

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

**Microsoft Corp.,
a corporation,**

and

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

Docket No. 9412

**RESPONDENT MICROSOFT CORP.’S MOTION TO CERTIFY TO THE
COMMISSION A REQUEST FOR COURT ENFORCEMENT OF
SUBPOENA *DUCES TECUM* ISSUED TO NONPARTY
SONY INTERACTIVE ENTERTAINMENT LLC**

INTRODUCTION

When Microsoft announced the proposed acquisition of Activision, Sony Interactive Entertainment’s (“SIE”) President and CEO, Jim Ryan, wrote to a friend and mentor that the acquisition was “not an xbox exclusivity play at all” and that SIE would be “more than OK” if the deal were consummated. Ex. A, Email from Jim Ryan re: MS acquisition of Activision at -001 (Jan. 20, 2022), RX2064, SIE-MSFT-10367176. In stark contrast to this candid, private assessment, SIE has long outwardly and vocally claimed—including to competition authorities around the world—that the acquisition would be harmful. Just days after Microsoft prevailed in the FTC’s preliminary injunction action, SIE inked a 10-year licensing deal with Microsoft for *Call of Duty* (“Microsoft-Sony Agreement”) that guarantees SIE better terms than it had with Activision. One would think that would have marked the end of SIE’s campaign against the Microsoft-Activision deal. It did not.

As Microsoft recently learned upon receiving SIE's cherry-picked 52-document production in response to the FTC's subpoena related to the Microsoft-Sony Agreement, [REDACTED]

[REDACTED]

[REDACTED] Specifically, SIE's production included a letter [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹

Microsoft is entitled to take discovery to test SIE's assertions and seeks a narrow, targeted production of documents from SIE related to the Microsoft-Sony Agreement. But SIE has not committed to produce a single document in response to Microsoft's subpoena and has insisted that its production to the FTC is sufficient to satisfy Microsoft's subpoena, despite not having conducted proper custodial searches. Microsoft therefore moves pursuant to 16 C.F.R. § 3.38(c) for an order certifying to the Commission a request to enforce Microsoft's subpoena in federal district court. *See In re Illumina, Inc.*, No. 9401, 2021 WL 3803658, at *4 (F.T.C. Aug. 17, 2021) (granting Respondents' motion to certify district court enforcement of subpoenas issued to a nonparty); *In re Axon Enter., Inc.*, No. 9389, 2020 WL 5543022, at *5 (F.T.C. Sept. 4, 2020)

¹ SIE made similar arguments in a letter to [REDACTED]
[REDACTED]

(same); *In re Traffic Jam Events, LLC*, No. 9395, 2021 WL 3808940, at *3 (F.T.C. Aug. 10, 2021) (granting Complaint Counsel’s motion to certify district court enforcement of subpoenas issued to a nonparty).

FACTUAL AND PROCEDURAL BACKGROUND

This Court is well acquainted with SIE’s central role in the FTC’s case and SIE’s nearly two-year effort to thwart this acquisition. For its part, Microsoft has sought to quell any concern by SIE and the gaming community that this acquisition would result in SIE losing access to Activision’s most notable franchise, *Call of Duty* (“CoD”), and has publicly stated its commitment to ensure CoD would remain on PlayStation. *E.g.*, Ex. D, Phil Spencer, Twitter (Jan. 20, 2022), <https://twitter.com/XboxP3/status/1484273335139651585> (“Had good calls this week with leaders at Sony. I confirmed our intent to honor all existing agreements upon acquisition of Activision Blizzard and our desire to keep Call of Duty on PlayStation.”). But that was not all. While the deal was undergoing regulatory review, Microsoft made written contractual offers for CoD to Sony, which Sony rebuffed, presumably because entering into a long-term agreement on CoD would have significantly undercut the FTC’s case and greatly improved the acquisition’s chances of success.

