

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

In the Matter of

Microsoft Corp .,
a corporation;

Docket No. 9412

and

Activision Blizzard, Inc.
a corporation.

JOINT MOTION FOR

**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.**

Docket No. 9412

[PROPOSED] FIRST REVISED SCHEDULING ORDER

- January 17, 2023 - Complaint Counsel provides preliminary witness list (not including experts), which will include no more than 35 persons (including no more than 10 non-party witnesses), with a brief summary of the proposed testimony.
- January 24, 2023 - Respondents' Counsel provides preliminary witness list (not including experts), which will include no more than 35 persons (including no more than 10 non-party witnesses), with a brief summary of the proposed testimony.
- February 24, 2023 - Complaint Counsel provides expert witness list.
- 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.
- March 10, 2023 - Respondents' Counsel provides expert witness list.
- March 17, 2023 - Complaint Counsel and Respondents to provide updated fact witness lists, which will include no more than 30 persons total with no more than 5 witnesses (including no more than 3 non-party witnesses) who did not appear on that side's preliminary list, with a brief summary of the proposed testimony.
- March 28, 2023 - Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity of documents.

- April 7, 2023 - Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- May 5, 2023 - Deadline

final proposed witness list and a brief summary of the testimony of each witness, including expert witnesses.

- June 2, 2023 - Complaint Counsel identifies any rebuttal experts not previously identified.
- June 6, 2023 - Respondents' Counsel provides to Complaint Counsel the final proposed exhibit list. The final proposed exhibit list shall include depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), and Respondents' basis of admissibility for each proposed exhibit.

Respondents' Counsel serves courtesy copies on the ALJ of the final proposed exhibit list and the basis of admissibility for each proposed exhibit.
- June 9, 2023 - Complaint Counsel provides rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondents).
- June 23, 2023 - Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
- June 29, 2023 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).¹ See Additional Provision 17.
- July 10, 2023 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- July 12, 2023 - Deadline for filing motions *in limine* to preclude admission of evidence. See Additional Provision 18.
- July 14, 2023 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. The Parties are directed to

¹ Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes in camera treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days' notice of the proposed use of such material. To resolve this apparent conflict, the Scheduling Order requires that the parties provide 10 days' notice to the opposing party or third parties to allow for the filing of motions for in camera treatment.

review the Commission's Rules on admissibility of evidence before filing objections to exhibits and raise only objections that

ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to Office of the Administrative Law Judge directly, and the FTC E-filing system shall not be used for this purpose. The oalj@ftc.gov email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Service Judge. no pleading shall not include the OALJ email address, or the ema

submissions to oalj@ftc.gov shall set forth only the docket number and the title of the submission.

The parties are not required to serve a courtesy copy to the OALJ in hard cecept upon request.

motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. Each party is limited to 50 requests for production to parties, including all discrete subparts; 25 interrogatories, including all discrete subparts; and 10 requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits.

8. If any federal court proceeding related to this administrative proceeding is initiated, any discovery obtained in this proceeding is deemed to have been taken in the related federal court litigation, and vice versa. Document requests, interrogatories, and requests for admission served by the parties in connection with any federal action will count against the discovery request limits noted above and vice versa. No individual or entity deposed in one action may be re-deposed in the other. The parties preserve all rights to object to the admissibility of evidence.

9. The parties agree to serve any objections to document requests within 5 business days of service of the request, to meet and confer to attempt to resolve any disputes, and to discuss timing of production within 3 business days of the objections being served. The party responding to document requests will make a good-faith effort to produce responsive documents as expeditiously as possible, including by making productions on a rolling basis, and must complete production within 21 days of the resolution of any objections relating to those requests. The party responding to interrogatories, other than interrogatories subject to Rule 3.35(b)(2), will serve responses and objections, if any, within 21 days after the service of the interrogatories.

both Complaint Counsel and Respondents notice any subpoena/seek to take a non-party fact deposition, the seven hours of record time will be divided equally between the sides. If only one side subpoenas a non-party fact deposition, then the maximum time shall be allocated 5.5 hours to the side that subpoenaed the deposition, and 1.5 hours for the side that did not. For purposes of allocating deposition time under this Scheduling Order, former employees, consultants, agents, contractors, or representatives of the parties are considered party witnesses if they are represented by

18. Motions *in limine* are strongly discouraged. Motion *in limine* refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (Apr. 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *SEC v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

19. The final witness lists shall represent counsels’ good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. A general designation that a party reserves the right to call anyone on the opposing party’s witness list is not sufficient. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the updated witness list previously exchanged except as provided above.

20. If any party wishes to offer a rebuttal witness other than a rebuttal expert, the party shall file a request in writing in the form of a motion to request a rebuttal witness. That motion shall be filed as soon as possible after the testimony sought to be rebutted is known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and shall demonstrate that the witness the party seeks to call has previously been designated on its witness list or adequately explain why the requested witness was not designated on its witness list.

21. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

22. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

23. The pl hac -0.001e[i]1.12 apllate that each i1.12ide is limited to identifying no moc -0.e than f -0.ouc - witnesses in the litigation of this matter. The p (hac -0.001e-4 (s)TJ0 Tc 0 Tw 2.68 0 Td()Tj-0.004 Tc 0.004 Tw expert, all publications authored by the expert within the preceding ten years, in wh (d)10 (by)-2 (hac -0.s)-1 ()10 (a)-2 (c)4 (a)4 (t.24 0 Tdβ2 Tc -0.00-0.0

that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with Additional Provision 6 of this Scheduling Order and 16 C.F.R. § 3.45(e).

25. Due to ongoing public health concerns related to COVID-19, it is possible that the evidentiary hearing in this matter will be conducted remotely by video conference. The parties are encouraged, in advance of the hearing, to take expert depositions for the purpose of perpetuating trial testimony (i.e., a trial deposition) and to submit such trial testimony as an exhibit in lieu of presenting the expert's testimony via live video at trial. This trial deposition may be conducted in addition to any deposition of an expert witness for purposes of discovery (discovery deposition). Although the parties are encouraged to submit trial depositions in lieu of live video testimony at trial for all expert witnesses in the case, you may choose to do trial depositions for all or fewer than all experts.

26. Due to ongoing public health concerns related to COVID-19, it is possible that the evidentiary hearing in this matter will be conducted remotely by video conference. To accommodate safety or other concerns of witnesses and attorneys and staff, the parties may, in advance of the hearing, take trial depositions of fact witnesses who had been deposed before the close of discovery and to submit such trial deposition testimony (as video and/or transcript of trial deposition testimony) as an exhibit in lieu of presenting the fact witness' testimony via live video at trial. Although the parties may submit trial depositions in lieu of live video testimony at trial for all fact witnesses in the case, you may choose to do trial depositions for fewer than all fact witnesses.

27. An expert witness' testimony is limited to opinions contained in the expert report that has been previously and properly provided to the opposing party. In addition, no opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness is

Dated: May 10, 2023

Respectfully submitted,

By: /s/ James Weingarten

By: /s/ Kieran Gostin

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 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:

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The Honorable D. Michael Chappell
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I also certify that I caused the forgoing document to be served via email to:

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