

1 Rakesh N. Kilaru (*pro hac vice*)
Anastasia M. Pastan (*pro hac vice*)
2 Jenna Pavelec (*pro hac vice*)
WILKINSON STEKLOFF LLP
3 2001 M Street NW, 10th Floor
Washington, DC 20036
4 Telephone: (202) 847-4000
Facsimile: (202) 847-4005
5 rkilaru@wilkinsonstekloff.com
apastan@wilkinsonstekloff.com
6 jpavelec@wilkinsonstekloff.com

7 Valarie C. Williams (Bar No. 335347)
Tania Rice (Bar No. 294387)
8 Alston & Bird LLP
5600 Mission Street, Suite 2100
9 San Francisco, CA 94105
Telephone: (415) 243-1000
10 Fax: (415) 243-1001
valarie.williams@alston.com
11 tania.rice@alston.com

12 *Counsel for Defendant Microsoft Corp.*

13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

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

20 Plaintiffs,

21 v.

22 MICROSOFT CORPORATION, a
Washington Corporation,

23 Defendant.
24
25
26
27
28

Case No. 3:22-cv-08991-JSC

**DEFENDANT MICROSOFT
CORPORATION'S NOTICE OF MOTION
AND MOTION TO STAY CASE;
MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT THEREOF**

Date: February 16, 2023, or sooner if
possible
Time: 10:00 a.m.
Location: Courtroom 8 – 19th Floor
Judge: Hon. Jacqueline Scott Corley

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 16, 2023 at 10:00 a.m. or as soon thereafter as this Motion may be heard in Courtroom 8 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Microsoft Corporation will, and hereby does, move this Court for an order staying all proceedings in this case pending the completion of any regulatory proceedings that would prevent Microsoft and Activision Blizzard King from closing their proposed transaction.

The motion will be made based on this Notice of Motion and Motion, the Memorandum of Points and Authorities herein, the accompanying Declaration of Rakesh Kilaru, all other papers and pleadings on file in this action, and any other written or oral argument or evidence that Microsoft might present to the Court.

REQUESTED RELIEF

Microsoft requests that the Court exercise its discretion to stay all proceedings in this case.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Microsoft respectfully requests that the Court stay this case. Plaintiffs' lawsuit has only
4 one purpose: to enjoin Microsoft's proposed acquisition of Activision Blizzard King. Though
5 Plaintiffs do not mention it, thirteen days before they filed their complaint, the Federal Trade
6 Commission ("FTC") filed an administrative complaint seeking the same relief. *See* Ex. C, Docket
7 in *In re Microsoft/Activision Blizzard*, FTC No. 9412; Ex. A, FTC Complaint (Dec. 8, 2022). Both
8 Plaintiffs and the FTC allege that the proposed acquisition would lessen competition in the video
9 game industry in violation of Section 7 of the Clayton Act. The only practical distinction between
10 the complaints is Plaintiffs are seeking a preliminary injunction, whereas the FTC presently is not.

11 There is nothing to preliminarily enjoin. For almost a year, Microsoft and Activision have
12 been working cooperatively with regulators around the world, including the FTC, to obtain the
13 necessary approvals to close the transaction. Microsoft and Activision have tried to expedite those
14 processes as much as possible, because the transaction agreement imposes a termination date of
15 July 18, 2023. *See* Ex. H, Microsoft/Activision Merger Agreement (Jan. 18, 2022), at 84. But
16 many of those regulatory reviews remain ongoing. Among them are the European Commission
17 ("EC"), which will review the transaction until at least April 11, 2023, and the United Kingdom's
18 Competition and Markets Authority ("CMA"), which will be examining the transaction until at
19 least April 26, 2023. The transaction will not close while these and certain other regulatory reviews
20 remain open, and those reviews could result in remedies that would "shape the litigation." *South*
21 *Austin Coal. Cmty. Council v. SBC Commc'ns, Inc.*, 191 F.3d 842, 844 (7th Cir. 1999)
22 (Easterbrook, J.). Further, the FTC has indicated that it may pursue a preliminary injunction to
23 stop the transaction from closing pending the outcome of its lawsuit.

24 There is accordingly no reason to litigate this case right now. Microsoft is already litigating
25 the issues presented here in front of the FTC, with the possibility of preliminary injunction
26 proceedings involving the FTC if they become necessary. And Microsoft is at least several months
27 away from being able to close the transaction. Judicial economy thus favors staying this action,
28 to avoid needless and duplicative litigation and the risk of inconsistent rulings on identical issues

1 of fact and law between this case and the FTC proceeding.

