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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

Microsoft Corp.

a corporation;

and

Activision Blizzard, Inc.,

a corporation.

Docket No. 9412

**COMPLAINT COUNSEL’S MOTION FOR LEAVE TO FILE AN OPPOSITION TO
RESPONDENT’S MOTION FOR CERTIFICATION TO THE COMMISSION OF
REQUEST FOR COURT ENFORCEMENT OF NONPARTY SUBPOENA**

Pursuant to Rule 3.22 of the Rules of Practice for Adjudicative Proceedings (“Rules”), Complaint Counsel respectfully moves for leave to file the attached brief opposing Respondent Microsoft Corp.’s Motion to Certify to the Commission a Request for Court Enforcement of Subpoena *Duces Tecum* Issued to Nonparty Sony Interactive Entertainment LLC on December 21, 2023. In support of its motion for leave, Complaint Counsel states as follows:

1. As explained in more detail in the Opposition, Microsoft served four invalid subpoenas on third parties and subsequently filed a motion to certify to the Commission a request for court enforcement of one of its invalid subpoenas.

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2. In addition to serving subpoenas without authority, Microsoft violated this Court's January 4, 2023 Scheduling Order and the Rules by putting the dispute over the validity of the subpoenas directly before the Court without first meeting and conferring with Complaint Counsel.
3. Complaint Counsel's proposed Opposition complies with the timing and word count requirements of Rule 3.22 and this Court's Scheduling Order.

For these reasons, as set forth in the proposed Opposition, Complaint Counsel respectfully requests leave to file its Opposition pursuant to Rule 3.22.

Dated: January 4, 2024

Respectfully submitted,

By: /s/ Nicole Callan

Nicole Callan

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In the Matter of

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**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S MOTION FOR LEAVE
TO FILE AN OPPOSITION TO RESPONDENT’S MOTION FOR CERTIFICATION TO
THE COMMISSION OF REQUEST FOR COURT ENFORCEMENT OF NONPARTY
SUBPOENA**

On January 2, 2024, Complaint Counsel filed a Motion for Leave to File an Opposition to Respondent’s Motion for Certification to the Commission of Request for Court Enforcement of Nonparty Subpoena. Complaint Counsel’s Motion is GRANTED. IT IS HEREBY ORDERED that Complaint Counsel has leave to file its Opposition to Respondent’s Motion for Certification to the Commission of Request for Court Enforcement of Nonparty Subpoena.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

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Docket No. 9412

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION FOR
CERTIFICATION TO THE COMMISSION OF REQUEST FOR COURT
ENFORCEMENT OF NONPARTY SUBPOENA**

On October 26, 2023, this Court granted leave for Complaint Counsel to take discovery relevant to the Ubisoft Agreement¹ and the Sony Agreement.² In the final days of that eight-week discovery period, Microsoft Corp. (“Microsoft”) sought to circumvent the Court’s October 26 Order and the Rules of Practice for Adjudicative Proceedings (“Rules”) by issuing four subpoenas to third parties with no authority to do so. Microsoft then filed a motion to certify to

¹ The Ubisoft Agreement consists of several complex, interrelated agreements between Microsoft, Activision, and French videogame publisher Ubisoft.

² See Order on Complaint Counsel’s Motion to Allow Discovery Regarding Respondents’ Agreements with Ubisoft Entertainment SA and Sony Interactive Entertainment LLC, Oct. 26, 2023 (“October 26 Order”).

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the Commission a request for court enforcement of one of its four subpoenas. Microsoft's motion to certify should be denied for two reasons. First, none of the subpoenas Microsoft issued to third parties is valid. Second, in direct violation of this Court's January 4, 2023 Scheduling Order ("Scheduling Order") and the Rules, Microsoft failed to meet and confer with Complaint Counsel regarding the validity of the subpoenas, and instead put this dispute directly before the Court.

BACKGROUND

Fact discovery in this matter closed on April 7, 2023. After the close of fact discovery, Respondents Microsoft and Activision Blizzard, Inc. ("Activision") executed a series of complex, interrelated agreements with Sony Interactive Entertainment LLC ("Sony") and Ubisoft Entertainment SA ("Ubisoft"), [REDACTED]. [REDACTED] Respondents have claimed that these agreements are procompetitive, but mostly opposed discovery, arguing that the agreements "speak for themselves." *See* Resp. Microsoft's Opp. to Complaint Counsel's Mot. to Extend Fact Discovery, October 20, 2023 ("Resp.'s Opposition") at 3.

