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 TO COMPEL DISCOVERY RESPONSES FROM RESPONDENTS

Pursuant to FTC Rule of Practice 3.38(a), Complaint Counsel respectfully moves the Court for an order compelling Respondents Microsoft Corporation and Activision Blizzard, Inc. to comply with this Court's October 26 Order by (1) conducting a reasonable search for, and producing in timely fashion, documents responsive to Request for Production 5 to Microsoft and Request for Production 4 to Activision in Complaint Counsel's Third Set of Requests for Production to Respondents and (2) producing corporate designees to testify on the topics noticed in Complaint Counsel's Second Notices of Deposition to Respondents.

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

COMPLAINT COUNSEL'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL DISCOVERY RESPONSES FROM RESPONDENTS

On October 26, 2023, this Court issued an Order granting leave for Complaint Counsel to take discovery relevant to the Ubisoft Agreement[1] and the Sony Agreement.[2] Respondents have claimed that these agreements are procompetitive and remedy the anticompetitive effects of Microsoft's acquisition of Activision (the "Transaction"), and Respondents plan to introduce both agreements as evidence in support of their defense. *See* October 26 Order at 2-3.

[1] The Ubisoft Agreement consists of several complex, interrelated agreements between Microsoft, Activision, and French videogame publisher Ubisoft.
[2] *See* Order on Complaint Counsel's Motion to Allow Discovery Regarding Respondents' Agreements with Ubisoft Entertainment SA and Sony Interactive Entertainment LLC, Oct. 26, 2023 ("October 26 Order"). As the Court found, Complaint Counsel had no opportunity to conduct any discovery related to the Ubisoft Agreement nor the circumstances surrounding the execution of the Sony Agreement, given that both agreements were executed months after the close of discovery. *See* October 26 Order at 3.

Despite this, and in violation of this Court's October 26 Order, Respondents refuse to provide (1) any corporate testimony about terms that were proposed but not included in the final Ubisoft Agreement; (2) any corporate testimony about the alternatives to the Ubisoft Agreement that Respondents considered; (3) any corporate testimony from Activision on all but three noticed topics; and (4) any documents or corporate testimony about Respondents' own agreement to extend their merger's timing, which was a necessary precondition to reaching the Ubisoft Agreement. Respondents have objected to this discovery as irrelevant. Regarding the corporate testimony, Respondents have raised an untimely and meritless argument that Microsoft's corporate designee will speak for Activision (and vice versa).

Complaint Counsel respectfully requests an order compelling Respondents to comply with this Court's October 26 Order and provide the requested documents and noticed corporate testimony.

BACKGROUND

On October 26, 2023, this Court reopened discovery relevant to the Ubisoft Agreement. *See* October 26 Order at 4. The Court applied Rule 3.31(c)(1), which provides that "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." The Court found that "there is no dispute as to the relevance" of the Ubisoft Agreement, which Respondents intend to offer as evidence in support of their defense, *see* October 26 Order at 3, and rejected Respondents' argument that the Ubisoft Agreement "speaks for itself," *see* Resp. Microsoft's Opp. to Complaint Counsel's Mot. to Extend Fact Discovery, October 20, 2023 ("Opposition") at 6.

Requests for Production. On October 27, Complaint Counsel served Respondents with its Third Set of Requests for Production ("RFPs"). RFP No. 5 to Microsoft and RFP No. 4 to

Activision request documents relating to negotiations to extend the termination date for the Transaction. Respondents have refused to produce any documents in response to these RFPs.

Complaint Counsel conferred extensively and in good faith with Respondents to resolve this disagreement. Instead of engaging in productive discussions, however, Respondents proposed a compromise that yielded no documents responsive to these RFPs. When Complaint Counsel clarified that Respondents' proposal did not produce responsive documents, Respondents stated that they would not produce any documents responsive to Microsoft RFP 5 or Activision RFP 4. Respondents even refused to state whether they had investigated the scope of potentially responsive documents. Because Respondents were unwilling to discuss the scope of potentially responsive documents, Complaint Counsel was not in a position to propose a compromise to resolve the disagreement.

Corporate Depositions. On November 27, 2023, Complaint Counsel served Second Notices of Deposition to each of Respondents Microsoft and Activision. Respondents did not respond. Per Rule 3.34(c), the deadline for Respondents to move to quash or modify these notices was December 7, 2023.

On December 5, 2023, Complaint Counsel asked Respondents to identify corporate designees for each topic and offered to meet and confer on scheduling. On December 6, 2023, Respondents proposed to meet and confer two days later—i.e., the day after the deadline to move to quash or limit the notices.

Respondents refused to prepare an Activision corporate witness on six of the nine topics noticed for Activision. While this Court ordered discovery of information from "each Respondent," *see* October 26 Order at 4, Respondents argued that the corporate witnesses could testify on each other's behalf and unilaterally asserted that the Microsoft witness would testify on

topics directed to Activision (and vice versa). Respondents further refused to prepare either a Microsoft or Activision corporate witness on six topics relevant to the Ubisoft Agreement. Specifically, Respondents refused to make witnesses available to testify on (i) Microsoft and Activision Corporate Deposition Topic 2(d), which seek testimony about terms that were proposed but not included in the final Ubisoft Agreement, (ii) Microsoft and Activision Corporate Deposition Topic 5, which seek testimony about alternative potential purchasers of Activision's cloud streaming rights (i.e., other than Ubisoft), and (iii) Microsoft Corporate Deposition Topic 9 and Activision Corporate Deposition Topic 8, which seek testimony about negotiations to extend the termination date for the Transaction.

