

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

_____)	
In the Matter of)	
Microsoft Corp.,)	
a corporation, and)	
Activision Blizzard, Inc.,)	Docket No. 9412
a corporation,)	
Respondents.)	
_____)	

**ORDER ON COMPLAINT COUNSEL’S MOTION
TO COMPEL PRODUCTION OF DOCUMENTS**

I.

On March 8, 2023, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed a Motion to Compel Respondents Microsoft Corp. (“Microsoft”) and Activision Blizzard, Inc. (“Activision”) to Produce Documents (“Motion”). Specifically, Complaint Counsel seeks an order (a) compelling Microsoft to comply with Requests 1, 3, 6, 11, and 16 of its Second Set of Requests for Production of Documents (“RFPs”) directed to Microsoft (“Microsoft RFPs”) and (b) compelling Activision to comply with Requests 1, 2, 5, 7, and 8 of Complaint Counsel’s Second Set of Requests for Production of Documents directed to Activision (“Activision RFPs”). On March 15, 2023, Microsoft and Activision filed their joint opposition to the Motion (“Opposition”). For the reasons set forth below, Complaint Counsel’s Motion is GRANTED IN PART and DENIED IN PART.

II.

Pursuant to Commission Rule 3.31(c)(1): “Parties 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). 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.” 16 C.F.R. § 3.31(c)(2)(i), (iii). “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). Under Rule 3.31(c)(4), which specifically governs motions to compel, “[d]iscovery shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency” 16 C.F.R. § 3.31(c)(4).

In the instant dispute, Respondents do not object to the requests on the basis of relevance. Rather, both Microsoft and Activision resist discovery on the grounds that the requested discovery is duplicative and/or unduly burdensome, as more fully explained below.

III.

A. Common Objections by Microsoft and Activision

Microsoft and Activision both object to searching for or producing documents in response to Complaint Counsel's RFPs on the grounds that the RFPs seek documents that are duplicative of documents requested and produced during the precomplaint investigative phase of this matter (the "Second Request Specifications"). At the outset, the fact that similar document requests may have been issued during an investigation does not prevent Complaint Counsel from exercising the right to take discovery in litigation, nor necessarily relieve a litigant from responding to discovery in litigation. *In re Polypore Int'l*, No. 9327, 2008 FTC LEXIS 155 at *8-13 (F.T.C. Nov. 14, 2008) (denying motion to preclude complaint counsel from taking depositions of witnesses who had been examined during the pre-complaint investigation); *In re All-State Indus., of N.C., Inc., et al.*, No. 8372, 1967 FTC LEXIS 159, at *6-10 (F.T.C. Nov. 13, 1967) (holding that while the Commission's rules of practice "provide for comprehensive precomplaint investigation . . . [t]he rules for adjudicatory proceedings . . . also provide[] for thorough post complaint discovery procedures"). To the extent Respondents are proposing such a broad definition of "duplicative" RFPs, the argument is rejected as unsupported and unpersuasive.

Moreover, to the extent there may be overlap between some of the Second Request Specifications and the RFPs, Complaint Counsel states that it is not asking Respondents to produce any documents that have already been produced, and that it has framed its RFPs and its search terms with reference to the investigative record developed. To relieve Respondents from the responsibility to even search for and identify responsive documents, based on the similarity to investigative requests, would improperly allow Respondents to unilaterally determine the scope of relevant documents.

In addition, based on a review of the Second Request Specifications upon which Respondents rely, Respondents have failed to justify denying discovery on the ground of duplication. For example, Microsoft RFP 3 and Activision RFP 2 both request documents related to "cross-play." It is undisputed that the Second Request Specifications did not include a specification related to cross-play. Respondents argue instead that these requests are duplicative of the Second Request Specifications because the term "cross-play" appears thousands of times in the documents produced in the investigation. The mere fact that documents produced in the investigative phased happened to contain a particular term does not render a request to affirmatively search for that term duplicative.

For all the above reasons, Respondents have failed to justify denying discovery on the ground that the disputed RFPs are duplicative of the Second Request Specifications.

Respondents also contend that Complaint Counsel’s RFPs exceed the number limits set under Additional Provision 7 of the Scheduling Order issued in this case. Respondents assert that, including all discrete subparts, the Microsoft RFPs total 44 and the Activision RFPs total 37. Additional Provision 7 states: “Each party is limited to 50 requests for production to parties, including all discrete subparts” *See* Scheduling Order at 6. Respondents interpret the language of Additional Provision 7 to limit RFPs to an aggregate total of 50 for both Respondents. Based on the plain language of Additional Provision 7, combined with applicable context, this interpretation is rejected.¹ Therefore, even accepting Respondents’ characterization of the subparts as separate requests, Complaint Counsel is within the limitation of 50 per party set forth in the Scheduling Order.

Finally, although the RFPs seek documents generated through and including February 28, 2023, Respondents have unilaterally “cut-off” searching for or producing documents generated after December 8, 2022, the date the Complaint was issued.² Respondents argue that, since the issuance of the Complaint, Respondents’ custodians have been involved in defending this and other cases challenging the acquisition and, thus, most of the responsive documents would likely be privileged. Respondents’ conclusory assertion that documents are likely to be privileged is insufficient to bar discovery. *See In re Microsoft Corp.*, No. 9412, 2023 FTC LEXIS 32, at *12-13 (F.T.C. Feb. 23, 2023) (holding where a non-party sought to quash a document request that it argued called for production of privileged documents, request was denied on grounds that the non-party was required to produce a privilege log).