In any event, after Microsoft defeated the FTC’s preliminary injunction motion, SIE ultimately did sign an agreement with Microsoft on highly favorable terms. Complaint Counsel then moved to reopen discovery related to the Microsoft-Sony Agreement. Microsoft objected to the breadth of Complaint Counsel’s request but confirmed it would be open to tailored discovery to ensure that the Agreement could be introduced at the upcoming evidentiary hearing, given the Agreement’s centrality to any analysis of the acquisition’s competitive effects. This Court granted Complaint Counsel’s motion in part and reopened discovery “relevant to the Ubisoft Agreement

and the Sony Agreement.” Order On Complaint Counsel’s Motion To Allow Discovery Regarding Respondents’ Agreements With Ubisoft Entertainment SA And Sony Interactive Entertainment LLC at 4 (Oct. 26, 2023) (“Order Reopening Discovery”).

The FTC then subpoenaed documents from SIE. SIE produced a total of 52 documents, fewer than half of which relate to the Microsoft-Sony Agreement.² There are virtually no internal documents evidencing why SIE entered the Agreement or [REDACTED]

[REDACTED]

After receiving SIE’s production and seeing [REDACTED] for the first time, Microsoft subpoenaed SIE seeking documents related to the Microsoft-Sony Agreement and the Microsoft-Ubisoft Agreement.³ Microsoft’s subpoena specifically noted concerns that SIE had produced a selective set of documents in response to the FTC’s subpoena and conveyed that Microsoft’s subpoena was intended to capture a more balanced and complete set of materials. *See* Ex. E, Respondent Microsoft Corp.’s Attachment to Subpoena *Duces Tecum* To Sony Interactive Entertainment LLC at 8 (Dec. 12, 2023).

SIE provided responses and objections to Microsoft’s subpoena on December 17, 2023. During a meet and confer the following day, SIE expressed its view that its prior collection and production of 52 documents to the FTC was “reasonable” and that in any event Microsoft was not authorized to take any discovery of SIE. Notwithstanding those objections—and perhaps recognizing the importance of the Microsoft-Sony Agreement to the FTC’s claims and the

² During the meet and confer process, SIE’s counsel revealed that SIE’s method for collecting documents was to inquire who at the company might have relevant information and then to ask those individuals to provide their relevant documents. SIE ultimately collected documents from seven individuals.

³ Microsoft also counter-noticed the FTC’s deposition subpoena for a corporate representative of SIE, but that notice is not presently at issue given SIE’s representations that they will not object to Microsoft using half of the allotted deposition time.

insufficiency of SIE’s prior production—SIE agreed to consider a reasonable search-terms-based collection and review of documents in response to Microsoft’s subpoena. Ex. F, Email from Sarah Neuman, Wilkinson Stekloff LLP, to Larry Malm, Cleary Gottlieb Steen & Hamilton LLP (Dec. 18, 2023).

Microsoft shared a proposal the following morning that genuinely endeavored to minimize the burden on SIE. Ex. G, Email from Sarah Neuman, Wilkinson Stekloff LLP, to Larry Malm, Cleary Gottlieb Steen & Hamilton LLP (Dec. 19, 2023). In short, Microsoft proposed that SIE search the files of six custodians for the narrow timeframe covering the period from SIE’s prior collections in this matter to present, and then run only four highly targeted search strings across those custodians’ files.⁴ *Id.* Late that evening, SIE responded it would not agree to Microsoft’s proposal. Ex. H, Email from Larry Malm, Cleary Gottlieb Steen & Hamilton LLP, to Sarah Neuman, Wilkinson Stekloff LLP (Dec. 19, 2023).

Given the impending close of discovery and the upcoming Sony corporate witness deposition contemplated for January 17, 2024, and to protect its rights, Microsoft now moves pursuant to 16 C.F.R. § 3.38(c) for an order certifying to the Commission a request to enforce the subpoena in federal district court.