Complaint Counsel met and conferred with Respondents in a good faith effort to resolve these disagreements but was unable to reach an agreement.

ARGUMENT

Respondents' refusal to provide discovery about the Ubisoft Agreement violates this Court's October 26 Order. As this Court already found, the Ubisoft Agreement is relevant to the issues in this case, and Respondents cannot justify their violation of this Court's Order. Respondents have forfeited their objections to the notices for corporate testimony, and their arguments are otherwise meritless for the reasons explained below.

I. Respondents' Refusals to Provide Relevant Corporate Testimony Are Forfeited Because They Are Untimely

Respondents failed to timely move to quash or modify Complaint Counsel's notices for corporate testimony. Rule 3.34(c) requires the subject of a deposition notice to move to quash or limit the notice "within the earlier of 10 days after service thereof or the time of compliance

therewith."[3] Complaint Counsel served the deposition notices at issue on November 27, 2023, and the deadline for Respondents to move to quash or limit the notices expired on December 7. Respondents raised no issue with the deposition notices until nine days after the subpoenas were served, when they requested to meet and confer the day *after* Respondents' December 7 deadline. Respondents have not identified any excuse for failing to timely raise their objections or move. Respondents were responsible under Rule 3.34(c) for moving to quash or limit the deposition notices, their neglect should not be excused, and they have forfeited any opposition to the notices.[4]

II. Respondents Refuse to Comply with This Court's Order Requiring Respondents to Designate Witnesses for Corporate Testimony

Even if not forfeited, Respondents' objections to the corporate deposition notices are meritless. Respondents refuse to designate an Activision witness on all but three of the noticed topics. Respondents assert that any testimony from an Activision witness on the remaining topics would be "duplicative of Microsoft's testimony." *See* Exhibit G at 3. Their refusal to designate a corporate witness on relevant topics violates this Court's October 26 Order, which permits Complaint Counsel to serve a "notice for a 3.33(c)(1) corporate deposition *on each Respondent*." October 26 Order at 4 (emphasis added).

This Court's October 26 Order does not require Complaint Counsel to divide topics between Activision and Microsoft corporate witnesses. And the Court should not allow such a division. Activision signed the Ubisoft Agreement, and this Court is entitled to hear testimony

[3] 3.34(c) applies to party deposition notices and third-party subpoenas *ad testificandum*. *See* Order, *In re North Texas Specialty Physicians*, No. 9312, 2003 WL 22936410, at *2 (FTC Dec. 4, 2003).

[4] Had Respondents timely moved on their testimony objections by December 7, the parties' disagreement over the relevance of these topics could have been resolved without the need for compressed holiday motions practice.

from Activision about the Ubisoft Agreement. There is no reason that Microsoft should testify on Activision's behalf about events that occurred when Activision was an independent company, or vice versa. Activision's role in the negotiations did not change when Respondents completed their merger, and Microsoft cannot limit the scope of relevant testimony after the fact. It is particularly egregious to do so on the basis that Respondents are a "single company," Exhibit G at 3, after this Court has already determined that good cause exists for Activision and Microsoft witnesses to sit for depositions. *See* October 26 Order at 4.

III. Respondents Refuse to Provide Testimony About the Negotiations that Led to the Execution of the Ubisoft Agreement

Respondents refuse to provide relevant testimony about noticed topics related to the negotiations that led to the execution of the Ubisoft Agreement. Microsoft and Activision Topics 2(d) and 5 seek testimony on terms that were proposed but not included in the final Ubisoft Agreement and testimony related to potential alternative purchasers of Activision's streaming rights. *See* Exhibits D and E. These topics are relevant to assessing the adequacy of the Ubisoft Agreement. Understanding what terms were considered but not included in the final Ubisoft Agreement, why those terms were not included, and what Respondents believed the impact of those terms would be provides important context for assessing the terms of the final Ubisoft Agreement. And understanding potential purchasers that were considered and why they were not selected provides important context to assessing the adequacy of Ubisoft as a purchaser.

Microsoft has already conceded the relevance of Topics 2(d) and 5 by producing documents in response to RFPs 2(a) (requesting communications with Ubisoft) and 2(b) (requesting documents analyzing or discussing alternative purchasers to Ubisoft). *See* Exhibit A. Respondents cannot now refuse to answer questions about these topics.

IV. Respondents Refuse to Provide Documents or Testimony About the Circumstances that Gave Rise to the Ubisoft Agreement

Respondents refuse to produce any documents or provide any testimony regarding the negotiations to extend the termination date for their merger. Extending their own deal provided time to negotiate and execute the Ubisoft Agreement. Respondents' refusal, which is premised on a claim that the information is not relevant, is inappropriate for two reasons.

First, the Court already resolved this dispute and granted discovery into this issue in its October 26 Order. On October 10, 2023, Complaint Counsel moved this Court to allow discovery regarding the Ubisoft Agreement. Complaint Counsel explained in that motion that the Ubisoft Agreement and its possible effects on American consumers present complex questions of fact that require additional fact discovery. Complaint Counsel's Mot. to Extend Fact Discovery, October 10, 2023 ("Motion") at 6. Complaint Counsel specifically identified the need for discovery into Microsoft's and Activision's negotiations to extend the deadline for completing the Transaction, which provided time to negotiate and execute the Ubisoft Agreement. *See id*. at 7-8.

