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'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO EXTEND FACT DISCOVERY TO ALLOW DISCOVERY REGARDING RESPONDENTS' AGREEMENTS WITH UBISOFT ENTERTAINMENT SA AND SONY INTERACTIVE ENTERTAINMENT LLC

Complaint Counsel's motion obscures the true issue presented: Should the Court permit Complaint Counsel to reengage in broad and burdensome discovery into a now-closed merger in the misguided hope of resuscitating theories of harm that have been rejected by a federal court and worldwide regulators? Microsoft respectfully submits that the answer to that question is no.

As the Court is aware, a federal court has already ruled against the Federal Trade Commission (the "Commission") in this matter. After a five-day evidentiary hearing involving testimony from 16 witnesses and the introduction of hundreds of exhibits, Judge Corley concluded that the Commission "has not raised serious questions regarding whether the proposed merger is likely to substantially lessen competition in the console, library subscription services, or cloud gaming markets," and thus, was unlikely to prevail in this administrative proceeding. *See* Ex. A, Prelim. Inj. Op., *FTC v. Microsoft Corp.*, No. 23-cv-02880-JSC, at 51 (N.D. Cal. July 10, 2023) ("PI Opinion").

Since that ruling was issued, Complaint Counsel's case has become only weaker. Long ago (and well prior to the close of discovery), Microsoft offered Sony Interactive Entertainment LLC ("Sony")—the principal complainant about the merger—an agreement to keep *Call of Duty* on its popular PlayStation console for ten years. [redacted] shortly after Judge Corley rejected the Commission's challenge, Sony immediately signed [redacted] guaranteeing Sony access to *Call of Duty* (the "Sony Agreement"). *See* Ex. B, Decl. of Megan Granger in Supp. of Opp'n ¶¶ 4–6 ("Granger Decl.").

Just prior to the closing of the merger, Activision Blizzard, Inc. ("Activision") also divested its cloud streaming rights to Ubisoft Entertainment SA ("Ubisoft"), including in the U.S. (the geographic market the Commission alleges) for all current games and any future games developed over the next 15 years (the "Ubisoft Agreement"). *See* Granger Decl. ¶ 13. Without ever seeing the Ubisoft Agreement, Judge Corley rejected the Commission's cloud theory, finding that the "merger will enhance, not lessen, competition in the cloud streaming market" because Microsoft had already entered into agreements with other cloud streaming competitors to make Activision content available on their services. *See* PI Opinion at 49. Independent of these agreements, Judge Corley separately rejected the Commission's assertion that an independent Activision would put its content on cloud streaming services, explaining: "[T]he fact is, Activision content is not currently on any cloud-streaming service. And it is not likely to be available absent the merger." *Id.* at 50. The Ubisoft Agreement, [redacted], *see* Granger Decl. ¶ 16, simply confirms that the Commission's cloud gaming theory of harm is meritless. On top of the Court's other evidentiary findings, Microsoft cannot withhold Activision content from cloud streaming competitors because

[redacted] *See id.* ¶¶ 13, 15, 16.

The Commission has already taken the unprecedented step of reinstituting its challenge to this merger after losing in federal court. Now, the Commission seeks to reopen discovery for a wide-ranging exploration of the agreements Microsoft signed with Sony and Ubisoft. To be clear, if this case proceeds to an administrative hearing, Microsoft intends to introduce both agreements as further evidence that the Commission's claim that Microsoft will withhold Activision content from competitors is unfounded and contradicted by real-world facts. [redacted], and, to ensure the Ubisoft Agreement can be introduced at a hearing, Microsoft does not oppose some additional discovery provided that discovery is appropriately limited and narrowly tailored.

But Complaint Counsel's proposed discovery is neither appropriately limited nor narrowly tailored. Complaint Counsel seeks *eight* more weeks of discovery—including 20 new Requests for Production, 15 new Interrogatories, and additional third-party discovery. *See* Proposed Order to Compl. Counsel's Mot., at 1–2 (Oct. 10, 2023) ("CC's Proposed Order"). Complaint Counsel's motion also completely avoids mentioning that it seeks an *unlimited* number of new depositions. *See id.*; *see also* Ex. C, Decl. of Kieran Gostin in Supp. of Opp'n ¶ 19 ("Gostin Decl.").

The Court should deny this request to take discovery in this manner. [redacted] Granger Decl. ¶¶ 7, 18. These agreements speak for themselves, and Complaint Counsel provides no convincing basis for requiring such broad discovery.

