

PUBLIC

**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 OPPOSITION TO MICROSOFT CORPORATION’S
MOTION TO REOPEN DISCOVERY**

Complaint Counsel respectfully opposes Respondent Microsoft Corporation’s (“Microsoft”) motion to reopen discovery for the purpose of serving subpoenas *ad testificandum* on Ubisoft Entertainment SA (“Ubisoft”) and Sony Interactive Entertainment LLC (“Sony”) regarding the Ubisoft and Sony Agreements. Microsoft has no good cause for reopening discovery. First, Microsoft’s request is untimely. Second, Microsoft has sufficient time to take testimony from both Sony and Ubisoft under this Court’s January 4, 2023 Scheduling Order (“Scheduling Order”). Third, Microsoft does not need additional deposition time from Ubisoft or Sony. Microsoft has a close commercial relationship with Ubisoft: it has { [REDACTED] } and has even shielded communications between the two companies that are relevant to this litigation under an assertion of common interest privilege. Further, Microsoft has been aware of the terms of the Sony Agreement for { [REDACTED] }, and has

PUBLIC

not sought to reopen discovery until now. Accordingly, the Court should deny Respondent's motion.

BACKGROUND

Fact discovery in this proceeding closed on April 7, 2023. On July 15, 2023, Microsoft and Sony executed the Sony Agreement, and on August 21, 2023, Microsoft, Respondent Activision Blizzard, Inc. ("Activision"), and Ubisoft executed the Ubisoft Agreement. On October 10, 2023, Complaint Counsel moved to reopen discovery related to these agreements. *See* Complaint Counsel's Mot. to Extend Fact Discovery to Allow Discovery Regarding Respondents' Agreements with Ubisoft and Sony (Oct. 10, 2023). Respondents opposed Complaint Counsel's motion. *See* Resp. Microsoft's Opp. to Complaint Counsel's Mot. to Extend Fact Discovery (Oct. 20, 2023) ("Microsoft's Oct. 20 Opp.").

On October 26, 2023, the Court granted Complaint Counsel leave to obtain discovery relating to the Ubisoft and Sony Agreements and set a discovery deadline of December 21, 2023. *See* Order on Complaint Counsel's Mot. to Allow Discovery Regarding Respondents' Agreements with Ubisoft and Sony (Oct. 26, 2023) ("Oct. 26 Order"). In the final days of this limited discovery period, Microsoft abruptly reversed its position and, without seeking leave from the Court, issued a subpoena *duces tecum* and subpoena *ad testificandum* to Sony and two subpoenas *ad testificandum* to Ubisoft. *See* Exhibit A, Exhibit B, Exhibit C, and Exhibit D.

On December 21, 2023, Microsoft moved to certify its subpoena *duces tecum* to Sony. On January 8, 2024, the Court denied that motion. The Court ruled that the October 26 Order did not grant Respondents leave to take discovery and that Microsoft had failed to seek leave to reopen discovery and had instead served the subpoena "on its own volition." *See* Order Denying Microsoft's Motion to Certify (Jan. 8, 2024). Microsoft did not move to certify its subpoena *ad*

PUBLIC

testificandum to Sony nor its subpoenas *ad testificandum* to Ubisoft, but those subpoenas are invalid for the same reasons Microsoft's subpoena *duces tecum* to Sony was invalid—as Microsoft's motion here acknowledges. See Respondent Microsoft's Motion to Reopen Discovery at 2 (Jan. 16, 2024) (“Resp. Mot. to Reopen Discovery”).

On January 11, 2024, nearly three months after opposing Complaint Counsel's motion to reopen discovery, Microsoft conveyed its view that discovery should be reopened *for a second time* to allow Microsoft to serve subpoenas *ad testificandum* on Ubisoft and Sony. After meeting and conferring, Complaint Counsel informed Microsoft on January 16, 2024, that it intended to oppose Microsoft's motion.

ARGUMENT

I. Microsoft's Request to Reopen Discovery Is Untimely

Microsoft's request to reopen discovery is untimely because it comes weeks after the close of supplemental discovery and three months after Complaint Counsel moved to reopen discovery.

