

**UNITED STATES OF AMERICA
BEFORE THE 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

**NON-PARTY STEVE SINGER’S MOTION TO QUASH COMPLAINT COUNSEL’S
UNTIMELY SUBPOENA AD TESTIFICANDUM TO STEVE SINGER**

Non-party Steve Singer (“Singer”) moves pursuant to 16 C.F.R. § 3.31 (“Rule 3.31”) and 16 C.F.R. § 3.34(c) (“Rule 3.34(c)”) to quash the subpoena *ad testificandum*, dated March 29, 2023, addressed to Mr. Singer (the “Singer Subpoena”) from Complaint Counsel.

Complaint Counsel missed the March 3, 2023 deadline to serve the Singer Subpoena. Complaint Counsel purports to have served the Singer Subpoena on March 29 or 30, 2023, and there is no good cause for the delay.

INTRODUCTION

On or about February 2, 2022—two weeks after Microsoft announced its planned acquisition of Activision—the FTC contacted NOA to request interviews “with appropriate individuals at Nintendo to discuss the Microsoft/Activision transaction.” In the initial discussions regarding these interviews, the FTC repeatedly asked for “Nintendo’s concerns about the transaction,” as well as “the personal opinions of [NOA’s] employees about the transaction.”

[REDACTED]

[REDACTED]

PUBLIC RECORD

[REDACTED]

Mr. Prata is NOA's Executive Vice President for Product Development, Publishing and Strategic Initiatives. Mr. Singer is NOA's Senior Vice President for Publisher and Developer Relations. As his title indicates, Mr. Singer is responsible for NOA's relationships with third-party game publishers and developers such as Microsoft and Activision. Mr. Prata is responsible for NOA's own product development. Messrs. Prata and Singer are two of NOA's most-senior executives.

[REDACTED]

} Thereafter, over the next several months, NOA counsel answered a series of questions from Complaint Counsel regarding information from the interviews that Complaint Counsel might wish to include in a declaration.

[REDACTED]

[REDACTED]

PUBLIC RECORD

[REDACTED]

On December 6, 2022, Microsoft announced that it had signed a Letter of Intent that same day with Nintendo (the "LOI"), in which Microsoft committed to make Call of Duty titles available on Nintendo platforms after the Activision acquisition. [REDACTED]

[REDACTED]

[REDACTED]

After Complaint Counsel filed the current adjudicative proceeding, NOA received a Subpoena for Production of Documentary Material, dated February 1, 2023, from Complaint Counsel (the "FTC Subpoena"). [REDACTED]

[REDACTED]

PUBLIC RECORD

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PUBLIC RECORD

[REDACTED]

Regardless of whether it was served on March 29 or 30, however, the Singer Subpoena was not served on or before the March 3, 2023 deadline. In discussions leading up to this motion, Complaint Counsel stated that the primary reason for their delay was that “Microsoft and Nintendo executed their agreement regarding Activision content on February 10, 2023— [REDACTED] } This incorrect statement conveniently ignores that the LOI was signed, and announced by Microsoft, on December 6,

2022. Mr. Singer should not bear the consequences of Complaint Counsel’s missed deadline, and respectfully requests that the Court quash the Singer Subpoena.

ARGUMENT

The Singer Subpoena was issued after the deadline, and was never properly served on Mr. Singer. As a result, it should be quashed.

The deadline to serve subpoenas was March 3, 2023, with certain exceptions. Scheduling Order, *In re Microsoft Corp. et al.*, FTC Dkt. No. 9412, at 1 (Jan. 4, 2023) (“Scheduling Order”). None of the exceptions apply here. Complaint Counsel purportedly served the Singer Subpoena on March 29 or 30, 2023. Therefore, the Singer Subpoena is untimely, and should be quashed.

The deadline to issue subpoenas in this proceeding was March 3, 2023:

March 3, 2023	-	Deadline for issuing document requests, interrogatories and subpoenas, except for discovery directed to witnesses who did not appear on either side’s preliminary lists and discovery for purposes of authenticity and admissibility of exhibits.
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Scheduling Order at 1. The exceptions for “discovery directed to witnesses who did not appear on either’s side’s preliminary lists” refers to (i) the preliminary witness lists disclosed by Complaint Counsel on January 17 and Respondents’ Counsel on January 24 (Scheduling Order at 1), and (ii) the scope of permissible depositions as governed by paragraph 11:

<p>11. Each side may depose any witness who (i) is listed on either side’s preliminary witness list; (ii) is listed on the other side’s updated witness list; or (iii) provides a declaration or affidavit offered by the other side. Depositions are limited to a single day of 7 hours on the record, unless otherwise agreed by the parties or ordered by the ALJ. The parties agree to meet and confer regarding a remote deposition protocol.</p>
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Scheduling Order at 6 ¶ 11.

