

**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

**SONY INTERACTIVE ENTERTAINMENT LLC’S MOTION TO
QUASH OR LIMIT SUBPOENA *DUCES TECUM***

Non-party Sony Interactive Entertainment LLC (“SIE”) respectfully requests that the Court quash or limit Microsoft’s January 17 subpoena (the “Subpoena”) as described below.

INTRODUCTION

Microsoft’s Subpoena to SIE is truly massive. Since receiving it, SIE has engaged in five meet and confers with Microsoft, served a 55-page set of detailed written responses and objections at Microsoft’s demand, and had extensive correspondence with Microsoft. On the evening of February 1, 2023, SIE and Microsoft generally agreed that SIE would produce files from seven identified custodians, but numerous additional scope issues remained. SIE requested an extension of time to resolve these, but Microsoft refused unless SIE agreed to file a partial motion to quash on the issue of Microsoft’s choice two days later. This gamesmanship by Microsoft is inefficient and inappropriate.

SIE respectfully requests that the Court limit the Subpoena as discussed below.

ARGUMENT

Courts limit discovery where it is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive” or “the burden and expense of the proposed discovery . . . outweigh its likely benefit.” 16 C.F.R. § 3.31(c)(2)(i),(iii). Further, this Court may deny discovery “to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.” 16 C.F.R. § 3.31(d). This Court should take special care to ensure non-parties, such as SIE, are treated fairly by Respondents in FTC proceedings. *Cf. Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 49 (S.D.N.Y. 1996) (“[T]he status of a witness as a non-party . . . entitles [the non-party] to consideration regarding expense and inconvenience.”).

I. Issues Microsoft Wants Resolved Now

Up until last night, February 2, 2023, SIE understood that Microsoft agreed to SIE searching the files of seven custodians: Jim Ryan, Hermen Hulst, Eric Lempel, Nick Maguire, Veronica Rogers, Phil Rosenberg, and Christian Svensson (the “Seven Custodians”). *See, e.g.*, Ex. A (S. Neuman 1/30 Email at 1) (proposing a “custodial search of the files of the following 7 individuals” and listing the Seven Custodians); Ex. D (S. Neuman 2/2 Email at 1). Their files cover the substantive issues in the case. The Seven Custodians are SIE’s Chief Executive Officer (Ryan), Head of Play Station Studios (Hulst), SVP of Worldwide Marketing (Lempel), VP Global Head of Subscriptions (Maguire), SVP of Global Sales and Business Operations (Rogers), SVP Head of Global Partner Development (Rosenberg), and VP Head of Global Third Party Relations (Svensson). The Seven Custodians have a high volume of documents, and collecting, processing, reviewing, and producing from the Seven Custodians will be burdensome, Ex. B (Mahoney Decl.

¶¶ 12-16); Ex. C (L. Malm 2/1 Email at 1-2), particularly given the shortened fact discovery period Microsoft chose here.

Microsoft said it also wanted files from the Seven Custodians' predecessors, files from an in-house lawyer, and various specific documents (discussed further below, in connection with issues that Microsoft prefers be addressed in a later motion), but did not say it needed other custodial files. Then, last night, Microsoft threatened that if SIE moved to quash Microsoft might demand files from two more individuals whose custodial files it had previously agreed it did not need, Lin Tao and Hideaki Nishino. Ex. D (S. Neuman 2/2 Email at 1).¹

A. Predecessor Custodians Should Not Be Required

Microsoft wants predecessors to the Seven Custodians. But SIE has agreed to provide documents further back in time than an ordinary Second Request (to January 1, 2019, four years ago), and in fact most of the Seven Custodians have been in their positions since at least 2019, if not earlier. The only two custodians who took their positions more recently are ones for whom SIE has added overlapping coverage: Veronica Rogers joined in 2020, but her direct report, Nick Maguire, has been in a subscription-related role since the beginning of 2019. And Christian Svensson took his position in 2021, but his direct supervisor, Phil Rosenberg, has been in his role since the beginning of 2019. Given this overlapping coverage, demanding that non-party SIE search for older files of predecessors, particularly in a forward-looking case in which Microsoft says the market is rapidly evolving, would be disproportionate to the needs of the case.

