

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

MICROSOFT CORPORATION, et al.,

Defendants.

Case No. 23-cv-02880-JSC

**PRELIMINARY INJUNCTION  
OPINION**

**FINAL REDACTED VERSION**

In December 2022, the FTC initiated an administrative action to block Microsoft’s proposed acquisition of Activision—publisher of the first-person shooter video-game franchise *Call of Duty*, among other popular video games. The gist of the FTC’s complaint is *Call of Duty* is so popular, and such an important supply for any video game platform, that the combined firm is probably going to foreclose it from its rivals for its own economic benefit to consumers’ detriment. Discovery in the administrative action has closed, and trial before an FTC judge is scheduled to commence on August 2, 2023.

Four weeks ago, the FTC filed this action to preliminarily enjoin the merger pending completion of the FTC administrative action. Because the merger has a July 18 termination date, expedited proceedings were commenced. After considering the parties’ voluminous pre-and-post hearing writing submissions, and having held a five-day evidentiary hearing, the Court DENIES the motion for preliminary injunction. The FTC has not shown it is likely to succeed on its assertion the combined firm will probably pull *Call of Duty* from Sony PlayStation, or that its ownership of Activision content will substantially lessen competition in the video game library subscription and cloud gaming markets.

United States District Court  
Northern District of California

## BACKGROUND

The video gaming industry represents the fastest growing form of media and entertainment with revenues larger than the film, music, and print industries. The industry consists of several components. The three billion worldwide gamers. The videogame developers who create the games. The videogame publishers who release the games. And the companies that make the devices on which gamers play the games. This action involves a merger between Activision—the developer of the *Call of Duty* video game franchise—and Microsoft—a game developer, publisher, and the manufacturer of the Xbox game console.

### A. The Parties

Microsoft made \$198 billion in revenue in 2022. (PX9050-043.<sup>1</sup>) Gaming is part of Microsoft’s More Personal Computing division. (PX9050-014.) Its gaming business includes Xbox, Xbox Game Pass (a gaming subscription service), and Xbox Cloud Gaming. (PX9050-014.) Microsoft publishes video games through Xbox Game Studios, comprising 23 game development studios, including nine studios that were included in Microsoft’s acquisition of ZeniMax Media Inc., announced in September 2020 and finalized in March 2021. (Dkt. No. 226-2, Lee Decl. at ¶ 14; PX0003 at 086-087 (detailing Microsoft acquisitions of gaming studios); PX1527-002.)

Activision, a publicly traded corporation, earned \$7.5 billion in revenue in 2022. (PX9388-040 (Activision 10-K 2022).) “Activision develops and publishes video games for consoles, PCs and mobile devices. Microsoft often refers to Activision, along with EA [Electronic Arts], Take-Two Interactive Software, Inc., and Ubisoft, as one of the ‘Big 4’ independent video game publishers.” (Dkt. No. 226-2, Lee Decl. at ¶ 19.) “Activision’s most successful video game franchise is *Call of Duty*, a first-person shooter video game series playable on video game consoles and PCs. “Activision also produces other popular video games for consoles, including games from the *Diablo*, *Overwatch*, *Crash Bandicoot*, and *Tony Hawk* franchises, as well as video

---

<sup>1</sup> Exhibit citations are to the exhibit number and the page number associated with the exhibit number. For hearing testimony, the Court has endeavored to include citations to the associated docket number. Other record citations are to material in the Electronic Case File (“ECF”) with

1 games for other devices, including games from the *Candy Crush* (for mobile devices) and  
 2 *Warcraft* (for PC) franchises.” (Dkt. No. 226-2, Lee Decl. at ¶ 21.)

