, and thus the requirement of a bond could well
14 foreclose Plaintiffs’ ability to bring this important case. Moreover, Plaintiffs are likely to succeed
15 in showing that this merger might substantially lessen competition in important markets, thus
16 protecting the public interest in robust economic competition and preventing a trend towards
17 concentration of economic power. All these factors weigh in favor of not requiring a bond here.

18 **V. CONCLUSION**

19 For all the foregoing reasons, the Court should issue a preliminary injunction to ensure
20 the unlawful merger does not commence before Plaintiffs can prove the merits of their case at
21 trial. Plaintiffs are likely to prevail on the merits, will suffer irreparable injury if the merger is
22 allowed to commence during the pendency of Plaintiffs’ claims, and the balance of hardships tips
23 sharply in Plaintiffs’—and the public interest’s—favor.

1 Dated: December 20, 2022

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