

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,)
)
Respondents.)

Docket No. 9412

**ORDER DENYING MOTION OF RESPONDENT MICROSOFT CORP. TO CERTIFY
REQUEST FOR COURT ENFORCEMENT OF SUBPOENA *DUCES TECUM***

I.

On December 21, 2023, Respondent Microsoft Corp. (“Microsoft”) filed a motion requesting the Administrative Law Judge to certify to the Federal Trade Commission (“Commission”) Microsoft’s request that the Commission seek a court order to enforce a subpoena *duces tecum* issued by Microsoft to nonparty Sony Interactive Entertainment LLC (“SIE”) (“Motion to Certify”). SIE filed an opposition to the Motion to Certify on January 2, 2024 (“Opposition”).¹ For the reasons set forth below, Microsoft’s Motion to Certify is DENIED.

II.

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

In a related preliminary injunction action filed in federal court by the Federal Trade Commission (“FTC”) under Section 13(b) of the FTC Act, the United States District Court for the Northern District of California denied the FTC’s request for a preliminary injunction; the

¹ Complaint Counsel filed a motion for leave to file an opposition to the Motion to Certify, together with its proposed opposition, on January 2, 2024. On January 4, 2024, Microsoft filed an opposition to Complaint Counsel’s motion for leave, requesting in the alternative that, if Complaint Counsel is permitted to file an opposition to the Motion to Certify, Microsoft be granted leave to file a reply in support of the Motion to Certify. Respondent’s Motion to Certify is being denied herein upon consideration of the Motion to Certify and SIE’s Opposition. Therefore, both Complaint Counsel’s and Microsoft’s motions for leave are DENIED as moot.

FTC appealed that decision to the United States Court of Appeals for the Ninth Circuit; and that appeal is still pending. *FTC v. Microsoft Corp.*, 2023 U.S. Dist. LEXIS 119001 (N.D. Cal. July 10, 2023). On October 13, 2023, Microsoft and Activision closed the Transaction.

Although the Commission had withdrawn the matter from adjudication pursuant to 16 C.F.R. § 3.26(c), on September 26, 2023, the Commission returned this matter to adjudication and set the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 10, 2023, Complaint Counsel moved to reopen fact discovery for the purpose 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, *inter alia*, “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 July 15, 2023 agreement between Microsoft Corp. and Sony Interactive Entertainment LLC.”² Complaint Counsel’s Motion to Reopen, Proposed Order at 1-2. Respondent Microsoft filed an opposition to the Motion to Reopen, in which Microsoft opposed discovery on the grounds that the Sony Agreement “speaks for itself.” Microsoft’s Opposition to Motion to Reopen at 3. Microsoft argued that this Court should not permit what it characterized as “burdensome discovery” into a closed acquisition. *Id.* at 1.

By Order issued on October 26, 2023, Complaint Counsel’s Motion to Reopen was granted in part (“October 26 Order”). The October 26 Order determined that the Sony Agreement is relevant within the meaning of the discovery rules because Microsoft “intends to offer [it] into evidence at the evidentiary hearing to support its defense”; (2) Complaint Counsel was not, in the exercise of due diligence, able “to undertake discovery into the agreement[] prior to the discovery deadline because [it was] not executed until months after the [discovery] deadline”; and (3) reopening discovery for the limited period requested would not risk delaying the evidentiary hearing. The October 26 Order granted Complaint Counsel leave to serve discovery requests and subpoenas *duces tecum* and *ad testificandum* “for the purpose of taking discovery relevant to the . . . Sony Agreement[.]”

Pursuant to the October 26 Order, on November 1, 2023, Complaint Counsel served SIE with subpoenas seeking documents and testimony regarding the Sony Agreement. SIE responded to Complaint Counsel’s subpoenas by producing approximately 50 documents on November 21, 2023, and offering a corporate designee for deposition. Thereafter, Microsoft was provided with a copy of the November 21 discovery and arranged to participate in the corporate deposition of SIE. On December 12, 2023, Microsoft served a subpoena on SIE seeking production of documents from six SIE custodians, designated by Microsoft, using search terms designated by Microsoft. SIE declined to comply with Microsoft’s December 12 document subpoena, asserting,

² 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). Complaint Counsel also sought discovery related to Respondents’ agreement with Ubisoft Entertainment SA, executed on August 21, 2023.

among other reasons, that the subpoena was issued after the close of fact discovery and therefore not properly authorized.

III.

FTC Rule 3.38(c) states that “in instances where a nonparty fails to comply with a subpoena or order, the [Administrative Law Judge] 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 Illumina, Inc.*, 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).

As noted above, fact discovery in this matter closed on April 7, 2023. Microsoft did not, prior to issuing its subpoena to SIE, request that discovery be reopened to allow Respondents to take discovery regarding the Sony Agreement. Nor is there anything in the October 26 Order that granted Respondents leave to take such discovery. Rather, on its own volition, Microsoft served its subpoena on SIE on December 12, 2023. Because the subpoena served on SIE by Microsoft was not authorized, SIE’s failure to comply is not properly the subject of court enforcement. Accordingly, Respondent’s Motion to Certify is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: January 8, 2024