PUBLIC

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 OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE AN OPPOSITION, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF MICROSOFT'S MOTION TO CERTIFY

Complaint Counsel ("CC") has no standing to challenge Microsoft's non-party subpoenas, and CC's motion seeking leave to oppose Microsoft's motion to certify should be denied. In the alternative, if CC is permitted to file its opposition, Microsoft seeks leave pursuant to 16 C.F.R. § 3.22(d) to file a Reply in support of its motion to certify to address the arguments CC raises in its opposition that go well beyond the scope of Microsoft's motion to certify.

I. Complaint Counsel Has No Standing To Oppose Microsoft's Non-Party Subpoenas, And The Opposition Is Untimely As To The SIE Subpoenas.

As CC has pointed out in other matters, "[a] party to litigation generally lacks standing to object to a third-party subpoena." CC's Opp'n to Resp. LabdMD, Inc.'s Mot. for Protective Order, *In the Matter of LabMD, Inc.*, No. 9357, 2013 WL 6213353, at *2 (F.T.C. Nov. 15, 2013) (collecting cases). Standing may be established only when the party seeking to prevent discovery "has a right or privilege personal to it—such as an interest in preserving proprietary confidential information or an interest in maintaining a privilege." *Id.* (also collecting cases). Here, CC's only colorable claim of harm is that if the subpoenas are deemed proper, then CC will be entitled to less

examination time during the SIE and Ubisoft depositions. This is not the type of personal "right or privilege" that the caselaw contemplates as conferring standing. *See, e.g.*, *Lattin ex rel. Marquez v. Bd. of Educ. of Aztec Mun. Sch. Dist.*, No. 1:20-CV-01037 DHU-LF, 2022 WL 1026946, at *2 (D.N.M. Apr. 6, 2022) (no standing to object to a non-party subpoena based on purportedly prejudicially late deposition date). Indeed, in an analogous situation involving the propriety of subpoenas *ad testificandum* issued to non-parties, the ALJ rejected CC's objections to non-party subpoenas where "the non-parties do not object to the depositions," and thus there was no reason to deviate from the general rule that CC, as a party, does not have standing to challenge non-party subpoenas. *See In re Basic Research, LLC*, No. 9318, 2004 FTC LEXIS 237, *12 (F.T.C. Dec. 9, 2004).

Even if CC could establish standing to challenge the subpoenas, which it cannot, a motion to quash would have been untimely as to the SIE subpoenas. Microsoft issued the SIE subpoenas on December 12, 2023. The deadline to move to quash those subpoenas was, therefore, December 22, 2023. *See* 16 C.F.R. § 3.34(c). CC's attempt to resuscitate its out-of-time objections under the guise of an opposition to Microsoft's motion to certify should be rejected.

II. If Complaint Counsel Is Permitted To Oppose Microsoft's Motion, Microsoft Should Be Permitted To File A Reply.

In the alternative, if CC is granted leave to oppose Microsoft's Motion to Certify, Microsoft respectfully moves pursuant to 16 C.F.R. § 3.22(d) for leave to file a Reply In Support Of Its Motion To Certify To The Commission A Request For Court Enforcement Of Subpoena Duces Tecum Issued To Nonparty Sony Interactive Entertainment LLC ("Motion"). The proposed Reply is attached to this opposition and motion. The basis for this request is that CC in its conditional opposition brief makes arguments about three new issues that could not have been addressed in Microsoft's initial brief in support of its Motion:

1. CC asserts in its response that the subpoenas *ad testificandum* that Microsoft issued to individuals at Ubisoft are invalid, but Microsoft's Motion sought only to certify a request to enforce the subpoena *duces tecum* that Microsoft served on SIE, and does not address the Ubisoft subpoenas;
2. CC raises the specific issue of deposition time allocation, which was not at issue in Microsoft's Motion, given that SIE does not object to Microsoft using half the total deposition time; and
3. CC makes certain representations about the meet and confer process between Microsoft and CC that occurred *after* Microsoft's Motion was filed.

Dated: January 4, 2024

Respectfully submitted,

By: */s/ Sarah Neuman*

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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 DENYING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE AN OPPOSITION TO RESPONDENT MICROSOFT CORP.'S MOTION TO CERTIFY

Upon consideration of Complaint Counsel's Motion For Leave To File An Opposition To Respondent's Motion For Certification To The Commission Of Request For Court Enforcement Of Nonparty Subpoena Respondent and Respondent Microsoft Corp.'s Opposition To Complaint Counsel's Motion To File An Opposition, Or In The Alternative, Motion To File A Reply In Support Of Microsoft's Motion To Certify, it is HEREBY

ORDERED that Complaint Counsel's Motion For Leave To File An Opposition To Respondent's Motion For Certification To The Commission Of Request For Court Enforcement Of Nonparty Subpoena Respondent is DENIED; and

FURTHER ORDERED that Complaint Counsel is denied leave to file an opposition to 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.