⁴ Microsoft proposed the following search terms:

[REDACTED]

LEGAL STANDARD

“[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.” Order On Motion Of Sony Interactive Entertainment LLC To Quash Or Limit Subpoena *Duces Tecum* at 2 (Feb. 23, 2023) (“*SIE I*”). “[E]ven where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding.” *Id.* When the party in violation of a subpoena is a nonparty, upon motion of a party, the ALJ “shall certify to the Commission a request that court enforcement of the subpoena or order be sought.” 16 C.F.R. § 3.38(c); *see also In re Traffic Jam Events*, No. 9395, 2021 WL 2379542, at *5 (F.T.C. May 13, 2021).

ARGUMENT

I. Microsoft Seeks Highly Relevant Discovery And Has Proposed A Minimally Burdensome Search Methodology.

There is no dispute that the Microsoft-Sony Agreement is highly relevant to the question whether Microsoft’s acquisition of Activision substantially lessens competition. Ex. I, Order Reopening Discovery at 3 (Oct. 26, 2023) (“[T]here is no dispute as to the relevance of the agreement[. . . .”); Ex. J, Mem. in Supp. of Compl. Counsel’s Mot. to Extend Fact Discovery at 6 (Oct. 10, 2023) (“[T]he agreement[] and [its] possible effects on American consumers in the relevant markets present complex questions of fact that require additional discovery.”). Nor can SIE credibly argue that its production to the FTC on this issue was “reasonable” or sufficient. SIE and Microsoft engaged on a potential CoD deal over the course of months. It is simply implausible that additional emails and other documents assessing whether to enter into an agreement with Microsoft, the potential effects of that agreement, or how to message the agreement (among other

topics) do not exist. SIE’s counsel represented during the meet and confer process that although SIE did not provide the FTC with a privilege log, SIE withheld fewer than 25 documents on privilege grounds. SIE’s selective production of documents was plainly intended to skew the story in its (and the FTC’s) favor.

Microsoft identified minimally burdensome search parameters that would enable Microsoft to discover SIE’s internal assessment of the deal it has [REDACTED]. The date range is cabined to the shortest possible window of time. And Microsoft proposed only *four* search strings that would capture highly relevant materials that go directly to the core question of whether Microsoft’s acquisition of Activision will harm competition. These aspects of Microsoft’s proposal went uncontested by SIE.

Instead, SIE makes vague arguments about burden, which cannot carry the day, *see SIE I* at 2–3, and requested that Microsoft “identify a more reasonable set” of custodians. Ex. H, Email from Larry Malm, Cleary Gottlieb Steen & Hamilton LLP, to Sarah Neuman, Wilkinson Stekloff LLP, (Dec. 19, 2023). But Microsoft’s proposal included *fewer individuals than SIE collected from in response to the FTC’s subpoena, see supra* note 1, and most of Microsoft’s proposed custodians were custodians for purposes of Sony’s response to Microsoft’s earlier subpoena. Specifically, Microsoft proposed collections from:

- **Jim Ryan, President & CEO**, who has been involved in discussions about the Microsoft-Sony Agreement and [REDACTED]

- **Stephanie Burns, Senior Vice President & General Counsel,** [REDACTED];⁶
- **Roxana Niktab, Senior Director of Legal,** [REDACTED]
- **Greg McCurdy, Senior Director, Competition & Regulatory Affairs,** who has led Sony’s regulatory effort related to Microsoft’s acquisition of Activision and has been involved in discussions relating the Microsoft-Sony Agreement;⁸
- **Phil Rosenberg, Senior Vice President, Head of Global Partner Development & Relations,** who leads Sony’s third-party relationships and has helped lead discussions with Microsoft post-acquisition over content licensing;
- **Christian Svensson, Senior Global Account Manager,** who leads Sony’s day-to-day relationship with Activision.

In objecting to these six key custodians, SIE did not offer a counterproposal or provide any explanation as to how Microsoft’s custodians proposal is overly burdensome or disproportionate to the needs of this case. SIE observed that the list includes three lawyers. That is not surprising or unreasonable given that discovery is being sought on the topic of contract negotiations. SIE has previously raised similar concerns that were not credited. *See SIE I* at 4 (rejecting SIE’s request to exclude SIE attorney Greg McCurdy as a custodian because, in part, “[i]n-house counsel are not immune from discovery merely by virtue of their role as lawyers, nor does SIE contend otherwise”). Moreover, Microsoft included four lawyers as custodians (and many more total

⁶ [REDACTED]

⁷ [REDACTED]

⁸ *See, e.g.,* [REDACTED]

custodians) in responding to the FTC's recent requests for production. Sony's non-compliance with the subpoena is unjustified.