Though Complaint Counsel inexplicably fails to mention so in its brief, Microsoft offered to allow Complaint Counsel to serve 5 new Requests for Production on Microsoft and take a Rule

3.33(c)(1) corporate deposition of Microsoft. Gostin Decl. ¶ 20. Even though it is normally unnecessary to do so, in response to Complaint Counsel's request, Microsoft further indicated that the deponent would be [redacted] with personal knowledge of both the Sony and Ubisoft Agreements and their negotiation. *See id.* ¶ 24; Granger Decl. ¶¶ 8, 12. Complaint Counsel's brief does not address this offer, let alone explain why it is inadequate. The Court should set this offer as the ceiling of what discovery is permitted.

ARGUMENT

Complaint Counsel has not shown the "good cause" required to justify the broad discovery it seeks. *See* 16 C.F.R. § 3.21(c)(2) ("The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order . . . . In determining whether to grant the motion, the Administrative Law Judge 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 a recommended decision in a timely manner.").

I. Broad Discovery Into The Sony And Ubisoft Agreements Is Unwarranted.

There are several reasons that Complaint Counsel should not be permitted to reopen discovery—on the broad terms it seeks—into the Sony and Ubisoft Agreements.

First, Complaint Counsel has already taken broad discovery in this case, encompassing a ten-month investigation, five months of discovery before this Court, and a federal preliminary-injunction proceeding. Discovery taken by Complaint Counsel has included: [redacted]

[redacted] *See* Gostin Decl. ¶¶ 4–14. The 5-day preliminary-injunction hearing included additional testimony from 16 witnesses by way of live testimony or deposition designation and testimony by declaration from another—including Microsoft's CEO, Activision's CEO, Xbox's CEO, the Microsoft CFO, the Xbox CFO, and economic experts, all but one of whom testified live. *See id.* ¶¶ 15–16.

Second, based on that extensive record, a federal court has already rejected the Commission's theories of harm. The Commission had the opportunity to present its strongest case before Judge Corley, and it (even on appeal in the Ninth Circuit) has not identified a single document or witness it did not get to introduce during the hearing. The Sony and Ubisoft Agreements only make the Commission's arguments weaker.

Third, Complaint Counsel does not detail any discovery it needs into the Sony Agreement. This is not surprising. The Sony Agreement [redacted] and was considered by Judge Corley in ruling, [redacted] *See* Granger Decl. ¶¶ 4–5. As Judge Corley explained, prior to the close of discovery, [redacted] PI Opinion at 38. Though "not necessary to the Court's finding," Judge Corley found [redacted] *Id.* The only thing that has changed since then is that Sony has now signed [redacted] *See* Granger Decl. ¶¶ 4–5.

Fourth, Complaint Counsel's purported reasons for needing discovery into the Ubisoft Agreement do not warrant broad and intrusive discovery. The Ubisoft Agreement, which speaks for itself, [redacted] *See id.* ¶ 18. [redacted] *See id.* Though Complaint Counsel only briefly touches on the additional information it purportedly needs about the Ubisoft Agreement, the suggestion seems to be that Complaint Counsel believes that Ubisoft may not be able to profit under the terms of the agreement. *See* Mem. in Supp. of Compl. Counsel's Mot. (Oct. 10, 2023) ("CC's Br.") ("Complaint Counsel is entitled to discovery of . . . whether Ubisoft can profitably offer streamed Activision games."). But Complaint Counsel has not provided any reason that a sophisticated company like Ubisoft, with a market capitalization over $3 billion and experience streaming its own games on the Ubisoft+ and Amazon Luna streaming services, would enter into an agreement from which it could not profit. Complaint Counsel also suggests that it needs discovery into Respondents' negotiation to extend the deadline for completing the transaction, CC's Br. at 7, but Complaint Counsel does not even try to explain the relevance of such an inquiry.

II. Complaint Counsel's Discovery Proposal Is Overbroad.

The broad discovery plan outlined in Complaint Counsel's proposed order belies its claim that it seeks discovery only "for the limited purpose of allowing discovery regarding [the Sony and Ubisoft Agreements]." *See* Compl. Counsel's Mot. at 1.

