

**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 FOR LEAVE TO FILE A REPLY IN SUPPORT
OF COMPLAINT COUNSEL’S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF
PUTATIVE PROCOMPETITIVE EFFECTS OF RESPONDENTS’ AGREEMENTS
WITH THIRD PARTIES**

Pursuant to Rule 3.22(c) of the Commission’s Rules of Practice, 16 C.F.R. § 3.22, Complaint Counsel respectfully moves for leave (“Motion for Leave”) to file the attached reply in support of Complaint Counsel’s Motion *in Limine* to Exclude Evidence of Putative Procompetitive Effects of Respondents’ Agreements with Third Parties (“Motion *in Limine*”).

Respondents’ Opposition to the Motion *in Limine*, filed on February 12, 2024, then refiled twice on February 13, 2024, includes misstatements about the adjudicative process before the Commission and before the Court of Appeals and misstatements about Respondents’ side agreements, including misstatements of fact about Boosteroid Ukraine and Sony. The misstatements of law and fact in Respondents’ Opposition constitute “recent important developments . . . that could not have been raised earlier in [Complaint Counsel’s] principal

brief.” See 16 C.F.R. § 3.22(d); see also, e.g., *In re 1-800 Contacts, Inc.*, No. 9372, 2017 WL 781386, at *1 (F.T.C. Feb. 21, 2017) (granting motion for leave to file reply where reply addressed mischaracterization of relevant case law and mischaracterization of the issues presented by complaint counsel’s motion)¹; *In re N. Texas Specialty Physicians*, No. 9312, 2004 WL 527340, at *7 (F.T.C. Jan. 30, 2004) (granting motion for leave to file reply where reply addressed inaccuracies and inconsistencies in respondent’s opposition)².

Respondents oppose this Motion for Leave.

Dated: February 20, 2024

Respectfully submitted,

s/ James H. Weingarten

James H. Weingarten
Meredith Levert
Cem Akleman
Maria Cirincione
Merrick Pastore
Nicole Callan

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-3570
Email: jweingarten@ftc.gov
mlevert@ftc.gov
cakleman@ftc.gov
mcirincione@ftc.gov
mpastore@ftc.gov
ncallan@ftc.gov

¹ Complaint Counsel’s Motion for Leave to File a Reply to Respondent’s Opposition to Complaint Counsel’s Motion to Bar Presentation of Testimony and Arguments Contradicting Certain Issues Respondents Litigated and Lost, *In re 1-800 Contacts, Inc.*, No. 9372 (F.T.C. Feb. 9, 2017),

https://www.ftc.gov/system/files/documents/cases/d09372_leave_to_reply_bar_testimony.pdf.

² Blue Cross Blue Shield of Texas’ Motion for Leave to Reply to North Texas Specialty Physicians’ Response to Motion to Quash and/or Limit Subpoena Duces Tecum, *In re N. Texas Specialty Physicians*, No. 9312 (F.T.C. Jan. 26, 2004),

<https://www.ftc.gov/sites/default/files/documents/cases/2004/01/040126bcbsmoforleave.pdf>.

**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 MEET AND CONFER STATEMENT

Complaint Counsel emailed counsel for Respondents on February 14, 2024, advising Respondents of Complaint Counsel’s intention to seek leave to file a reply in support of Complaint Counsel’s Motion *in Limine* to Exclude Evidence of Putative Procompetitive Effects of Respondents’ Agreements with Third Parties. That same day, Respondents informed Complaint Counsel they oppose this Motion.

Dated: February 16, 2024

Respectfully submitted,

/s/ James H. Weingarten

James H. Weingarten

Meredith Levert

Cem Akleman

Maria Cirincione

Merrick Pastore

Nicole Callan

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-3570
Email: jweingarten@ftc.gov
mlevert@ftc.gov
cakleman@ftc.gov
mcirincione@ftc.gov
mpastore@ftc.gov
ncallan@ftc.gov

**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

REPLY MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF PUTATIVE PROCOMPETITIVE EFFECTS OF RESPONDENTS’ AGREEMENTS WITH THIRD PARTIES

Respondents’ Opposition to Complaint Counsel’s Motion *In Limine* to Exclude Evidence of Putative Procompetitive Effects of Respondents’ Agreements with Third Parties includes misstatements of law and fact.

