

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Commissioner**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya

In the Matter of

**Microsoft Corp.,
a corporation,**

and

**Activision Blizzard, Inc.,
a corporation.**

Docket No. 9412

**RESPONDENTS' MOTION TO WITHDRAW THIS
PROCEEDING FROM ADJUDICATION**

Respondents Microsoft Corp. (“Microsoft”) and Activision Blizzard, Inc. (“Activision”) jointly move to withdraw this proceeding from adjudication in light of the district court’s denial of the FTC’s request for a preliminary injunction under Section 13(b), and the court of appeals’ denial of the FTC’s motion for an injunction pending appeal. *See* Preliminary Injunction Opinion (Dkt. 305), *FTC v. Microsoft Corp.*, No. 3:23-cv-02880 (N.D. Cal.) (hereinafter “PI Order”); Order (Dkt. 25), *FTC v. Microsoft Corp.*, No. 23-15992 (9th Cir.). FTC Rule 3.26 establishes “two procedures by which respondents may obtain consideration of whether continuation of an adjudicative proceeding is in the public interest after a court has denied preliminary injunctive relief in a separate proceeding brought under section 13(b) of the Federal Trade Commission Act.” 16 C.F.R. § 3.26(a). Respondents rely on the first of those procedures—a motion to withdraw the proceeding from adjudication to allow the Commission “to consider whether the public interest warrants further litigation.” 16 C.F.R. § 3.26(c).

Withdrawal would advance the public interest and the core purpose of Rule 3.26(c). After a five-day evidentiary hearing, the district court found that the FTC is unlikely to succeed on any of the theories of competitive harm advanced in its Complaint for multiple, independently sufficient reasons. In addition, in the wake of the district court's findings and the court of appeals' denial of injunctive relief pending appeal, Microsoft signed a 10-year, binding agreement with Sony, the principal complainant against the transaction, to keep *Call of Duty* on PlayStation following the acquisition of Activision Blizzard. Under these circumstances, withdrawal from adjudication is not only mandated by regulation, but would enable the Commission to make a reasoned determination whether to proceed without the ordinary adjudicative constraints of Part 3, including the ban on *ex parte* communications between the Commission and Complaint or Respondents' Counsel.

BACKGROUND

This matter concerns the FTC's challenge of Microsoft's proposed acquisition of Activision. On December 8, 2022, the FTC initiated an administrative proceeding before its Administrative Law Judge (ALJ) seeking to block the transaction. An evidentiary hearing is currently scheduled to commence on August 2, 2023, before the ALJ.

On June 12, 2023, the FTC filed a Complaint for a Temporary Restraining Order (TRO) and Preliminary Injunction in the United States District Court for the Northern District of California pursuant to Section 13(b) of the Federal Trade Commission Act, seeking to enjoin the transaction pending the completion of that administrative proceeding. The district court granted the request for a TRO, enjoining Microsoft and Activision from closing their merger until the fifth business day after the court's ruling on the FTC's request for a preliminary injunction. The district court then held a five-day evidentiary hearing from June 22 to 29, 2023.

On July 10, 2023, the district court denied the FTC’s request for a preliminary injunction in a carefully reasoned 53-page decision. *See* PI Order. The court further modified its TRO to dissolve at 11:59 p.m. on July 14, 2023, unless the FTC obtained a stay pending appeal from the Ninth Circuit Court of Appeals. *Id.* at 53.

On July 12, 2023, the Commission noticed an appeal of the district court’s decision. *See* Notice of Appeal (Dkt. 307), *FTC v. Microsoft Corp.*, No. 3:23-cv-02880 (N.D. Cal.). On July 13, 2023, the Commission filed emergency motions in both the district court and the court of appeals seeking a stay of the district court’s decision pending appeal and requesting a decision before the expiration of the district court’s TRO. *See id.*, Motion for Injunction Pending Appeal (Dkt. 313); Motion for Injunction Pending Appeal (Dkt. 21), *FTC v. Microsoft Corp.*, No. 23-15992 (9th Cir.). That same day, the district court summarily denied relief. *See* Order Denying Motion for Injunction Pending Appeal (Dkt. 317), *FTC v. Microsoft Corp.*, No. 3:23-cv-02880 (N.D. Cal.). The Ninth Circuit swiftly followed suit. *See* Order (Dkt. 25), *FTC v. Microsoft Corp.*, No. 23-15992 (July 14, 2023).

On July 16, 2023, Microsoft publicly announced that it had signed a binding agreement to keep *Call of Duty* on PlayStation following the transaction.¹

ARGUMENT

The plain language of the FTC’s Rules of Practice for Adjudicative Proceedings compels withdrawal of this matter from adjudication as a matter of course. Rule 3.26(b) permits the filing of a motion to withdraw an administrative proceeding from adjudication when “[a] court of

¹ Phil Spencer (@XboxP3), *Twitter* (Jul. 16, 2023, 10:03 AM), <https://twitter.com/XboxP3/status/1680578783718383616> (“We are pleased to announce that Microsoft and @PlayStation have signed a binding agreement to keep *Call of Duty* on PlayStation following the acquisition of Activision Blizzard. We look forward to a future where players globally have more choice to play their favorite games.”).

appeals has denied a Commission motion for relief pending appeal” following a district court’s denial of the Commission’s request for a preliminary injunction. 16 C.F.R. § 3.26(b)(2). Such a motion must be filed within 14 days of the denial of the Commission’s request for relief pending appeal. *Id.* Assuming the motion is timely filed, “[t]he Secretary *shall* issue an order withdrawing the matter from adjudication 2 days after such a motion is filed.” 16 C.F.R. § 3.26(c) (emphasis added).