¹ Microsoft asserted in a filing earlier today that SIE has not acted diligently with respect to custodians. Opp. to Mot. to Extend at 3 (filed Feb. 3, 2023). Microsoft has no basis for this statement, and it is wrong. Mot. to Extend Reply at 1 (filed Feb. 3, 2023).

B. A Custodial Search of SIE's In-House Lawyer Should Not Be Required

Microsoft has demanded custodial documents from SIE's in-house antitrust lawyer, Greg McCurdy. Custodial searches of in-house lawyers are rare. *See, e.g., In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, No. 14-md-02542-VSB-SLC (S.D.N.Y. Feb. 14, 2020) (ECF No. 750) (denying request for in-house counsel's documents); *Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co.*, 2017 WL 9802844, at *2-3 (S.D.N.Y. Sept. 15, 2017) (declining to add in-house counsel as custodians); *cf. In re Hoechst Marion Roussel*, 2000 FTC LEXIS 155, at *3-4 (Oct. 17, 2000) (where there is a dearth of Commission precedent, federal decisions provide helpful guidance).

Microsoft originally said it wanted Mr. McCurdy's documents because it believed he communicated with the FTC, worked [REDACTED] [REDACTED] and [REDACTED] [REDACTED] Ex. A (S. Neuman 1/30 Email at 6).

As for SIE's communications with the FTC, Microsoft does not deny that it has them already.

As for Mr. McCurdy's internal communications [REDACTED] [REDACTED] Microsoft has dropped this demand. Ex. A (S. Neuman 1/30 Email at 1).

Microsoft now says it only wants Mr. McCurdy's communications with people external to SIE. Microsoft argues there is no privilege review burden because for external documents "there is no colorable privilege concern." Opp. to Mot. to Extend at 5. This is obviously wrong. To take one example, Mr. McCurdy's communications with SIE's outside counsel are privileged, and Microsoft says they need not be produced. But the same holds true with respect to economists and other consultants SIE retained in connection with this matter. *See, e.g., Fed. Trade Comm'n v.*

GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002) (public relations and government affairs consultants were “completely intertwined with [party’s] litigation and legal strategies” and should be treated as company employees for purposes of determining privilege). And finding and producing the likely tiny subset of non-substantive materials that might be non-privileged would be both very burdensome and unlikely to produce relevant material, and thus inappropriate for discovery. Ex. F (McCurdy Decl. ¶ 5).

Microsoft says it wants communications with industry participants regarding the transaction. But SIE has agreed to produce such communications from the files of the Seven Custodians, two of whom lead SIE’s communications with industry participants: Phil Rosenberg, Head of Global Partner Development, and his direct report, Christian Svensson, Head of Global Third Party Relations. There is no need to invade a lawyer’s custodial files to discover communications related to the transaction and doing so would not be proportionate to the needs of the case, which, after all, turns on whether Microsoft’s acquisition of Activision may lessen competition. Microsoft’s demand would impose cost that outweighs the benefit. 16 C.F.R. § 3.31(c)(2)(i)-(iii). Microsoft has argued that because Mr. McCurdy has only worked at SIE for eight months collecting and reviewing his documents should not be burdensome. But manually reviewing eight months of an attorney’s external communications—when Microsoft is already receiving documents on the topic at issue from other sources—is not reasonable.

Avoiding Mr. McCurdy’s files is consistent with what Microsoft did when the shoe was on the other foot. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

There is no reason why SIE, a non-party, should do so here, particularly where SIE has already agreed to extensive discovery from seven custodians that is likely to cost more than \$2 million and yield a large volume of documents. Ex. B (Mahoney Decl. ¶ 12).