This Court disagreed. As the Court found, Complaint Counsel had no opportunity to conduct any discovery related to the Ubisoft Agreement nor the circumstances surrounding the execution of the Sony Agreement, given that both agreements were executed months after discovery closed. *See* October 26 Order at 3. The Court therefore ordered: "Complaint Counsel is granted leave to serve requests for production of documents and data, interrogatories, notices of depositions, and subpoenas *duces tecum* and *ad testificandum* for the purpose of taking discovery relevant to the Ubisoft Agreement and the Sony Agreement." October 26 Order at 4.

Respondents did not request—and the Court did not grant—leave for *Respondents* to take discovery.

In the final days of the limited discovery period this Court ordered, Microsoft issued a subpoena *duces tecum* and a subpoena *ad testificandum* to Sony and two subpoenas *ad testificandum* to Ubisoft. *See* Exhibits A, B, C, D. Complaint Counsel raised the issue of the validity of Microsoft’s subpoenas in separate emails dated December 19 and December 21. *See* Exhibits E, F. Microsoft said it would respond “soon,” but never provided a substantive response. Exhibit E. Instead, Microsoft filed the motion at issue and subsequently referred Complaint Counsel to its motion. *See* Exhibit F. In its motion, Microsoft argued that its subpoena *duces tecum* to Sony is valid and suggested that the same is true for its subpoena *ad testificandum*. *See* Resp. Microsoft Corp.’s Mot. to Cert. to the Comm’n a Request for Court Enforcement of Nonparty Subpoena, December 21, 2023 (“Resp.’s Mot.”) at 9; *see also id.* at 4 n.3 (representing that Microsoft intends to use half of the allocated time in the Sony corporate deposition and that the allocation of deposition time is “not presently at issue” because Sony had not objected).

On December 28, 2023, Complaint Counsel met with Respondents in good faith to resolve the disagreement over the validity of Microsoft’s subpoenas. Complaint Counsel explained that Microsoft issued subpoenas without authority to do so and conveyed its position that Microsoft is entitled to 1.5 hours of deposition time in the third-party depositions that Complaint Counsel noticed. *See* Scheduling Order Additional Provision 12 (providing that the time for non-party depositions is allocated 5.5 hours to the side that subpoenaed the deposition and 1.5 hours for the side that did not). On December 31, 2023, Microsoft informed Complaint Counsel that it would not agree to abide by the appropriate allocation of deposition time under

this Court's Scheduling Order. The following day, Complaint Counsel notified Respondents of its intent to file the instant motion. *See* Exhibit H.

ARGUMENT

I. Microsoft's Subpoenas to Third Parties Are Not Valid

Microsoft has not sought leave to take any discovery since fact discovery in this matter closed on April 7. Instead, Microsoft has consistently fought discovery, including by opposing Complaint Counsel's request for third party discovery and by refusing to provide relevant discovery in violation of this Court's October 26 Order. *See* Resp.'s Opposition at 8 (requesting that discovery be limited to five requests for production and one corporate deposition); Compl. Counsel's Mot. to Compel Discovery Responses from Resp., December 20, 2023 (explaining that Respondents refuse to provide requested documents and noticed corporate testimony in violation of the Court's October 26 Order).

Microsoft also contacted at least one third party and communicated its view that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

After its attempt to obstruct Complaint Counsel's discovery proved unsuccessful, Microsoft reversed course in the final days of discovery ordered by this Court and issued its own third-party subpoenas, with no authority to do so. This litigation tactic should not be allowed. If

Microsoft believed it needed discovery from third parties, it could have moved the Court for an order authorizing that discovery, which would have allowed the Court to consider whether good cause exists for Microsoft to obtain discovery (including in light of Microsoft's efforts to obstruct Complaint Counsel's ability to obtain discovery and Microsoft's eleventh-hour reversal of its position). Rather than seeking leave from the Court to obtain out-of-time discovery like Complaint Counsel did, and as Microsoft is required to do by the Rules, Microsoft instead issued subpoenas without even notifying the Court.

II. Microsoft Failed to Meet and Confer with Complaint Counsel as Required by This Court's Scheduling Order and the Rules

This Court's Scheduling Order makes crystal clear that parties must confer with opposing counsel before raising disputes by motion before the Court. *See* Scheduling Order Additional Provision 4; *see also* 16 C.F.R. § 3.22(g); *In re Lab Corp.*, 2011 FTC LEXIS 26, at *5-6 (Feb. 8, 2011) ("Counsel for parties moving to compel discovery have a duty to make reasonable efforts to confer with opposing counsel before filing a motion to compel.").