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date:

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 REPLY IN SUPPORT OF MOTION TO CERTIFY TO THE COMMISSION A REQUEST FOR COURT ENFORCEMENT OF SUBPOENA *DUCES TECUM* ISSUED TO NONPARTY SONY INTERACTIVE ENTERTAINMENT LLC

Complaint Counsel ("CC") does not attempt to argue that the narrowly tailored discovery Microsoft seeks from SIE is not relevant or proportional to the litigation. Instead, CC's opposition advances procedural arguments in a transparent effort to prevent Microsoft from taking discovery that would promote a more balanced record on the topics of the Sony and Ubisoft agreements. CC's preferred rule—that a party who opposes reopening discovery and loses is prohibited from taking discovery—is fundamentally unfair and prejudicial and should not be credited. And in any event, here, Microsoft opposed only the *breadth* of discovery sought, not discovery itself. *See* Resp. Microsoft's Opp'n CC's Mot. To Extend Fact Disc. To Allow Disc. Regarding Resps.' Agreement With Ubisoft Entertainment SA & Sony Interactive Entertainment LLC at 4 (Oct. 20, 2023).

ARGUMENT

I. Complaint Counsel's Assertions About Meet And Confer Requirements Are Incorrect.

Microsoft did not seek to avoid any meet and confer obligations. The purpose of the meet and confer requirements is to determine whether an issue can be resolved short of court intervention. Here, Microsoft's motion to certify raised a dispute *between Microsoft and SIE*. Microsoft's counsel conferred with SIE's counsel numerous times, by phone and by email, before determining that Microsoft and Sony were at an impasse and filing a motion to certify. *See, e.g.*, Ex. H, Email from Larry Malm, Cleary Gottlieb Steen & Hamilton LLP, to Sarah Neuman, Wilkinson Stekloff LLP (Dec. 19, 2023), Resp. Microsoft's Mot. to Certify (Dec. 21, 2023). While CC raised a question about Microsoft's authority to issue the subpoenas on December 19, by that point, the return date on the subpoena *duces tecum* had passed and Microsoft's dispute with SIE had become clear. No amount of meeting and conferring with CC would have obviated Microsoft's need to file its motion to certify. And in addressing the validity of the subpoenas to SIE in its motion to certify, Microsoft was responding to a point that SIE had raised in the meet and confer process, not end-running CC.

The authority CC cites does not require Microsoft to have met and conferred with CC prior to filing a motion to certify. *See* 16 C.F.R. § 3.22(g) (rule governing discovery motions directed at a *party, not motions to certify*—which, by definition, involve third parties); *In re Lab Corp. of Am.*, No. 9345, 2011 FTC LEXIS 26, at *5–6 (F.T.C. Feb. 8, 2011) (addressing the requirement to meet and confer before a motion to compel *party* discovery, *not a motion to certify*). While Additional Provision 4 of the Scheduling Order does require the parties to meet and confer before certain types of motions practice, that Provision does not explicitly apply to disputes between a party and a non-party, nor would such a rule make practical sense.

II. The Discovery Is Necessary To Ensure A Balanced Record, And Any Concerns Could Be Addressed By Reopening Discovery To Permit Microsoft's Subpoenas.

As set out in Microsoft's motion to certify, in SIE's small production of 52 documents in response to the FTC's subpoena *duces tecum*, fewer than half of the documents related to the Sony Agreement. Microsoft's subpoena and narrowly tailored document collection and review proposal was designed to develop a more complete record, particularly with respect to SIE's internal assessment of the Sony Agreement. *See* Resp. Microsoft Corp.'s Mot. to Certify at 7 (Dec. 21, 2023). Fundamental fairness dictates that such discovery be permitted. *Cf. In re Thompson Med. Co., Inc.*, 101 F.T.C. 385 (1983) ("[D]iscovery should be granted when the court is persuaded that 'the party seeking discovery is not abusing the procedure and the information sought would prove helpful in providing for a full and fair adjudication.'" (citation omitted)).

If the Court determines it is necessary, Microsoft would be willing to file a motion pursuant to Rule 3.21(c)(2) seeking to extend the fact discovery schedule to take targeted, reciprocal third-party discovery, consistent with the Court's October 26 Order Reopening Discovery.[1] In that case, Microsoft would request that the Court deny Microsoft's motion to certify without prejudice so that it may be refiled contemporaneous with a motion to extend the fact discovery schedule.

[1] The same factors CC cited in their Motion to Extend Fact Discovery constitute good cause for permitting Microsoft to take discovery on the Sony and Ubisoft Agreements. *See* CC's Mot. to Extend Fact Discovery at 2 (Oct. 10, 2023) (arguing with respect to the Agreements that "this Court [needs] *a complete picture* of the facts when it decides this matter" and that 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" (emphasis added)); *see also* CC's Mem. In Supp. Of Mot. to Extend Fact Discovery at 6 (citing caselaw that additional discovery is authorized when "the search for the truth [is] served").

CONCLUSION

For the foregoing reasons and the additional reasons set out in Microsoft's motion to certify, Microsoft's motion to certify should be granted.

Dated: January 4, 2024

Respectfully submitted,

By: */s/ Sarah Neuman*

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CERTIFICATE OF SERVICE

I hereby certify that, on January 4, 2024, 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:

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

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