No. _____

IN THE

Supreme Court of the United States

DANTE DEMARTINI, CURTIS BURNS JR., NICHOLAS ELDEN, JESSIE GALVAN, CHRISTOPHER JOSEPH GIDDINGS-LAFAYE, STEVE HERRERA, HUNTER JOSEPH JAKUPKO, DANIEL DERMOT ALFRED LOFTUS, BEOWULF EDWARD OWEN, AND IVAN CALVO-PÉREZ,

Applicant,

v.

MICROSOFT CORPORATION, A WASHINGTON CORPORATION.,

Respondents.

TO THE HONORABLE ELENA KAGAN ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

APPLICATION FOR EMERGENCY TEMPORARY INJUNCTION PENDING NINTH CIRCUIT APPEAL

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INTRODUCTION

Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. § 1651, Plaintiffs respectfully apply for a stay of the district court's order denying Plaintiffs' motion for preliminary injunction, and an emergency injunction to temporarily halt Microsoft and Activision Blizzard from merging before Plaintiffs' appeal to the Ninth Circuit, and Plaintiffs' motion for preliminary injunction, can be heard. The Ninth Circuit summarily denied Plaintiffs' motion for a stay pending Plaintiffs' appeal without analysis. There is more than sufficient basis to temporarily preserve the status quo here. As of 11:59 p.m. Pacific Time on July 14, 2023, the TRO preventing Microsoft from merging expired. Microsoft and Activision are set to merge sometime between now and 11:59 p.m. on July 18, 2023.

The merger between Microsoft and Activision would be one of, if not *the* largest technology mergers in history, at a time when concentration among technology companies is already threatening the competitive balance of our economy and even our political systems. Section 7 of the Clayton Act was passed by Congress to stop concentration *in its incipiency*. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962) ("[A] keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency."). Congress therefore "sought to assure . . . the courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317–18.

The concentration in the video game industry is long passed the incipiency stage, as Microsoft and other giants in the industry have acquired numerous video game competitors over the last several years. For example, in 2021, Microsoft acquired ZeniMax media, a massive video game conglomerate for $7.5 billion. In addition to drastically lessening competition in the video game industry, this merger would take a giant leap toward untenable market concentration that is without question unlawful under Section 7 of the Clayton Act. Congress meant to "clamp down with vigor on mergers." *Von's Grocery*, 384 U.S. at 276. The very objective of Section 7 of the Clayton Act was to "prevent accretions of power," even those "which 'are individually so minute as to make it difficult to use the Sherman Act test against them.'" *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964). For from any minute accretion of power, this merger is enormous and will substantially lessen competition. Yet the district court has accepted Microsoft's erroneous position that they can merge without even allowing Plaintiffs to be heard on the merits.

Plaintiffs ask that the Court temporarily halt the merger so that Plaintiffs' important and meritorious appeal can be heard, and the district court can consider Plaintiffs' motion for a preliminary injunction on the merits for the first time. Failure to provide emergency relief will allow Microsoft and Activision to merge, causing irreparable harm to competition and to these Plaintiffs.

There is substantial support for Plaintiffs requested relief. *See California v. Am. Stores Co.,* 492 U.S. 1301, 1307 (1989). There is much more than a fair prospect

that Plaintiffs will prevail on their appeal because the district court's underlying order denying their motion for a preliminary injunction—and denying Plaintiffs even the right to be heard—is directly contrary to binding Supreme Court authority. Failure to grant relief will allow the largest technology merger to consummate before Plaintiffs can even be heard on the merits. Allowing Microsoft and Activision to merge will cause irreparable harm to competition—as the district court assumed—and to these Plaintiffs.

If the Clayton Act is to be followed, mergers must be subjected to "searching scrutiny." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). Yet, the district court denied Plaintiffs even the opportunity to be heard. Plaintiffs must have an opportunity to be heard on the merits. And there is no harm to Microsoft in temporarily staying the merger until Plaintiffs can be heard. Microsoft made no showing of harm in the Ninth Circuit below and therefore concedes it. *See* App. 71a–94a. Yet despite no showing of harm to Microsoft, the Ninth Circuit still summarily denied Plaintiffs' motion for a temporary injunction pending appeal without any analysis. *See* App. 001a. Emergency relief is necessary to preserve Plaintiffs' due process rights to be heard, and to ensure that the merger is not consummated—and irreparable harm caused—before the merger can be properly scrutinized.