Respondents argued in their opposition that the Ubisoft Agreement "speaks for itself," but they nevertheless proposed a limited discovery plan, arguing that information on the extension could be "readily obtained" through a limited set of document requests and a corporate deposition. *See* Opposition at 6, 8. This Court then ordered limited discovery. Respondents now contradict their prior position and seek to evade the Court's October 26 Order. Respondents refuse to provide any information on the negotiations to extend the deadline for completing the Transaction. Respondents cannot ask to limit discovery on a topic and then—once discovery is ordered—relitigate whether there should be any discovery.

Second, even assuming this issue was not already resolved, Respondents cannot justify their failure to comply with their discovery obligations based on relevance. Microsoft and Activision extended the termination date for their merger so they could negotiate additional purported remedies to address the competitive harm arising from their merger. On July 18, 2023, Respondents extended the deadline to close the Transaction by three months, and Microsoft agreed to increase the Transaction's $3 billion break fee to as much as $4.5 billion. *See* Exhibit I. Microsoft President Brad Smith announced that the purpose of the extension was to provide "ample time" to work through regulatory issues. *See* Exhibit J. The outcome of that work was the Ubisoft Agreement.

Respondents have refused to explain how Respondents could have agreed to extend the deadline for their merger without discussing the contours of a potential remedy—and there is no reason to think that they did.[5] Information about these negotiations may be reasonably expected to yield information relevant to the defenses of Respondents. Discovery into the extension of the merger deadline may reveal executives' discussions about and reactions to potential remedies, including the impact of such purported remedies on the combined company's business and on competition. All of this is relevant to the Ubisoft Agreement. Indeed, the Ubisoft Agreement would not exist absent the negotiations to extend the deadline—a fact that Respondents have acknowledged in their briefing before this Court and in public statements. *See, e.g.*, Opposition at 8; Exhibit J.

[5] Respondents have claimed that the disputed document requests amount to a "fishing expedition." *See* Exhibit H. That is not the case. Complaint Counsel's requests are narrowly tailored in time and scope and seek information on a topic that Respondents plan to introduce as a defense. As detailed above, the requests are reasonably calculated to lead to relevant evidence. Further, it is difficult to understand how Respondents could argue the requests are burdensome—let alone amount to a "fishing expedition"—when they refuse to investigate the scope of responsive material or make a witness available to testify on the topic. *See* Exhibits G, H.

V. The Scope of Complaint Counsel's Requests for Documents and Testimony Is Reasonable, and Respondents Cannot Show the Discovery Is Unduly Burdensome

Respondents have made no specific arguments about the burden or expense of the proposed discovery. In fact, with respect to documents, Respondents have refused to tell Complaint Counsel whether they even investigated the scope of potentially responsive documents. "Respondent's general, unsupported allegations of burden and expense are insufficient to meet its burden of demonstrating that the requested discovery should be denied." *In re Sysco Corp.*, No. 9364, 2015 WL 3897396, at *3 (FTC June 17, 2015).

In any event, the burden and expense of responding to the disputed requests is likely to be minimal. With respect to the disputed document requests, the relevant time period is short. Likewise, there is limited burden associated with preparing Microsoft and Activision witnesses to testify about negotiations that occurred within the last six months. Finally, Respondents have represented to this Court that information about the noticed topics can be "readily obtained" through document requests and a corporate deposition. Opposition at 8. Respondents cannot reverse course now and claim undue burdens that are contrary to their prior positions.

CONCLUSION

For the foregoing reasons, this Court should grant Complaint Counsel's motion to compel deposition testimony and the production of documents.

Dated: December 21, 2023

Respectfully submitted,

By: */s/ Nicole Callan*
Nicole Callan
Cem Akleman
Maria Cirincione
Meredith Levert
Merrick Pastore
James H. Weingarten

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2234
Email: ncallan@ftc.gov
cakleman@ftc.gov
mcirincione@ftc.gov
mlevert@ftc.gov
mpastore@ftc.gov
jweingarten@ftc.gov

Counsel Supporting the Complaint

UNITED STATES OF AMERICA
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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 to Compel Discovery Responses from Respondents and any opposition to that motion:

IT IS HEREBY ORDERED that Complaint Counsel's Motion is GRANTED.

IT IS FURTHER ORDERED that Respondents shall produce documents responsive to Request for Production 5 to Microsoft and Request for Production 4 to Activision on a rolling basis and complete production of such responsive documents on or before January 17, 2024.

IT IS FURTHER ORDERED that Microsoft and Activision shall each produce one or more corporate designees to testify on the topics in their respective corporate deposition notices 10 days after completing production of responsive documents (or such other date(s) as agreed among the parties).

IT IS FURTHER ORDERED that any supplemental exhibits from documents responsive to Request for Production 5 to Microsoft and Request for Production 4 to Activision be identified to both parties no later than 14 days after all document production is complete. If any such documents are confidential, the supplementing party must provide notice of intent to offer confidential materials to the opposing party within 14 days of such identification.

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date: _____

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STATEMENT REGARDING MEET AND CONFER PURSUANT TO 16 C.F.R. § 3.22(g)

Complaint Counsel respectfully submits this Statement, pursuant to Rule 3.22(g) of the Federal Trade Commission's Rules of Adjudicative Practice and Provision 4 of this Court's Scheduling Order. Complaint Counsel has attempted to confer in good faith with counsel for Respondents Microsoft Corporation ("Microsoft") and Activision Blizzard, Inc. ("Activision") to obtain the documents requested in Complaint Counsel's Third Set of Requests for Production (the "RFPs") and the testimony requested in Complaint Counsel's November 27, 2023 Notices of Deposition on a timely basis without the Court's intervention.