The conditions for withdrawing this matter from adjudication are satisfied here. The district court has denied the FTC’s request for a preliminary injunction. The court of appeals has denied the FTC’s motion for relief pending appeal. Respondents are filing a timely motion to withdraw from adjudication under Rule 3.26(b). Because the grounds for withdrawal under Rule 3.26(c) are met, “the Secretary *shall* issue an order withdrawing the matter from adjudication [in] 2 days”—on Thursday, July 20, 2023. 16 C.F.R. § 3.26(c) (emphasis added).

Withdrawal from adjudication is not only mandatory but is in the public interest. The district court had a full opportunity to consider the FTC’s claims and found that the Commission was unlikely to succeed on the merits of those claims for multiple, independently sufficient reasons. The evidence considered by the district court was robust: All the FTC’s major witnesses—including the CEOs of Microsoft, Xbox, Activision, and Sony— testified at the hearing. The court also heard from the CFOs of Microsoft and Xbox, all of the economic experts, and all of the third parties the FTC subpoenaed to testify in the administrative proceeding. The FTC submitted a total of 851 exhibits to the district court, including evidence not directly raised during the hearing. Finally, the court considered “voluminous pre-and-post hearing writ[ten] submissions” before reaching its decision. PI Order at 1.

In light of this thorough airing and the district court’s findings that the FTC failed to raise any serious questions regarding the legality of the merger, there is little reason to believe the ALJ would reach a different conclusion. Any justification for continuing the case is further undermined by the fact that Sony—the principal complainant against the deal—has now signed a 10-year, binding agreement with Microsoft to keep *Call of Duty* on the PlayStation.

Indeed, the Commission has not proceeded with a Part 3 trial following a district court denial of a motion for a preliminary injunction in more than three decades, and it has never done so in connection with a vertical merger challenge. Rather, the Commission’s consistent practice following denial of a preliminary injunction has been to withdraw the matter from adjudication upon request and then, after a reasoned consideration of the district court ruling, return the matter to adjudication for the sole purpose of dismissing the case. *See, e.g., Meta Platforms, Inc.*, No. 9411, 2023 WL 2328125 (FTC Feb. 24, 2023); *Thomas Jefferson Univ.*, No. 9392, 2021 WL 1143383 (FTC Mar. 15, 2021); *RAG-Stiftung*, No. 9384, 2020 WL 2197925 (Apr. 29, 2020). That is what should happen here.

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Commission grant their motion for withdrawal of this matter from adjudication in order to consider whether the public interest warrants further litigation.

Dated: July 18, 2023

Respectfully submitted,

By: /s/ Steve C. Sunshine

By: /s/ Beth Wilkinson

Steven C. Sunshine
Julia K. York
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7860
Fax: (202) 661-9126
steve.sunshine@skadden.com
julia.york@skadden.com

Maria A. Raptis
Michael J. Sheerin
Evan R. Kreiner
Skadden, Arps, Slate, Meagher & Flom LLP
One Manhattan West
New York, NY 10001
Telephone: (212) 735-2425
Fax: (917) 777-2425
maria.raptis@skadden.com
michael.sheerin@skadden.com
evan.kreiner@skadden.com

Counsel for Activision Blizzard, Inc.

Beth Wilkinson
Rakesh N. Kilaru
Kieran Gostin
Grace L. Hill
Anastasia M. Pastan
Sarah E. Neuman
Alysha Bohanon
Wilkinson Stekloff LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005
bwilkinson@wilkinsonstekloff.com
rkilaru@wilkinsonstekloff.com
kgostin@wilkinsonstekloff.com
ghill@wilkinsonstekloff.com
apastan@wilkinsonstekloff.com
sneuman@wilkinsonstekloff.com
abohanon@wilkinsonstekloff.com

Michael Moiseyev
Megan A. Granger
Weil Gotshal & Manges LLP
2001 M Street NW
Suite 600
Washington, DC 20036
(202) 682-7026
michael.moiseyev@weil.com
megan.granger@weil.com

Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2023, I caused a true and correct copy of the foregoing to be filed electronically using the FTC's E-Filing System and served the following via email:

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 forgoing document to be served via email to:

James H. Weingarten (jweingarten@ftc.gov)
James Abell (jabell@ftc.gov)
Cem Akleman (cakleman@ftc.gov)
J. Alexander Ansaldo (jansaldo@ftc.gov)
Peggy Bayer Femenella (pbayerfemenella@ftc.gov)
Michael T. Blevins (mblevins@ftc.gov)
Amanda L. Butler (abutler2@ftc.gov)
Nicole Callan (ncallan@ftc.gov)
Maria Cirincione (mcirincione@ftc.gov)
Kassandra DiPietro (kdipietro@ftc.gov)
Jennifer Fleury (jfleury@ftc.gov)
Michael A. Franchak (mfranchak@ftc.gov)
James Gossmann (jgossmann@ftc.gov)
Ethan Gurwitz (egurwitz@ftc.gov)
Meredith Levert (mlevert@ftc.gov)
David E. Morris (dmorris1@ftc.gov)
Merrick Pastore (mpastore@ftc.gov)
Stephen Santulli (ssantulli@ftc.gov)
Edmund Saw (esaw@ftc.gov)
U.S. Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Telephone: (202) 326-3570

Counsel Supporting the Complaint

/s/ Beth Wilkinson _____

Beth Wilkinson
Counsel for Microsoft Corp.