B. Alleged Undue Burden Objections

1. Microsoft

Microsoft asserts that it has identified and produced more than 2.5 million documents responsive to the Second Request Specifications, as “refreshed”³ through the date of the Complaint. These documents were identified and produced pursuant to a technology assisted review (“TAR”) protocol that was agreed to between Complaint Counsel and Microsoft. Microsoft argues that Complaint Counsel’s request that Microsoft respond to the RFPs by

¹ The language in Additional Provision 7 was intended to place numerical limits on discovery for each party, not to displace the plain language of the FTC Rules that uses the term “party” to refer to each entity, not each “side” of the litigation. *E.g.*, 16 C.F.R. § 3.35(a)(1) (“Any party may serve upon any other party written interrogatories, not exceeding 25 in number, including all discrete subparts, to be answered by the party served”); 16 C.F.R. § 3.37(a) (“Any party may serve on another party a request: to produce . . . any designated documents or electronically stored information . . . in the possession, custody, or control of the party upon whom the request is served . . .”).

² It should be noted that in Respondents’ requests for production, Respondents ask Complaint Counsel to produce documents dating beyond the date of the Complaint, up to the date of the request. Motion, Exhibit U, Resp. Microsoft Corp.’s First Set of Reqs. for Prod. to Complaint Counsel at 7; Motion, Exhibit V, Resp. Activision Blizzard, Inc.’s First Set of Reqs. for Prod. to Complainant Federal Trade Commission at 6.

³ Respondents state that after certifying substantial compliance with the Second Request Specifications, they supplemented or “refreshed” their Second Request productions to include documents through the date of the Complaint.

“re-searching” Microsoft’s files using specified search terms is unduly burdensome. Microsoft argues that the TAR protocol already identified all responsive documents in response to the Second Request Specifications, and applying search terms would identify and require a review of documents that the TAR protocol has already identified as unlikely to be relevant. Microsoft asserts that the cost of applying a search term protocol is too high in light of the asserted low likelihood of the search yielding relevant documents. As noted above, Microsoft’s unilateral determination as to the likelihood of identifying relevant documents is not dispositive. Similarly, Respondents’ conclusory assertion that a search for documents generated after the Complaint is unduly burdensome because a large volume of these documents is likely to be privileged is an insufficient basis to bar discovery. *Microsoft*, 2023 FTC LEXIS 32, at *10-11. In addition, given Microsoft’s apparent resources, its assertions that searching for responsive documents using Complaint Counsel’s request search terms is too costly are unpersuasive. For all these reasons, Microsoft has failed to justify its objection that searching for responsive documents based on search terms as requested by Complaint Counsel is unduly burdensome.

Furthermore, the record shows that Complaint Counsel is willing to revise the TAR protocol for use in this litigation, including to reflect Complaint Counsel’s requested search terms, and offered to do so, but that Microsoft did not agree. Motion at 4 n.8. Agreeing to such a modification would reduce Microsoft’s alleged burden, and this Order incorporates this option as an alternative.

2. Activision

Activision asserts that it has identified and produced nearly one million documents responsive to the Second Request Specifications, as “refreshed” through the date of the Complaint. As to Activision RFPs 5, 7, and 8, Activision states that it agrees to run the search terms as requested by Complaint Counsel. Accordingly, this portion of Complaint Counsel’s Motion is DENIED as moot.

Activision argues that Activision RFPs 1 and 2 are unreasonably burdensome as evidenced by its Second Request production containing hundreds and thousands of documents responsive to these requests. Moreover, Activision asserts that its review of a random sample of the additional documents that Activision would need to review per Complaint Counsel’s proposal shows a low responsiveness rate for RFP 2, and that, therefore, requiring a further search and review is unjustified. However, as explained above, a respondent’s unilateral determination as to the likelihood of identifying relevant documents is not dispositive. Moreover, the estimated cost Activision cites for complying with these requests is not on its face unreasonable.

IV.

In summary, Respondents’ remaining objections to Complaint Counsel’s RFPs are rejected. As explained above, Complaint Counsel’s Motion is DENIED in part as moot and otherwise GRANTED. It is HEREBY ORDERED that:

1. Respondents shall comply with Complaint Counsel's RFPs including as to documents generated through and including February 28, 2023, by April 21, 2023;
2. Microsoft and Complaint Counsel shall use their best efforts to agree to a revised and updated TAR protocol for use in this litigation, including to respond to disputed RFPs consistent with this Order, within 14 days. In the event that, despite their best efforts, Microsoft and Complaint Counsel are unable to agree to a revised TAR protocol within 14 days, then within 1 day thereafter, Microsoft and Complaint Counsel shall jointly notify the Court of the failure to agree, and the search term methodology attached as Exhibit A to Complaint Counsel's proposed order on this Motion, will be entered as an Order;
3. Respondents are not required to produce any documents that have already been produced; and
4. No party may rely on, or submit as evidence in this case, any document that was not produced in discovery.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 21, 2023