

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

In the Matter of

**Microsoft Corporation,
a corporation,**

and

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

Docket No. 9412

**COMPLAINT COUNSEL’S MOTION TO COMPEL
MICROSOFT CORPORATION AND ACTIVISION BLIZZARD, INC.
TO PRODUCE DOCUMENTS**

Pursuant to Administrative Rule 3.38(a), Complaint Counsel respectfully moves the Court for an order compelling Respondents Microsoft Corporation and Activision Blizzard, Inc. (collectively, “Respondents”) to conduct a reasonable search for, and produce in timely fashion, documents responsive to Request Nos. 1, 3, 6, 11, and 16 and Request Nos. 1, 2, 5, 7, and 8 in Complaint Counsel’s Second Set of Requests for Production to Respondents, respectively (the “RFPs”).

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**COMPLAINT COUNSEL’S MEMORANDUM IN SUPPORT OF ITS MOTION TO
COMPEL PRODUCTION OF DOCUMENTS FROM RESPONDENTS**

Microsoft Corporation, a global technology company that owns: (a) the Xbox gaming console, (b) Game Pass, the fastest growing game subscription service, (c) xCloud, the largest cloud gaming service, and (d) twenty-three game development studios that make some of the world’s most popular games (including Halo and Minecraft), now proposes to acquire Activision Blizzard, Inc., one of the most important publishers of video game content, for approximately \$70 billion (the “Proposed Transaction”). More than five weeks after receiving thirty-two document requests (the “RFPs”), Respondents have produced only a smattering of self-selected documents in response and have refused to produce anything at all for twenty-four requests.

This is not for lack of extensive efforts by Complaint Counsel to reach a compromise where possible, including holding six separate meet and confers (“M&Cs”),¹ engaging in

¹ See Statement Regarding Meet and Confer Pursuant to 16 C.F.R. § 3.22(g) (“Meet & Confer Statement”).

extensive correspondence with Respondents,² and identifying priority requests. Respondents have offered a hodgepodge of unavailing arguments: that the RFPs are overly broad and burdensome; that the RFPs are duplicative of the Second Request specifications; and that they already produced a large volume of documents in response to the Second Request and in their refresh of that Second Request production.³

Now, Respondents assert that there is “simply not enough time” for them to produce the requested documents.⁴ Respondents cannot complain of having too little time after proposing an expedited discovery schedule that has fact discovery set to close on April 7 and a hearing date of August 2, 2023.⁵ Complaint Counsel respectfully moves the Court to compel Respondents to immediately produce documents in response to the limited set of RFPs set forth below.

ARGUMENT

Rule 3.31(c)(1) provides “[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” When a party fails to comply with its discovery obligations, a motion to compel under Rule 3.38(a) is appropriate. *See also* Rule

² *See* Exhibit M, Letter from N. Callan to G. Hill (Feb. 16, 2023), and Exhibits F to T (correspondence among the parties).

³ Microsoft produced approximately 2.15 million documents during the Second Request, and approximately 480,000 documents in its refresh production. Activision produced approximately 892,000 documents during the Second Request and approximately 118,000 documents in its refresh production. Respondents have repeatedly cited the raw number of documents and/or pages produced during the investigation to claim they have satisfied all discovery obligations, ignoring the simple fact that Complaint Counsel is entitled to discovery of relevant materials that have *not* been produced. *See In re Sysco Corp.*, 2015 WL 3897396 (June 17, 2015) (ordering the production of documents by Respondents in the Part III administrative hearing, despite discovery in the parallel federal proceeding having already taken place). At the start of this litigation, Complaint Counsel accepted Respondents’ proposal for a voluntary refresh based on assurances that Respondents would not seek to prevent Complaint Counsel from requesting formal discovery during litigation. Complaint Counsel’s review of the investigative record guided the drafting of the RFPs. The instructions to the RFPs state that Respondents do not need to produce documents that were already produced during the investigation. Respondents should have conducted a diligent search for each RFP; instead, they caused weeks of delay, argued over each and every RFP, and ultimately agreed only to limited go-gets for a handful of RFPs.