II. Microsoft's Subpoena Was Properly Issued.

SIE has separately objected to Microsoft's subpoena on the ground that Microsoft was not authorized to serve discovery at all. SIE points to language in the Court's order reopening discovery that limits the scope of Complaint Counsel's discovery. *See* Order Reopening Discovery at 4. Microsoft understood those limitations to adjudicate the scope dispute between Microsoft and Complaint Counsel but not to prohibit Microsoft from taking reciprocal discovery from third parties.

SIE also asserted during the meet and confer process that Microsoft is barred from taking discovery because Microsoft opposed the reopening of discovery that Complaint Counsel sought. That untenable rule would result in parties never opposing additional discovery for fear that any later-permitted discovery would not be reciprocal. At bottom, it would be unfair and prejudicial for discovery to proceed in the one-sided fashion SIE proposes.

CONCLUSION

For the foregoing reasons, Microsoft requests that the Court certify to the Commission a request to enforce Microsoft's subpoena by seeking a court order requiring SIE to search the custodial files of Microsoft's six proposed custodians using the search terms identified in Microsoft's December 19, 2023 email to SIE's counsel. *See* Ex. G, Email from Sarah Neuman, Wilkinson Stekloff LLP, to Larry Malm, Cleary Gottlieb Steen & Hamilton LLP (Dec. 19, 2023); *supra* note 4.

Dated: December 21, 2023

Respectfully submitted,

By: /s/ Sarah Neuman

Beth Wilkinson
Rakesh N. Kilaru
Kieran Gostin
Grace L. Hill
Anastasia M. Pastan
Sarah E. Neuman
Wilkinson Stekloff LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005
bwilkinson@wilkinsonstekloff.com
rkilaru@wilkinsonstekloff.com
kgostin@wilkinsonstekloff.com
ghill@wilkinsonstekloff.com
apastan@wilkinsonstekloff.com
sneuman@wilkinsonstekloff.com

Michael Moiseyev
Megan A. Granger
Weil Gotshal & Manges LLP
2001 M Street NW
Suite 600
Washington, DC 20036
(202) 682-7026
michael.moiseyev@weil.com
megan.granger@weil.com

Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I hereby certify that, on December 21, 2023, I caused a true and correct copy of the foregoing to be filed electronically using the FTC's E-Filing System and served the following via email:

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 forgoing document to be served via email to:

James H. Weingarten (jweingarten@ftc.gov)
James Abell (jabell@ftc.gov)
Cem Akleman (cakleman@ftc.gov)
J. Alexander Ansaldo (jansaldo@ftc.gov)
Peggy Bayer Femenella (pbayerfemenella@ftc.gov)
Michael T. Blevins (mblevins@ftc.gov)
Amanda L. Butler (abutler2@ftc.gov)
Nicole Callan (ncallan@ftc.gov)
Maria Cirincione (mcirincione@ftc.gov)
Kassandra DiPietro (kdipietro@ftc.gov)
Michael A. Franchak (mfranchak@ftc.gov)
James Gossmann (jgossmann@ftc.gov)
Meredith Levert (mlevert@ftc.gov)
David E. Morris (dmorris1@ftc.gov)
Merrick Pastore (mpastore@ftc.gov)
Stephen Santulli (ssantulli@ftc.gov)
Edmund Saw (esaw@ftc.gov)
U.S. Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Telephone: (202) 326-3570

Counsel Supporting the Complaint

D. Bruce Hoffman (bhoffman@cgsh.com)
Leah Brannon (lbrannon@cgsh.com)
Carl Lawrence Malm (lmalm@cgsh.com)
Isabel Tuz (ituz@cgsh.com)
Everett K. Coraor (ecoraor@cgsh.com)
Cleary Gottlieb Steen & Hamilton LLP
2112 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Telephone: (202) 974-1500

Counsel for Non-Party Sony Interactive Entertainment LLC

Steven C. Sunshine (steve.sunshine@skadden.com)
Julia K. York (julia.york@skadden.com)
Jessica R. Watters (jessica.watters@skadden.com)
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
Telephone: (202) 271-7860

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

Counsel for Activision Blizzard, Inc.