On October 26, 2023, this Court reopened discovery for the purpose of taking discovery relevant to the Ubisoft Agreement and the Sony Agreement. *See* Oct. 26 Order at 4.

Requests for Production. On October 27, 2023, Complaint Counsel served Respondents with its Third Set of Requests for Production Issued to Respondent Microsoft and its Third Set of Requests for Production Issued to Respondent Activision. *See* Exhibits A, B. On November 3, 2023, Respondents served Complaint Counsel with Respondents' Responses and Objections to Complaint Counsel's Third Set of Requests for Production. *See* Exhibit C.

Complaint Counsel had an initial meet and confer with Respondents via videoconference on November 6, 2023 at 4:00 p.m. to discuss Respondents' Responses and Objections.

Complaint Counsel subsequently exchanged numerous emails with Respondents in an effort to reach an agreement on its RFPs. *See, e.g.*, Exhibits F, G, H.

Respondents repeatedly demanded and rejected Complaint Counsel's explanations of the relevance of various RFPs, both in meet and confers and by email. *See* Exhibits F, G, H.

Respondents also proposed a compromise to respond to Microsoft RFP 5 and Activision RFP 4 on November 13, 2023. *See* Exhibit F at 14. However, after reviewing documents Microsoft produced in response to other RFPs, it become clear to Complaint Counsel that Microsoft's proposed compromise would result in no responsive documents being produced in response to the disputed RFPs. It was only after reviewing documents that Complaint Counsel became aware that Respondents' proposed compromise yielded no responsive documents.[6] It was, however, within Respondents' knowledge at the time Respondents made the proposal. *See*

[6] Specifically, Respondents proposed a compromise by which Respondents would respond to Microsoft RFP 5 and Activision RFP 4 using search terms designed to identify documents in response to Microsoft RFP 2, which asks, in part, for all documents relating to the Ubisoft Agreement. After reviewing Microsoft's rolling document productions, it became clear to Complaint Counsel that Ubisoft was not known to be the buyer of Activision's cloud streaming rights at the time negotiations to extend the termination date for the Transaction took place. As a result, no documents were produced that are responsive to Microsoft RFP 5 and Activision RFP 4. *See* Exhibit H at 1, 3-4.

Exhibit H at 1, 3-4. When Complaint Counsel raised this concern, Respondents admitted for the first time on December 11, 2023 that they had no expectation that their proposed compromise would yield responsive documents. *See* Exhibit G at 7-8. Respondents further refused to tell Complaint Counsel whether they had even investigated the scope of potentially responsive documents. *See* Exhibit H at 1, 4. Because Respondents were unwilling to discuss the scope of potentially responsive materials, Complaint Counsel was unable to propose a path forward on Microsoft RFP 5 or Activision RFP 4.

On December 13 at 10:00 a.m., Complaint Counsel met and conferred with Respondents via videoconference again and attempted to negotiate in good faith but was unable to reach an agreement.

Corporate Testimony. On November 27, 2023, Complaint Counsel served Notices of Deposition to Respondents Microsoft and Activision. *See* Exhibits D, E.

After hearing no response from Respondents on the Notices, on December 5, 2023, Complaint Counsel asked Respondents to identify corporate designees for each topic and offered to meet and confer on scheduling. *See* Exhibit G at 20-21. On December 6, Respondents replied and asked to meet and confer two days later. *See* Exhibit G at 19-20.

On December 8, 2023, at 11:00 a.m., Complaint Counsel met and conferred with Respondents via videoconference regarding corporate deposition topics. An hour and a half before that meeting, Respondents objected for the first time to corporate deposition testimony by email. *See* Exhibit G at 12-18.

At the December 8 meeting, Respondents refused to make an Activision corporate witness available for seven hours of testimony[7] and refused to prepare an Activision corporate witness for six of the nine topics in Complaint Counsel's deposition notice to Activision. Respondents further refused to make available a Microsoft *or* Activision corporate witness for six topics relevant to the Ubisoft Agreement.[8]

Respondents also objected to producing witnesses before the close of fact discovery on December 21. The parties reached agreement that the depositions could take place out of time. *See* Exhibit G at 1.

On December 13 at 10:00 a.m., Complaint Counsel met and conferred with Respondents via videoconference again and attempted to negotiate in good faith but was unable to reach an agreement. Following that meeting, Complaint Counsel emailed Respondents to confirm that the parties were at an impasse and subsequently notified Respondents of its intent to move to enforce the Court's October 26 Order. *See* Exhibit G at 1.

Dated: December 21, 2023

Respectfully submitted,

By: */s/ Nicole Callan*

Nicole Callan
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2234
Email: ncallan@ftc.gov

Counsel Supporting the Complaint

[7] Respondents ultimately agreed to make an Activision witness available for seven hours as required under this Court's Scheduling Order after Complaint Counsel notified Respondents of its intent to move to compel.

[8] Respondents refuse to make witnesses available to testify on (i) Microsoft Corporate Deposition Topic 9 and Activision Corporate Deposition Topic 8, (ii) Microsoft and Activision Corporate Deposition Topic 2(d), and (iii) Microsoft and Activision Corporate Deposition Topic 5.