Microsoft may have met with Sony, but the dispute over deposition time created by Microsoft's deposition subpoenas is a dispute between Microsoft and Complaint Counsel. Microsoft appears to have attempted an end run around Complaint Counsel by cloaking the dispute about its deposition subpoenas as one that had been resolved by agreement with Sony, and by separately asking the Court to rule on the validity of its document subpoena. *See* Resp.'s Mot. at 4 n.3, 9.³ But the validity of all four of Microsoft's subpoenas is clearly raised by Microsoft's motion, and whatever resolution Microsoft and Sony may have reached is not

³ Microsoft's motion took the position that its deposition subpoena to Sony was not "presently at issue,"—even though Microsoft had not responded to Complaint Counsel's December 19 and December 21 emails raising that exact issue. *See* Resp.'s Mot. at 4 n.3; Exhibits E, F.

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relevant because it is Complaint Counsel's (and Microsoft's) deposition time at issue, not Sony's deposition time.

Failing to meet and confer with Complaint Counsel over this disputed issue is an independent basis for denying Microsoft's motion and is warranted here.⁴ Notably, although this Court sometimes will overlook failure to meet-and-confer as a matter of discretion, *see In re Benco Dental Supply Co.*, 2018 WL 4488326 at *1 n.1, No. 9379 (FTC Sept. 13, 2018), here Microsoft's evasion was deliberate and warrants denial. *See id.* (citing *In re Lab Corp.*, 2011 FTC LEXIS 26, at *5-6 (Feb. 8, 2011) (denying motion where the party sent a single email *before* filing and did not wait for a response)). Microsoft's evasion is more egregious than the failure at issue in *Lab Corp.*, as Microsoft not only failed to discuss this issue at all with Complaint Counsel, but also failed to respond to Complaint Counsel's outreach and used a contested motion involving a nonparty to put the issue before the Court.

CONCLUSION

For the foregoing reasons, Microsoft's motion should be denied with prejudice.

Dated: January 4, 2024

Respectfully submitted,

By: /s/ Nicole Callan

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Maria Cirincione

Meredith Levert

James H. Weingarten

⁴ In addition to failing to meet and confer with Complaint Counsel at all, Microsoft failed to include a signed statement representing that its counsel had conferred with opposing counsel in a good faith effort to resolve the issues raised by the motion and reciting the date, time, and place of each conference between counsel. A meet and confer statement is required by Rule 3.22(g) and by this Court's Scheduling Order. Microsoft's failure to include the required statement is an independent ground on which Microsoft's motion may be denied. *See* Scheduling Order Additional Provision 4 ("Motions that fail to include such separate statement may be denied on that ground.").

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**STATEMENT REGARDING MEET AND CONFER PURSUANT TO SCHEDULING
ORDER ADDITIONAL PROVISION 4**

Complaint Counsel respectfully submits this Statement, pursuant to Additional Provision 4 of this Court’s Scheduling Order. Complaint Counsel has attempted to confer in good faith with counsel for Respondents Microsoft Corporation (“Microsoft”) and Activision Blizzard, Inc. (“Activision”) to resolve by agreement the issues raised in this motion and has been unable to reach an agreement.

On December 12, 2023, Microsoft served a subpoena *duces tecum* and a subpoena *ad testificandum* on Sony Interactive Entertainment LLC. *See* Exhibits A, B. On December 20, 2023, Microsoft served two subpoenas *ad testificandum* on Ubisoft Entertainment SA. *See* Exhibits C, D. Complaint Counsel raised the issue of the validity of Microsoft’s subpoenas in separate emails dated December 19 and December 21. *See* Exhibit E at 1-2, Exhibit F at 2.

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Microsoft said it would respond “soon,” *see* Exhibit E at 1, but never provided a substantive response. Instead, Microsoft filed the motion at issue, and subsequently referred Complaint Counsel to its motion. *See* Exhibit F at 1.

On December 28, 2023, Complaint Counsel met with Respondents in good faith to resolve the disagreement over the validity of the subpoenas as it relates to the allocation of deposition time. Complaint Counsel explained that Microsoft’s subpoenas to third parties are not valid, and that Microsoft is not entitled to split deposition time in the third-party depositions that Complaint Counsel properly noticed.

On December 31, 2023, Microsoft informed Complaint Counsel that it would not agree to abide by the appropriate allocation of deposition time under this Court’s Scheduling Order. *See* Exhibit H at 1-2. On January 1, 2024, Complaint Counsel emailed Microsoft to confirm that the parties were at an impasse and notified Microsoft of its intent to file the instant motion. *See id.* at 1.

Dated: January 4, 2024

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EXHIBIT A – EXHIBIT H

CONFIDENTIAL
REDACTED IN ENTIRETY

PUBLIC**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2024, 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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The Honorable D. Michael Chappell
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I also certify that I caused the foregoing document to be served via email to:

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