Indeed, Microsoft's request stands in stark contrast with its past positions and actions regarding supplemental discovery. Microsoft originally opposed the discovery it is now trying to reopen, arguing that the agreements at issue “speak for themselves.” Microsoft's Oct. 20 Opp. at 3. Microsoft's months-long failure to move for permission to issue its own subpoenas does not provide grounds to reopen discovery now -- a month after the end of the reopened discovery period.

Microsoft had ample time to seek leave to attempt to serve timely deposition subpoenas on Ubisoft and Sony. Given Microsoft's failure to pursue the discovery it seeks in a timely manner, the Court should deny Microsoft's motion here.

PUBLIC

II. Microsoft Already Has Sufficient Time to Take Testimony from Ubisoft and Sony under This Court's Existing Scheduling Order

Despite Microsoft's representations to the contrary, *see* Resp. Mot. to Reopen Discovery at 4-5, the Court's Scheduling Order provides sufficient deposition time to take testimony from both Ubisoft and Sony. Under Additional Provision 12 of the Scheduling Order, a side that does *not subpoena* a non-party fact deposition is allotted 1.5 hours of questioning at the deposition.¹ *See* Scheduling Order Additional Provision 12.

Microsoft has not shown any good cause to take more than the 1.5 hours of testimony it is already granted under the Scheduling Order. Indeed, in its 14-page motion, Microsoft fails to raise any argument as to why it requires more time than 1.5 hours, and instead continues to assert that the agreements "speak for themselves." Resp. Mot. to Reopen Discovery at 5. If Microsoft's position is that the agreements speak for themselves, then it does not need additional deposition time. Moreover, having 1.5 hours of deposition time does not deprive Microsoft of the opportunity to "counter any suggestion that the agreements are inadequate." Resp. Mot. To Reopen Discovery at 5. Microsoft will have ample opportunity to present its arguments about the agreements at the hearing and in briefing.

Notwithstanding Microsoft's failure address the time it does have, given Microsoft's commercial relationship with both Sony and Ubisoft and its familiarity with the agreements and negotiations at issue, 1.5 hours per deposition is sufficient time to cover the issues Microsoft raises in its motion to reopen discovery. Resp. Mot. to Reopen Discovery at 2-3. As discussed below, Microsoft has a close legal and business relationship with Ubisoft and has been familiar with the operative terms of the Sony Agreement for { ██████████ }.

¹ In contrast, if Complaint Counsel and Respondents both issue a subpoena *ad testificandum* to a non-party fact witness, the deposition time is split equally. *See* Scheduling Order Additional Provision 12.

PUBLIC

A. Microsoft Has Not Shown Good Cause for Additional Time to Depose Ubisoft

Microsoft is well-positioned to understand the terms and likely competitive effects of the Ubisoft Agreement without additional deposition time beyond the 1.5 hours it is entitled to under the Scheduling Order. In addition to being the counterparty to the Ubisoft Agreement,

{ [REDACTED]

[REDACTED]

[REDACTED] } See Exhibit E;

Exhibit F; Exhibit G. Microsoft and Ubisoft are coordinating so closely in this case that

{ [REDACTED]

[REDACTED]

[REDACTED] } See Exhibit L; Exhibit M.

By contrast, Complaint Counsel has struggled to obtain information relevant to the Ubisoft Agreement. Microsoft and Ubisoft have shielded relevant information from Complaint Counsel by asserting a common interest privilege over communications. See Exhibit H, at 7 (“Microsoft withheld or redacted communications with Ubisoft containing privileged information regarding subject matters for which the parties shared a common legal interest.”); see also Exhibit E; Exhibit K. And while Ubisoft is cooperating with Microsoft, Ubisoft has refused to respond to various discovery requests from Complaint Counsel. See Exhibit I. Under these circumstances, Microsoft has not shown good cause why it needs additional time to depose Ubisoft, a third party with legal and commercial interests that are clearly aligned with Microsoft’s interests.

Complaint Counsel’s efforts to obtain information during the supplemental discovery period permitted by this Court confirms the importance of Complaint Counsel—not Microsoft—

PUBLIC

taking additional discovery from Ubisoft. After initially executing the Ubisoft Agreement on August 21, 2023, { [REDACTED] }
[REDACTED]
[REDACTED] } Complaint Counsel did not learn of these { [REDACTED] }
[REDACTED] } were required to produce them in supplemental discovery. After the close of supplemental discovery, Complaint Counsel learned that the { [REDACTED] }
[REDACTED] }
Troublingly, neither company produced documents related { [REDACTED] } in response to Complaint Counsel's document requests. Instead, Complaint Counsel only learned of { [REDACTED] } during Microsoft's corporate deposition on January 17, 2024. Microsoft then produced two documents that its corporate representative was aware of during the deposition. This course of events—including the production of responsive communications between Microsoft and Ubisoft *during* Microsoft's corporate deposition—underscores the importance of Complaint Counsel having sufficient time to take testimony from Ubisoft.

