

**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 MOTION TO EXTEND FACT DISCOVERY TO ALLOW
DISCOVERY REGARDING RESPONDENTS’ AGREEMENTS WITH UBISOFT
ENTERTAINMENT SA AND SONY INTERACTIVE ENTERTAINMENT LLC AND
REQUEST FOR EXPEDITED RULING**

Complaint Counsel respectfully moves the Court to extend fact discovery in this matter for the limited purpose of allowing discovery regarding agreements that Respondents executed months after the close of fact discovery with third parties Ubisoft Entertainment SA (“Ubisoft”) and Sony Interactive Entertainment LLC (“Sony”). Fact discovery in this matter closed on April 7, 2023. Respondents executed the Sony and Ubisoft agreements¹ on July 15, 2023, and August 21, 2023, respectively. According to Respondents, these agreements are procompetitive and remedy the anticompetitive effects of the proposed acquisition of Activision Blizzard, Inc. by

¹ The Ubisoft agreement consists of several complex, interrelated agreements.

Microsoft Corp. (the “Proposed Transaction”). Microsoft in fact told the United Kingdom’s Competition & Markets Authority (“UK CMA”) that the Ubisoft agreement rendered the Proposed Transaction a “substantially different transaction.”² Complaint Counsel has had no opportunity to conduct discovery regarding the Ubisoft agreement or the execution of the Sony agreement.

As further explained in the attached Memorandum, good cause exists for granting discovery on the agreements. These agreements require scrutiny so that this Court has a complete picture of the facts when it decides this matter. Discovery can be completed without risk of delaying the merits hearing, which is currently scheduled to commence twenty-one days after the U.S. Court of Appeals for the Ninth Circuit issues its opinion regarding the Commission’s appeal of the district court decision denying preliminary relief. Allowing the requested discovery will not unfairly prejudice Respondents. Denying discovery of these agreements will, however, unfairly prejudice Complaint Counsel and undermine the Court’s ability to adjudicate this matter.

The Court previously granted Complaint Counsel’s and Respondents’ joint request to extend the deadline for all parties’ final exhibit lists by one week. *See Order, In re Microsoft Corp. & Activision Blizzard, Inc.*, No. 9412 (F.T.C. May 12, 2023). Complaint Counsel has received no other timing extensions in this matter.

Complaint Counsel respectfully requests expedited briefing and disposition of this Motion. This Court has previously recognized that, “[p]ursuant to FTC Rule 3.22(d), [it] may shorten the time within which a response is due.” *In re La. Real Est. Appraisers Bd.*, No. 9374,

² B. Smith, *Microsoft And Activision Blizzard Restructure Proposed Acquisition and Notify Restructured Transaction to the UK’s Competition and Markets Authority* (Aug. 21, 2023), available at <https://blogs.microsoft.com/on-the-issues/2023/08/21/microsoft-activision-restructure-acquisition/>.

2017 WL 3277253 (F.T.C. July 20, 2017); *see also* Email from D. Gross to A. Bohanon, et al., *In re Microsoft Corp. & Activision Blizzard, Inc.*, No. 9412 (F.T.C. June 27, 2023) (Chambers Order shortening time to respond).

A proposed order is attached.

Dated: October 10, 2023

Respectfully submitted,

s/ James H. Weingarten

James H. Weingarten

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Counsel Supporting the Complaint

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[PROPOSED] ORDER

Upon consideration of Complaint Counsel’s Motion to Extend Fact Discovery to Allow Discovery Regarding Respondents’ Agreements with Ubisoft Entertainment SA and Sony Interactive Entertainment LLC and Request for Expedited Ruling:

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

IT IS FURTHER 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 August 21, 2023 agreements by and among Ubisoft Entertainment SA, Microsoft Corp., and Activision

Blizzard, Inc. and the July 15, 2023, agreement between Microsoft Corp. and Sony Interactive Entertainment LLC.

