

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,)
)
Respondents.)
_____)

Docket No. 9412

ORDER DENYING COMPLAINT COUNSEL’S MOTION *IN LIMINE*

I.

On February 2, 2024, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed a motion *in limine* seeking to preclude admission of certain evidence at the evidentiary hearing in this matter (“Motion”). Respondents Microsoft Corporation (“Microsoft”) and Activision Blizzard, Inc. (“Activision”) (collectively, “Respondents”) filed an opposition on February 13, 2024 (“Opposition”). On February 16, 2024, Complaint Counsel moved for leave to file a reply in support of the Motion (“Reply”), which is hereby GRANTED, in accordance with 16 C.F.R. § 3.22. For the reasons set forth below, Complaint Counsel’s Motion is DENIED.

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 the merger pending appeal. *FTC v. Microsoft Corp.*, 2023 U.S. App. LEXIS 17985 (9th Cir. July 14, 2023).

On July 20, 2023, the Commission withdrew this matter from adjudication pursuant to 16 C.F.R. § 3.26(c). *See* Order Withdrawing Matter from Adjudication, *In re Microsoft Corp. & Activision Blizzard, Inc.*, No. 9412, 2023 WL 4733806 (FTC July 20, 2023). On September 26, 2023, the Commission returned this matter to adjudication and set the evidentiary hearing to

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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, 2023 WL 6389836 (FTC Sept. 26, 2023). On October 10, 2023, Complaint Counsel moved to reopen discovery for the purpose of allowing Complaint Counsel to request documents and take deposition testimony relating to an agreement Microsoft and Activision entered into with non-party Ubisoft Entertainment SA (“Ubisoft”), and an agreement Microsoft entered into with Sony Interactive Entertainment LLC (“Sony”) (the “Ubisoft Agreement” and the “Sony Agreement,” respectively). The Ubisoft Agreement consists of three separate contracts executed in August 2023 by and among Microsoft, Activision, and Ubisoft that together purport to transfer to Ubisoft the rights to stream Activision content over the cloud. The Sony Agreement was executed on July 15, 2023, by and between Microsoft and Sony, and purports to offer the video game series “Call of Duty” on PlayStation and PlayStation Plus (Sony’s video game subscription service). On October 13, 2023, Microsoft and Activision closed the acquisition.

On October 26, 2023, an order was issued granting Complaint Counsel leave to take limited discovery relating to the Sony and Ubisoft Agreements (“October 26 Order”). The October 26 Order held that there was good cause to reopen discovery for the limited purpose requested by Complaint Counsel because: (1) Microsoft acknowledged it intends to introduce the Agreements into evidence at trial and therefore the Agreements are relevant; (2) Complaint Counsel could not have undertaken discovery into the Agreements prior to the discovery deadline because the Agreements were not executed until months after the discovery deadline; and (3) reopening discovery would not risk delaying the evidentiary hearing.¹

On December 21, 2023, pursuant to FTC Rule 3.38(c), 16 C.F.R. § 3.38(c), Microsoft filed a motion to certify a request that the Commission seek a court order to enforce a subpoena *duces tecum* Microsoft had issued to Sony on December 12, 2023. On January 8, 2024, that motion was denied, on the basis that Microsoft had not, prior to issuing its subpoena to Sony, requested that discovery be reopened to allow Microsoft to take such discovery. On January 16, 2024, Microsoft filed a motion to reopen discovery for the limited purpose of serving subpoenas *ad testificandum* on Ubisoft and Sony. On January 31, 2024, that motion was granted.

On February 15, 2024, an order was issued deferring ruling on Complaint Counsel’s Motion until 10 days prior to commencement of the evidentiary hearing in this matter. On May 7, 2025, the Ninth Circuit Court of Appeals upheld the district court’s denial of the preliminary injunction sought by the Commission. *FTC v. Microsoft Corp.*, 2025 WL 1319069 (9th Cir. May 7, 2025).

III.

In its Motion, Complaint Counsel seeks to preclude Respondents from introducing (1) any evidence of the purported procompetitive benefits of Respondents’ agreements with third parties, including Ubisoft, Sony, Nintendo Co., Ltd., Boosteroid Ukraine, Nvidia Corporation,

¹ Although there was good cause to reopen discovery for the limited purpose requested by Complaint Counsel, the October 26 Order imposed certain limitations on the frequency and types of discovery methods that could be used.

Cloudware S.L. (“Nware”), and Ubitus KK; (2) any testimony by the executives named on Respondents’ witness lists regarding the effects of the Ubisoft and Sony Agreements; and (3) Respondents’ agreements with firms that do not offer services in the United States.

Complaint Counsel argues that (1) if no analysis of the agreements’ effects exists, any testimony from Respondents’ executives regarding the procompetitive effects of these agreements would be unreliable and speculative and should therefore be excluded; (2) if such analysis does exist, Respondents are prohibited under the “sword/shield” doctrine from introducing evidence about the agreements’ effects while invoking privilege to shield the analysis; (3) fairness dictates that the executives named on Respondents’ witness list not be allowed to testify as to the effects of the Ubisoft and Sony Agreements because Respondents did not make those witnesses available for depositions on those topics; and (4) evidence of Respondents’ agreements with entities that do not offer services in the United States is irrelevant.