PUBLIC

EXHIBIT A

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EXHIBIT H

CONFIDENTIAL

REDACTED IN ENTIRETY

PUBLIC

EXHIBIT I

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

FORM 8-K

CURRENT REPORT
Pursuant to Section 13 or 15(d)
of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): July 19, 2023 (July 18, 2023)

Activision Blizzard, Inc.

(Exact name of Registrant as specified in its charter)

Delaware	**001-15839**	**95-4803544**
(State of Incorporation)	**(Commission File No.)**	**(IRS Employer Identification No.)**

2701 Olympic Boulevard, Building B
Santa Monica, CA 90404
(Address of principal executive offices)

Registrant's telephone number: (310) 255-2000

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol	Name of each exchange on which registered
Common Stock, $0.000001 par value	**ATVI**	**The Nasdaq Global Select Market**

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the Registrant under any of the following provisions:

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

☐ Emerging Growth Company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Item 1.01. Entry into a Material Definitive Agreement.

Letter Agreement to Merger Agreement

As previously disclosed, on January 18, 2022, Activision Blizzard, Inc., a Delaware corporation (the "Company"), entered into an Agreement and Plan of Merger (as may be amended, supplemented or otherwise modified from time to time, the "Merger Agreement") with Microsoft Corporation, a Washington corporation ("Parent"), and Anchorage Merger Sub Inc., a Delaware corporation and a wholly owned subsidiary of Parent ("Merger Sub", and together with the Company and Parent, the "Parties"). Capitalized terms used but not defined herein shall have the respective meanings ascribed to such terms in the Merger Agreement.

On July 18, 2023, the Parties entered into a letter agreement (the "Letter Agreement"), pursuant to which, among other things:

- each of Parent and Merger Sub:
  - certified to the Company that the conditions to Closing with respect to (x) the accuracy of the representations and warranties of Parent and Merger Sub in the Merger Agreement, subject to applicable materiality qualifiers, and (y) the performance and compliance in all material respects by Parent and Merger Sub with all covenants and obligations required to be performed and complied with by them under the Merger Agreement, in each case, would be satisfied as of the date of the Letter Agreement if the Closing were to occur on the date of the Letter Agreement;
  - acknowledged and agreed that as of the date of the Letter Agreement, to the Knowledge of Parent, no event, development, circumstance, change, effect or occurrence had occurred that would cause any of the conditions to Closing with respect to (x) the accuracy of the representations and warranties of the Company in the Merger Agreement, subject to applicable materiality qualifiers, (y) the performance and compliance in all material respects by the Company with all covenants and obligations required to be performed and complied with by it under the Merger Agreement, and (z) the absence of any Company Material Adverse Effect after the date of the Merger Agreement that is continuing, in each case, to not be satisfied if the Closing were to occur on the date of the Letter Agreement; and
  - agreed not to assert that (x) any of such conditions are not satisfied at the Closing or (y) the Parent Termination Fee is not payable, in each case of clause (x) and (y), as a result of any events, developments, circumstances, changes, effects or occurrences of which Parent or Merger Sub had Knowledge as of the date of the Letter Agreement;

- the Company:
  - certified to Parent and Merger Sub that the conditions to Closing with respect to (x) the accuracy of the representations and warranties of the Company in the Merger Agreement, subject to applicable materiality qualifiers, (y) the performance and compliance in all material respects by the Company with all covenants and obligations required to be performed and complied with by it under the Merger Agreement, and (z) the absence of any Company Material Adverse Effect after the date of the Merger Agreement that is continuing, in each case, would be satisfied as of the date of the Letter Agreement if the Closing were to occur on the date of the Letter Agreement;

  - acknowledged and agreed that as of the date of the Letter Agreement, to the Knowledge of the Company, no event, development, circumstance, change, effect or occurrence had occurred that would cause any of the conditions to Closing with respect to (x) the accuracy of the representations and warranties of Parent and Merger Sub in the Merger Agreement, subject to applicable materiality qualifiers, and (y) the performance and compliance in all material respects by Parent and Merger Sub with all covenants and obligations required to be performed and complied with by them under the Merger Agreement, in each case, to not be satisfied if the Closing were to occur on the date of the Letter Agreement; and
  - agreed not to assert that any such conditions are not satisfied at the Closing as a result of any events, developments, circumstances, changes, effects or occurrences of which the Company had Knowledge as of the date of the Letter Agreement;

- each of Parent and the Company waived any right to terminate the Merger Agreement other than (i) pursuant to mutual agreement or (ii) if the Merger has not been consummated prior to 11:59 p.m. (Pacific time) on October 18, 2023 (the "Waiver Period");

- each of the Parties waived any failure of the conditions to Closing set forth in the Merger Agreement with respect to the expiration or termination of the applicable waiting period pursuant to, or obtaining all requisite clearances, consents and approvals pursuant to, the HSR Act and the antitrust and foreign investment laws of certain specified countries, without the imposition of any action that would reasonably be expected to (i) have a material adverse impact on the Company and its Subsidiaries, taken as a whole, (ii) have a material impact on the benefits expected to be derived from the Merger by Parent or (iii) have a more than immaterial impact on any business or product line of Parent (any of clauses (i), (ii) or (iii), a "Burdensome Condition"), in each case, other than with respect to the United Kingdom;