C. A Custodial Search of Nishino and Tao Should Not Be Required

Microsoft’s filing earlier today acknowledged Microsoft was “willing to agree” to the Seven Custodians. Opp. to Mot. to Extend at 2. But Microsoft has now suggested it may want to renege on this and demand custodial files from Mr. Nishino, who it has not mentioned in some time and expressed no concern about dropping. It also raised Ms. Tao, who it agreed to drop. As SIE explained to Microsoft, analysis of Ms. Tao’s documents revealed that a high percentage are in Japanese. Reviewing them would add delay and expense. See Ex. B (Mahoney Decl. ¶ 11). SIE offered a targeted pull of financial reports in lieu of Ms. Tao’s files and Microsoft indicated it agreed. Ex. A (S. Neuman 1/30 Email at 1); Ex. C (L. Maln 2/1 Email at 1 . Enough is enough on this point.

II. Issues Microsoft Wants Resolved In A Late Motion to Quash

Microsoft’s Subpoena includes 45 document requests, 3 with subparts, for a total of more than 120 separate document requests. It also has 52 defined terms and 21 instructions, most of which increase the Subpoena’s breadth. Ex. G (Subpoena). These requests demand all documents

² Brad Smith, Microsoft News, <https://news.microsoft.com/exec/brad-smith/> (last visited Feb. 3, 2023).

related to nearly all aspects of SIE's business, as well as extensive sets of sales, financial, and personal user data (e.g., user date of birth, country, gender, for likely millions of users). Ten of these requests seek materials going back more than 11 years. Even after intensive efforts by SIE to negotiate scope, SIE estimates that providing just the custodial files SIE has offered from the Seven Custodians will cost approximately \$2 million and [REDACTED]

[REDACTED] See Ex. B (Mahoney Decl. ¶¶ 12-14). [REDACTED]

[REDACTED] And these documents are only a portion of what SIE has offered. More is not proportionate to impose on a non-party. We highlight selected issues below and provide additional context in Exhibit H.

1. Date Range

[REDACTED]
[REDACTED]
[REDACTED] Decade-old material is of lower utility in this forward-looking litigation. In light of the massive discovery burden non-party SIE has agreed to undertake, including more than four years' worth of data, SIE submits that more is disproportionate.

2. Definitions

SIE has objected to the definitions that are overly broad, unduly burdensome, and vague. SIE has proposed more concrete definitions. See Ex. I (SIE's Responses and Objections); Ex. H. Microsoft engaged with SIE on only a few of SIE's proposed definitions, and in light of Microsoft's refusal to grant an adequate extension to SIE's time to move to quash, SIE asks that the Court limit the Subpoena accordingly.

3. Individual Document Requests

In addition to the issues noted below, SIE has made a reasonable offer of financial reports in lieu of Lin Tao’s custodial files and the Subpoena should be so limited.

a. **Request 3:** [REDACTED]
[REDACTED]
[REDACTED]

There are no non-privileged documents responsive to this request beyond SIE’s communication to the FTC attaching the signed declaration, which Microsoft already has. Accordingly, this document request should be quashed.

b. **Request 13:** [REDACTED]
[REDACTED]
[REDACTED]

Microsoft’s demand for performance reviews for SIE’s leadership is obvious harassment. Even in *employment* cases courts require a specific showing of relevance before requiring production of personnel files. *See, e.g., Achille v. Chestnut Ridge*, 584 F. App’x 20, 23 (2d Cir. 2014) (denying request for personnel files as unjustified “fishing expedition”); *Byrd v. D.C.*, No. CV 06-0522(HHK/AK), 2008 WL 11493720, at *4 (D.D.C. Feb. 8, 2008) (similar). This is not an employment case. Microsoft speculates these documents may “candidly” discuss the performance of SIE’s gaming business, Ex. J (E. Clarke 1/31 Email at 8), but SIE will be producing ordinary course documents that directly relate to its gaming business in the files of the Seven Custodians, *see, e.g., Ex. G* (Subpoena Document Request Nos. 14, 16).

c. **Request 35:** [REDACTED]
[REDACTED]

This request has no apparent probative value, but would require [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This huge burden for material of little if any relevance is clearly

disproportionate.