IT IS FURTHER ORDERED that the following deadlines and limits shall apply to the discovery authorized herein:

1. Complaint Counsel shall serve no more than ten requests for production on each Respondent;
2. Complaint Counsel shall serve no more than ten interrogatories on Microsoft Corp. and five interrogatories on Activision Blizzard, Inc.;
3. Following service of discovery, recipients shall meet and confer within two days, serve responses and objections within seven days, and complete document production within 21 days;
4. The deadline for completing fact discovery shall be eight weeks from the date of the entry of this Order.

SO ORDERED.

Dated: _____

D. Michael Chappell
Chief Administrative Law Judge

**UNITED STATES OF AMERICA
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In the Matter of

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**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S MOTION TO EXTEND
FACT DISCOVERY TO ALLOW DISCOVERY REGARDING RESPONDENTS’
AGREEMENTS WITH UBISOFT ENTERTAINMENT SA AND SONY INTERACTIVE
ENTERTAINMENT LLC AND REQUEST FOR EXPEDITED BRIEFING**

Months after fact discovery closed in this matter in April 2023, Respondents executed agreements with French videogame publisher Ubisoft Entertainment SA (“Ubisoft”) and Sony Interactive Entertainment LLC (“Sony”) that will impact American consumers and that Respondents assert are procompetitive and remedy the alleged anticompetitive effects of the proposed acquisition of Respondent Activision Blizzard, Inc. (“Activision”) by Respondent Microsoft Corp. (“Microsoft”) (the “Proposed Transaction”). Microsoft’s July 15, 2023, agreement with Sony (the “Sony Agreement”) purports to provide Sony with rights to certain

Activision content.³ The August 21, 2023, set of agreements by and among Microsoft, Activision, and Ubisoft (collectively, the “Ubisoft Agreement”) purport to transfer to Ubisoft the rights to stream Activision content over the cloud—including to United States consumers—if the Proposed Transaction closes. Respondent Microsoft has publicly stated that because of the Ubisoft Agreement, “its proposed acquisition of Activision Blizzard presents **a substantially different transaction** under UK law than the transaction Microsoft submitted for . . . consideration in 2022” and that Complaint Counsel is challenging here.⁴ The United Kingdom Competition & Markets Authority (“UK CMA”) determined that the Ubisoft Agreement is so significant that it required Respondents to start an entirely separate merger notification and review process.⁵

Complaint Counsel has had no opportunity to conduct discovery regarding the Ubisoft Agreement or the execution of the Sony Agreement. In fact, Complaint Counsel first learned about the Ubisoft Agreement after Respondents announced its execution and submission to the UK CMA. Complaint Counsel is entitled to take—and this Court ought to have the benefit of—discovery of Respondents’ agreements with Ubisoft and Sony.

PROCEDURAL BACKGROUND

The Complaint in this matter alleges that the Proposed Transaction will give Microsoft the ability and incentive to fully or partially foreclose competitors from Activision’s uniquely valuable video game content. Compl. ¶ 96-119. As a result, the Proposed Transaction may

³ See, e.g., Phil Spencer (Xbox CEO), X, (July 16, 2023), <https://twitter.com/XboxP3/status/1680578783718383616>.

⁴ Brad Smith, *Microsoft and Activision Blizzard Restructure Proposed Acquisition and Notify Restructured Transaction to the UK’s Competition and Markets Authority*, MICROSOFT, (Aug. 21, 2023), <https://blogs.microsoft.com/on-the-issues/2023/08/21/microsoft-activision-restructure-acquisition/> (emphasis added); see also Brad Smith (Microsoft Pres.), X, (Aug. 22, 2023), <https://twitter.com/BradSmi/status/1693866142702653802>.

⁵ See UK CMA, *Microsoft / Activision Blizzard (Ex-cloud Streaming Rights) Merger Inquiry*, (Aug. 22, 2023) <https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-ex-cloud-streaming-rights-merger-inquiry>.

substantially lessen competition in at least one of the following markets: a relatively mature market for high-performance video game consoles (or in the alternative, a broader video game console market); a market for video game content library subscription services in which consumers subscribe to a service offering access to a library of video games; and a relatively nascent market in which consumers stream video games over the cloud. Compl. ¶¶ 62; 118-19.