- each of the Parties waived any failure of the condition to Closing set forth in the Merger Agreement with respect to the absence of any applicable prohibitive law or injunction due to (i) any governmental authority seeking to prohibit, make illegal or enjoin the consummation of the Merger or seeking to impose a Burdensome Condition, (ii) any governmental authority imposing a Burdensome Condition, or (iii) any governmental authority prohibiting, making illegal or enjoining the consummation of the Merger, and in the case of clauses (ii) and (iii), other than in the United Kingdom or the United States;

- each of Parent and Merger Sub waived any failure of the condition to Closing with respect to the Company's performance and compliance in all material respects with all covenants and obligations required to be performed and complied with by it under the Merger Agreement, other than any failure for any such matters that constitute willful breaches of such covenants or obligations following the date of the Letter Agreement;

- each of Parent and Merger Sub waived the forbearance covenant set forth in the Merger Agreement with respect to the declaration and payment of dividends solely to permit the Company to declare and pay one regular cash dividend for fiscal year 2023 on Company Common Stock in an amount per share of Company Common Stock not in excess of $0.99, prior to and not contingent on the Closing;

- the Company waived any right to the Parent Termination Fee during the Waiver Period, after which the Parent Termination Fee, if payable under the Merger Agreement after (x) August 29, 2023, shall be increased from $3,000,000,000 to $3,500,000,000 and (y) September 15, 2023, shall be increased from $3,500,000,000 to $4,500,000,000;

- Parent and Merger Sub waived any right to not pay the first $3,000,000,000 of the Parent Termination Fee, if otherwise payable pursuant to the Merger Agreement (which amount shall be payable regardless of any breach of the Merger Agreement by the Company);

- Parent and Merger Sub waived any right to not pay any portion of the Parent Termination Fee in excess of $3,000,000,000, to the extent otherwise payable pursuant to the Merger Agreement:

    - (i) as a result of a breach by the Company of any representation, warranty or covenant in the Merger Agreement, whether before or after the date of the Letter Agreement, other than the willful breach by the Company of a covenant required to be performed after the date of the Letter Agreement by it that is the proximate cause of the failure of the conditions to Closing with respect to the expiration or termination of the applicable waiting period pursuant to, or obtaining all requisite clearances, consents and approvals pursuant to, the HSR Act and the antitrust and foreign investment laws of certain specified countries, without the imposition of a Burdensome Condition; or
    - (ii) in the event that Parent or any of its Subsidiaries materially breaches the Merger Agreement after the date of the Letter Agreement;

- each of the Parties waived any requirement to take the actions set forth on Section 6.15 of the Company Disclosure Letter;

- the Parties agreed that, effective from and after October 18, 2023, Parent and its Affiliates shall pay to the Company 100% of all proceeds or other payments for games of the Company and its Affiliates, and the Company shall be entitled to offset any payments owed to the gaming business of Parent or its Affiliates pursuant to the existing agreements between the Company or its Affiliates and Parent or its Affiliates, on a combined basis, in an amount up to $250,000,000 for each of the 12-month periods ending December 31, 2023 and December 31, 2024 (for an aggregate amount up to $500,000,000), subject to the terms set forth in the Letter Agreement (collectively, the “Commercial Arrangements”);

- the Parties agreed that the Commercial Arrangements shall only take effect if the Merger Agreement has been terminated in circumstances in which the Parent Termination Fee is payable pursuant to the Merger Agreement; and

- Parent will continue to use its best efforts to consummate the Merger, and Parent may seek to pursue an agreement with the Competition and Markets Authority of the United Kingdom to hold separate the Company or certain assets of the Company or to implement other lawful alternatives to consummate the Merger, and the Company will continue to cooperate with Parent and use its best efforts to take all actions and do all things necessary, proper or advisable and consented to by Parent in furtherance of such efforts, in each case, subject to the terms and conditions of the Merger Agreement.

The foregoing description of the Letter Agreement is not complete and is qualified in its entirety by reference to the Letter Agreement, which is filed as Exhibit 10.1 hereto and incorporated herein by reference.

Item 9.01. Financial Statements and Exhibits.

Exhibit No.	Description
10.1	Merger Letter Agreement, dated as of July 18, 2023, by and among Microsoft Corporation, Anchorage Merger Sub Inc. and Activision Blizzard, Inc.
104	Cover Page Interactive Data File (embedded within the Inline XBRL document)

PUBLIC

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Date: July 19, 2023

ACTIVISION BLIZZARD, INC.

By: /s/ Luci Altman
Name: Luci Altman
Title: Senior Vice President, Corporate Governance and Corporate Secretary

EX-10.1 2 tm2321522d1_ex10-1.htm EXHIBIT 10.1

Exhibit 10.1

Microsoft Corporation
Anchorage Merger Sub Inc.
One Microsoft Way
Redmond, Washington 98052-6399

Activision Blizzard, Inc.
2701 Olympic Boulevard, Building B
Santa Monica, California 90404

Re: Merger Letter Agreement

This letter agreement (this "Letter"), dated as of July 18, 2023, is executed by Activision Blizzard, Inc., a Delaware corporation (the "Company"), Microsoft Corporation, a Washington corporation ("Parent"), and Anchorage Merger Sub Inc., a Delaware corporation and a wholly owned subsidiary of Parent ("Merger Sub" and, together with the Company and Parent, the "Parties") with respect to that certain Agreement and Plan of Merger, dated as of January 18, 2022, among the Parties (the "Merger Agreement"). Capitalized terms used but not defined herein shall have the respective meanings ascribed to such terms in the Merger Agreement.