2 Microsoft accordingly requests that the Court stay these proceedings pending the
3 completion of any regulatory proceedings that would prevent Microsoft and Activision from
4 closing their proposed transaction.

5 **STATEMENT OF ISSUES TO BE DECIDED**

6 Whether to stay all proceedings in this case pending the completion of any regulatory
7 proceedings that would prevent Microsoft and Activision from closing their proposed transaction.

8 **STATEMENT OF FACTS**

9 This case involves a proposed transaction between the third-place manufacturer of gaming
10 consoles and one of many publishers of popular video games. Defendant Microsoft competes in
11 gaming through its Xbox division. Xbox started behind Nintendo and Sony when it began making
12 consoles 20 years ago, and it remains in third place today. Xbox also has next to no presence in
13 mobile gaming, the fastest-growing segment of gaming and the place where 94% of gamers spend
14 their time today. And Xbox and Activision are just two of hundreds of game publishers, who
15 compete by providing different types of games on different platforms at different prices, ranging
16 all the way down to \$0.

17 On January 18, 2022, Microsoft announced its agreement to acquire Activision Blizzard
18 King (“Activision”). Microsoft’s vision for the transaction is simple: Xbox wants to grow its
19 presence in mobile gaming, and three quarters of Activision’s gamers and more than a third of its
20 revenues come from mobile offerings. Xbox believes it is good business to make Activision’s
21 limited portfolio of popular games more accessible to consumers, by putting them on more
22 platforms and making them more affordable. That includes making *Call of Duty*, one of
23 Activision’s most popular games, more broadly available. Microsoft made this public pledge on
24 the day the deal was announced. Since then, Xbox has agreed to provide the game to Nintendo
25 (which does not currently have it) and has offered to continue making the game available to Sony
26 for ten years.

27 Microsoft and Activision’s agreement imposes a termination date of July 18, 2023. *See*
28 Ex. H at 84. Because of that deadline, Microsoft and Activision have been working diligently to

1 ensure that they have regulatory approval to proceed with the acquisition.

2 From the moment the deal was announced, Microsoft and Activision have been working
3 cooperatively with regulators around the world to address any competition-related concerns about
4 the transaction. Among others, Microsoft has been engaging with the EC and the CMA to obtain
5 their clearance for the transaction. Both the EC's and CMA's review periods are ongoing and will
6 continue for at least several more months: the EC's current deadline for completing review is
7 April 11, 2023, and the CMA's deadline is April 26, 2023. *See* Ex. F, European Commission
8 Docket Notice (Nov. 18, 2022); Ex. G, Competition & Markets Authority Notice of Extension
9 (Jan. 5, 2023). Microsoft cannot close the transaction while these and certain other foreign
10 regulatory reviews remain open.

11 The FTC also began reviewing the transaction when it was announced. On December 8,
12 2022, the FTC filed a complaint against Microsoft and Activision before the agency's
13 Administrative Law Judge, alleging that the proposed acquisition violated federal antitrust laws.
14 *See* Ex. A, FTC Complaint (Dec. 8, 2022). The FTC is seeking to prohibit Microsoft and
15 Activision from combining their businesses (except as approved by the Commission) or any other
16 relief appropriate to remedy the alleged anticompetitive effects of the acquisition. Trial is currently
17 scheduled for August 2, 2023. *See* Ex. E, FTC Scheduling Order (Jan. 4, 2023). Given the time
18 constraints on closing the deal, the parties agreed to an expedited discovery timeline, with fact
19 discovery scheduled to close on April 7, 2023. *See id.* The parties agreed to that schedule to
20 accommodate a possible preliminary injunction proceeding by the FTC. Specifically, if Microsoft
21 obtains the necessary regulatory approvals abroad to close the transaction, expedited discovery
22 will increase the likelihood that any preliminary injunction proceeding can be litigated and
23 resolved by July 18, 2023.

24 Against that regulatory backdrop, and just weeks after the FTC filed its complaint,
25 Plaintiffs, a group of 10 individual gamers, filed this lawsuit and simultaneously moved for a
26 preliminary injunction to block the proposed transaction. Like the FTC, Plaintiffs allege that the
27 proposed acquisition would lessen competition in various markets within the video game industry
28 in violation of Section 7 of the Clayton Act. And Plaintiffs seek precisely the same relief—to

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.