PROCEDURAL HISTORY

On January 18, 2022, Microsoft and Activision Blizzard announced that Microsoft would purchase Activision Blizzard for $68.7 billion. Soon after the

statutory waiting period under the Hart-Scott-Rodino Act expired, on December 20, 2022, Plaintiffs filed suit in the Northern District of California on behalf of video game players to stop the unlawful merger. App. 267a–309a at ECF No. 1. Plaintiffs brought suit under Sections 7 and 16 of the Clayton Act, 15 U.S.C. §§ 18, 26, alleging that the merger might substantially lessen competition across numerous video game markets. Also on December 20, 2022, Plaintiffs immediately moved for a preliminary injunction to stop the merger before it consummated to prevent the irreparable harm to competition that this merger threatens. See App. 267a–309a at ECF No. 4; see also App. 267a–309a at ECF No. 135.

The Court initially scheduled a hearing on Plaintiffs' motion for a preliminary injunction for February 16, 2023. App. 267a–309a at ECF No. 19. At Microsoft's request, however, the Court postponed the motion for preliminary injunction to April 12, 2023, and then to May 12, 2023. See App. 267a–309a at ECF No. 38; App. 267a–309a at ECF No. 97.

At the hearing on Plaintiffs' motion for preliminary injunction on May 12, 2023, the court held that Microsoft did not need to respond to Plaintiffs' motion for preliminary injunction on the merits. The Court held instead that Microsoft merely needed to address whether video game consumers were threatened with irreparable harm sufficient to be eligible for a preliminary injunction. App. 110a. On May 19, 2023, the Court denied Plaintiffs' motion for a preliminary injunction on that basis. App. 110a–118a. Plaintiffs appealed on June 7, 2023. App. 267a–309a at ECF No. 212.

Given that this merger might substantially lessen competition and cause irreparable harm, Plaintiffs also moved for a temporary injunction preventing the merger during the pendency of the appeal on June 9. App. 095a–109a. Microsoft opposed that motion on June 20, 2023. App. 071a–094a. Plaintiffs replied on June 27, 2023. App. 056a–070a.

While Plaintiffs' appeal was pending, the FTC moved for the first time for a preliminary injunction in federal court on June 12, 2023. *See* App. 310a–354a at ECF No. 1. The FTC brought its case in the Northern District of California, and the suit was promptly related to Plaintiffs' suit and assigned to the same judge, the honorable judge Jacqueline Scott Corley. App. 310a–354a at ECF No. 21. The district court granted the TRO and set an evidentiary hearing on the FTC's motion for preliminary injunction for June 22, 23, 27, 28, 29.

On June 19, Plaintiffs moved for joinder and to participate in the FTC's evidentiary hearing. See App. 310a–354a at ECF No. 223. The district court denied Plaintiffs' motion, barring Plaintiffs from participating in the FTC's evidentiary hearing. App. 310a–354a at ECF No. 224.

On July 11, 2023, the district court denied the FTC's motion for preliminary injunction. App. 214a–266a. The order denies the FTC's motion for a preliminary injunction and therefore cleared the way for Microsoft and Activision Blizzard to merge after the TRO dissolves at 11:59 p.m. on July 14. *Id.*

On July 11, Plaintiffs moved for emergency relief in the Ninth Circuit, asking them to adjudicate their motion for a temporary injunction pending appeal before

the expiration of the TRO at 11:59 p.m. on July 14. The Ninth Circuit denied Plaintiffs' motion for temporary injunction pending appeal on July 14 at 4:01 p.m. *See* App. 001a.

LEGAL STANDARD

In deciding whether to issue a temporary injunction pending appeal, courts consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

ARGUMENT

First, Plaintiffs are likely to prevail on their appeal because the district court's order was in direct contravention to binding Supreme Court and Ninth Circuit authority directly on point. The district court assumed that the merger would substantially lessen competition yet held that Plaintiffs were required to show immediate irreparable harm other than the harm to competition. *See* App. 110a–118a. The district court even held that the irreparable harm must occur immediately upon consummation of the merger. *See* App. 114a–118a. That was clear error. *See California v. Am. Stores Co.*, 492 U.S. 1301, 1304 (1989) ("lessening of competition 'is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent.'"); *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) ("A lessening of competition constitutes an

irreparable injury under our case law."). Plaintiffs' opening appellate brief to the Ninth Circuit explains how the district court clearly misapplied binding Supreme Court and Ninth Circuit authority directly on point. *See* App. 002a–038a.[1] That failure was monumental in the district court, because by denying Plaintiffs' motion for preliminary injunction without even considering the merits—indeed assuming Plaintiffs would prevail—the district court denied Plaintiffs' Due Process rights to be heard on the merits and allowed the merger to proceed without scrutiny.