⁴ *See, e.g.*, Meet & Confer Statement; Exhibit P, Letter from B. Pierson to N. Callan at 2 (Feb. 23, 2023).

⁵ *See* Scheduling Order at 4.

3.37(b). The Court will limit discovery only “if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or if the burden and expense of the proposed discovery outweigh its likely benefit.” *In re Daniel Chapter One, A Corp., & James Feijo, Respondents*, No. 9329, 2009 WL 569694, at *2 (F.T.C. Jan. 9, 2009). Importantly, “[p]arties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied.” *In re Intuit, Inc.*, No. 9408, 2022 WL 18389914, at *2 (F.T.C. Dec. 30, 2022) (quoting *In re Daniel Chapter One, supra*). As explained below, the discovery sought is highly probative of the issues in this case, and Respondents cannot justify their failure to produce responsive documents.

I. Respondents Should Produce Relevant Post-Complaint Documents

Respondents refuse to produce relevant documents created after the Complaint was filed on December 8, 2022. Respondents’ refusal includes, for example, Microsoft’s internal documents and correspondence related to ongoing negotiations with key third parties and submissions to regulators. Complaint Counsel has requested post-Complaint documents for a reasonable period of time—proposing a cutoff four weeks before the close of fact discovery. In the alternative, Complaint Counsel offered Respondents a reciprocal agreement not to rely on evidence dated after December 8, 2022. Respondents declined both offers. Instead, Microsoft has chosen a self-serving approach to discovery by which Respondents get to choose what is “relevant” to this matter.⁶ This position is untenable. For example, Microsoft recently produced a set of agreements with certain third parties that would make Activision content available on their services post-transaction and agreed to produce some external communications regarding these

⁶ Respondents’ inequitable view of discovery includes seeking documents from Complaint Counsel past the date of the Complaint to the present. Exhibit U, Resp. Microsoft Corp.’s First Set of Reqs. for Prod. to Complaint Counsel at 7; Exhibit V, Resp. Activision Blizzard, Inc.’s First Set of Reqs. for Prod. to Complainant Federal Trade Commission at 18.

agreements, but Microsoft will not produce external communications or proposals sent to other third parties and will not produce any internal documents related to any agreements or proposed agreements.⁷ This approach prejudices Complaint Counsel, including most immediately by hampering Complaint Counsel's ability to prepare for depositions that are already underway.

Complaint Counsel respectfully moves the Court to order Respondents to produce documents responsive to the RFPs referenced herein through February 28, 2023.

II. Respondents Should Search for and Produce Documents Responsive to Complaint Counsel's RFPs

Respondents pointed to the volume of documents produced in the investigation as evidence that they have produced "enough" documents and should not be required to conduct diligent searches specifically in response to Complaint Counsel's RFPs. Respondents have repeatedly asserted that Complaint Counsel has not identified with sufficient specificity what is left to be produced. This assertion is false. Complaint Counsel has discussed each RFP in detail with Respondents, proposed specific search terms,⁸ and even cited specific file names of responsive documents that have not been produced. To support their baseless assertion that Respondents do not know what is "missing" from prior productions, Respondents have ignored the date issue described above and searched documents they have already produced to suggest they have already "fully" responded to the RFPs. By this logic, there is no request for documents Complaint Counsel could write that Respondents would be obligated to respond to.

For each RFP described below, Complaint Counsel respectfully moves the Court to order Respondents to produce documents in accordance with the proposal attached as Exhibit A.

⁷ See *infra*. § II.A (RFP 16).