None of these exceptions apply to Mr. Singer. { [REDACTED]

[REDACTED]

[REDACTED]

PUBLIC RECORD

[REDACTED]

[REDACTED] }

There is no good cause for excusing Complaint Counsel's failure to comply with the subpoena deadline. Complaint Counsel [REDACTED] was aware of the LOI as early as December 6, 2022 when Microsoft announced it. Complaint Counsel [REDACTED] did not ask who did until March 16, 2023—after the subpoena deadline.

If the deposition of the NOA employee who negotiated with Microsoft is so important to Complaint Counsel's case, it could have asked Microsoft or Nintendo at any time after the LOI was announced on December 6, 2022. [REDACTED]

[REDACTED] }

Complaint Counsel put itself in this position by not requiring Microsoft to produce the communications sooner, never asking Nintendo for the name of its primary negotiators until March 16, 2023, and then waiting another two weeks before issuing the Singer Subpoena.

The consequences of Complaint Counsel's delay and disregard for deadlines prejudice Mr. Singer and NOA. Mr. Singer is one of the top executives at NOA, [REDACTED]

[REDACTED] }

[REDACTED] } Mr. Singer and NOA should not bear the burden of Complaint Counsel's delay and disregard for deadlines.

Complaint Counsel failed to comply with a deadline, and that failure should have consequences. For these reasons, Mr. Singer and NOA respectfully request that the Singer Subpoena be quashed in its entirety.

CONCLUSION

WHEREFORE, for good cause shown, Mr. Singer respectfully requests that Your Honor grant the requested relief and quash the subpoena *ad testificandum* and grant such other relief as Your Honor deems just and proper.

Dated: April 10, 2023

Respectfully submitted,

/s/ Leonard L. Gordon

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and Nintendo of America Inc.*

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**STATEMENT OF LEONARD L. GORDON
PURSUANT TO RULE OF PRACTICE 3.22(G)**

I am an attorney at Venable LLP. I represent non-parties Steve Singer and Nintendo of America Inc. in this matter. I submit this statement pursuant to 16 C.F.R. § 3.22(g).

Unless otherwise indicated, all facts set forth in this Statement and in Non-Party Steve Singer's Motion to Quash Complaint Counsel's Untimely Subpoena *Ad Testificandum* (the "Motion") are true and accurate to the best of my knowledge, based on my personal involvement in the events discussed and my review of documents and correspondence related to this proceeding.

I, and my colleague Benjamin P. Argyle, Esq., Venable LLP, have conferred with Complaint Counsel (Maria Cirincione and/or Taylor Alexander, Esqs.) in a good faith effort to resolve by agreement the issues raised in the Motion, but have been unable to reach such an agreement. We met and conferred with Complaint Counsel multiple times, both via teleconference and email correspondence, in an attempt to reach agreement regarding the deposition of Mr. Singer and the Singer Subpoena:

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- On March 17, 2023, telephonically (at approximately 9:00 am ET) and via email correspondence;
- On March 20, 2023, via email correspondence;
- On March 22, 2023, via email correspondence;
- On March 23, 2023, telephonically (at approximately 1:45 pm ET) and via email correspondence;
- On March 27, 2023, telephonically (at approximately noon ET);
- On March 29, 2023, via email correspondence;
- On March 31, 2023, via email correspondence;
- On April 3, 2023, via email correspondence;
- On April 4, 2023, via email correspondence;
- On April 6, 2023, via email correspondence; and
- On April 7, 2023, telephonically (at approximately 10:00 am ET).

Although these communications have been productive, we have not yet reached agreement on any portion of the Singer Subpoena.

Dated: April 10, 2023

Respectfully submitted,
/s/ Leonard L. Gordon

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**[PROPOSED] ORDER GRANTING MOTION TO QUASH COMPLAINT COUNSEL'S
SUBPOENA AD TESTIFICANDUM TO STEVE SINGER**

On April 10, 2023, non-party Steve Singer (“Singer”) filed a Motion to Quash Complaint Counsel’s Subpoena *ad testificandum* to Steve Singer (“Motion”).

Singer has demonstrated good cause for the requested relief. Accordingly, the Motion is GRANTED, and it is hereby ORDERED that Complaint Counsel’ Subpoena *ad testificandum* to Steve Singer, dated March 29, 2023, is QUASHED in its entirety.

D. Michael Chappell
Chief Administrative Law Judge

Date: _____, 2023

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April 2023, I filed the foregoing document electronically using the Federal Trade Commission's e-filing system, which will send notification of such filing to:

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
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I also certify that I caused the foregoing document to be served via email to:

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