Most importantly, Complaint Counsel's proposal, which seeks to reopen discovery for 8 weeks, contains *no* limit on depositions. *See* CC's Proposed Order at 1–2. Indeed, during the meet-and-confer process, [redacted]

[redacted] Gostin Decl. ¶ 19. These three executives were each required to testify at Investigational Hearings, all three were deposed by Complaint Counsel during discovery, and each was also called by Complaint Counsel to testify live at the preliminary-injunction hearing. *See id.* ¶¶ 4, 11, 14, 15. There is no basis for Complaint Counsel to seek to reopen discovery so that [redacted] highlights the importance of limiting any additional discovery.

Complaint Counsel also seeks to serve 20 Requests for Production, 15 Interrogatories, and additional third-party discovery. CC's Proposed Order at 1–2. Comparing Complaint Counsel's proposal for additional discovery with the discovery already completed in this case demonstrates the breadth of additional discovery Complaint Counsel seeks. Complaint Counsel's proposal to serve 20 Requests for Production and 15 Interrogatories means Complaint Counsel wants to serve *more than half* the number Requests for Production (39) and Interrogatories (25) they served throughout the entirety of discovery. *See* Gostin Decl. ¶¶ 7, 8. Such broad proposed discovery is inconsistent with Complaint Counsel's claim that it wants to take narrowly tailored discovery into the Sony and Ubisoft Agreements, and should not be permitted. *See* Order on Compl. Counsel's Mot. to Compel Produc. of Docs. at 1 (Mar. 21, 2023) ("Discovery shall be limited if the Administrative Law Judge determines that it is 'unreasonably cumulative or duplicative,' or the 'burden and expense of the proposed discovery . . . outweigh its likely benefit.'" (quoting 16 C.F.R. § 3.31(c)(2)(i), (iii))).

III. Additional Discovery Should Be Narrowly Tailored.

Contrary to Complaint Counsel's claim, discovery should be limited to the reasonable proposal Microsoft made during negotiations with Complaint Counsel, which Complaint Counsel neglects to mention anywhere in its brief.

In the motion, Complaint Counsel asserts that it needs discovery into: (1) the different payment schemes in the Ubisoft Agreement; (2) Microsoft's assertion that the Ubisoft Agreement is procompetitive; (3) Ubisoft's plans to market cloud streaming rights of Activision games; and (4) Microsoft's and Activision's decision to extend the deadline for completing the proposed transaction, which provided time for negotiating and executing the Ubisoft Agreement. CC's Br. at 7–8.

Putting aside that none of this discovery is essential to litigating this case, this information can readily be obtained through Microsoft's proposed discovery plan, which includes 5 Requests for Production and a 3.33(c)(1) corporate deposition. *See* Gostin Decl. ¶ 20. As noted, Microsoft has already indicated that it will make [redacted] available as its corporate designee. *Id.* ¶ 24. [redacted] *See* Granger Decl. ¶¶ 8, 12. Moreover, this is not the first time that Complaint Counsel will have served a 3.33(c)(1) notice on Microsoft in this case, *see* Gostin Decl. ¶ 14, and Complaint Counsel has never raised any concerns about the Microsoft corporate designees' level of preparedness. If a 3.33(c)(1) deposition is noticed on the Sony and Ubisoft Agreements, Microsoft will of course adequately prepare [redacted] to testify about the noticed topics, provided those topics are appropriately tethered to the Agreements. *See* 16 C.F.R. § 3.31(c)(2)(i), (iii).

CONCLUSION

Microsoft respectfully requests that the Court deny Complaint Counsel's motion to extend discovery in the manner requested. To the extent that additional discovery is required for the Sony and Ubisoft Agreements to be introduced at an administrative hearing, Microsoft asks discovery be limited to no more than 5 Requests for Production and a 3.33(c)(1) corporate deposition about the agreements.

Dated: October 20, 2023

Respectfully submitted,

By: */s/ Beth Wilkinson*

Beth Wilkinson
Rakesh N. Kilaru
Kieran Gostin
Grace L. Hill
Anastasia M. Pastan
Sarah E. Neuman
Alysha Bohanon
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
abohanon@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 October 20, 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)
Jennifer Fleury (jfleury@ftc.gov)
Michael A. Franchak (mfranchak@ftc.gov)
James Gossmann (jgossmann@ftc.gov)
Ethan Gurwitz (egurwitz@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

/s/ Beth Wilkinson

Beth Wilkinson
Counsel for Microsoft Corp.

PUBLIC

EXHIBIT A

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

PUBLIC

EXHIBIT B

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

PUBLIC

EXHIBIT C

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