

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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In the Matter of )  
 )  
Microsoft Corp., )  
a corporation, and )  
 )  
Activision Blizzard, Inc., )  
a corporation, )  
 )  
Respondents. )  
\_\_\_\_\_

Docket No. 9412

**ORDER ON COMPLAINT COUNSEL’S MOTION TO ALLOW DISCOVERY  
REGARDING RESPONDENTS’ AGREEMENTS WITH UBISOFT  
ENTERTAINMENT SA AND SONY INTERACTIVE ENTERTAINMENT LLC**

**I.**

On October 10, 2023, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed a motion seeking to reopen fact discovery in this matter, which closed on April 7, 2023 (“Motion”). Specifically, Complaint Counsel requests an order to reopen discovery for an eight-week period to take discovery regarding certain agreements that Respondents Microsoft Corp. (“Microsoft”) and Activision Blizzard, Inc. (“Activision”) executed with non-parties Ubisoft Entertainment SA (“Ubisoft”) and Sony Interactive Entertainment LLC (“Sony”) after the discovery deadline.<sup>1</sup> Microsoft filed an opposition on October 20, 2023 (“Opposition”). For the reasons set forth below, Complaint Counsel’s Motion is GRANTED IN PART.

**II.**

On December 8, 2022, the FTC filed an administrative complaint seeking to enjoin Microsoft from acquiring Activision. On June 12, 2023, the FTC filed a complaint in the United States District Court for the Northern District of California seeking to preliminarily enjoin the acquisition pending completion of the administrative proceeding. After an evidentiary hearing, on July 10, 2023, the district court denied the request for a preliminary injunction. *FTC v. Microsoft Corp.*, 2023 U.S. Dist. LEXIS 119001 (N.D. Cal. July 10, 2023). On July 12, 2023, the Commission appealed the district court’s decision. The United States Court of Appeals for the Ninth Circuit denied the Commission’s motion for an injunction to prevent the consummation of

<sup>1</sup> Although Complaint Counsel titled its motion as a “Motion to Extend Fact Discovery,” because the discovery deadline has long-since passed, the motion is more properly considered a motion to reopen discovery.

the merger pending appeal. *FTC v. Microsoft Corp.*, 2023 U.S. App. LEXIS 17985 (9th Cir. July 14, 2023). Oral argument on the appeal is set for December 6, 2023.

On July 20, 2023, the Commission withdrew this matter from adjudication pursuant to 16 C.F.R. § 3.26(c). *See Order, In re Microsoft Corp. & Activision Blizzard, Inc.*, No. 9412 (July 20, 2023). On September 26, 2023, the Commission returned this matter to adjudication and set the evidentiary hearing to commence twenty-one days after the Ninth Circuit issues its opinion on the appeal of the district court decision. *See Order Returning Matter to Adjudication, In re Microsoft Corp. & Activision Blizzard, Inc.*, No. 9412 (Sept. 26, 2023). On October 13, 2023, Microsoft and Activision closed the acquisition.

Complaint Counsel describes the Ubisoft agreement as consisting of three separate contracts executed in August 2023, by and among Microsoft, Activision, and Ubisoft (collectively, the “Ubisoft Agreement”) that together purport to transfer to Ubisoft the rights to stream Activision content over the cloud. Complaint Counsel states that Respondents’ counsel provided the Ubisoft Agreement to Complaint Counsel on August 28, 2023 and provided an overview of the terms of the agreements via videoconference. Complaint Counsel notes that, because the agreement was executed after the discovery deadline, Complaint Counsel has not had the opportunity to obtain discovery regarding the Ubisoft Agreement.

Complaint Counsel describes the Sony agreement as an agreement executed on July 15, 2023, by and between Microsoft and Sony (the “Sony Agreement”) that purports to offer the video game series “Call of Duty” on PlayStation and PlayStation Plus (Sony’s video game subscription service). Complaint Counsel acknowledges that the Sony Agreement is [REDACTED] and that Complaint Counsel has taken discovery on the proposed agreement, but argues that, because the Sony Agreement was executed after the discovery deadline, Complaint Counsel has not had the opportunity to take discovery regarding Sony’s decision to sign the Sony Agreement.

