

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

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In the Matter of )  
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Microsoft Corp., )  
a corporation, and )  
 )  
Activision Blizzard, Inc., )  
a corporation, )  
 )  
Respondents. )  
\_\_\_\_\_

Docket No. 9412

**ORDER GRANTING RESPONDENT MICROSOFT CORPORATION’S  
MOTION TO REOPEN DISCOVERY FOR LIMITED PURPOSE**

**I.**

On January 16, 2024, Respondent Microsoft Corporation (“Microsoft”) filed a motion seeking to reopen discovery in this matter, which, pursuant to the Scheduling Order issued in this case, closed on April 7, 2023 (“Motion”). Specifically, Microsoft requests an order to reopen discovery for the limited purpose of serving subpoenas *ad testificandum* on non-parties Ubisoft Entertainment SA (“Ubisoft”) and Sony Interactive Entertainment LLC (“Sony”). Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed an opposition on January 24, 2024 (“Opposition”). For the reasons set forth below, Microsoft’s Motion is GRANTED.

**II.**

On December 8, 2022, the FTC filed an administrative complaint seeking to enjoin Microsoft from acquiring Respondent Activision Blizzard, Inc. (“Activision”). On June 12, 2023, the FTC filed a complaint in the United States District Court for the Northern District of California seeking to preliminarily enjoin the acquisition pending completion of the administrative proceeding. After an evidentiary hearing, on July 10, 2023, the district court denied the request for a preliminary injunction. *FTC v. Microsoft Corp.*, 2023 U.S. Dist. LEXIS 119001 (N.D. Cal. July 10, 2023). On July 12, 2023, the Commission appealed the district court’s decision. The United States Court of Appeals for the Ninth Circuit denied the Commission’s motion for an injunction to prevent the consummation of the acquisition pending appeal. *FTC v. Microsoft Corp.*, 2023 U.S. App. LEXIS 17985 (9th Cir. July 14, 2023).

On July 20, 2023, the Commission withdrew this matter from adjudication pursuant to 16 C.F.R. § 3.26(c). *In re Microsoft Corp. & Activision Blizzard, Inc.*, 2023 WL 4733806 (F.T.C. 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. *In re Microsoft Corp. & Activision Blizzard, Inc.*, 2023 WL 6389836 (F.T.C. Sept. 26, 2023). On October 13, 2023, Microsoft and Activision closed the acquisition.

On October 10, 2023, Complaint Counsel moved to reopen discovery for the purpose of allowing Complaint Counsel to request documents and take deposition testimony relating to an agreement Microsoft and Activision entered into with Ubisoft (the “Ubisoft Agreement”), and an agreement Microsoft entered into with Sony (the “Sony Agreement”) (collectively, the “Agreements”). The Ubisoft Agreement consists of three separate contracts executed in August 2023 by and among Microsoft, Activision, and Ubisoft that together purport to transfer to Ubisoft the rights to stream Activision content over the cloud. The Sony Agreement was executed on July 15, 2023 by and between Microsoft and Sony, and purports to offer the video game series “Call of Duty” on PlayStation and PlayStation Plus (Sony’s video game subscription service) (the “Sony Agreement”). On October 26, 2023, an order was issued granting Complaint Counsel leave to take limited discovery relating to the Sony and Ubisoft Agreements (“October 26 Order”). The October 26 Order held that there was good cause to reopen discovery for the limited purpose requested by Complaint Counsel because: (1) Microsoft acknowledged it intends to introduce the Agreements into evidence at trial and therefore the Agreements are relevant; (2) Complaint Counsel could not have undertaken discovery into the Agreements prior to the discovery deadline because the Agreements were not executed until months after the discovery deadline; and (3) reopening discovery would not risk delaying the evidentiary hearing.<sup>1</sup>

On December 21, 2023, pursuant to FTC Rule 3.38(c), 16 C.F.R. § 3.38(c), Microsoft filed a motion to certify a request that the Commission seek a court order to enforce a subpoena *duces tecum* Microsoft had issued to Sony on December 12, 2023. On January 8, 2024, that motion was denied, on the basis that Microsoft had not, prior to issuing its subpoena to Sony, requested that discovery be reopened to allow Microsoft to take such discovery.<sup>2</sup>

In its present Motion, Microsoft asserts there is good cause for reopening discovery because: (1) both the Ubisoft Agreement and the Sony Agreement are relevant; (2) as a matter of fairness, Microsoft should be entitled to conduct discovery to address any concerns about the Agreements raised by Complaint Counsel; (3) Microsoft could not previously seek this discovery because the Agreements were not executed until after the April 7, 2023 discovery deadline; and (4) reopening discovery for the limited purpose of serving subpoenas *ad testificandum* will not delay the evidentiary hearing in this matter.

