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17 **UNITED STATES DISTRICT COURT**
 18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

19 FEDERAL TRADE COMMISSION

20 *Plaintiff,*

21 v.

22 MICROSOFT CORP. and
 23 ACTIVISION BLIZZARD, INC.,

24 *Defendants.*

Case No. 3:23-cv-02880-JSC

**PRELIMINARY RESPONSE TO
 PLAINTIFF'S MOTION FOR
 INJUNCTION PENDING APPEAL**

Expedited Review Requested

1 The Federal Trade Commission (“FTC”) has asked the Court to enjoin the merger of
2 Microsoft Corporation (“Microsoft”) and Activision Blizzard, Inc. (“Activision”) pending
3 appeal, notwithstanding the Court’s July 10, 2023 order denying the FTC’s request for a
4 preliminary injunction. Dkt. 313. Due to the compressed deadline—an exigency created by the
5 FTC’s delay first in bringing this case¹ and then further delay in seeking the instant relief—
6 Defendants provide the following preliminary response setting forth why the Motion can and
7 should be summarily denied. If the Court desires further briefing, Defendants stand ready to
8 provide it on whatever timetable would aid the Court’s consideration.

9 STATEMENT

10 This Court ordered an expedited evidentiary hearing on a nearly unprecedented timetable
11 because, as it recognized, the parties’ merger agreement would not survive the indefinite
12 injunctive relief the FTC had sought. The Court has now issued a detailed opinion on a similarly
13 compressed timetable. Dkt. 305 (“Op.”). In that opinion, despite finding the FTC failed to carry
14 its burden on independent, fact-based grounds, the Court temporarily restrained the closing of the
15 merger through July 14 at 11:59 PM for the express reason of ensuring that the FTC, if it so
16 chose, could seek appellate intervention before this merger closes. *See* Op. 53. Yet rather than
17 move quickly to seek relief pending appeal from the Ninth Circuit, the FTC dragged its heels,
18 waiting three days (of the four days the Court provided) to ask this Court again (and for the same
19 reasons) to enjoin the parties’ merger.

20 The Court has already effectively denied the relief the FTC seeks. “A motion for an
21 injunction pending appeal is considered under the same standard as a motion for a preliminary
22 injunction.” *Taylor v. Bosco Credit, LLC*, No. 18-CV-06310-JSC, 2019 WL 6877470, at *1
23 (N.D. Cal. Dec. 17, 2019). The Court has already explained why the FTC has come nowhere
24 close to meeting its burden. *See, e.g.*, Op. 33-38 (explaining why, for eight different reasons plus
25

26 ¹ “Although the Agreement allows either party to terminate the merger agreement if the transaction has not closed
27 by July 18, 2023, and appears to obligate Microsoft to pay Activision a termination fee of \$3 billion, the FTC did
28 not file this action to preliminarily enjoin the merger until June 12, 2023—less than six weeks before the termination
date.” Op. 20.

1 a bonus reason, “the evidence points to no incentive to foreclose Call of Duty ... from Sony
2 PlayStation”); *id.* at 40-41 (explaining why the “lynchpin of the FTC’s argument,” its expert’s
3 testimony and analyses, “does not dispute the evidence of Microsoft’s lack of an economic
4 incentive” and rests on “an assumed input ... not based on evidence”); *id.* at 50 (finding the
5 merger was likely to result in Activision content on platforms where “it is not likely to be
6 available absent the merger”); *see also id.* at 39 (describing Microsoft’s contracts with six other
7 platforms as: “Perhaps bad for Sony. But good for *Call of Duty* gamers and future gamers.”).

8 The FTC’s filing fails to provide any basis to expect that it will prevail on a single issue
9 on appeal, much less run the table on the multiple findings it would have to reverse to prevail.
10 *See Cascadia Wildlands v. Thrailkill*, 806 F.3d 1234, 1240 (9th Cir. 2015) (appellate review of
11 an order denying a motion for preliminary injunction “is limited and deferential”). Specifically,
12 as we will explain to the Ninth Circuit, the FTC does not identify a single legal error in this
13 Court’s reasoning, nor any reason to think that any of the complaints they lodge would have
14 changed the outcome.

15 Further, the Court has already found that it would be inequitable to enter an injunction
16 that could lead to “the potential skuttling of the merger,” and that this inequitable result was “a
17 separate, independent reason the FTC’s motion must be denied.” Op. 51–52. The FTC’s new
18 request to enjoin the merger for the months (or more) that it will take for the Ninth Circuit to
19 hear and decide this appeal would have the same effect. The Court’s opinion was cognizant of
20 the potential for appellate review and the competing need for finality in advance of July 18. It
21 therefore left the TRO in place long enough for the FTC to seek relief pending appeal, while at
22 the same time *shortening* the TRO already in place by three days, in apparent recognition that
23 any appellate relief would have to be sought expeditiously and without prejudice to the parties’
24 ability to close the transaction. *Compare* Op. 53, *with* Dkt. 37. That the FTC wasted nearly 75%
25 of the time the Court allowed is not a reason to reconsider.

26 The FTC also asks, in the alternative, that this Court enter an injunction until after the
27 Ninth Circuit has ruled on the FTC’s motion for a stay pending appeal that it intends to file
28

1 “contemporaneously” in the appellate court. Dkt. 313 (Notice of Motion). Although the FTC has not
 2 yet filed its motion in the Ninth Circuit, the FTC has informed the appellate court that it will seek a
 3 decision on that request prior to the expiration of the TRO tomorrow evening. Defendants have
 4 also made clear to the Ninth Circuit clerk that they will file an opposition to that motion as soon
 5 as is practicable so the Court will have full briefing before the TRO expires. There is thus no
 6 reason for this Court to enter a temporary injunction pending the Ninth Circuit’s decision—the
 7 existing TRO already serves that purpose.

CONCLUSION

8
 9 For these reasons, Defendants respectfully ask that the Court summarily deny the FTC’s
 10 request for an injunction. To the extent the Court believes it would be necessary or helpful to
 11 receive a more formal opposition to the Motion filed here, Defendants will further respond on
 12 whatever schedule the Court orders.

13 Dated: July 13, 2023

Respectfully submitted,

By: /s/ Beth Wilkinson

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