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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)	
)	Docket No. 9412
Activision Blizzard, Inc.,)	
a corporation,)	
)	
Respondents.)	

ORDER ON COMPLAINT COUNSEL’S MOTION TO COMPEL

I.

On December 20, 2023, Federal Trade Commission (“FTC”) Complaint Counsel, pursuant to FTC Rule of Practice 3.38(a), 16 C.F.R. § 3.38(a), filed a motion to compel discovery from Respondents Microsoft Corp. (“Microsoft”) and Activision Blizzard, Inc. (“Activision”) (“Respondents”). As more fully discussed below, Complaint Counsel’s motion to compel (“Motion”) contends that, in refusing to provide certain documents and testimony sought by Complaint Counsel, Respondents have failed to comply with the order issued on October 26, 2023 (“October 26 Order”), which reopened fact discovery in this matter for certain limited purposes. Respondents filed an opposition to the Motion on January 2, 2024 (“Opposition”), contending that the requested discovery is outside the scope of the discovery permitted under the October 26 Order. For the reasons set forth below, Complaint Counsel’s Motion is GRANTED IN PART and DENIED IN PART.

II.

Procedural background

On December 8, 2022, the FTC filed an administrative complaint seeking to enjoin Microsoft from acquiring Activision (the “Transaction”). Pursuant to the Scheduling Order issued on January 4, 2023, fact discovery closed on April 7, 2023.

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 Transaction 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.

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Dist. LEXIS 119001 (N.D. Cal. July 10, 2023). On July 12, 2023, the Commission appealed the district court's decision. The United States Court of Appeals for the Ninth Circuit denied the Commission's motion for an injunction to prevent the consummation of the merger pending appeal. *FTC v. Microsoft Corp.*, 2023 U.S. App. LEXIS 17985 (9th Cir. July 14, 2023).

On July 20, 2023, the Commission withdrew this matter from adjudication pursuant to 16 C.F.R. § 3.26(c). *See 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. *See Order Returning Matter to Adjudication, 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 Transaction.

Oral argument in the Ninth Circuit appeal was held on December 6, 2023. The appeal remains pending.

October 26 Order

On October 10, 2023, Complaint Counsel moved to reopen fact discovery for the purposes of obtaining discovery into certain agreements executed by Respondents after the close of discovery ("Motion to Reopen"). Specifically, Complaint Counsel requested an order allowing it "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 ['SIE']." Complaint Counsel's Motion to Reopen, October 10, 2023, Proposed Order at 1-2.¹ Complaint Counsel argued that the agreements were relevant and that because they were executed after the close of fact discovery, Complaint Counsel had not had adequate opportunity to obtain discovery regarding the agreements.

On October 20, 2023, Respondent Microsoft filed an opposition to the Motion to Reopen, in which Microsoft acknowledged its intention to introduce both the Ubisoft and Sony Agreements to rebut the Commission's claim that Microsoft will withhold Activision content from competitors. Microsoft did not challenge the relevance of the agreements but opposed the amount of discovery proposed by Complaint Counsel. Specifically, Microsoft contended that Complaint Counsel's discovery plan was duplicative and unduly burdensome, particularly with respect to the unlimited number of depositions, interrogatories, requests for production, and non-party discovery sought by Complaint Counsel.

By Order issued on October 26, 2023, Complaint Counsel's Motion to Reopen was granted in part. The October 26 Order determined that (1) the agreements are relevant within the

¹ Based on the record presented by the parties, Respondents' agreement with Ubisoft, executed on August 21, 2023 (the "Ubisoft Agreement"), purports to transfer to Ubisoft the rights to stream Activision content over the cloud. Microsoft's agreement with SIE, executed on July 15, 2023 (the "Sony Agreement"), purports to offer the video game series "Call of Duty" on PlayStation and PlayStation Plus (SIE's video game subscription service).

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meaning of the discovery rules because Microsoft “intends to offer the agreements into evidence at the evidentiary hearing to support its defense” (citing Rule 3.31(c)(1) (allowing discovery where relevant, *inter alia*, “to the defenses of any respondent”)); (2) Complaint Counsel was not, in the exercise of due diligence, able “to undertake discovery into the agreements prior to the discovery deadline because the agreements were not executed until months after the deadline” (citing *In re Traffic Jam Events*, 2021 WL 3465709, at *1 (F.T.C. July 23, 2021));² and (3) reopening discovery for the limited period requested would not risk delaying the evidentiary hearing, which is not scheduled to begin until twenty-one days after the disposition of the appeal before the Ninth Circuit. Notwithstanding a finding of good cause to allow discovery regarding the Sony and Ubisoft Agreements, the October 26 Order determined that the extent of the discovery methods proposed by Complaint Counsel was unduly extensive. *See* 16 C.F.R. § 3.31(c)(2) (“The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the Administrative Law Judge” where the discovery sought is unreasonably cumulative or duplicative, or unduly burdensome.). Accordingly, the October 26 Order granted Complaint Counsel leave to serve discovery requests “for the purpose of taking discovery relevant to the Ubisoft Agreement and the Sony Agreement,” with specified limitations, including as to the number of discovery requests and depositions.³

III.

