

**UNITED STATES OF AMERICA
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

**RESPONDENT MICROSOFT CORPORATION’S MOTION TO REOPEN DISCOVERY
FOR THE LIMITED PURPOSE OF SERVING SUBPOENAS *AD TESTIFICANDUM* ON
UBISOFT ENTERTAINMENT SA AND SONY INTERACTIVE ENTERTAINMENT
LLC**

Respondent Microsoft Corporation (“Microsoft”) respectfully moves to reopen discovery for the limited purpose of serving subpoenas *ad testificandum* on Ubisoft Entertainment SA (“Ubisoft”) and Sony Interactive Entertainment LLC (“Sony”) regarding the Ubisoft and Sony Agreements. Pursuant to FTC Rule 3.21(c)(2) and outlined in the corresponding Memorandum, there is good cause for reopening discovery for this limited purpose—namely, fairness and timeliness.

Fact discovery in this proceeding closed on April 7, 2023. Shortly thereafter, Microsoft and Sony executed the Sony Agreement on July 15, 2023, and Respondents and Ubisoft executed the Ubisoft Agreements on August 21, 2023. On October 10, 2023, Complaint Counsel moved to reopen discovery on these agreements. *See* Complaint Counsel’s Motion to Extend Fact Discovery To Allow Discovery Regarding Respondents’ Agreements With Ubisoft Entertainment SA And Sony Interactive Entertainment LLC (“Oct. 10, 2023 Motion”). On October 26, 2023, in relevant

part, the Court ordered that Complaint Counsel was granted leave to serve subpoenas *ad testificandum* relating to the Ubisoft and Sony Agreements and reopened discovery for eight weeks, ending on December 21, 2023. *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) (“Oct. 26, 2023 Order”).

Microsoft understood the Oct. 26, 2023 Order to place outer limits on Complaint Counsel’s ability to take discovery on these agreements out of time and timely filed a motion to certify a request for the Commission to enforce a subpoena *duces tecum* on Sony regarding the Sony Agreement on December 21, 2023 (“Microsoft’s Motion to Certify”). However, on January 8, 2024, the Court denied Microsoft’s Motion to Certify (“Jan. 8, 2024 Order”), explaining that the Oct. 26, 2023 Order only authorized Complaint Counsel to serve discovery. As a result, Microsoft has not had the opportunity to take proportional discovery limited to the issues reopened by Complaint Counsel.

Shortly thereafter, on January 11, 2024, Microsoft informed Complaint Counsel that it intended to move to reopen discovery for the limited purpose of serving subpoenas *ad testificandum* on Ubisoft and Sony. *See* Ex. A, Declaration of Kieran Gostin ¶ 9 (Jan. 16, 2024) (“Gostin Decl.”). The parties met and conferred on January 12, 2024. *Id.* ¶ 10. Complaint Counsel notified Microsoft on January 16, 2024, that they would oppose, and Microsoft filed this motion later the same day. *See id.* ¶ 11.

In providing notice that they intend to oppose the instant motion, Complaint Counsel shared their view that Microsoft is filing this motion to deprive Complaint Counsel of deposition time. *See* Ex. B, Email from Complaint Counsel to Respondent Microsoft (Jan. 16, 2024). That is untrue. As undersigned counsel explained in responding to Complaint Counsel, Microsoft’s goal

is to ensure Microsoft has sufficient time to question Sony and Ubisoft witnesses on, among other topics, the negotiations over the respective agreements; the financial and other impact of the agreements; how the agreements are being implemented by the third parties; and the third parties' understanding of the terms of the agreement. *See id.* Contrary to Complaint Counsel's view, Microsoft intends to use the full time allotted to Microsoft. Nevertheless, in an effort to obtain Complaint Counsel's consent to the relief requested in this motion, Microsoft agreed to forfeit unused time (if any) to Complaint Counsel, despite no provision for such reversion in the Scheduling Order, and even though Microsoft is unaware of any precedent for such an offer. *Id.* Complaint Counsel rejected the proposal. *See id.*

Granting Microsoft's motion would not delay the evidentiary hearing in this matter, given that it will not start prior to twenty-one days after the disposition of the appeal before the Ninth Circuit. Furthermore, there has been discussion about an Ubisoft deposition on January 31, but that date has not been finalized. The Sony deposition is scheduled to take place on February 8. Microsoft only seeks the opportunity to serve its own subpoenas on Sony and Ubisoft so that it can question those witnesses ahead of the hearing.

In addition to granting Complaint Counsel's motion to reopen discovery related to the Sony and Ubisoft Agreement, the Court previously granted: the parties' joint request to extend the deadline for final exhibit lists by one week, *see* Order Granting Joint Motion For First Revised Scheduling Order at 1 (May 12, 2023); Respondents' request to revise the scheduling order, *see* Order Granting Respondents' Motion For Second Revised Scheduling Order at 1 (June 29, 2023); and the parties' joint motion to revise the remaining deadlines, *see* Order Granting Joint Motion For Third Revised Scheduling Order at 1 (Dec. 15, 2023).