Pursuant to the Court's Case Management and Scheduling Order, fact discovery in this case closed on April 7, 2023. *See* Scheduling Order at 2.

On April 26, 2023, the UK CMA prohibited Respondents from consummating the Proposed Transaction based on finding it may be expected to substantially lessen competition in the market for cloud gaming services.⁶

On June 12, 2023, the Commission filed an action in federal district court to preliminarily enjoin the Proposed Transaction after Respondents refused to confirm that they would abide by the UK CMA's orders barring the Proposed Transaction. *See* Compl. at 2-3 (ECF No. 1), *FTC v. Microsoft Corp.*, No. 3:23-cv-2880 (N.D. Cal. June 12, 2023). After a five-day evidentiary hearing, the district court denied the FTC's request for a preliminary injunction. *See FTC v. Microsoft Corp.*, No. 3:23-cv-2880, 2023 WL 4443412 (N.D. Cal. July 10, 2023). The Commission appealed, and oral argument before the U.S. Court of Appeals for the Ninth Circuit is scheduled for December 6, 2023.

On July 15, 2023, Microsoft and Sony executed the Sony Agreement.

⁶ UK CMA, ANTICIPATED ACQUISITION BY MICROSOFT OF ACTIVISION BLIZZARD, INC. FINAL REPORT (Apr. 26, 2023), https://assets.publishing.service.gov.uk/media/644939aa529eda000c3b0525/Microsoft_Activision_Final_Report_.pdf.

On July 18, 2023, Respondents agreed to a negotiated extension of the time to consummate the Proposed Transaction from July 18 to October 18, 2023.⁷

On July 20, 2023, on Respondents' motion, the FTC Secretary 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 August 21, 2023, Respondents and Ubisoft executed the Ubisoft Agreement.

On September 26, 2023, the Commission voted to return this matter to adjudication. *See Order Returning Matter to Adjudication, In re Microsoft Corp. & Activision Blizzard, Inc.*, No. 9412 (Sept. 26, 2023).

FACTUAL BACKGROUND

A. The Ubisoft Agreement

The Ubisoft Agreement is comprised of three separate contracts executed in August 2023 that together purport to transfer to Ubisoft the rights to sell cloud-streamed versions of Activision games in the United States, the United Kingdom, and various other countries outside of the European Economic Area if the Proposed Transaction is consummated.

Complaint Counsel first learned of the Ubisoft Agreement after Respondents publicly announced its execution and submission to the UK CMA as part of an effort to remedy the UK CMA's finding that the Proposed Transaction may be expected to result in a substantial lessening of competition in the market for the supply of cloud gaming services in the United Kingdom. On August 28, after multiple requests, Respondents provided the Ubisoft Agreement to Complaint Counsel. The next day, at Complaint Counsel's request, Respondents' counsel provided a brief overview of the terms of the agreements via videoconference.

⁷ *See Activision Blizzard, Inc.*, Current Report at 2 (Form 8-K) (July 19, 2023).

Complaint Counsel has had no opportunity for discovery regarding the Ubisoft Agreement. Before this matter was returned to adjudication, Complaint Counsel asked Respondents' counsel for any business documents about the Ubisoft Agreement, but Respondents never responded to this request. Respondents also declined to provide Complaint Counsel with copies of information about the Ubisoft Agreement they provided to the UK CMA.

B. The Sony Agreement

On July 15, 2023, Microsoft executed an agreement with Sony purporting to offer *Call of Duty* on PlayStation and PlayStation Plus (Sony's video game subscription service) after the close of the Proposed Transaction. { [REDACTED] } an offer Microsoft made to Sony in December 2022, on which Complaint Counsel diligently sought timely discovery. Sony's CEO testified that the December offer was { [REDACTED] }
 [REDACTED]
 [REDACTED]
 [REDACTED] } After the district court denied preliminary relief, and seven months after the close of fact discovery in this matter, Sony nevertheless signed the agreement. Complaint Counsel has had no opportunity to take discovery regarding Sony's decision to sign the agreement with Microsoft.