In their Opposition, Respondents argue that: (1) the competitive effects of the agreements are relevant, and Courts routinely consider the effect of such agreements, including testimony, without requiring evidence of economic modeling; (2) Microsoft’s assertions of privilege provide no basis for excluding evidence of the agreements’ competitive effects and the sword/shield doctrine does not apply; (3) the October 26 Order ruled that 16 C.F.R. § 3.33(c)(1) corporate depositions would be sufficient to explore the Ubisoft and Sony Agreements and Respondents’ executives were not precluded from testifying about the Ubisoft and Sony Agreements; and (4) Complaint Counsel’s arguments regarding the relevant geographic market are based on a faulty factual premise, and will be a disputed issue at trial.

In its Reply, Complaint Counsel argues that Respondents’ Opposition includes misstatements of law and fact. Specifically, Complaint Counsel (1) disputes Respondent’s characterization of the terms and effects of the agreements; (2) argues that legal precedent holds that Respondents cannot rely on purported benefits to consumers in other countries to offset harm to U.S. consumers; and (4) maintains that Respondents’ commitments to foreign governments have no applicability in the United States and are thus irrelevant.

IV.

FTC Rules provide that: “Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded.” 16 C.F.R. § 3.43(b). Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence, or if the evidence would be misleading. *Id.*

“Motion *in limine*” refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re POM Wonderful LLC*, No. 9344, 2011 FTC LEXIS 79, at *6-7 (ALJ May 6, 2011) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). This practice has developed pursuant to the Administrative Law Judge’s inherent authority to manage the course of trials, particularly as to the receipt of evidence. *See* 16 C.F.R. § 3.42(c)(5), (8). *See also, e.g., In re 1-800 Contacts, Inc.*, No. 9372, 2017 WL 1345288, at *1 (FTC ALJ Mar. 30, 2017); *In re Telebrands Corp.*, No.

9313, 2004 FTC LEXIS 270 (ALJ Apr. 26, 2004); *In re Dura Lube Corp.*, No. 9292, 1999 FTC LEXIS 252 (ALJ Oct. 22, 1999).

Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. *I-800 Contacts*, 2017 WL 1345288, at *1 (citing *POM Wonderful*, 2011 FTC LEXIS 79, at *6-8). Furthermore, evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *I-800 Contacts*, 2017 WL 1345288, at *1; *POM Wonderful*, 2011 FTC LEXIS 79, at *7-8. “Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded.” *In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 85, at *20 (ALJ Apr. 20, 2009) (quoting *Noble v. Sheahan*, 116 F. Supp.2d 966, 969 (N.D. Ill. 2000)). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *In re McWane, Inc.*, No. 9351, 2012 WL 3719035, at *3 (FTC ALJ Aug. 16, 2012).

V.

Complaint Counsel’s case is based on the theory that: “With control of Activision’s content, Microsoft would have the ability and increased incentive to withhold or degrade Activision’s content in ways that substantially lessen competition.” Compl. ¶ 1. There is no dispute as to the relevance of the agreements to this case, given that Microsoft intends to offer the agreements into evidence at the evidentiary hearing to support its defense. *See* FTC Rule 3.31(c)(1) (allowing discovery where relevant, *inter alia*, “to the defenses of any respondent”). 16 C.F.R. § 3.31(c)(1). Complaint Counsel’s contention that without the existence of formal analyses, Microsoft may not discuss the effects of its agreements is unsupported and therefore rejected. Whether such analyses exist is a consideration that goes to the weight to be applied to the evidence, not its admissibility.

With regard to the sword/shield doctrine – which “applies to a litigant that seeks to use information as a ‘sword,’ in furtherance of a claim or defense, but at the same time ‘shields’ such information from discovery by invoking a privilege,” *In re McWane, Inc.*, No. 9351, 2012 WL 3057728, at *4 (FTC ALJ July 13, 2012) – Complaint Counsel has failed to establish its applicability here. Microsoft has represented that it will not use “any withheld analysis of its Streaming or Nintendo Agreements as a sword, because no such analyses were done.” Opposition at 7. With regard to the Sony and Ubisoft Agreements, Microsoft further represents that while [REDACTED] Microsoft will not use [REDACTED] to support its case. Accordingly, Complaint Counsel has not established the application of this doctrine.

As to deposing Respondents’ executives, the October 26 Order permitted Complaint Counsel to serve one notice for a § 3.33(c)(1) corporate deposition on each Respondent, but did not prohibit Respondents’ executives from testifying regarding the Ubisoft and Sony Agreements in the absence of a prior deposition by them. Complaint Counsel has not established that the executives named on Respondents’ witness list should be precluded from testifying about the effects of the Ubisoft and Sony Agreements.

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Regarding the relevant geographic market, given Respondents' representations that (1) Boosteroid has servers in Pennsylvania, North Carolina, Texas, Illinois, Florida, and Washington, and (2) that the geographic market will be a disputed issue at trial, it is premature to preclude evidence on that basis without the context of trial.

In sum, Complaint Counsel has failed to demonstrate that evidence of procompetitive effects of Respondents' agreements with third parties is clearly inadmissible on all potential grounds. *1-800 Contacts*, 2017 WL 1345288, at *1. Accordingly, Complaint Counsel's Motion is DENIED. As noted above, this Order shall not be construed as a determination that any particular evidence that may be offered at the evidentiary hearing will be admitted. *Daniel Chapter One*, 2009 FTC LEXIS 85, at *20.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 20, 2025