B. Microsoft Has Not Shown Good Cause for Additional Time to Depose Sony

Microsoft's stated reasons for why it needs to issue its own subpoena *ad testificandum* to Sony are likewise unpersuasive. The executed July 15, 2023, Sony Agreement is { [REDACTED] }
[REDACTED] } See Oct. 26 Order at 2. Microsoft is best positioned to understand the terms and implications of the agreement that { [REDACTED] }
[REDACTED] } and does not attempt to explain why it needs more than its allotted 1.5 hours to explore this topic. Moreover, Microsoft and Sony { [REDACTED] }
[REDACTED]

PUBLIC

[REDACTED]

[REDACTED]

If the Court does grant Microsoft's motion for leave to issue a subpoena *ad testificandum* to Sony, Microsoft should be limited to issuing the same subpoena it invalidly issued on December 12, 2023. *See* Exhibit A. The deposition topics in that subpoena substantially overlap with those in the subpoena *ad testificandum* issued by Complaint Counsel to Sony on November 30, 2023. *See* Exhibit J. Given that the Sony deposition is scheduled to take place on February 8, 2024, Microsoft should not be permitted to issue a more expansive subpoena *ad testificandum* with additional topics not contained in its original, invalidly issued subpoena to Sony. To allow Microsoft to issue a more expansive subpoena would introduce additional and potentially substantial delay, as the deposition would likely need to be rescheduled to allow Microsoft and Sony to negotiate the additional topics and engage in motions practice if necessary, and to allow the witness to be educated on the additional topics.

CONCLUSION

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

Dated: January 24, 2024

Respectfully submitted,

By: /s/ Merrick Pastore

Merrick Pastore

Nicole Callan

Meredith R. Levert

James H. Weingarten

Peggy Bayer Femenella

PUBLIC

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2234
Email: mpastore@ftc.gov
ncallan@ftc.gov
mlevert@ftc.gov
jweingarten@ftc.gov
pbayerfemenella@ftc.gov

Counsel Supporting the Complaint

CONFIDENTIAL – REDACTED IN ENTIRETY

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

Microsoft Privilege Log

(excerpted)

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

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2024, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

Beth Wilkinson
Rakesh Kilaru
Alysha Bohanon
Anastasia Pastan
Grace Hill
Sarah Neuman
Kieran Gostin
Wilkinson Stekloff LLP
2001 M Street, NW
Washington, DC 20036
(202) 847-4010
bwilkinson@wilkinsonstekloff.com
rkilaru@wilkinsonstekloff.com
abohanon@wilkinsonstekloff.com
apastan@wilkinsonstekloff.com
ghill@wilkinsonstekloff.com
sneuman@wilkinsonstekloff.com
kgostin@wilkinsonstekloff.com

Mike Moiseyev
Megan Granger
Weil, Gotshal & Manges LLP
2001 M Street, NW
Washington, DC 20036
(202) 682-7235
michael.moiseyev@weil.com

Steven Sunshine
Julia K. York
Jessica R. Watters
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave, NW
Washington, DC 20005
(202) 371-7860
steve.sunshine@skadden.com
julia.york@skadden.com
jessica.watters@skadden.com

Maria Raptis
Matthew M. Martino
Michael Sheerin
Evan R. Kreiner
Bradley J. Pierson
Skadden, Arps, Slate, Meagher & Flom LLP
One Manhattan West
New York, NY 10001
(212) 735-2425
maria.raptis@skadden.com
matthew.martino@skadden.com
michael.sheerin@skadden.com
evan.kreiner@skadden.com
bradley.pierson@skadden.com

PUBLIC

megan.granger@weil.com

Counsel for Activision Blizzard, Inc.

Counsel for Microsoft Corporation

By: s/ James H. Weingarten
James H. Weingarten

Counsel Supporting the Complaint