⁸ Microsoft has argued that running any set of search terms would be burdensome after using Technology Assisted Review ("TAR") for the investigation. Complaint Counsel does not oppose the use of TAR to respond to the RFPs. After Microsoft refused to revisit updating TAR for this litigation, Complaint Counsel proposed a limited, concrete set of search terms in an effort to reach a compromise. See Exhibit M, Letter from N. Callan to G. Hill, Appendix A (Feb. 16, 2023). Microsoft rejected this approach as well.

A. Microsoft should produce documents responsive to the following RFPs

RFP 1 requests materials sent to { [REDACTED] }. The { [REDACTED] } regularly reviews white papers, presentations, and discussion documents that are relevant to this litigation. Microsoft has taken the position that it has “fully satisfied” this request, even though Complaint Counsel has also identified specific file names of documents that have *not* been produced in the 2019 to 2022 time period. Microsoft agreed only to produce responsive documents and previously withheld videos from central Teams sites used by the { [REDACTED] }, but declined to produce any documents created after December 8, despite the fact that { [REDACTED] } meetings discussing, for instance, { [REDACTED] } { [REDACTED] }. Complaint Counsel identified specific steps Microsoft could take to identify further responsive documents that have not been produced, with minimal burden. For example, Complaint Counsel explained that Microsoft could easily identify responsive documents sent to the { [REDACTED] } that have not been produced by searching for emails sent to { [REDACTED] }, a dedicated email address for circulating materials to the { [REDACTED] }. Microsoft refused.

RFP 3 requests documents related to cross-play, *i.e.*, features that enable gamers to play a game together across different companies’ products. For example, cross-play enables gamers playing Call of Duty on Microsoft Xbox to play with gamers playing Call of Duty on Sony PlayStation. { [REDACTED] } { [REDACTED] } Microsoft made a similar argument when it acquired ZeniMax, but subsequently decided to take newly-acquired ZeniMax titles exclusive. *See* Compl. ¶ 12. In response to this RFP, Microsoft asserted that the

Second Request productions cover this request, but took no steps to confirm. In fact, the Second Request did not include a Specification related to cross-play. Microsoft effectively conceded the relevance of this topic when it requested documents relating to cross-play from a third party in this litigation.⁹ Microsoft's contradictory position is that it can seek relevant documents on this topic from a third party while avoiding similar discovery from its own files.

RFP 6 requests documents related to {REDACTED}, the code name for Microsoft's next generation gaming ecosystem. {REDACTED} is part of Microsoft's forward-looking strategy for its console, subscription, and cloud gaming businesses—all markets in which Complaint Counsel alleges harm. {REDACTED} {REDACTED}, after the Second Request was issued and after Microsoft's TAR had been trained to identify responsive documents.¹⁰ Complaint Counsel proposed search terms that would identify documents responsive to this RFP that have not been produced and identified the file names of multiple documents referenced in the production set that were not identified by the TAR and were not produced in response to the Second Request (e.g., {REDACTED} {REDACTED} {REDACTED}). Microsoft refused any approach that would require it to produce new responsive documents.

RFP 11 requests all documents related to exclusivity of content Microsoft acquired from ZeniMax and exclusivity of content Microsoft proposes to acquire from Activision. In addition to post-Complaint documents Microsoft refuses to produce, Complaint Counsel does not have a complete set of relevant documents from the time period covered by the investigation. To cite

⁹ Exhibit W, Microsoft's Subpoena for Production of Documentary Material issued to Sony Interactive Entertainment LLC on January 13, 2023 (Request No. 32 seeking documents regarding cross-play).

¹⁰ See, e.g., {REDACTED}

one example, { [REDACTED] }
[REDACTED]
[REDACTED] } Microsoft has not produced the
{ [REDACTED] } document. Complaint Counsel has proposed search terms aimed at identifying this and other relevant documents, including by using specific titles that Microsoft has made exclusive or has considered making exclusive. Microsoft has refused any approach that would require it to produce new responsive documents.