/s/ Sarah Neuman

Sarah Neuman
Wilkinson Stekloff LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005
sneuman@wilkinsonstekloff.com

Counsel for Microsoft Corp.

**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.**

Docket No. 9412

**[PROPOSED] ORDER GRANTING RESPONDENT MICROSOFT CORP.'S
MOTION TO CERTIFY TO THE COMMISSION A REQUEST FOR
COURT ENFORCEMENT OF SUBPOENA *DUCES TECUM* ISSUED TO
NONPARTY SONY INTERACTIVE ENTERTAINMENT LLC**

Upon consideration of Respondent Microsoft Corp.'s ("Microsoft") Motion To Certify To The Commission A Request For Court Enforcement Of Subpoena *Duces Tecum* Issued To Nonparty Sony Interactive Entertainment LLC ("SIE") (the "Motion"), it is HEREBY

ORDERED that Microsoft's request for court enforcement of the Subpoena *Duces Tecum* issued to SIE be and hereby is certified to the Commission, with the recommendation that district court enforcement be sought; and

IT IS FURTHER RECOMMENDED that the subpoena be enforced against SIE consistent with the proposal offered by Microsoft. That is, SIE should be ordered to complete a custodial document search of the files of Jim Ryan, Stephanie Burns, Roxana Niktab, Greg McCurdy, Phil Rosenberg, and Christian Svensson between the date of collection(s) in response to Microsoft's prior subpoena to SIE and the date of collection(s) in response to Microsoft's present subpoena to SIE using the following search strings:

[REDACTED]

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

EXHIBIT A

From: Ryan, Jim [REDACTED]
To: chrisdeering [REDACTED]
Sent: 1/20/2022 7:10:36 AM
Subject: RE: MS acquisition of Activision.

I think that was overdone.

That said, at almost \$130, I think it was a bit topy.

From: chris deering [REDACTED] >
Sent: 20 January 2022 15:01
To: Ryan, Jim [REDACTED]
Subject: Re: MS acquisition of Activision.

OK then I shouldn't worry that Sony stock dropped 12%

Cheers,

(m) [REDACTED] 9
[REDACTED] 1

On Thursday, January 20, 2022, 02:52:57 PM GMT, Jim.Ryan [REDACTED] wrote:

It's not an xbox exclusivity play at all, they're thinking bigger than that, and they have the cash to make moves like this. I've spent a fair bit of time with both Phil and Bobby over the past day, I'm pretty sure we will continue to see COD on PS for many years to come.

We have some good stuff cooking. Keep your eyes peeled.

I'm not complacent and I'd rather this hadn't happened, but we'll be ok, more than OK.

From: chris deering [REDACTED] >
Sent: 19 January 2022 13:20
To: Ryan, Jim [REDACTED] >
Subject: MS acquisition of Activision.

Phil Spencer was in CNBC saying that the acquisition would cement MS as a player in mobile games. Strikes me as more of a King play than COD. But King sold to Bobby for \$5Billion and has now grown to be worth £50 Billion. If it was a Xbox exclusivity play. Spencer could have locked up MS console exclusivity for the next 3 COD releases for maybe £5 Billion.

The major cash out will lure most of the talent to take the money and run as fast as their contracts will allow, leaving MS with very gnarly management challenge. I bet Yves is smiling like the Cheshire cat.

If this was a play to end run PS5 etc, I think it was massively overvalued and will not meaningfully succeed. I guess MS can piss away that kind of valuation without being more harmed than helped, but I am not losing a wink of sleep over the future for our baby. Hope you agree.

