

**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

**COMPLAINT COUNSEL’S MEMORANDUM OPPOSING RESPONDENTS’ MOTION
TO MODIFY ORDER SETTING HEARING DATE**

Complaint Counsel hereby submits under Rule 3.22 its opposition to Respondents’ Motion to Modify Order Setting Hearing Date, filed on November 16, 2023 (“Motion”). Good cause does not presently exist to change the hearing date set in the Commission’s Order Returning Matter to Adjudication, issued on September 26, 2023. 16 C.F.R. § 3.41. Respondents’ sole concern involves a hypothetical timeline that could potentially create a scheduling conflict for Microsoft’s lead counsel. At this time, it is unclear whether or not there will be a conflict, and if so, the degree of the potential conflict. Therefore, the Commission should deny Respondents’ Motion as unripe.

First, Respondents speculate that the Ninth Circuit may issue its decision—and start the 21-day clock—before the conclusion of the trial in *In re National Football League’s “Sunday*

Ticket” *Antitrust Litigation*, No. 2:15-ml-02668-PSG (C.D. Cal.) (hereinafter “*NFL’s Sunday Ticket*”). As an initial matter, there will be a conflict between *NFL’s Sunday Ticket* and the administrative hearing only if the Ninth Circuit issues its decision *and* the *NFL’s Sunday Ticket* trial does not conclude within the subsequent 21 days. Given that Respondents estimate that the trial in *NFL’s Sunday Ticket* may take six weeks in total (42 days), Mot. at 2, Respondents are relying on a remote possibility as the basis to modify the Commission’s September 26 order. Moreover, Respondents’ Motion does not address the likelihood of the *NFL’s Sunday Ticket* conflict resolving due to settlement, as often happens in class action litigation. At bottom, there is significant uncertainty about both when the Ninth Circuit will issue its opinion and the length of the *NFL’s Sunday Ticket* trial. Mot. at 2. The uncertainty surrounding either event may render Respondents’ hypothetical scheduling conflict moot, making a Commission decision on this unripe issue unnecessary at this time.

Second, Respondents can renew their request if and when a scheduling conflict actually appears imminent—i.e., following the Ninth Circuit’s decision. Respondents’ argument that the May 6, 2024 date enhances certainty in the litigation misses the point. Mot. at 2. The Commission can give certainty by selecting a hearing date when it has the necessary information about contingent future events. Waiting for the potential conflict to ripen—or for future events to preclude the conflict altogether—carries little to no hardship for Respondents.

In fact, the opposite is true. As the Commission stated in the Order Returning Matter to Adjudication, the public interest “warrants that this matter be resolved fully and expeditiously.” If the trial date is moved now, and Respondents’ hypothetical timeline does not occur because (for example) the *NFL’s Sunday Ticket* trial does not go forward, then this proceeding would be unnecessarily delayed, harming the public interest. Moreover, Microsoft and Activision have

consummated their transaction and begun integrating Activision's assets. Microsoft's refusal to hold separate Activision's assets makes an expeditious hearing even more important to ensure the Commission can order effective relief if necessary.

For these reasons, the Commission should deny Respondents' Motion.

Dated: November 27, 2023

Respectfully submitted,

s/ James H. Weingarten

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2023, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I caused a copy of the foregoing to be served electronically on:

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