ARGUMENT

FTC Rule 3.21(c)(2) permits this Court to extend discovery for good cause, which exists when a scheduling order deadline "cannot be met despite the diligence of the party seeking the extension." *In re Traffic Jam Events*, No. 9395, 2021 WL 3465709, at *1 (F.T.C. July 23, 2021) (quoting *In re Gemtronics, Inc.*, No. 9330, 2009 WL 725988, at *1 (F.T.C. Feb. 13, 2009)).

⁸ Exhibit A, Excerpt of PX3378 at 016-20 (Ryan Hr'g Testimony at 59:10-70:23).

Pursuant to Rule 3.21(c)(2), the Court shall consider “any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner.” This Court also has granted requests for additional discovery when the “public interest and the search for the truth are served” by such discovery. *In re LabMD, Inc.*, No. 9357, 2014 WL 7183808, at *4 (F.T.C. Dec. 8, 2014).

Complaint Counsel has good cause for requesting the ability to take discovery of the Ubisoft and Sony Agreements, and all of the factors set forth in Rule 3.21(c)(2) support this request.

First, good cause exists to grant additional time for discovery of the Ubisoft and Sony Agreements because the agreements were not executed until months after the close of fact discovery. While Complaint Counsel had taken discovery of Microsoft’s offer to Sony and Sony’s { [REDACTED] } to that offer, Complaint Counsel had no opportunity to take discovery about the circumstances surrounding Sony’s decision in July 2023 to accept the offer. Moreover, Complaint Counsel had no notice of the Ubisoft Agreement until after it was executed in August 2023. Respondents controlled the timing of this agreement, waiting to negotiate and execute the Ubisoft Agreement more than eighteen months after announcing the Proposed Transaction, seven months after the Commission issued its Administrative Complaint, and over three months after the UK CMA concluded that the Proposed Transaction may be expected to substantially lessen competition in the cloud streaming market.

Second, the agreements and their possible effects on American consumers in the relevant markets present complex questions of fact that require additional discovery. *See In re Pom Wonderful LLC & Roll Glob. LLC.*, No. 9344, 2011 WL 1429882, at *2 (F.T.C. Apr. 5, 2011) (granting an extension in part due to the “[t]he complexity of the issues in this case”). For example:

- The Ubisoft Agreement implicates different payment schemes, including { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Complaint Counsel is entitled to discovery of, for example, how these payment schemes were determined, whether Ubisoft can profitably offer streamed Activision games based on these schemes, and whether other market participants can profitably purchase streamed Activision games based on this pricing scheme.

- Discovery also is required to test Respondents’ assertions that the Ubisoft Agreement is procompetitive. For example, under the current pricing terms, Ubisoft must pay Microsoft { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } This raises doubts about whether it could ever be profitable for Ubisoft to license these games to multi-game content subscription service providers that offer streaming. If not, the effect may be to foreclose new Activision games from being offered on those services. This potential anticompetitive effect, among others, demonstrates why discovery is needed from Respondents and Ubisoft, as well as from the multi-game content subscription services providing cloud streaming today, including Amazon and Sony.

- Although Complaint Counsel had no opportunity to take discovery of the Ubisoft Agreement and no notice of any potential deal with Respondents, Ubisoft’s ability, incentives, and plans to market cloud streaming rights for Activision games are now highly relevant.

- Relevant discovery also encompasses Respondents’ negotiation to extend the deadline for completing the Proposed Transaction from July to October 2023, which provided time for

negotiating and executing the Ubisoft Agreement. The Ubisoft Agreement purports to offer Activision content broadly across cloud-gaming services, which is in direct conflict with Respondents' arguments that Activision content cannot be supported by cloud streaming.

Third, all of the other Rule 3.21(c)(2) factors support extending discovery. The proceedings to date have progressed efficiently, with the only pause arising from Respondents' motion to withdraw this matter from adjudication. Permitting discovery of the agreements presents no risk of delaying the evidentiary hearing. The evidentiary hearing is not set to begin until twenty-one days after the Ninth Circuit rules on the Commission's appeal. Complaint Counsel's request for eight weeks to take the requested discovery will not risk delaying the merits hearing or issuance of the Court's decision.