Cheers.

Chris

PS they would have been better off announcing a new Electric Car



This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify siee.postmaster@sony.com
This footnote also confirms that this email message has been checked for all known viruses.
Sony Interactive Entertainment Europe Limited
Registered Office: 10 Great Marlborough Street, London W1F 7LP, United Kingdom
Registered in England: 3277793

P *Please consider the environment before printing this e-mail*

EXHIBIT B

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT C

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT D



Phil Spencer 

@XboxP3

Had good calls this week with leaders at Sony. I confirmed our intent to honor all existing agreements upon acquisition of Activision Blizzard and our desire to keep Call of Duty on PlayStation. Sony is an important part of our industry, and we value our relationship.

4:15 PM · Jan 20, 2022 · Twitter Web App

EXHIBIT E

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT F

From: [Sarah Neuman](#)
To: [Malm, Larry](#); [Anthony Ferrara](#)
Cc: [Kieran Gostin](#); [Coraor, Everett](#)
Subject: RE: Matter of Microsoft Corp. and Activision Blizzard | Sony Subpoenas
Date: Monday, December 18, 2023 6:13:08 PM

Larry,

Microsoft consents to a one-day extension of the return date, to 12/19, to permit further discussions on a reasonable search-terms-based collection and review.

Thanks,

Sarah

From: Malm, Larry <lmalm@cgsh.com>
Sent: Monday, December 18, 2023 3:34 PM
To: Sarah Neuman <sneuman@wilkinsonstekloff.com>; Anthony Ferrara <aferrara@wilkinsonstekloff.com>
Cc: Kieran Gostin <kgostin@wilkinsonstekloff.com>; Coraor, Everett <ecoraor@cgsh.com>
Subject: RE: Matter of Microsoft Corp. and Activision Blizzard | Sony Subpoenas

Sarah, Anthony, Thank you for speaking earlier. Can we hop back on around 4 to update?

Larry Malm

Cleary Gottlieb Steen & Hamilton LLP
2112 Pennsylvania Avenue, NW
Washington, DC 20037
T: +1 202 974 1959 | M: +1 203 464 8024
lmalm@cgsh.com | clearygottlieb.com
Pronouns: he/him/his

From: Sarah Neuman <sneuman@wilkinsonstekloff.com>
Sent: Monday, December 18, 2023 9:07 AM
To: Malm, Larry <lmalm@cgsh.com>; Anthony Ferrara <aferrara@wilkinsonstekloff.com>
Cc: Kieran Gostin <kgostin@wilkinsonstekloff.com>; Coraor, Everett <ecoraor@cgsh.com>
Subject: RE: Matter of Microsoft Corp. and Activision Blizzard | Sony Subpoenas

Noon works for us. We will circulate an invite.

Sarah Neuman | Counsel

WILKINSON STEKLOFF LLP

2001 M Street NW, 10th Flr, Washington, DC 20036
Direct: [\(202\) 804-4238](tel:(202)804-4238) | Fax: [\(202\) 847-4005](tel:(202)847-4005)

sneuman@wilkinsonstekloff.com
wilkinsonstekloff.com

From: Malm, Larry <lmalm@cgsh.com>
Sent: Sunday, December 17, 2023 8:02 PM
To: Anthony Ferrara <aferrara@wilkinsonstekloff.com>
Cc: Kieran Gostin <kgostin@wilkinsonstekloff.com>; Sarah Neuman <sneuman@wilkinsonstekloff.com>; Coraor, Everett <ecoraor@cgsh.com>
Subject: RE: Matter of Microsoft Corp. and Activision Blizzard | Sony Subpoenas

—

All,
Please see attached. Please let us know if noon works for a meet and confer tomorrow.
Kind regards,
Larry

Larry Malm
Cleary Gottlieb Steen & Hamilton LLP
2112 Pennsylvania Avenue, NW
Washington, DC 20037
T: +1 202 974 1959 | M: +1 203 464 8024
lmalm@cgsh.com | clearygottlieb.com
Pronouns: he/him/his