### 3 **B. The Proposed Merger**

4 On January 18, 2022, Microsoft announced an agreement to acquire Activision for \$68.7  
 5 billion—one of the largest, if not the largest, tech industry mergers. The agreement provides,  
 6 among other things, either party may terminate the merger agreement if the transaction has not  
 7 closed by July 18, 2023. (PX0083-088.) If the agreement is terminated because it has not closed,  
 8 Microsoft may have to pay Activision a \$3 billion termination fee. (PX0083-091, Sec. 8(c).)  
 9 Following the merger, “[Activision Blizzard] will continue as the surviving corporation of the  
 10 Merger and a Subsidiary of Parent [Microsoft].” (PX00083-024; *see also* RX5058 (Hood Decl.) at  
 11 ¶ 6 (discussing Microsoft’s plan to maintain Activision as a limited-integration studio).

### 12 **C. The Video Game Industry**

13 Video gaming generates hundreds of billions of dollars of revenue a year and is projected  
 14 to grow substantially in the future. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 404:12–16; Dkt. No.  
 15 285, 6/28/23 Tr. (Kotick) at 710:16–17 (“[T]he business has evolved to be what’s today probably  
 16 a \$130 billion-a-year industry.”). Gaming grew to record high levels during the global pandemic,  
 17 with people seeking at-home entertainment options more than ever before. (RX3136; Dkt. No.  
 18 285, 6/28/23 Tr. (Bailey) at 789:16–22.)

#### 19 **1. Gaming Platforms**

20 Video games are available to play across a wide range of platforms, including mobile, PC,  
 21 and console. (Dkt. No. 283, 6/23/23 Tr. (Spencer) at 404:6–405:3 (discussing RX3166-003); *see*  
 22 *also* Dkt. No. 284, 6/27/23 Tr. (Bailey) at 661:3–23.) Games can be played on general purpose  
 23 PCs or gaming PCs, but gaming PCs typically have more advanced hardware to allow them to  
 24 play more computationally demanding games. (PX8001 (Ryan Decl.) at ¶ 15.) Conversely,  
 25 games played on mobile have lower graphics and are less sophisticated than games played on  
 26 consoles or gaming PCs. (PX0003-073.) The three primary console makers are Microsoft (Xbox  
 27 Series X|S), Sony (PlayStation 5), and Nintendo (Switch). (PX1777-008; Dkt. No. 226-2, Lee  
 28 Decl. at ¶ 12.)

**a. Console Gaming**

1 Video game consoles are consumer devices designed for, and whose primary use is, to play  
2 video games. (PX8001 (Ryan Decl.) at ¶ 10.) Consumers purchase video game consoles based on  
3 the hardware features of the consoles as well as the availability of game content on the console.  
4 (PX8001 (Ryan Decl.) at ¶¶ 4, 11; PX7053 (Ryan Dep. Tr. Vol. I) at 21:1-5.) Console  
5 manufacturers earn revenues from several sources: sales of consoles and accessories like game  
6 controllers, headsets, supplemental storage, cables, and power supplies (*i.e.*, hardware) and  
7 revenue shares or royalties from sales of video game titles (*i.e.*, software) and accessories for the  
8 console. (PX8001 (Ryan Decl.) ¶ 4; PX0003-016.) Console manufacturers can also earn revenue  
9 from post-sale monetization. For example, console manufacturers may split royalties with  
10 publishers and developers on the sale of add-on content or in-game purchases. (PX1110-012;  
11 PX1065-003.)

12 Microsoft entered the gaming industry in 2001 with the launch of its first Xbox video game  
13 console, competing with the established incumbents Sony and Nintendo. (RX5055-100.) With  
14 every succeeding generation, Sony, Nintendo, and Xbox have remained the three major console  
15 producers, and have been engaged in what some refer to as the “console wars.” (PX7054 (Ryan  
16 Dep. Tr. Vol. II) at 25:22–26:8 (reporting since the release of PlayStation 5 and Xbox Series X|S,  
17 Xbox outsold PlayStation “about three months”); Dkt. No. 283, 6/23/23 Tr. (Spencer) at 294:23-  
18 295:6; Dkt. No. 285, 6/28/23 Tr. (Nadella) at 850:4 (describing the console market as “us and  
19 Sony and Nintendo”).)

