

**Congress of the United States**  
**Washington, DC 20515**

July 28, 2023

The Honorable Lina Khan  
Chair  
U.S. Federal Trade Commission  
600 Pennsylvania Ave, NW  
Washington, D.C., 20580

Dear Chair Khan:

On July 10, 2023, Judge Jacqueline Scott Corley of the Northern District of California, denied the Federal Trade Commission's (FTC's) attempt to block the acquisition of Activision Blizzard by Microsoft.<sup>1</sup> Four days later, on July 14, 2023, the United States Court of Appeals for the Ninth Circuit similarly denied the FTC's attempt to halt the merger between Microsoft and Activision Blizzard.<sup>2</sup> In her ruling, Judge Corley states what Microsoft, Activision Blizzard, and the consumers of the products have been saying all along, that "the record evidence points to more consumer access to *Call of Duty* and other Activision content."<sup>3</sup> Only foreign video game companies stand to benefit from the FTC's action against Microsoft and Activision Blizzard. Yet, despite finding no evidence that this acquisition could substantially lessen competition after an almost yearlong investigation, the FTC spent nearly seven months litigating, millions of taxpayer dollars, and thousands of staff hours chasing evidence to support your anti-business policies.

This is just the latest example of the FTC fighting a losing battle. On November 2, 2022, the FTC lost its challenge to Meta's acquisition of Within.<sup>4</sup> Under your leadership, the FTC lost two additional merger challenges in front of its administrative law judge: Illumina's acquisition of GRAIL and Altria's acquisition of JUUL.<sup>5</sup> The FTC has yet to win a merger challenge in litigation since you became Chair. In addition, reports suggest that your challenge to Amgen's acquisition of Horizon is relying on an even more dubious theory of harm than your prior

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<sup>1</sup> FTC v. Microsoft Corp., No. 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023).

<sup>2</sup> Order, FTC v. Microsoft Corp., No. 23-15992 (9<sup>th</sup> Cir. 2023).

<sup>3</sup> FTC v. Microsoft Corp., No. 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023).

<sup>4</sup> FTC v. Microsoft Corp., No. 23-CV-02880-JSC, 2023 WL 4443412 at \*53 (N.D. Cal. July 10, 2023).

<sup>5</sup> *Id.*

<sup>6</sup> Press Release, FTC, Administrative Law Judge Dismisses FTC's Challenge of Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Sept. 12, 2021); Press Release, FTC, Administrative Law Judge Dismisses FTC Antitrust Complaint against Altria Group and JUUL Labs, Inc. (Feb. 24, 2022).

challenges.<sup>6</sup> Further, a review of the FTC's recent draft merger guidelines suggests that the FTC is likely to pursue even more novel theories unsupported by current law or economics.

The FTC's losses at trial are partially explainable by your choice of resource allocation. Former Commissioner Christine Wilson, who resigned in February 2023 due to your abuse of merger review process,<sup>7</sup> noted in her dissent of the FTC's Notice of Proposed Rulemaking (NPRM) regarding non-compete clauses that, "[d]efending these challenges will entail lengthy litigation that will consume substantial staff resources. I anticipate that the Rule will not withstand these challenges, so the Commission majority essentially is directing staff to embark on a demanding and futile effort."<sup>8</sup> Despite this warning, the FTC has moved forward with its Rule.

For Fiscal Year (FY) 2024, the FTC is requesting an appropriation of \$590 million and 1,690 full-time equivalent (FTE) employees, an increase of \$190 million and an estimated 310 FTE above the FTC's FY 2023 enacted appropriation, respectively. As Congress debates your agency's budget request, we must ensure taxpayer dollars are not being wasted chasing conduct that is not unlawful.

Accordingly, please provide us with the following information no later than August 25, 2023.

1. The amount of funds spent on litigation in each of the aforementioned cases.<sup>9</sup>
2. The amount of staff hours spent on the aforementioned cases.
3. A list of outside experts, including their affiliate organizations, in each of the aforementioned cases and the amount paid to each expert and their affiliate organizations.
4. The amount of funds spent on outside counsel, if any, in each of the aforementioned cases.
5. All recommendation memorandum prepared by FTC staff that discuss each of the aforementioned cases.

Thank you for your attention to this matter. Please do not hesitate to contact our offices with any questions.

Sincerely,



Scott Fitzgerald  
Member of Congress



Kevin Kiley  
Member of Congress

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<sup>6</sup> Diane Bartz, *FTC effort to stop Amgen's Horizon takeover faces uphill fight*, REUTERS (May 19, 2023).

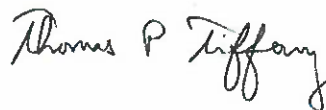
<sup>7</sup> Christine Wilson, Opinion, *Why I'm Resigning as an FTC Commissioner*, WALL ST. J. (Feb. 14, 2023).

<sup>8</sup> Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, Commission File No. P201200-1 (Jan. 5, 2023).

<sup>9</sup> The aforementioned cases include: Microsoft/Activision; Meta/Within; Altria/Juul; Illumina/Grail; and Amgen/Horizon.



Andy Biggs  
Member of Congress



Thomas P. Tiffany  
Member of Congress



Ben Cline  
Member of Congress



Harriet M. Hageman  
Member of Congress



Nathaniel Moran  
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