From: Anthony Ferrara <aferrara@wilkinsonstekloff.com>
Sent: Tuesday, December 12, 2023 12:51 PM
To: Malm, Larry <lmalm@cgsh.com>
Cc: Kieran Gostin <kgostin@wilkinsonstekloff.com>; Sarah Neuman <sneuman@wilkinsonstekloff.com>
Subject: Matter of Microsoft Corp. and Activision Blizzard | Sony Subpoenas

Larry,

Thank you for agreeing to accept service on behalf of Sony. As discussed with Sarah, I'm attaching both the document subpoena and the deposition subpoena to this email. We are also having copies couriered to your office.

We're available to meet and confer on the documents subpoena this week. Thank you.

Best,
Anthony

Anthony P. Ferrara | Associate

WILKINSON STEKLOFF LLP

2001 M Street NW, 10th Flr, Washington, DC 20036

Direct: (202) 847-4024 | Fax: (202) 847-4005

aferrara@wilkinsonstekloff.com

wilkinsonstekloff.com

The information contained in this communication is confidential, may be attorney-client privileged and constitute protected work product, may constitute inside information, and is intended only for the use of the intended addressee. It is the property of Wilkinson Stekloff LLP. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify us immediately by return email and destroy this communication and all copies thereof, including all attachments.

This message is being sent from a law firm and may contain confidential or privileged information. If you are not the intended recipient, please advise the sender immediately by reply e-mail and delete this message and any attachments without retaining a copy.

Throughout this communication, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities. Our external privacy statement is available at: <https://www.clearygottlieb.com/footer/privacy-statement>

This message is being sent from a law firm and may contain confidential or privileged information. If you are not the intended recipient, please advise the sender immediately by reply e-mail and delete this message and any attachments without retaining a copy.

Throughout this communication, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities. Our external privacy statement is available at: <https://www.clearygottlieb.com/footer/privacy-statement>

EXHIBIT G

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT H

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT I

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

_____)	
In the Matter of)	
Microsoft Corp.,)	
a corporation, and)	
Activision Blizzard, Inc.,)	Docket No. 9412
a corporation,)	
Respondents.)	
_____)	

**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.¹ 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

¹ 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

EXHIBIT J

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

In the Matter of

Microsoft Corp.,

a corporation,

and

Docket No. 9412

Activision Blizzard, Inc.,

a corporation.

**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

Maria Cirincione

Ethan Gurwitz

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Telephone: (202) 326-3570

Email: jweingarten@ftc.gov

Counsel Supporting the Complaint

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

In the Matter of

Microsoft Corp.,

a corporation,

and

Docket No. 9412

Activision Blizzard, Inc.,

a corporation.

[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
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

Microsoft Corp.,

a corporation,

and

Docket No. 9412

Activision Blizzard, Inc.,

a corporation.

**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

Ethan Gurwitz

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Telephone: (202) 326-3570

Email: jweingarten@ftc.gov

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.,

a corporation,

and

Docket No. 9412

Activision Blizzard, Inc.,

a corporation.

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

James H. Weingarten

Maria Cirincione

Ethan Gurwitz

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Telephone: (202) 326-3570

Email: jweingarten@ftc.gov

Counsel Supporting the Complaint

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

In the Matter of

Microsoft Corp.,

a corporation,

and

Docket No. 9412

Activision Blizzard, Inc.,

a corporation.

**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:

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
Andrew D. Kabbes
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
andrew.kabbes@skadden.com

megan.granger@weil.com

Counsel for Microsoft Corporation

bradley.pierson@skadden.com

Counsel for Activision Blizzard, Inc.

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

Counsel Supporting the Complaint

EXHIBIT L

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT M

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT N

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT O

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT P

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT Q

**[This entire exhibit is Confidential pursuant to the
Protective Order]**

EXHIBIT R

**[This entire exhibit is Confidential pursuant to the
Protective Order]**