

**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 SONY INTERACTIVE ENTERTAINMENT LLC'S MOTION FOR
LEAVE TO FILE PROPOSED REPLY IN SUPPORT OF ITS MOTION TO QUASH
OR LIMIT SUBPOENA *DUCES TECUM***

Pursuant to Rule 3.22(d), Sony Interactive Entertainment LLC (“SIE”) respectfully requests that the Court permit SIE to file the attached Proposed Reply supporting SIE’s Motion To Quash Or Limit Subpoena *Duces Tecum*. This brief four-page reply would be helpful to the Court in resolving this issue by responding to Microsoft’s improper request for relief in their opposition to SIE’s motion and correcting a few discrete points.

The Proposed Reply is attached as Exhibit A.

Dated: February 14, 2023

Respectfully Submitted,

/s/ Leah Brannon

D. Bruce Hoffman (bhoffman@cgsh.com)

Leah Brannon (lbrannon@cgsh.com)

Carl Lawrence Malm (lmalm@cgsh.com)

Isabel Tuz (ituz@cgsh.com)

2112 Pennsylvania Avenue, N.W.

Washington, D.C. 20037

T: +1 202 974 1500

CLEARY GOTTlieb STEEN & HAMILTON LLP

Counsel for Non-Party Sony Interactive Entertainment LLC

**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

**[PROPOSED] ORDER GRANTING NON-PARTY SONY INTERACTIVE
ENTERTAINMENT LLC'S MOTION FOR LEAVE TO FILE PROPOSED REPLY IN
SUPPORT OF ITS MOTION TO QUASH OR LIMIT SUBPOENA *DUCES TECUM***

FTC Rule 3.22(d) authorizes the Administrative Law Judge to permit replies in support of motions. Based on the representations in the Proposed Reply, the Motion is GRANTED and it is hereby ORDERED that the Proposed Reply is accepted and deemed properly filed.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February _____, 2023

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 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, D.C. 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, D.C. 20580
OALJ@ftc.com

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

Complaint Counsel

James Weingarten
James Abell
Meredith Levert
Jennifer Fleury
Cem Akleman
Taylor Alexander
Amanda Butler
Merrick Pastore
Nicole Callan
Ethan Gurwitz
Maria Cirincione
James Gossmann
Stephen Santulli
Edmund Saw
Michael A. Franchak
Peggy Bayer Femenella
Kassandra DiPietro
Justin Alexander Ansaldo
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580
(202) 326-2289
jweingarten@ftc.gov

jabell@ftc.gov
mlevert@ftc.gov
jfleury@ftc.gov
cagleman@ftc.gov
tallexander@ftc.gov
abutler2@ftc.gov
mpastore@ftc.gov
ncallan@ftc.gov
egurwitz@ftc.gov
mcirincione@ftc.gov
jgossmann@ftc.gov
ssantulli@ftc.gov
esaw@ftc.gov
mfranchak@ftc.gov
pbayerfemenella@ftc.gov
kdipietro@ftc.gov
jansaldo@ftc.gov

Counsel for Respondent Microsoft Corp.

Beth Wilkinson
Rakesh N. Kilaru
Kieran Gostin
Grace L. Hill
Anastasia M. Pastan
Alysha Bohanon
Sarah E. Neuman
Wilkinson Stekloff LLP
2001 M Street, NW
Washington, D.C. 20036
(202) 847-4010
bwilkinsonstekloff.com
rkilaru@wilkinsonstekloff.com
kgostin@wilkinsonstekloff.com
ghill@wilkinsonstekloff.com
apastan@wilkinsonstekloff.com
abohanon@wilkinsonstekloff.com
sneuman@wilkinsonstekloff.com

Michael Moiseyev
Megan Granger
Weil, Gotshal & Manges LLP
2001 M Street, NW
Washington, D.C. 20036
(202) 682-7235
michael.moiseyev@weil.com
megan.granger@weil.com

Counsel for Respondent Activision-Blizzard, Inc.

Steven C. Sunshine
Julia K. York
Jessica R. Watters
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 271-7860
steve.sunshine@skadden.com
julia.york@skadden.com
jessica.watters@skadden.com

Maria A. Raptis
Michael J. Sheerin
Evan R. Kreiner
Andrew D. Kabbes
Bradley J. Pierson
Matthew M. Martino
Skadden, Arps, Slate, Meagher & Flom LLP
One Manhattan West
New York, NY 10001
(212) 735-2425
maria.raptis@skadden.com
michael.sheerin@skadden.com
evan.kreiner@skadden.com
andrew.kabbes@skadden.com
bradley.pierson@skadden.com
matthew.martino@skadden.com