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

<sup>2</sup> Microsoft acknowledges in the present Motion that it misread the October 26 Order as only limiting the amount of discovery allowed and did not understand the Order as allowing discovery only for Complaint Counsel.

In its Opposition, Complaint Counsel contends that Microsoft has failed to demonstrate good cause for reopening discovery. Complaint Counsel argues that: (1) Microsoft’s request is untimely; (2) Microsoft has not shown that it requires more time for deposition questioning than it is allowed to have during Complaint Counsel’s depositions of Sony and Ubisoft, pursuant to Additional Provision 12 of the Scheduling Order<sup>3</sup>; (3) Microsoft previously opposed reopening discovery for the purpose of inquiring into the Sony and Ubisoft Agreements on the ground that the Agreements speak for themselves; and (4) Microsoft has withheld discovery related to the Ubisoft Agreement from Complaint Counsel, based on an assertion of a common interest legal privilege with Ubisoft.

### 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 FTC Rule 3.21(c)(2) when the deadline “cannot be met despite the diligence of the party seeking the extension.”).

### IV.

Good cause exists to grant Microsoft’s Motion. First, as determined by the October 26 Order, the Ubisoft and Sony Agreements are relevant because Microsoft intends to offer the Agreements into evidence at the evidentiary hearing to support its defense. October 26 Order at 3. *See* FTC Rule 3.31(c)(1) (allowing discovery where relevant, *inter alia*, “to the defenses of any respondent”). Moreover, given that Complaint Counsel was granted leave to reopen discovery into these Agreements, fairness dictates that Microsoft be granted the same opportunity. An equal chance to address issues explored by Complaint Counsel and balance in the discovery process should be allowed. *See Stuart Title Guar. Co. v. Credit Suisse*, No. 1:11-cv-00227-BLW, 2015 U.S. Dist. LEXIS 44237, at \*4-6 (D. Idaho Mar. 31, 2015) (explaining that when one party is granted leave to reopen discovery into an issue, it would be “unjust” not to allow discovery by the opposing party “within the same boundaries [previously] granted”).

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<sup>3</sup> Additional Provision 12 of the Scheduling Order allocates the time for deposition questioning between the parties, providing that where “only one side subpoenas a non-party fact deposition, then the maximum time shall be allocated 5.5 hours to the side that subpoenaed the deposition, and 1.5 hours for the side that did not.” Where both parties subpoena a deposition, then “the seven hours of record time will be divided equally between the sides.”

Lastly, reopening discovery for the limited purpose of serving subpoenas *ad testificandum* on Ubisoft and Sony will not delay the evidentiary hearing.

Complaint Counsel's argument that Microsoft's Motion should be denied as untimely is unpersuasive. The deadline for discovery imposed under the October 26 Order applied specifically to Complaint Counsel and does not provide a basis for concluding that Microsoft's request for discovery is untimely. Similarly, whether or not Microsoft previously opposed the reopening of discovery into the Sony and Ubisoft Agreements is also immaterial. Complaint Counsel was granted leave to take discovery into the Agreements and Microsoft is entitled to reciprocal discovery to explore issues raised by Complaint Counsel and to clarify the testimony to be presented at the hearing. Moreover, Complaint Counsel's argument that Additional Provision 12 of the Scheduling Order, which provides a party 1.5 hours of questioning at a deposition subpoenaed by the opposing party, allows sufficient time for Microsoft to take testimony from both Ubisoft and Sony is irrelevant; at issue is whether there is good cause to reopen discovery to allow Microsoft to issue its own deposition subpoenas to Ubisoft and Sony.

Complaint Counsel's reliance on Microsoft's previous assertion of a common interest legal privilege with Ubisoft to withhold discovery from Complaint Counsel is also misplaced. Whether or not Microsoft properly raised a privilege to withhold previous discovery sought by Complaint Counsel from Microsoft is immaterial to the issue of whether there is good cause to reopen discovery into the Ubisoft Agreement and is beyond the scope of the present Motion. Finally, Complaint Counsel's request that, if Microsoft's Motion is granted, Microsoft should be limited to issuing the same subpoena to Sony as it improperly issued on December 12, 2023, is rejected. Complaint Counsel has not demonstrated that such a limitation is warranted, and it is premature at this stage to opine on the potential scope of discovery that Microsoft may seek from Ubisoft and Sony.

V.

Accordingly, the Motion is GRANTED, and it is hereby ORDERED that Microsoft is granted leave to serve subpoenas *ad testificandum* for the purpose of taking discovery related to the Ubisoft Agreement and the Sony Agreement. 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: January 31, 2024