

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**      **Lina M. Khan, Chair**  
                                 **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 MODIFY ORDER SETTING HEARING DATE**

On July 10, 2023, following a five-day evidentiary hearing, the District Court for the Northern District of California denied Complaint Counsel's request to preliminarily enjoin Microsoft Corporation's ("Microsoft's") acquisition of Activision Blizzard, Inc. The Commission appealed the District Court's decision to the Court of Appeals for the Ninth Circuit, and oral argument has been calendared for December 6. Meanwhile, on September 26, 2023, the Commission returned this matter to adjudication and ordered the Part 3 evidentiary hearing to commence 21 days after the Ninth Circuit issues its ruling on the Commission's appeal. *See* Commission Order Returning Matter to Adjudication (Sept. 26, 2023).

Respondents respectfully request that the Commission modify its September 26 Order setting the hearing date to provide that the hearing shall commence 21 days after the Ninth Circuit's decision, or on May 6, 2024, whichever is later. This modification is necessary to avoid pre-existing conflicts for Microsoft's trial counsel, will not prejudice any party, and will give the parties and the Administrative Law Judge more certainty about the trial date and more time in which to meet the necessary pretrial deadlines.

The Commission’s Rules of Practice authorize the Commission to reschedule the hearing date in an adjudicative proceeding “upon a showing of good cause.” 16 C.F.R. § 3.41(b); *see also* 16 C.F.R. § 3.21(c)(1). There is good cause here for several reasons.

First, Microsoft’s lead and second-chair trial counsel have a long-scheduled federal trial in California in *In re NFL’s Sunday Ticket Antitrust Litigation*, No. 2:15-ml-02668 (C.D. Cal.). The trial is scheduled to begin on February 22, 2024, and could last six weeks or more. Setting the hearing date in this matter to begin no earlier than May 6, 2024, is necessary to provide adequate time to complete the *Sunday Ticket* trial before the hearing in this matter begins, and to ensure that Microsoft is not deprived of counsel’s full participation in this hearing.

Second, the modification would provide all parties with more notice (and certainty) than the current Order provides. It is unclear when the Ninth Circuit will rule, and it will aid the parties (and potentially the Administrative Law Judge) to have a certain “no earlier than” date to avoid conflicts with other matters and provide a clear road map for setting the numerous remaining pretrial deadlines.

Finally, Respondents’ request will not prejudice any party. The Ninth Circuit appeal is not set to be argued until December 6, 2023, and there is no certainty that the court will rule on or before April 14, 2024, such that an evidentiary hearing could begin before May 6, 2024. The transaction has already closed, and in repeated meet-and-confers on this matter, Complaint Counsel has not put forward any evidence of prejudice from the limited potential deferment of the hearing in this matter. *See also* Preliminary Injunction Opinion at 52, *FTC v. Microsoft Corp.*, 3:23-cv-2880 (N.D. Cal. Jul. 19, 2023), ECF No. 327 (“The FTC insists the difficulty in ordering post-acquisition divestiture is the public equity that prevails. But it does not cite anything specific about this merger to support that assertion. It is a vertical acquisition. Microsoft and Activision will act as parent and subsidiary. There is no planned dismantling of operations . . . . What exactly about the merger would make it difficult to order an effective divestiture? The FTC does not say. . . . So, the balance of equities is a separate, independent reason the FTC’s motion must be denied.”). The only party facing significant

prejudice here is Microsoft, because of the possibility that the hearing would commence while lead counsel are unavailable in a different trial.

Respondents have conferred with Complaint Counsel, who intend to oppose this Motion on the grounds that it is not yet ripe. Microsoft seeks relief from this potential conflict now, because waiting until the Ninth Circuit issues its decision (and the conflict, if any, is imminent) would mean the evidentiary hearing would be set to commence in 21 days, well before the Commission's 45-day deadline to rule on a motion seeking relief. *See* 16 C.F.R. § 3.22(a). This puts Microsoft in an unfair position. Accordingly, Respondents respectfully request that the Commission modify its September 26 Order setting the hearing date to provide that the hearing shall commence 21 days after the Ninth Circuit's decision, or on May 6, 2024, whichever is later.

Dated: November 16, 2023

Respectfully submitted,

By: /s/ Steven C. Sunshine

By: /s/ Beth Wilkinson

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**[PROPOSED] ORDER GRANTING RESPONDENTS' MOTION TO MODIFY  
ORDER SETTING HEARING DATE**

Upon consideration of Respondents' Motion to Modify Order Setting Hearing Date, and for good cause shown, it is hereby ORDERED, pursuant to Commission Rule 3.41(b), 16 C.F.R. § 3.41(b), that the evidentiary hearing in this matter shall commence 21 days after the Ninth Circuit's decision, or on May 6, 2024, whichever is later.

By the Commission.

\_\_\_\_\_  
April J. Tabor  
Secretary

SEAL:  
ISSUED:

**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 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:

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Administrative Law Judge  
Federal Trade Commission  
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I also certify that I caused the forgoing document to be served via email to:

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