On October 27, 2023, Complaint Counsel issued requests for production of documents to Microsoft and to Activision. On November 27, 2023, Complaint Counsel served notices for designee depositions designating certain topics for testimony. Respondents objected to certain of these discovery requests, and after several attempts to resolve all the disputes, the parties reached an impasse. This Motion followed. Rule 3.38(a), which governs motions to compel discovery, provides in pertinent part as follows:

A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to . . . a deposition under § 3.33, an interrogatory under § 3.35, or a production of documents or things or access for inspection or other purposes under § 3.37. . . . Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that an initial disclosure or an answer to any requests for admissions, documents, depositions, or interrogatories be served or disclosure otherwise be made.

16 C.F.R. § 3.38(a).

² While Complaint Counsel took discovery of Microsoft’s December 2022 offer to SIE, Complaint Counsel had no opportunity to take discovery regarding the circumstances surrounding SIE’s decision in July 2023 to enter into an agreement with Microsoft.

³ Specifically, the October 26 Order limited Complaint Counsel to serve: no more than six requests for production on each Respondent; no more than six interrogatories on Microsoft and three interrogatories on Activision; and no more than one notice for a Rule 3.33(c)(1) corporate deposition on each Respondent. The October 26 Order imposed a deadline for completion of the allowed discovery of eight weeks from the date of the Order.

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Pursuant to the October 26 Order, Complaint Counsel was authorized to seek discovery relevant to the Ubisoft Agreement and the Sony Agreement. Thus, the issue is whether Complaint Counsel's requested discovery is within the limited scope of the October 26 Order. The discovery requested and Respondents' objections are evaluated below.⁴

Designation of corporate designee for Activision on deposition notice topics 1, 3, 4 and 7

Complaint Counsel's notices of deposition to Microsoft and Activision request testimony on several common topics. Respondents object to producing a corporate designee from Activision to testify on four of these overlapping topics, contending that such testimony would be unreasonably duplicative to that of Microsoft: topic 1 (terms of the Ubisoft Agreement and how the agreement will operate in conjunction with other cloud streaming agreements and the Sony Agreement); topic 3 (how the payment provisions of the Ubisoft Agreement were determined and their anticipated effects); topic 4 (models, analyses, plans or assessments of impact or potential impact of the Ubisoft Agreement); and topic 7 (plans or potential plans by Respondents or Ubisoft to license Activision content for cloud streaming). Respondents further assert that Activision has no knowledge on the topics at issue, relying on a declaration from Activision's Senior Vice President of Global Platform Strategy and Partner Relations, attached as Opposition Exhibit 2 ("Schnakenberg Decl.").

Activision deposition topics 1, 3, 4 and 7 appear nearly identical to Microsoft deposition topics 1, 3, 4 and 8. *Compare* Motion Ex. E with Motion Ex. D. Rule 3.31(c)(2) specifically directs the Administrative Law Judge to limit "[t]he frequency or extent of use of the discovery methods otherwise permitted under these rules" where it is determined, *inter alia*, that "[t]he discovery sought . . . is unreasonably cumulative or duplicative . . ." 16 C.F.R. § 3.31(c)(2). However, the fact that the topics are substantively identical does not mean that the testimony of the two Respondents on those topics will necessarily be cumulative or duplicative. Respondents' objection on these grounds is therefore without merit and is rejected.

Respondents' assertion that Activision lacks relevant knowledge on topics 1, 3, and 7 lacks sufficient support. The declaration upon which Respondents rely indicates that

⁴ As a preliminary matter, Complaint Counsel argues that Respondents waived any objections to the corporate designee depositions by failing to file a motion to quash subpoena under Rule 3.34(c) within 10 days of service of the notices of deposition. This argument is without merit. Complaint Counsel sought to obtain the Microsoft and Activision depositions pursuant to Rule 3.33 notices of deposition (*see* Motion Exhibits D and E), which is the appropriate procedure to secure depositions from a *party*. Rule 3.34, in contrast, is the appropriate procedure to secure depositions or documents *by subpoena* and is the appropriate procedure to secure discovery from *non-parties*. Complaint Counsel does not allege, nor does the record show, any Rule 3.34 subpoenas issued to Respondents. Complaint Counsel relies on *In re North Texas Specialty Physicians*, 2003 WL 22936410 (F.T.C. Dec. 4, 2003), in which the respondent moved to quash deposition subpoenas served by complaint counsel on individual non-party physicians affiliated with the corporate respondent. *See* Respondents' Motion for Protective Order, or in the Alternative, to Quash Depositions (Nov. 11, 2003), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/11/031112ntspmforder.pdf>. The order in that case does not stand for the proposition that a *party* receiving a notice of deposition must file a motion to quash subpoena under Rule 3.34(c).