20 Each console generation represents an opportunity to “win” the console generation by  
21 shifting the distribution of gamers onto their respective consoles. (PX8001 (Ryan Decl.) at ¶ 11.)  
22 In the United States, Microsoft won Generation 7 with the Xbox 360 pitted against the PlayStation  
23 3. (*Id.*) However, Sony won Generation 8 with the PlayStation 4. (*Id.*) In this current  
24 generation—the ninth generation—the Xbox Series X and PlayStation 5 both launched with a  
25 price of \$499 in November 2020 in direct competition. (RX5055-076, Ex. 42; PX0003-050; *see*  
26 *also* Dkt. No. 282, 6/22/23 Tr. (Booty) at 57:21-58:2, 58:25-59:4.) Microsoft released the Xbox  
27 Series S at the same time as the Series X, and at the same price point (\$299) as the Nintendo  
28

1 Switch which had been released three years earlier. (PX7059 (Prata Dep.) at 19:24-20:1; PX8002  
2 (Prata Decl.) at ¶ 2; *see* Dkt. No. 285, 6/28/23 Tr. (Bailey) at 783:11–19; RX5055-076, Ex. 42;  
3 PX0003-050.)

4 In recent years, Xbox’s console has consistently ranked third (of three) behind PlayStation  
5 and Nintendo in sales. (Dkt. No. 282, 6/22/23 Tr. (Bond) at 129:3-4; Dkt. No. 283, 6/23/23 Tr.  
6 (Spencer) at 295:2–6, 9-10; RX5046.) In 2021, Xbox had a [REDACTED] share of the console market,  
7 while Nintendo and PlayStation had a [REDACTED] and [REDACTED] share, respectively. For console revenues and  
8 share of consoles currently in use by gamers (“installed base”), Xbox trails with [REDACTED] while  
9 PlayStation and Nintendo have shares of [REDACTED] and [REDACTED], respectively.

10 While consoles were once the predominant form of home gaming, they now represent a  
11 smaller share of video game revenue than either mobile or PC. (Dkt. No. 282, 6/22/23 Tr. (Bond)  
12 at 127:16-128:1; RX3166-003.)

#### 13 **b. Mobile Gaming**

14 Most gamers today play on mobile devices, which is also the fastest growing segment as  
15 the technical capabilities of mobile devices increase. (Dkt. No. 282, 6/22/23 Tr. (Bond) at  
16 127:24–128:1; Dkt. No. 283, 6/23/23 Tr. (Spencer) at 392:5–6, 392:10–12, 404:11, 404:21-22;  
17 Dkt. No. 285, 6/28/23 Tr. (Kotick) at 712:1-12, 732:4-20; *id.* at 712:8-9 (“And so today the bulk  
18 of games are played on phones . . . .”); Dkt. No. 284, 6/27/23 Tr. (Bailey) at 661:6–23; *see also*  
19 RX5058 (Hood Decl.) at ¶ 14 (“\$113 billion of the game industry’s total revenues of \$210 billion  
20 came from mobile gaming in 2020”).) Growth in mobile gaming is expected to continue, as  
21 microprocessors equivalent to those used in past video game consoles are increasingly becoming  
22 more powerful and incorporated into phones. (*See, e.g.*, Dkt. No. 285, 6/28/23 Tr. (Kotick) at  
23 720:7-11 (explaining mobile is “the biggest part of the market”).)

#### 24 **c. PC Gaming**

25 After mobile, PC gaming is the next largest source of video game revenue. (Dkt. No. 284,  
26 6/27/23 Tr. (Bailey) at 661:11-12.) Jim Ryan, Sony Interactive Entertainment’s CEO, referred to  
27 PC gaming as “a very direct competitor to the PlayStation platform.” (PX7053 (Ryan Dep. Tr.

# 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.