**MEMORANDUM IN SUPPORT OF RESPONDENT MICROSOFT CORPORATION'S
MOTION TO REOPEN DISCOVERY FOR THE LIMITED PURPOSE OF SERVING
SUBPOENAS *AD TESTIFICANDUM* ON UBISOFT ENTERTAINMENT SA AND SONY
INTERACTIVE ENTERTAINMENT LLC**

Respondent Microsoft respectfully moves to reopen discovery for the limited purpose of serving subpoenas *ad testificandum* on Ubisoft and Sony about the Ubisoft Agreements and Sony Agreement, respectively. Discovery may be allowed after the discovery deadline has passed, provided there is good cause to do so. *See In re LabMD, Inc.*, No. 9357, 2014 FTC LEXIS 307, at *9 (F.T.C. Dec. 8, 2014) (granting in part Complaint Counsel's motion to reopen discovery to allow limited deposition of defense witness in advance of testimony in order to advance public interest in effective cross-examination); Oct. 26, 2023 Order at 2–3; *see also* FTC Rule 3.21(c)(2), 16 C.F.R. § 3.21(c)(2) (permitting the Administrative Law Judge to extend any deadline or time specified in a scheduling order for good cause). Good cause exists here for several reasons.

First, as the Court has noted, “there is no dispute as to the relevance of the [Sony Agreement and Ubisoft Agreements], given that Microsoft intends to offer the agreements into evidence at the evidentiary hearing to support its defense.” Order Denying Motion of Respondent Microsoft Corp. to Certify Request for Court Enforcement of Subpoena *Duces Tecum* (Jan. 8, 2023) (“Jan. 8, 2023 Order”). While Microsoft opposed Complaint Counsel's motion to reopen discovery into these agreements, it did not oppose some additional discovery, arguing instead that “[t]he discovery plan presented by Complain Counsel is not appropriately limited or tailored.” Oct. 26, 2023 Order at 2.

Second, as a matter of fairness, Microsoft should be entitled to conduct discovery to address any concerns about the Ubisoft and Sony Agreements raised by Complaint Counsel. When one party is granted to leave to reopen discovery into an issue, it would be “unjust” not to allow discovery by the opposing party “within the same boundaries [previously] granted.” *Stuart Title*

Guar. Co. v. Credit Suisse, No. 1:11-cv-00227-BLW, 2015 U.S. Dist. LEXIS 44237, at *4–6 (D. Idaho Mar. 31, 2015) (finding “nothing illegitimate” about opposing discovery and subsequently requesting to conduct reciprocal discovery when discovery was reopened). Complaint Counsel, in its motion to reopen discovery, indicated that it intends to attempt to rebut Microsoft’s assertions that the agreements mitigate any purported anticompetitive harm of the merger. *See* Oct. 10, 2023 Motion at 7–8. And, in prior cases, the Commission has closely analyzed the adequacy of relevant agreements in merger cases. *See generally In the Matter of Illumina, Inc.*, No. 9401, 2023 FTC LEXIS 43 (F.T.C. Mar. 31, 2023). While Microsoft has previously argued (and continues to maintain) that the Ubisoft and Sony Agreements speak for themselves, Microsoft should still be entitled to seek balanced discovery so that it can counter any suggestion that the agreements are inadequate.

Third, Microsoft could not previously seek this discovery because the Ubisoft and Sony Agreements were not executed until after the prior discovery deadline. Microsoft respectfully asks the Court to excuse their misreading of the Court’s October 26 Order reopening discovery. Microsoft acknowledges that the October 26 Order states “that Complaint Counsel is granted leave to serve . . . subpoenas . . . *ad testificandum* for the purpose of taking discovery relevant to the Ubisoft Agreement and the Sony Agreement.” Oct. 26, 2023 Order at 4. But Microsoft understood this statement to relate to the limitations on the amount of discovery Complaint Counsel could seek, which was the focus of the parties’ dispute, and not to prevent Microsoft from seeking corresponding discovery.

Fourth, reopening discovery for the limited purpose of serving subpoenas *ad testificandum* will not delay the evidentiary hearing in this matter or the depositions. The evidentiary hearing is not scheduled to occur until twenty-one days after the disposition of the appeal before the Ninth

Circuit. Order Granting Joint Motion for Third Revised Scheduling Order at 1 (Dec. 15, 2023). Complaint Counsel has already served subpoenas *ad testificandum* on Ubisoft and Sony. Microsoft understands that the dates for those depositions have not been finalized, but the Ubisoft deposition is expected to occur on January 31 and the Sony deposition is expected to occur on February 8. Microsoft only seeks the opportunity to serve its own subpoenas on Sony and Ubisoft so that it can question those witnesses ahead of the hearing.

For the foregoing reasons, Microsoft respectfully asks the Court to grant it permission to serve subpoenas *ad testificandum* on Ubisoft and Sony and to take discovery related to the Ubisoft and Sony Agreements.