Nor does the district court's order denying the FTC's motion for a preliminary injunction have any bearing on Plaintiffs' motion for preliminary injunction. Putting aside that the district court erred in numerous ways,[2] issue preclusion is inapplicable to deny Plaintiffs' right to be heard. Moreover, Plaintiffs' allegations and theories of competitive harm are different than the FTC's. The FTC proceeding was governed by different theories, different parties, and different law. While the FTC continues to operate under the merger guidelines, the merger guidelines are not the law and Plaintiffs are not constrained by them. Further, Plaintiffs' theories of why the merger might substantially lessen competition are different than the FTC's. For example, the FTC did not make any evidentiary showing on the horizontal harm to competition.

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[1] Plaintiffs' Opening Appellate Brief also showed how Plaintiffs do in fact meet the district court's erroneous standard. *See* App. 38a–52a.

[2] Among other errors, the district court applied the wrong legal standard, holding that the FTC was required to show that the "combined firm will ***probably*** pull *Call of Duty* from Sony PlayStation," and that "to establish a likelihood of success . . . the FTC must show . . . competition ***would probably*** be substantially lessened." App. 214a, 246a (emphasis added). Under the Clayton Act, mergers are unlawful that ***might*** substantially lessen competition, not will. Thus, only a "reasonable probability" of substantial lessening of competition is required, not a more likely than not standard. A more likely than not standard would be applicable if the statue required a showing that the merger ***would*** substantially lessen competition. But the Clayton Act specifically requires something less.

Second, Plaintiffs are threatened with irreparable harm absent relief, because, as the district court assumed, Plaintiffs will prevail on their Section 7 claim that the merger will substantially lessen competition. *See* App. 114a ("For purposes of this Order, the Court will assume Plaintiffs have met their burden of showing a likelihood of success on the merits."). Substantial harm to competition in the video game markets that these Plaintiffs rely on constitutes irreparable harm under the law. *See Am. Stores Co.*, 492 U.S. at 1304; *Boardman*, 822 F.3d at 1023 (9th Cir. 2016). Plaintiffs submitted declarations showing that they rely on video games for recreation and social interaction. *See* App. 119a–122a, 158a–163a.

Plaintiffs also submitted an expert report showing how the merger threatens significant harm to competition.169a–173a, 197a–198a.[3] Plaintiffs' expert was entirely uncontroverted because the district court ordered Microsoft *not* to respond on the merits. *See* App. 110a ("At the Court's direction, Microsoft's opposition to the motion addresses only the issues of irreparable harm and the bond."). For example, Professor Cabral explained that the "[t]he day the merger is consummated, the upward pressure on the price of [triple-A] games will begin to be felt" due to the internalization of the externality of competition. App. 197a. And there are numerous internal Microsoft documents showing that this merger is part of a plan to "spend Sony out of business" by buying up enough video game content and foreclosing it from rivals to create a competitive "moat." App. 165a. Matt Booty, Microsoft's Head of Xbox Game Studios, wrote to Microsoft's Chief Financial Officer of Xbox, saying:

[3] Plaintiffs are only including the portion of the Cabral Report that the district court did not seal.

> A different view to the general view below might be that we (Microsoft) are in a very unique position to be able to go spend Sony out of business. If we think that video game content matters in 10 years, we might look back and say, "Totally would have been worth it to lose $2B or $3B in 2020 to avoid a situation where Tencent, Google, Amazon or even Sony have become the Disney of games and own most of the valuable content." For example, it is practically impossible for anyone to start a new video streaming service at scale at this point. What content do you base it on? Things like Hulu and CBS All Access will be trivial players in the space. In games, Google is 3 to 4 years away from being able to have a studio up and running. Amazon has shown no ability to execute on game content. Content is the one moat that we have, in terms of a catalog that runs on current devices and capability to create new. Sony is really the only other player who could compete with Game Pass and we have a 2 year and 10M subs lead.