1. Confirmations under the Merger Agreement.

   (a) Each of Parent and Merger Sub hereby certify to the Company that the conditions to Closing set forth in Section 7.3(a) and (b) of the Merger Agreement would be satisfied as of the date of this Letter if the Closing were to occur on the date of this Letter. Each of Parent and Merger Sub hereby acknowledges and agrees that as of the date of this Letter, to the Knowledge of Parent, no event, development, circumstance, change, effect or occurrence has occurred that would cause any of the conditions to Closing set forth in Section 7.2(a), (b) and (d) of the Merger Agreement to not be satisfied if the Closing were to occur on the date of this Letter, and each of Parent and Merger Sub agree not to assert that (x) any of such conditions are not satisfied at the Closing or (y) the Parent Termination Fee is not payable, in each case of subclause (x) and (y), as a result of any events, developments, circumstances, changes, effects or occurrences of which it had Knowledge as of the date of this Letter.

   (b) The Company hereby certifies to Parent and Merger Sub that the conditions to Closing set forth in Section 7.2(a), (b) and (d) of the Merger Agreement would be satisfied as of the date of this Letter if the Closing were to occur on the date of this Letter. The Company hereby acknowledges and agrees that as of the date of this Letter, to the Knowledge of the Company, no event, development, circumstance, change, effect or occurrence has occurred that would cause any of the conditions to Closing set forth in Section 7.3(a) or Section 7.3(b) of the Merger Agreement to not be satisfied if the Closing were to occur on the date of this Letter, and the Company agrees not to assert that any of such conditions are not satisfied at the Closing as a result of any events, developments, circumstances, changes, effects or occurrences of which it had Knowledge as of the date of this Letter.

2. Waivers under Merger Agreement.

(a) Each of Parent and the Company hereby unconditionally and irrevocably waives any right to terminate the Merger Agreement pursuant to Section 8.1(c) of the Merger Agreement prior to 11:59 p.m. (Pacific time) on October 18, 2023 (the "Waiver Period"). Following the execution of this Letter, each of Parent, Merger Sub and the Company hereby further waives any right or claim to interpret the terms of the Merger Agreement (including references to the Termination Date) in any manner inconsistent with the Waiver Period.

(b) Each of Parent and the Company hereby unconditionally and irrevocably waives any right to terminate the Merger Agreement pursuant to any section of Article VIII of the Merger Agreement other than pursuant to (x) Section 8.1(a) or (y) Section 8.1(c) of the Merger Agreement.

(c) Each of Parent, Merger Sub and the Company unconditionally and irrevocably waives any failure of the conditions to Closing set forth in Section 7.1(b) and Section 7.1(c) of the Merger Agreement, in each case, other than with respect to the United Kingdom.

(d) Each of Parent, Merger Sub and the Company unconditionally and irrevocably waives any failure of the condition to Closing set forth in Section 7.1(d) of the Merger Agreement due to (i) any Governmental Authority seeking to prohibit, make illegal or enjoin the consummation of the Merger or seeking to impose a Burdensome Condition, (ii) any Governmental Authority imposing a Burdensome Condition or (iii) any Governmental Authority prohibiting, making illegal or enjoining the consummation of the Merger, in the case of each of subclause (ii) and (iii), other than in the United Kingdom or the United States, and, in each case, the Parties acknowledge Item 1 set forth on Annex A of this Letter.

(e) Each of Parent and Merger Sub unconditionally and irrevocably waives any failure of the condition to Closing set forth in Section 7.2(b) of the Merger Agreement, including, for the avoidance of doubt, with respect to actions set forth in any requests (excluding pending requests) made by the Company prior to the date of this Letter, relating or pursuant to covenants or other agreements of the Company where, prior to the date of this Letter, Parent has provided consent to such requests or acknowledged and deemed it not appropriate to provide approval of such requests to ensure compliance with applicable legal requirements, other than any failure for any such matters that constitute willful breaches (as defined in the Merger Agreement) of such covenants or obligations following the date of this Letter.

(f) Each of Parent and Merger Sub hereby unconditionally and irrevocably waives the forbearance covenant set forth in Section 5.2(e)(B)(y) of the Merger Agreement solely to permit the Company to declare and pay one regular cash dividend for fiscal year 2023 on Company Common Stock in an amount per share of Company Common Stock not in excess of $0.99, for the avoidance of doubt, prior to and not contingent on the Closing.

(g) Except as otherwise set forth below, the Company hereby unconditionally and irrevocably waives any right to the Parent Termination Fee during the Waiver Period, after which the Parent Termination Fee, if payable pursuant to Section 8.3(c) of the Merger Agreement after (x) August 29, 2023, shall be increased from $3,000,000,000 to $3,500,000,000 and (y) September 15, 2023, shall be increased from $3,500,000,000 to $4,500,000,000.

(h) Parent and Merger Sub hereby unconditionally and irrevocably waive any right to not pay the first $3,000,000,000 of the Parent Termination Fee, if otherwise payable pursuant to Section 8.3(c) of the Merger Agreement (which amount shall be payable regardless of any breach of the Merger Agreement by the Company).