First, Respondents incorrectly assert that Sony “now has access” to *Call of Duty* on { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Exhibit A, PX6060 at 008, Term 5.2. Microsoft has not put any *Call of Duty* title into its subscription service, and Microsoft recently testified { [REDACTED]

[REDACTED]

[REDACTED] } Exhibit

B, PX7081 at 84:9-22. Thus, contrary to Respondents’ assertion, Sony { [REDACTED]

[REDACTED]

[REDACTED] } Moreover, Microsoft's assertion ignores { [REDACTED]

[REDACTED]

[REDACTED] } Exhibit C, PX7053 at

61:24-63:24.

Second, Respondents' assertion that their agreement with Boosteroid Ukraine will have an effect in the United States, citing Boosteroid Ukraine's website, Opp. at 9,³ misstates the facts and ignores the law regarding how courts analyze extraterritorial effects. As to the facts, Respondents cite Boosteroid Ukraine's website, but as Respondents know, the Boosteroid Ukraine website also claimed that *Call of Duty* was *already available* on Boosteroid Ukraine's cloud gaming service well before Microsoft acquired Activision. See Exhibit D, PX9460. If that is true, then the purported benefits of the Boosteroid Ukraine agreement are not merger-specific and (contrary to Respondents' assertions) Activision content already was available on cloud gaming services.⁴ As to the law, Respondents claim the scope of the geographic market is disputed, Opp. at 9, but Respondents cannot use purported benefits to consumers in other countries to offset harm to U.S. consumers. See, e.g., *Food Lion, LLC v. Dean Foods Co.*, No. 2:07-CV-188, 2017 WL 11681054, at *3 (E.D. Tenn. Mar. 15, 2017). The Clayton Act addresses the effect on consumers in the United States. See 15 U.S.C. § 18 ("in any section of *the country*") (emphasis added).

³ Respondents' Opposition does not even attempt to counter Complaint Counsel's Motion *in Limine* regarding the other foreign cloud agreements.

⁴ Because Boosteroid Ukraine does not have a presence in the United States, Complaint Counsel was unable to take discovery about the claims on its website. See Motion *in Limine* at 3 & Exs. R & S; cf. *In re Altria Grp. & Juul Labs., Inc.*, No. 9393, 2021 WL 1922274, at *1 (F.T.C. May 5, 2021) (granting motion *in limine* and precluding complaint counsel from offering testimony via declaration of a witness Respondents had no opportunity to depose).

Third, Respondents' recitation of their commitments to foreign governments, Opp. at 4-5, rests on a misapprehension of the applicability of those commitments here. This proceeding concerns the United States, and Respondents have made no regulatory commitments enforceable in the United States to protect U.S. consumers.

Finally, Respondents mischaracterize the Commission's positions in federal court. Respondents assert that because counsel for the Commission has maintained that this administrative proceeding is the proper forum for determining the ultimate question of whether their merger violates the antitrust laws, there is something untoward about Complaint Counsel moving *in limine* to exclude inadmissible evidence. *See* Opp. at 2-3. But moving here to hold Respondents to their disclosures in discovery and avoid trial by surprise is completely consistent with the fact that this proceeding is the one in which Respondents have the burden of production regarding the effects of their allegedly procompetitive agreements. *See Illumina v. FTC*, 88 F.4th 1036, 1058 (5th Cir. 2023). Respondents have had every opportunity to offer any analysis of why their private agreements are procompetitive and address the anticompetitive effects of the Transaction. Having failed to disclose anything about the *effect* on competition of these agreements, save the text of those agreements, they cannot now complain that, like any other litigant, they will be held to those same disclosures at trial.

Dated: February 20, 2024

Respectfully submitted,

s/ James H. Weingarten

James H. Weingarten

Meredith Levert

Cem Akleman

Maria Cirincione

Merrick Pastore

Nicole Callan

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-3570
Email: jweingarten@ftc.gov
mlevert@ftc.gov
cakleman@ftc.gov
mcirincione@ftc.gov
mpastore@ftc.gov
ncallan@ftc.gov

EXHIBIT A – C

**CONFIDENTIAL – REDACTED IN
ENTIRETY**

EXHIBIT D

How can I help?