Id. Microsoft made no effort to explain or rebut this email, because the district court did not even require Microsoft to respond. Plaintiffs' Opening Appellate Brief to the Ninth Circuit discusses more fully other ways that Plaintiffs are threatened with irreparable harm from this merger. *See* App. 38a–52a.

Third, the issuance of a temporary injunction pending Plaintiffs appeal will not substantially injure Microsoft. In the proceedings below, Microsoft never put forward any basis for harm. *See* 071a–094a. Nor could there be. Temporarily preventing the merger merely preserves the status quo. The only possible harm is some delay to the merger. Microsoft and Activision can extend the July 18, 2023 deadline at any time. *See* App. 153a at §8.1(c). There is no compelling reason for not maintaining the current status of the parties, and Microsoft has wholly failed to articulate any harm in delay. *See F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001).

The lack of harm from delaying the merger is further demonstrated by Microsoft's litigation conduct to date. Plaintiffs first brought suit in December,

2022. Since then, Microsoft has never taken the position that the proceedings should be expedited in any fashion. Indeed, the contrary is true. Microsoft has sought to delay the proceedings at every opportunity. Microsoft filed a motion to stay Plaintiffs' litigation until after the FTC's trial, scheduled for August, 2023. *See* App. 380a–392a. Then, Microsoft moved to dismiss Plaintiffs' complaint on the grounds that Plaintiffs claims were not yet ripe, contending again that Plaintiffs' claims should await the resolution of the FTC action, set for trial in August 2023. *See* App. 372a–375a. Notably, Microsoft contended that after the FTC trial, Plaintiffs could then be given their opportunity to "be heard on a preliminary injunction motion."). App. 375a at 14:24–25. Microsoft has never asked the district court, or the Ninth Circuit, to expedite any facet of these proceedings.

Indeed, any prejudice to Microsoft is entirely its own doing. Microsoft could have sought to expedite the proceedings, not delay them. Perhaps most importantly, Microsoft could—and can—extend the deadline for closing the Merger. Microsoft cannot now claim that the arbitrary merger deadline that Microsoft and Activision set (and which can be easily amended by the parties), precludes Plaintiffs' ability to have their appeal, and ultimately their motion for a preliminary injunction, properly heard on the merits. *See U.S. v. Hosp. Affiliates Int'l, Inc.*, No. 80-3672, 1980 WL 1983, at *5 (E.D. La. Oct. 9, 1980) ("The public interest, 'as specifically protected by Section 7 of the Clayton Act, outweighs any harm to defendants brought about by the position in which defendants contracted to place themselves in.'").

Fourth, the public interest lies strongly in favor of preventing irreparable harm to competition and preserving the status quo until Plaintiffs can be heard on their motion for preliminary injunction. There are strong public interests weighing in favor of issuance of an injunction preventing the merger pending the resolution of the appeal. The first is the public interest in effective enforcement of the antitrust laws. *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). Plaintiffs are threatened with irreparable harm to competition if the merger is allowed to consummate without a hearing on the merits of Plaintiffs' motion for preliminary injunction. The district court has yet to address whether this merger might substantially lessen competition. Plaintiffs must be entitled to an evidentiary hearing on their motion for a preliminary injunction before the merger is allowed to consummate.

Moreover, the interest of Plaintiffs in preventing damage to the marketplace from an anticompetitive merger is high. *See Am. Stores*, 492 U.S. at 1307 ("[B]alancing the stay equities persuades me that the harm to applicant if the stay is denied, in the form of a substantial lessening of competition in the relevant market, outweighs the harm respondents may suffer as a result of a stay of the mandate."). The public interest has a strong interest in preserving competition in the marketplace, particularly in the case of a multibillion industry effecting dozens of businesses and millions of consumers. "Foremost among the public equities in any merger case is the need to protect the public's interest in free and open competition." *FTC v. Bass Bros. Enterprises*, No. C84-1304, 1984 WL 355, at *23

(N.D. Ohio June 6, 1984). Were the merger to be consummated, and later found to be in violation of the antitrust laws, the remedies available at that juncture would be more limited and would come at an extraordinary cost.

CONCLUSION

For the reasons stated above the Court should temporarily enjoin the merger pending Plaintiffs' appeal to the Ninth Circuit.

In the alternative, the Court should temporarily enjoin the merger for a short period of time so that further briefing (if needed) can be submitted.

Respectfully submitted,

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