CONCLUSION

For the foregoing reasons, SIE respectfully requests that the Court quash or limit the Subpoena to the modifications proposed herein and reflected in Exhibit H.

Dated: February 3, 2023

Respectfully,
/s/ Isabel Tuz

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**Activision Blizzard, Inc.,
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**STATEMENT OF LEAH BRANNON PURSUANT TO FEDERAL TRADE
COMMISSION RULE OF PRACTICE 3.22(G)**

I am an attorney at Cleary Gottlieb Steen & Hamilton LLP. I represent non-party Sony Interactive Entertainment LLC in this matter and submit this statement pursuant to Rule 3.22(g) of the FTC Rules of Practice. 16 C.F.R. § 3.22(g). My colleagues and I have conferred with opposing counsel in a good faith effort to resolve by agreement the issues raised by the attached motion to limit or quash Microsoft Corp.'s subpoena duces tecum but have been unable to reach such an agreement.

We met with Sarah Neuman and/or Kieran Gostin, counsel for Microsoft Corp., five separate times in an attempt to reach agreement:

- On January 18, 2023 at 10:00 AM ET, telephonically;
- On January 24, 2023 at 4:00 PM ET, telephonically;
- On January 25, 2023 at 10:00 AM ET, telephonically;
- On January 26, 2023 at 1:00 PM ET, telephonically;
- On February 1, 2023 at 8:30 PM ET, telephonically.

Although these meetings have been productive, we have not yet reached agreement on any portion of the subpoena.

Dated: February 3, 2023

Respectfully,
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[PROPOSED] ORDER GRANTING MOTION TO LIMIT OR QUASH SUBPOENA

On February 3, 2023, non-party Sony Interactive Entertainment LLC (“SIE”) filed a Motion to Limit or Quash a subpoena (“Motion”) served by Respondent Microsoft Corp. (“Microsoft”) on January 17, 2023.

SIE has demonstrated good cause for the requested relief. Accordingly, the Motion is GRANTED and it is hereby ORDERED that:

- The Subpoena is limited to requesting documents from seven custodians: Hermen Hulst, Eric Lempel, Nick Maguire, Veronica Rogers, Phil Rosenberg, Jim Ryan, Christian Svensson, and no predecessor custodians shall be required;
- The Subpoena is limited to requesting data and documents from January 1, 2019 through January 17, 2023;
- Document request number 3 is quashed;
- Document request number 13 is quashed;
- The Definitions in the Subpoena are limited as reflected in Exhibit H to the Motion;

- The Documents Requests and Instructions are limited as reflected in Exhibit H to the Motion.
- The Subpoena is limited as reflected in Exhibit H to the Motion.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February _____, 2023

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2023, I filed the foregoing document electronically using the Federal Trade Commission's e-filing system, which will send notification of such filing to:

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

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EXHIBIT A

[This entire exhibit is subject to the Protective Order]

EXHIBIT B

[This entire exhibit is subject to the Protective Order]

EXHIBIT C

[This entire exhibit is subject to the Protective Order]

EXHIBIT D

[This entire exhibit is subject to the Protective Order]

EXHIBIT E

[This entire exhibit is subject to the Protective Order]

EXHIBIT F

[This entire exhibit is subject to the Protective Order]

EXHIBIT G

[This entire exhibit is subject to the Protective Order]

EXHIBIT H

[This entire exhibit is subject to the Protective Order]

EXHIBIT I

[This entire exhibit is subject to the Protective Order]

EXHIBIT J

[This entire exhibit is subject to the Protective Order]