(i) Parent and Merger Sub hereby unconditionally and irrevocably waives any right to not pay any portion of the Parent Termination Fee in excess of $3,000,000,000 to the extent otherwise payable pursuant to Section 8.3(c) of the Merger Agreement (x) as a result of a breach by the Company of any representation, warranty or covenant in the Merger Agreement, whether before or after the date of this Letter, other than the willful breach by the Company of a covenant required to be performed after the date of this Letter by the Company that is the proximate cause of the failure of any of the conditions to Closing set forth in Section 7.1(b) and Section 7.1(c) of the Merger Agreement to be satisfied, or (y) in the event that Parent or any of its Subsidiaries materially breaches the Merger Agreement after the date of this Letter.

(j) Each of Parent, Merger Sub and the Company unconditionally and irrevocably waives any requirement to take the actions set forth on Section 6.15 of the Company Disclosure Letter.

3. Affirmations.

(a) The Parties hereby agree that, effective from and after October 18, 2023, Parent and its Affiliates shall pay to the Company 100% of all proceeds or other payments for games of the Company and its Affiliates (without deduction for amounts that would otherwise be retained by Parent or its Affiliates) and the Company shall be entitled to offset any payments owed to the gaming business of Parent or its Affiliates pursuant to the existing agreements between the Company or its Affiliates and Parent or its Affiliates, on a combined basis, in an amount up to $250,000,000 for each of the 12-month periods ending December 31, 2023 and December 31, 2024 (for an aggregate amount up to $500,000,000). Payments are due quarterly within 30 days of the conclusion of each calendar quarter. To the extent that the aggregate payments paid and offset in accordance with the foregoing are less than $250,000,000 in aggregate for any 12-month period, Parent shall pay the difference to the Company in cash within 30 days of the conclusion of such 12-month period. In addition, the Parties acknowledge Item 2 on Annex A of this Letter.

(b) Parent will continue to use its best efforts to consummate the Merger, and Parent may seek to pursue an agreement with the Competition and Markets Authority to hold separate the Company or certain assets of the Company or to implement other lawful alternatives to consummate the Merger, in each case, subject to the other terms and conditions of the Merger Agreement. The Company will continue to cooperate with Parent and use its best efforts to take, or cause to be taken, all actions and do, or cause to be done, all things necessary, proper or advisable and consented to by Parent in furtherance of the foregoing efforts, in each case, subject to the terms and conditions of the Merger Agreement.

4. Commercial Arrangements. The Parties hereby agree that the commercial arrangements set forth in Section 3(a) shall only take effect in the event the Merger Agreement has been terminated in circumstances in which the Parent Termination Fee is payable pursuant to Section 8.3(c) of the Merger Agreement.

5. Full Force and Effect. Subject to the terms of this Letter, all terms, conditions and provisions of the Merger Agreement, Company Disclosure Letter and Parent Disclosure Letter shall remain in full force and effect.

6. Miscellaneous. Sections 1.3, 8.3(a), 8.4 and 8.5 and Article IX of the Merger Agreement shall apply to this Letter, *mutatis mutandis*, as if set forth herein.

[*Remainder of page intentionally left blank.*]

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This Letter has been duly executed and delivered by duly authorized officers of the Parties as of the date first written above.

ACTIVISION BLIZZARD, INC.

By: /s/ Robert A. Kotick
Name: Robert A. Kotick
Title: Chief Executive Officer

MICROSOFT CORPORATION

By: /s/ Satya Nadella
Name: Satya Nadella
Title: Chairman and Chief Executive Officer

ANCHORAGE MERGER SUB INC.

By: /s/ Keith R. Dolliver
Name: Keith R. Dolliver
Title: President and Treasurer

PUBLIC

EXHIBIT J

Post

Brad Smith
@BradSmi

Together with @Activision, we are announcing the extension of our merger agreement to 10/18 to provide ample time to work through the final regulatory issues. We will honor all commitments agreed upon with the EC and other regulators and continue to work with the CMA on the issues raised in the UK. We are confident about our prospects for getting this deal across the finish line. c.s-microsoft.com/en-us/CMSFiles...

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6

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2023, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

Beth Wilkinson
Rakesh Kilaru
Alysha Bohanon
Anastasia Pastan
Grace Hill
Sarah Neuman
Kieran Gostin
Wilkinson Stekloff LLP
2001 M Street, NW
Washington, DC 20036
(202) 847-4010
bwilkinson@wilkinsonstekloff.com
rkilaru@wilkinsonstekloff.com
abohanon@wilkinsonstekloff.com
apastan@wilkinsonstekloff.com
ghill@wilkinsonstekloff.com
sneuman@wilkinsonstekloff.com
kgostin@wilkinsonstekloff.com

Mike Moiseyev
Megan Granger
Weil, Gotshal & Manges LLP
2001 M Street, NW
Washington, DC 20036
(202) 682-7235
michael.moiseyev@weil.com

Steven Sunshine
Julia K. York
Jessica R.Watters
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave, NW
Washington, DC 20005
(202) 371-7860
steve.sunshine@skadden.com
julia.york@skadden.com
jessica.watters@skadden.com

Maria Raptis
Matthew M. Martino
Michael Sheerin
Evan R. Kreiner
Bradley J. Pierson
Skadden, Arps, Slate, Meagher & Flom LLP
One Manhattan West
New York, NY 10001
(212) 735-2425
maria.raptis@skadden.com
matthew.martino@skadden.com
michael.sheerin@skadden.com
evan.kreiner@skadden.com
bradley.pierson@skadden.com

megan.granger@weil.com

Counsel for Microsoft Corporation

Counsel for Activision Blizzard, Inc.

By: *s/ James H. Weingarten*
James H. Weingarten

Counsel Supporting the Complaint