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Activision's knowledge may be limited in some respects but fails to establish that Activision has no relevant knowledge on all the matters encompassed by the topics at issue. As to topic 1, the declarant acknowledges general knowledge of the terms of the Ubisoft Agreement, if not some of the specifics, requested under topic 1. Schnakenberg Decl. ¶ 5. As to topic 3, the declaration's assertion that Activision has "no insight" into how Microsoft determined the payment provisions of the Ubisoft Agreement or their anticipated effects is vague. Schnakenberg Decl. ¶ 6. With respect to topic 7, regarding plans or potential plans to offer or license Activision content for cloud gaming, the declaration does not disclaim knowledge, but contends only that Microsoft and Ubisoft are "likely better-placed to answer those questions." Schnakenberg Decl. ¶ 9. Regarding topic 4, in contrast, the declaration clearly states that Activision did not model or otherwise assess the impact or potential impact of the Ubisoft Agreements. Schnakenberg Decl. ¶ 7. This is sufficient to disclaim knowledge of matters encompassed by topic 4, and Respondents' objection to topic 4 is sustained.

Discovery regarding negotiations to extend termination date for the Transaction
(Request for Production of Documents No. 5 to Microsoft and No. 4 to Activision; Microsoft corporate designee deposition topic 9 and Activision corporate designee deposition topic 8).

Complaint Counsel has requested discovery into the negotiations that resulted in Respondents' agreement to extend the termination date for the Transaction from July 18, 2023 to October 18, 2023. Respondents object, arguing that the extension of the termination date for the Transaction pursuant to Respondents' merger agreement is outside the scope of the October 26 Order which allowed discovery relevant to the Ubisoft and Sony Agreements, not the merger agreement.

Complaint Counsel argues that the purpose of extending the termination date for the Transaction was so that Respondents could "negotiate additional purported remedies" to address the alleged anticompetitive harm from Microsoft's acquisition of Activision and notes that Microsoft publicly announced that the purpose of the extension was to provide "ample time" to work through regulatory issues. Motion at 9; Motion Ex. J. Complaint Counsel contends that the Ubisoft Agreement would not exist absent the negotiations to extend the deadline, and therefore, discovery regarding the extension of the termination date is relevant to the Ubisoft Agreement. This strained attempt to shoehorn discovery into the merger agreement into the discovery into the Ubisoft Agreement allowed under the October 26 Order is unpersuasive and is rejected.⁵ Respondents' objections to Request for Production of Documents No. 5 to Microsoft and No. 4 to Activision, and to Microsoft corporate designee deposition topic 9 and Activision corporate designee deposition topic 8 are sustained.

⁵ Complaint Counsel contends that the October 26 Order encompassed discovery into the negotiations to extend the termination date for the Transaction because Complaint Counsel raised those negotiations in its argument as to the relevance of the Ubisoft Agreement, and that granting Complaint Counsel's motion to reopen discovery "resolved" the question of the relevance of the extension negotiations in Complaint Counsel's favor. This logic is fallacious. Regardless of the arguments Complaint Counsel may have made in support of its motion to reopen discovery, the motion was granted "in part" and clearly explained the bases for concluding that the Ubisoft and Sony Agreements were relevant. October 26 Order at 3-4. The extension of the termination date for the Transaction was not among them.

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Deposition testimony regarding alternative potential purchasers to Ubisoft or alternative Ubisoft Agreement terms (Microsoft and Activision corporate designee deposition topics 2(d) and 5)

Complaint Counsel has requested deposition testimony related to terms that were proposed but not included in the final Ubisoft Agreement (topic 2(d)), and negotiations with or consideration of any potential purchasers, other than Ubisoft, of the rights to stream Activision's games via cloud gaming (topic 5). Respondents object to providing testimony on both these topics, asserting that the October 26 Order granted only "limited" discovery into the Ubisoft Agreement and did not encompass discovery into proposed terms for the Ubisoft Agreement or consideration of alternative purchasers. These objections are rejected. While the October 26 Order limited the frequency and use of the discovery methods to be used for the Ubisoft Agreement, the October 26 Order did not limit the scope of discovery otherwise authorized by the Rules of Practice. Pursuant to Rule 3.31(c)(1), "[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." 16 C.F.R. § 3.31(c)(1). Respondents have failed to articulate a valid basis for concluding that discovery into draft terms considered for the Ubisoft Agreement, or Respondents' consideration of alternatives to an agreement with Ubisoft, are not relevant within the meaning of Rule 3.31(c)(1).

IV.

For the reasons set forth above, Complaint Counsel's Motion to Compel is GRANTED IN PART and DENIED IN PART. Except as to Respondents' objections that are sustained in this Order, Respondents shall provide the requested discovery.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: January 5, 2024