Fourth, the "public interest and search for the truth" require discovery on the agreements. *See LabMD, Inc.*, 2014 WL 7183808, at *4. These agreements purport to affect millions of gamers in the United States. The issue of whether the agreements are sufficient to replace the competition lost because of the Proposed Transaction requires additional discovery before it can be resolved. Neither Complaint Counsel nor this Court can simply take Respondents' untested word on the alleged procompetitive benefits of the agreements. As the Supreme Court has made clear, "all doubts as to the remedy are to be resolved in [the Government's] favor." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961); *see also United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 78 (D.D.C. 2017) ("Courts appropriately guard their ability to ascertain the actual facts at issue, rather than allow a party to thwart judicial review through its own machinations."). This Court is entitled to ordinary course information and sworn testimony about these agreements and their effects.

Finally, Respondents cannot plausibly claim any unfair prejudice arising from permitting discovery of agreements that they executed long after the close of fact discovery and that they are publicly touting as having changed the antitrust analysis of the Proposed Transaction. In fact, the lack of discovery unfairly prejudices Complaint Counsel's ability to analyze the effects of these agreements on American consumers.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully moves the Court to extend the fact discovery deadline to permit discovery relevant to the Ubisoft and Sony Agreements. Pursuant to FTC Rule 3.22(d), Complaint Counsel respectfully requests expedited briefing and disposition of this Motion.

Dated: October 10, 2023

Respectfully submitted,

s/ James H. Weingarten

James H. Weingarten

Maria Cirincione

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Counsel Supporting the Complaint

EXHIBIT A

CONFIDENTIAL – REDACTED IN ENTIRETY

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

In the Matter of

Microsoft Corp.,

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Docket No. 9412

STATEMENT REGARDING MEET AND CONFER

Pursuant to the January 4 Scheduling Order and the May 12 Order Granting Joint Motion for First Revised Scheduling Order, Complaint Counsel submit this statement in support of their Motion to Extend Fact Discovery to Allow Discovery Regarding Respondents' Agreements with Ubisoft Entertainment SA and Sony Interactive Entertainment LLC and Request for Expedited Ruling. Complaint Counsel has conferred with Respondents in good faith and attempted to come to an agreement on a discovery proposal. On September 27, 2023, Complaint Counsel requested Respondents' position on a proposal to extend fact discovery. Respondents waited five days to acknowledge the request and submitted a counterproposal to Complaint Counsel on October 5. On October 6, Respondents confirmed by email their unwillingness to agree to a discovery

proposal that includes individual depositions and interrogatories. Discussions continued via email on October 6 and 9. Complaint Counsel and Respondents reached an impasse regarding the appropriate scope of discovery regarding the agreements.

Dated: October 10, 2023

Respectfully submitted,

s/ James H. Weingarten

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Counsel Supporting the Complaint

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**DECLARATION OF MARIA CIRINCIONE IN SUPPORT OF COMPLAINT
COUNSEL’S MOTION TO EXTEND FACT DISCOVERY TO ALLOW DISCOVERY
REGARDING RESPONDENTS’ AGREEMENTS WITH UBISOFT ENTERTAINMENT
SA AND SONY INTERACTIVE ENTERTAINMENT LLC AND REQUEST FOR
EXPEDITED BRIEFING**

My name is Maria Cirincione. I am over eighteen years of age, and I am a citizen of the United States. I have personal knowledge of the information contained herein.

1. I am serving as Complaint Counsel in the above-captioned matter.
2. I respectfully submit this declaration to provide certain documents that are referred to in Complaint Counsel’s Motion to Extend Fact Discovery to Allow Discovery Regarding Respondents’ Agreements with Ubisoft Entertainment SA and Sony Interactive Entertainment LLC and Request for Expedited Ruling.

3. Submitted herewith are true and correct copies of the following:

Exhibit	Description
A	Excerpt of PX3378 at 016-20 (Ryan Hr’g Testimony at 59:10-70:23).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: October 10, 2023

Respectfully submitted,

s/ Maria Cirincione

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 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
Administrative Law Judge
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I also certify that I caused the foregoing document to be served via email to:

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