RFP 16 requests all documents related to making Activision content available on competing products and services after the Proposed Transaction closes. As discussed *infra* at Section I, Microsoft has recently sought to enter into agreements regarding making Activision content available on certain third parties' services. Despite clearly intending to use these agreements in its defense, Microsoft has refused to produce underlying internal documents related to these agreements, or communications with third parties other than Nvidia, Nintendo, and Sony. Microsoft should be not permitted to introduce or rely on these agreements without producing the requested underlying discovery.

B. Activision should produce documents responsive to the following RFPs

RFP 1 requests documents related to gaming consumer preferences, factors affecting consumer purchase decisions, and consumer willingness to switch from one gaming console to another. As a compromise, Complaint Counsel offered to limit its request to documents dated January 1, 2020 through February 28, 2023, and asked only for responsive studies and reports from the files of the three employees Respondents named as “oversee[ing] direct access to these types of materials,” as well as any studies and reports conducted or commissioned by { [REDACTED] }

██████████ } Activision’s in-house marketing group. Activision refuses to produce any more than a set of documents it cherry-picked to support its advocacy to a foreign regulator.

RFP 2 requests documents related to the relevance of cross-play,¹¹ which was missing from the search terms Activision used during the investigation. Activision refused Complaint Counsel’s request to run a search for the term “cross-play” in the documents Activision has already collected.

RFPs 5 and 7 respectively request documents related to offering Activision on subscription services and cloud gaming services, including services from Nvidia (GeForce NOW), Nintendo (Nintendo Switch Online or NSO), Google (Stadia), and Amazon (Luna) and request documents related to offering Activision games on Nintendo devices. Even after identifying examples of relevant terms missing from Activision’s search term list, including, for example, “GeForce NOW” and “NSO,” Activision refused to consider adding any additional search terms.

RFP 8 requests documents relating to purported cannibalization of purchased games (“buy-to-play”) by subscription services and whether consumer behavior differs between buy-to-play users and subscription service users. Even after Complaint Counsel pointed out that “cannibalization” was missing from Activision’s search terms during the investigation, Activision refused to search its documents using this one term.

CONCLUSION

For the foregoing reasons, this Court should grant Complaint Counsel's motion to compel the production of documents.

¹¹ See *supra*. § II.A (RFP 3).

Dated: March 14, 2023

Respectfully submitted,

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STATEMENT REGARDING MEET AND CONFER PURSUANT TO 16 C.F.R. § 3.22(g)

Complaint Counsel respectfully submits this Statement, pursuant to Rule 3.22(g) of the Federal Trade Commission's Rules of Adjudicative Practice and Paragraph 4 of the Scheduling Order.

Complaint Counsel has attempted to confer in good faith with counsel for Respondents Microsoft Corp. ("Microsoft") and Activision Blizzard, Inc. ("Activision") in an effort to obtain the documents requested in Complaint Counsel's Second Set of Requests for Production (the "RFPs") on a timely basis without the Court's intervention.

On January 27, 2023, Complaint Counsel served on Respondents its Second Set of RFPs. Exhibits B and C. On February 3, 2023, Respondents delivered written Responses and Objections ("R&Os") to Complaint Counsel. Complaint Counsel (Nicole Callan, Maria Cirincione, and Jennifer Fleury) then had an initial meet and confer ("M&C") via videoconference with Respondents' Counsel (Grace Hill, Robert Keeling, and Alysha Bohanon for Microsoft, and Julia York, Michael Sheerin and Bradley Pierson for Activision) on February 8, 2023 at 3:00 PM to discuss Respondents' R&Os.

Since then, the parties have had numerous additional M&Cs to discuss the RFPs via videoconference. On February 10, 2023 at 5:00 PM, Complaint Counsel (Jennifer Fleury and Nicole Callan) met with Respondents' Counsel (Grace Hill and Robert Keeling for Microsoft, and Julia York, Michael Sheerin and Bradley Pierson for Activision). On February 13, 2023 at 11:00 AM, Complaint Counsel (Nicole Callan and Jennifer Fleury) again met with Respondents' Counsel (Grace Hill and Robert Keeling for Microsoft, and Julia York, Bradley Pierson and Andrew Kabbes for Activision).

