

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

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

**ORDER EXTENDING DEADLINE FOR RULING ON  
COMPLAINT COUNSEL’S MOTION *IN LIMINE***

**I.**

On February 2, 2024, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed a motion *in limine* seeking to preclude admission of certain evidence at the evidentiary hearing in this matter (“Motion”). Respondents Microsoft Corporation (“Microsoft”) and Activision Blizzard, Inc. (“Activision”) (collectively, “Respondents”) filed an opposition on February 13, 2024 (“Opposition”). For the reasons explained below, this order defers ruling on the Motion until 10 days prior to commencement of the evidentiary hearing in this matter.

**II.**

On December 8, 2022, the FTC filed an administrative complaint seeking to enjoin Microsoft from acquiring Activision. 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 acquisition 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. Dist. LEXIS 119001 (N.D. Cal. July 10, 2023). On July 12, 2023, the FTC appealed the district court’s decision. The United States Court of Appeals for the Ninth Circuit denied the FTC’s motion for an injunction to prevent the consummation of the acquisition 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). *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 21 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 13, 2023, Microsoft and Activision closed the acquisition.

Oral argument before the Ninth Circuit was held on December 6, 2023. A decision has not yet been issued.

After Microsoft announced the acquisition of Activision, Respondents entered into several agreements with third parties to provide access to Activision's games. Microsoft has stated that it intends to offer such agreements into evidence to support its position that the Commission's claim that Microsoft will withhold Activision content from competitors is unfounded and contradicted by actions Respondents have taken.<sup>1</sup> By orders issued on October 26, 2023 and January 31, 2024, the parties were granted leave to engage in limited discovery concerning some of these third-party agreements.

### III.

Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *In re 1-800 Contacts, Inc.*, 2017 WL 1345288, at \*1 (F.T.C. Mar. 30, 2017); *In re POM Wonderful LLC*, 2011 FTC LEXIS 79, at \*7-8 (May 6, 2011). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *In re McWane, Inc.*, 2012 WL 3719035, at \*3 (F.T.C. Aug. 16, 2012).

In its Motion, Complaint Counsel seeks to preclude admission of any evidence of the purported procompetitive benefits of Respondents' agreements with third parties and to preclude admission of any evidence regarding Respondents' agreements with firms that Complaint Counsel asserts do not offer services in the alleged geographic market, the United States. Complaint Counsel argues that the foregoing evidence is unreliable or irrelevant. Complaint Counsel also seeks to preclude testimony from Respondents' executives named on Respondents' joint witness list about the effects of the agreements with Ubisoft Entertainment SA ("Ubisoft") and Sony Interactive Entertainment, LLC ("Sony"), arguing that it would be unfair to allow such testimony because those witnesses have not been made available for depositions.

In their Opposition, Respondents argue that Complaint Counsel has failed to meet the legal standard of demonstrating that the challenged evidence is clearly inadmissible on all potential grounds and that, because the relevant geographic market will be a disputed issue at trial, it is premature to preclude evidence regarding agreements with third parties allegedly not offering services in the United States. Respondents also argue that testimony from corporate executives regarding the procompetitive effects of the Ubisoft and Sony agreements should not be precluded because Complaint Counsel can rely on the corporate depositions it took pursuant to 16 C.F.R. § 3.33(c)(1) to cross-examine Respondents' executives on these issues.

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<sup>1</sup> Respondent Microsoft's Opposition to Complaint Counsel's Motion to Extend Fact Discovery, at 3 (October 20, 2023).

**IV.**

FTC Rule 4.3(b) authorizes the Administrative Law Judge to extend any time limit prescribed by the rules for “good cause shown . . .” 16 C.F.R. § 4.3(b)(1). In the instant case, good cause exists to extend the deadlines for a ruling on Complaint Counsel’s Motion. The Commission has directed that the evidentiary hearing will commence 21 days after the Ninth Circuit rules on the FTC’s appeal of the district court’s denial of its request for a preliminary injunction. In the interim, Microsoft’s acquisition of Activision has been completed. Thus, at present, a hearing date has not been set and depending on the ruling of the Ninth Circuit, there is a possibility that a hearing will not occur 21 days after its ruling. Rather than attempt to preliminarily define the scope of evidence to be admitted at a hearing that is neither imminent nor certain, the better approach is to defer ruling on Complaint Counsel’s Motion. Accordingly, it is hereby ORDERED that any ruling on Complaint Counsel’s Motion will be issued no later than 10 days prior to commencement of the evidentiary hearing in this matter, if any.

ORDERED:



D. Michael Chappell  
Chief Administrative Law Judge

Date: February 15, 2024