[Home](#) / [Troubleshooting](#) / [Games and launchers](#) / Call of Duty: Warzone

Categories

[About Boosteroid](#)

[Account](#)

[How to start](#)

[Subscription and
Payment methods](#)

Troubleshooting

[Games and launchers](#)

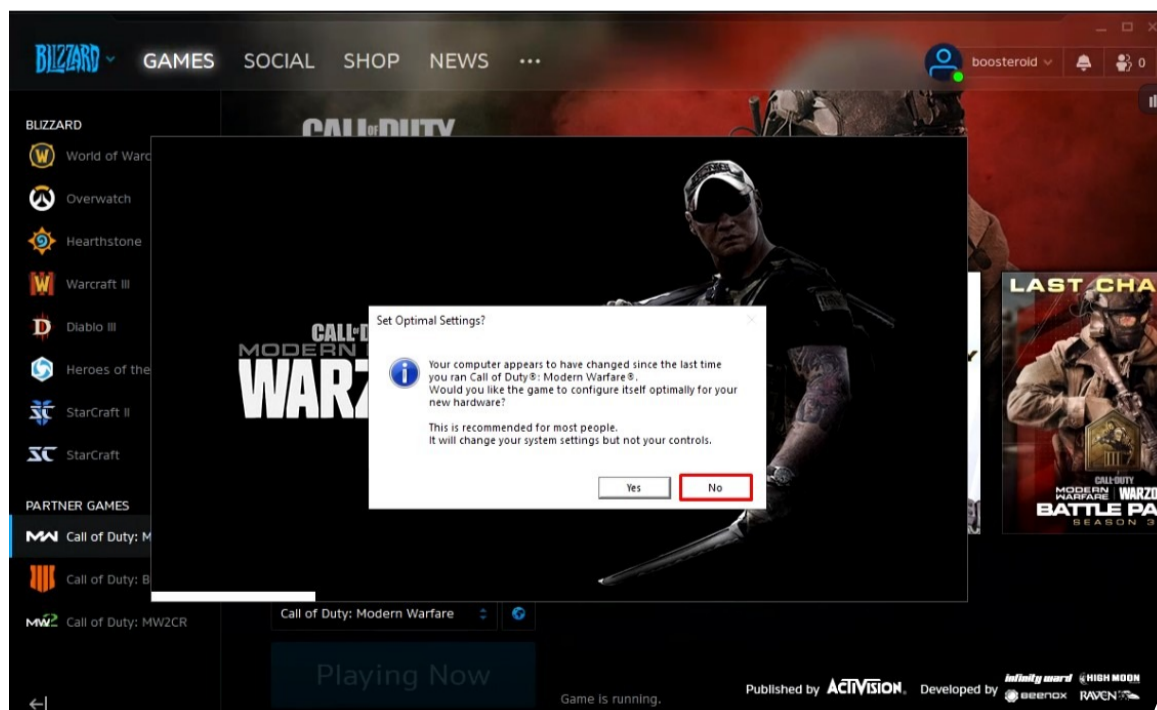
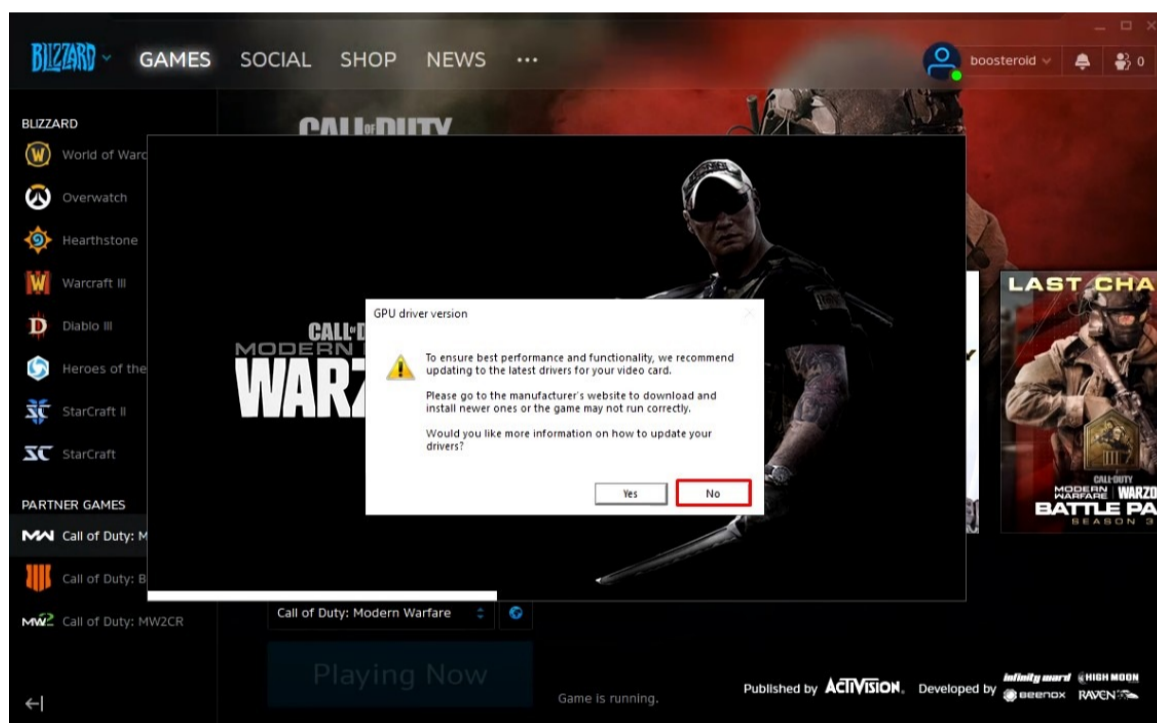
[Most common issues](#)