On February 15, 2023 at 1:00 PM, the parties had a M&C on Complaint Counsel's First Set of Requests for Production (the "data RFPs"), during which Complaint Counsel (Jennifer Fleury and Nicole Callan) and Microsoft's Counsel (Grace Hill and Robert Keeling for Microsoft) also briefly discussed the document RFPs. On February 24, 2023 at 10:00 AM, Complaint Counsel (Jennifer Fleury and Nicole Callan) again met with Respondents' Counsel (Grace Hill and Robert Keeling for Microsoft, and Bradley Pierson for Activision). Complaint Counsel has also exchanged letters and numerous emails with Respondents.

During a regularly scheduled weekly meeting amongst the parties on February 27, 2023 at 4:30 PM, Complaint Counsel (Jennifer Fleury) raised to Counsel for Respondents (Julia York for Activision, and Beth Wilkinson and Grace Hill for Microsoft) that Complaint Counsel believed the parties were nearing impasse regarding several of the RFPs.¹ Following this meeting, Complaint Counsel (Jennifer Fleury) sent an email to Respondents' Counsel (including Grace Hill and Robert Keeling for Microsoft, and Julia York for Activision) on February 28, 2023 Exhibit Q, stating that Complaint Counsel was considering filing a motion to compel on

¹ In an effort to reach a compromise, Complaint Counsel identified a set of priority RFPs by email on February 8. Exhibit I, at 8–9.

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specific priority requests given the outstanding issues, and Complaint Counsel asked whether Respondents had reconsidered their positions on any of these priority requests.

Respondent Microsoft's Counsel (Grace Hill) replied to this email seeking another M&C on the outstanding RFPs Exhibit R, at 4. Complaint Counsel and Respondents then had a M&C on March 1, 2023 at 3:30 PM. At this M&C, Complaint Counsel and Respondent Microsoft came to agreement on two RFPs, Nos. 12 and 19. This understanding was memorialized in emails between Complaint Counsel (Jennifer Fleury) and Respondent Microsoft's Counsel (Grace Hill) Exhibit T, at 1. Complaint Counsel and Microsoft remain at impasse on RFPs 1, 3, 6, 11, and 16. Complaint Counsel and Respondent Activision remain at impasse on RFPs 1, 2, 5, 7, and 8.

Dated: March 14, 2023

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of Complaint Counsel’s Motion to Compel Microsoft Corp. (“Microsoft”) and Activision Blizzard, Inc. (“Activision”) (collectively, The “Respondents”) to Produce Documents Requested by Complaint Counsel’s Second Set of Requests for Production of Documents, and any opposition thereto,

IT IS HEREBY ORDERED that Complaint Counsel’s Motion is GRANTED.

IT IS FURTHER ORDERED that Respondents shall immediately run the searches attached to Complaint Counsel’s Motion to Compel as Exhibit A and otherwise take all necessary steps towards producing to Complaint Counsel all requested documents responsive to Request Nos. 1, 3, 6, 11, and 16 to Respondent Microsoft, and Request Nos. 1, 2, 5, 7, and 8 to Respondent Activision from Complaint Counsel’s Second Set of Requests for Production of Documents issued on January 27, 2023 within 21 days from the issuance of this Order.

D. Michael Chappell
Chief Administrative Law Judge

DATED this ___ day of March, 2023

Exhibit A

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit B

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit C

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit D

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit E

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit F

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit G

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit H

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit I

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit J

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit K

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit L

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit M

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit N

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit O

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit P

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit Q

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit R

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit S

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit T

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit U

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit V

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit W

CONFIDENTIAL - REDACTED IN ENTIRETY

PUBLIC**CERTIFICATE OF SERVICE**

I hereby certify that on March 14, 2023, 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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