Microsoft asserts that if this case proceeds to an administrative hearing, it intends to introduce both agreements as evidence that the Commission’s claim that Microsoft will withhold Activision content from competitors is unfounded and contradicted by real-world facts. Microsoft states that there has already been discovery into the Sony Agreement (before it was signed), and, to ensure the Ubisoft Agreement can be introduced at a hearing, Microsoft does not oppose some additional discovery. Microsoft argues, however, that the discovery plan presented by Complaint Counsel is not appropriately limited or tailored.

### III.

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 (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); *In re Basic Research, LLC*, No. 9318, 2005 FTC LEXIS 165, at \*7-8 (Nov. 22, 2005) (denying respondent’s motion to reopen discovery for failure to meet burden of demonstrating good cause, where respondent had failed to establish relevance of the requested

discovery); *In re Rambus, Inc.*, No. 9302, 2003 FTC LEXIS 44, at \*2-3 (Mar. 12, 2003) (denying Complaint Counsel’s motion to take additional deposition testimony after discovery deadline where Complaint Counsel had sufficient opportunity to obtain the requested testimony prior to deadline); *see also* FTC Rule 3.21(c)(2) (permitting the Administrative Law Judge to extend any deadline or time specified in a scheduling order for good cause); *In re Traffic Jam Events, LLC*, No. 9395, 2021 WL 3465709, at \*1 (F.T.C. July 23, 2021) (Good cause exists to extend a scheduling order deadline under Rule 3.21(c)(2) when the deadline “cannot be met despite the diligence of the party seeking the extension.”).

In the instant case, good cause exists to grant additional time for limited discovery on the Ubisoft and Sony Agreements. First, there is no dispute as to the relevance of the agreements, given that Microsoft intends to offer the agreements into evidence at the evidentiary hearing to support its defense. *See* Rule 3.31(c)(1) (allowing discovery where relevant, *inter alia*, “to the defenses of any respondent”). Second, there is no basis for finding that Complaint Counsel lacked diligence in failing to undertake discovery into the agreements prior to the discovery deadline because the agreements were not executed until months after the deadline. *See Traffic Jam Events*, 2021 WL 3465709, at \*1. While Complaint Counsel has taken discovery of Microsoft’s offer to Sony, Complaint Counsel had no opportunity to take discovery regarding the circumstances surrounding Sony’s decision in July 2023 to accept the offer and Complaint Counsel had no opportunity to take any discovery of the Ubisoft Agreement. Third, reopening discovery for the limited period requested will not risk delaying the evidentiary hearing in this matter because, pursuant to the Commission order returning this matter to adjudication, the evidentiary hearing will not begin until twenty-one days after the disposition of the appeal before the Ninth Circuit.

#### IV.

Although good cause exists to reopen fact discovery to allow discovery regarding the Ubisoft and Sony Agreements, the discovery requested by Complaint Counsel in its proposed order is unduly extensive. Complaint Counsel seeks to serve on Respondents a total of 20 new requests for production of documents and 15 new interrogatories. *See* Motion, Proposed Order at 1-2. The number of new requests for production (20) and new interrogatories (15) sought by Complaint Counsel is disproportionately large in relation to the number of requests for production (39) and interrogatories (25) that Complaint Counsel served in the five months prior to the close of fact discovery. Microsoft notes that, during the meet-and-confer process, Complaint Counsel suggested that it might seek additional depositions of [REDACTED]

[REDACTED] and that the three named executives have previously given testimony in investigational hearings, in depositions, and at the preliminary injunction hearing in the district court. Opposition, Ex. C, Declaration of Kieran Gostin ¶¶ 4, 11, 14, 15, 19. For the foregoing reasons, the discovery sought by Complaint Counsel will be limited. 16 C.F.R. § 3.31(c)(2)(i), (iii) (providing that requested discovery shall be limited when it is “unreasonably cumulative or duplicative,” or the “burden and expense of the proposed discovery . . . outweigh its likely benefit”).

Accordingly, the Motion is GRANTED in part, and it is hereby ORDERED that 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, with the limitations set forth below:

1. Complaint Counsel shall serve no more than six requests for production on each Respondent;
2. Complaint Counsel shall serve no more than six interrogatories on Microsoft and three interrogatories on Activision;
3. Complaint Counsel shall serve no more than one notice for a 3.33(c)(1) corporate deposition on each Respondent;
4. Any documents or testimony sought by Complaint Counsel shall not be duplicative or cumulative of documents or testimony previously provided;
5. The deadline for completing the fact discovery allowed herein shall be eight weeks from the date of this Order.

ORDERED:



D. Michael Chappell  
Chief Administrative Law Judge

Date: October 26, 2023