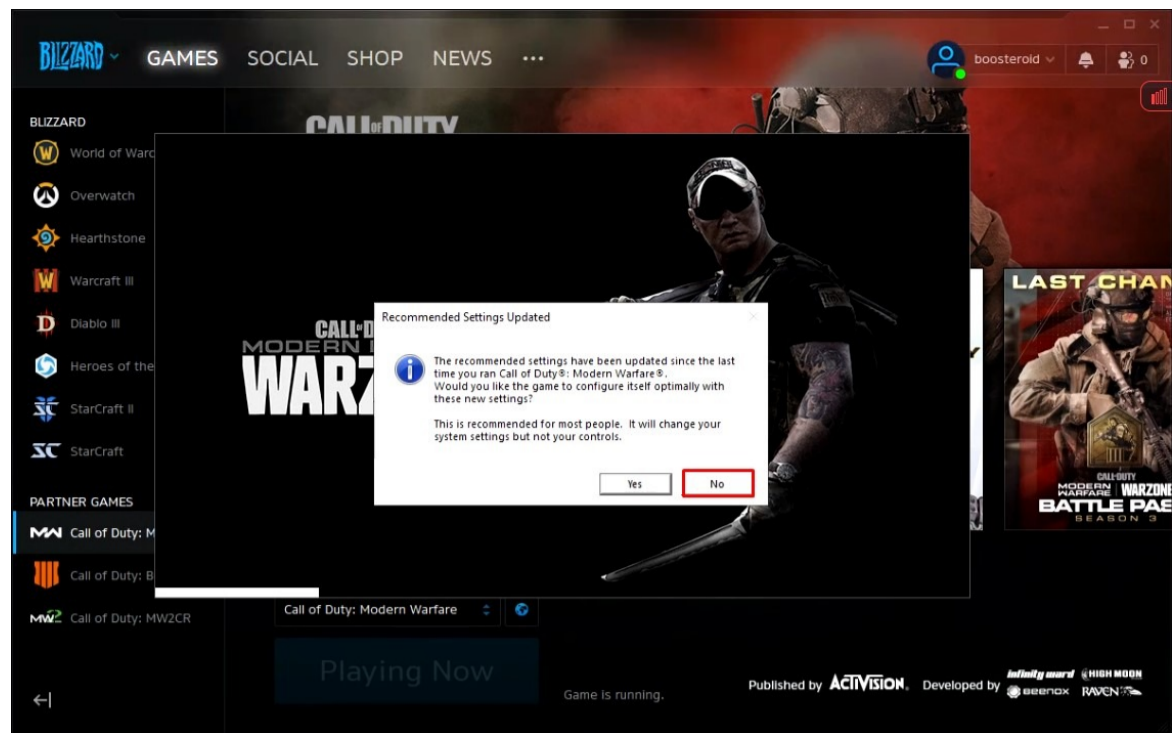
Call of Duty: Warzone

When you launch the game, the following notifications are popped up on the screen.