Dated: January 16, 2024

Respectfully submitted,

By: /s/ Beth Wilkinson

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Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2024, 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:

April Tabor
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Federal Trade Commission
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The Honorable D. Michael Chappell
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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Counsel Supporting the Complaint

/s/ Beth Wilkinson _____

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Counsel for Microsoft Corp.

**UNITED STATES OF AMERICA
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

**[PROPOSED] ORDER GRANTING RESPONDENT MICROSOFT CORPORATION'S
MOTION TO REOPEN DISCOVERY FOR THE LIMITED PURPOSE OF SERVING
SUBPOENAS *AD TESTIFICANDUM* ON UBISOFT ENTERTAINMENT SA AND SONY
INTERACTIVE ENTERTAINMENT LLC**

Upon consideration of Respondent Microsoft's Motion to Reopen Discovery for the Limited Purpose of Serving Subpoenas *Ad Testificandum* on Ubisoft Entertainment SA ("Ubisoft") and Sony Interactive Entertainment LLC ("Sony"), IT IS HEREBY ORDERED THAT:

Respondent Microsoft's motion is GRANTED; and

Respondent Microsoft is granted leave to serve subpoenas *ad testificandum* for the purpose of taking discovery related to the Ubisoft and Sony agreements.

SO ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

**Microsoft Corp.,
a corporation,**

and

**Activision Blizzard, Inc.,
a corporation.**

Docket No. 9412

**DECLARATION OF KIERAN GOSTIN IN SUPPORT OF RESPONDENT
MICROSOFT’S MOTION TO REOPEN DISCOVERY FOR THE LIMITED PURPOSE
OF SERVING SUBPOENAS *AD TESTIFICANDUM* ON UBISOFT ENTERTAINMENT
SA AND SONY INTERACTIVE ENTERTAINMENT LLC**

I, Kieran Gostin, hereby declare under penalty of perjury that the following is true and correct:

1. I am a partner at Wilkinson Stekloff LLP and am counsel for Respondent Microsoft Corporation (“Microsoft”) in the above-captioned matter. I submit this declaration in support of Respondents’ Motion to Reopen Discovery For the Limited Purpose of Serving Subpoenas *Ad Testificandum* on Ubisoft Entertainment SA (“Ubisoft”) And Sony Interactive Entertainment LLC (“Sony”). In my role, I have personal knowledge of certain issues related to the Federal Trade Commission’s (“FTC” or the “Commission”) investigation of the transaction between Microsoft and Activision Blizzard, Inc. (“Activision”), as well as the discovery and progression of litigation in this matter as Microsoft’s counsel.

2. I have read and am familiar with the Court’s Order on Complaint Counsel’s Motion To Allow Discovery Regarding Respondents’ Agreements With Ubisoft Entertainment SA And Sony Interactive Entertainment LLC (the “Oct. 26, 2023 Order”).

3. In making this declaration, I do not intend to—and am not authorized to—waive any applicable privilege or protection from discovery, including the attorney-client privilege and the work product protection.

4. On October 10, 2023, Complaint Counsel moved to reopen discovery on the Ubisoft and Sony Agreements. *See* Complaint Counsel’s Motion to Extend Fact Discovery To Allow Discovery Regarding Respondents’ Agreements With Ubisoft Entertainment SA And Sony Interactive Entertainment LLC (the “Oct. 10, 2023 Motion”).

5. On October 26, 2023, the Commission ordered that Complaint Counsel was granted leave to serve subpoenas *ad testificandum* relating to the Ubisoft and Sony Agreements. Oct. 26, 2023 Order at 4. The Oct. 26, 2023 Order also reopened discovery for an eight-week period, ending on December 21, 2023. *Id.*

6. On December 21, 2023, Microsoft filed a motion to certify a request for the Commission’s enforcement of a subpoena *duces tecum* on Sony regarding the Sony Agreement (the “Microsoft’s Motion to Certify”).

7. On January 2, 2024, Sony opposed Microsoft’s Motion to Certify. On January 4, 2024, Complaint Counsel filed a motion for leave to file an opposition to Microsoft’s Motion to Certify.

8. On January 8, 2024, the Court denied Microsoft’s Motion to Certify.

9. On January 11, 2024, Microsoft notified Complaint Counsel that it intended to seek permission from the Court to issue subpoenas *ad testificandum* on Sony and Ubisoft related to the relevant agreements.

10. On January 12, 2024, the parties met and conferred via video conference. Complaint Counsel has confirmed that there has been discussion about an Ubisoft deposition on

January 31, but that date has not been finalized. The Sony deposition is scheduled to take place on February 8.

11. On January 16, 2024, Complaint Counsel notified counsel for Microsoft that they intended to oppose this motion. In an effort to obtain Complaint Counsel's consent to the relief requested in the corresponding motion, Microsoft agreed to forfeit unused time (if any) to Complaint Counsel. Complaint Counsel rejected the proposal.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16 day of January, 2024, in Washington, D.C.

/s/Kieran Gostin

Kieran Gostin

EXHIBIT B

CONFIDENTIAL

REDACTED IN ENTIRETY