1. Recommended settings updated
2. Set optimal settings?
3. GPU driver version

In all cases click "No" and wait until the game starts loading. (Take a look at the screenshots)

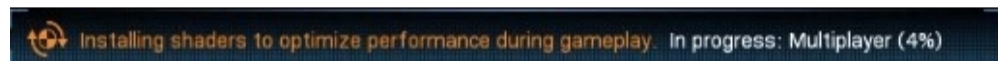




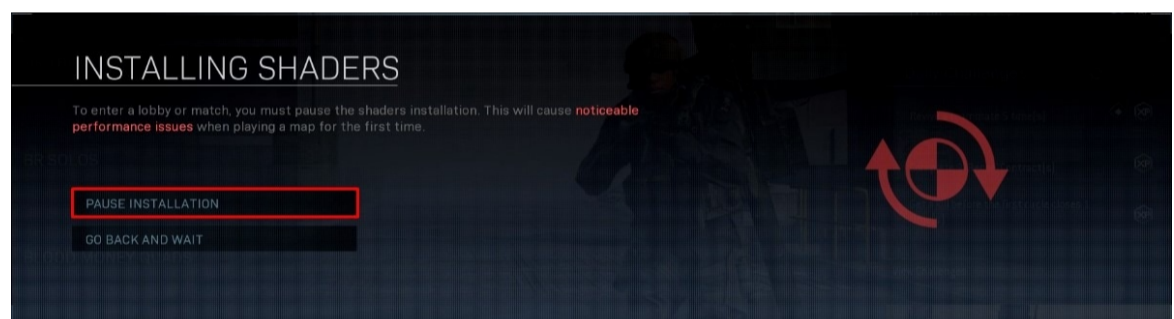
Loading shaders

If you see the process of **loading shaders**, as it's shown on the screenshot, you can and should pause this process since it merely doesn't affect your gameplay.

Choose any Warzone mode you are about to play, then click "Pause installation".

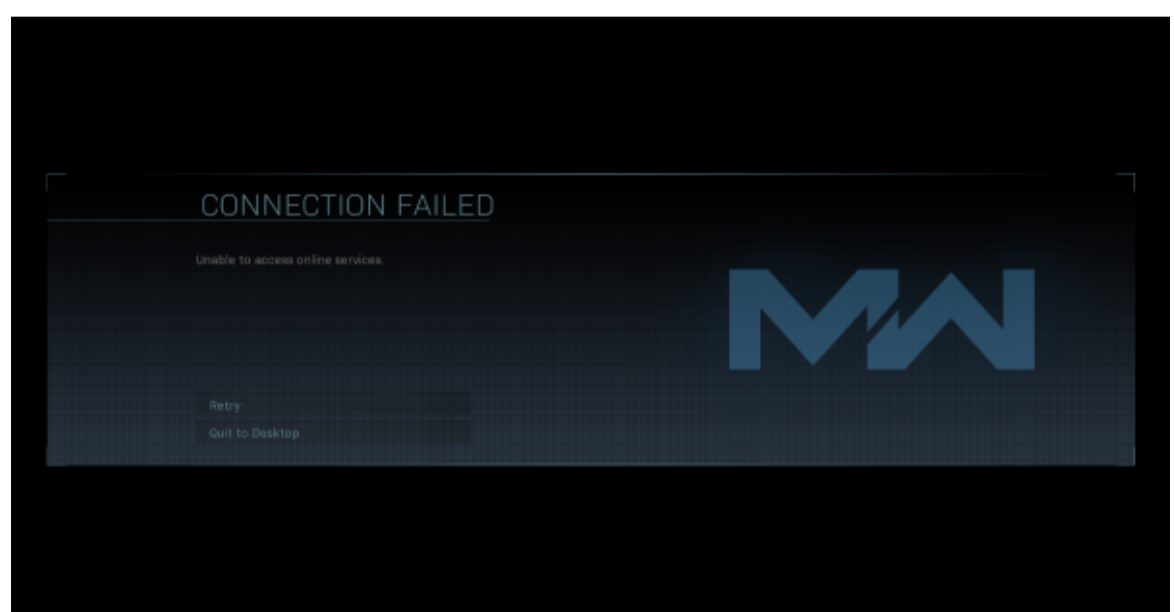


Pause installation



Unable to access online services

If you notice the next startup issue: **"Unable to access online services"** as shown below, keep in mind that this happens occasionally and you just need to reload the game from the launcher without closing your current game session.



Update requires restart

The notification below: **"Update requires restart"** stipulates that you just need to click "Exit" and the game will restart normally.



Was this article helpful?



Boosteroid Help Center

[Back to top](#)



CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2024, 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 Activision Blizzard, Inc.

Counsel for Microsoft Corporation

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

Counsel Supporting the Complaint