Respectfully submitted,

/s/ Leah Brannon

D. Bruce Hoffman (bhoffman@cgsh.com)
Leah Brannon (lbrannon@cgsh.com)
Carl Lawrence Malm (lmalm@cgsh.com)
Isabel Tuz (ituz@cgsh.com)
2112 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
T: +1 202 974 1500

CLEARY GOTTlieb STEEN & HAMILTON LLP

Counsel for Non-Party Sony Interactive Entertainment LLC

EXHIBIT A

**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

**[PROPOSED] REPLY IN SUPPORT OF SONY INTERACTIVE ENTERTAINMENT
LLC'S MOTION TO QUASH OR LIMIT SUBPOENA *DUCES TECUM***

Sony Interactive Entertainment LLC (“SIE”) respectfully submits the following reply in support of its Motion to Quash or Limit Microsoft’s Subpoena *Duces Tecum* (the “Motion”).

First, the Court should deny Microsoft’s demand that the Court order SIE to complete document production by March 13, 2023. Opp. at 2 (filed Feb. 13, 2023). It is inappropriate for Microsoft to slip its own request for relief into an opposition to SIE’s Motion. Microsoft’s request is effectively a motion to compel enforcement of its subpoena, which is not authorized under the Rules. 16 C.F.R. §§ 3.38(a), (c). Moreover, given the breadth of discovery Microsoft has demanded, its preferred deadline cannot be met, and Microsoft exacerbated this issue by waiting a full ten days to respond to SIE’s Motion. (Microsoft’s non-response to SIE’s February 3 proposals is delaying technology assisted review). Ex. 1 (K. Gostin 2/10 Email).

Second, Microsoft does not deny it agreed to drop Lin Tao and Hideaki Nishino as proposed custodians, and only began demanding their files again as retaliation for SIE seeking relief from this Court on other issues. Microsoft previously agreed Tao could be dropped in favor of a targeted pull of financial documents. Now, Microsoft tells this Court that it needs her

PUBLIC RECORD

custodial files to obtain “information about SIE’s financial health and plans,” Opp. at 3, but fails to mention SIE’s agreement to conduct a targeted pull of financial reports, Mot., Ex. H at 16 (Request 21). These reports plus custodial documents from others, including SIE’s CEO, Jim Ryan, will provide Microsoft with SIE’s financial health and plans. This is an antitrust case against Microsoft, not an accounting audit of SIE.

With respect to Nishino, Microsoft dropped its request for him several weeks ago. It now says it needs his documents to test SIE’s [REDACTED] [REDACTED]” Opp. at 3 (quoting [REDACTED] [REDACTED]). Again, Jim Ryan [REDACTED] [REDACTED] will be a custodian. There is no need for Nishino to be added as a custodian. Mot., Ex. A (S. Neuman 1/30 Email at 1, 5-6) (Microsoft’s counsel dropped Nishino as a custodian as of January 26, 2023 and Tao as a custodian as of January 30, 2023).

Because Tao and Nishino are unnecessary, the incremental burden imposed by adding them is disproportionate, even without considering the Japanese language content in their files. Microsoft now says any burden is “unsupported.” Opp. at 4. But adding two unnecessary custodians obviously adds burden, and counsel for SIE told counsel for Microsoft that their files would be especially burdensome given the Japanese language content in them. Counsel for Microsoft never requested additional information on this issue. Given Microsoft’s new position, however, SIE offers a supplemental declaration for Christian J. Mahoney, explaining that he estimates [REDACTED] [REDACTED] [REDACTED] [REDACTED]” Ex. 2 (Mahoney Decl. ¶¶ 3-4).

PUBLIC RECORD

Third, Microsoft's argument that there is no privilege burden involved in reviewing the files of an in-house lawyer is legally and factually wrong. Microsoft argues that an in-house lawyer's communications with third parties such as public relations and government affairs consultants are "by definition" not privileged but fails to address the case law SIE cited in its motion, which holds otherwise. Mot. at 4-5. Microsoft also ignored Mr. McCurdy's sworn statement that [REDACTED]

[REDACTED]

Mot., Ex. F (McCurdy Decl. ¶ 4). Parsing through his privileged documents for a few non-privileged communications is entirely disproportionate, particularly since Microsoft is obtaining external communications related to the transaction in the files of seven business custodians. See Mot. at 5.

The case law Microsoft cites is entirely inapposite. In *Forth v. Walgreen Co.*, 2020 WL 4569501, at *2-3 (D.R.I. Aug 7, 2020), the parties agreed that a search would be limited to in-house counsel's communications with *one* third party (Walgreens) and the parties *agreed* those communications would not be privileged, *id.* ("The parties concurred that this additional limitation . . . would eliminate the burden of privilege concerns."). That is a far cry from the fishing expedition Microsoft is requesting here, where SIE does *not agree* that the requested search would eliminate the burden of privilege concerns. See Mot. at 4-5. And, in the other two cases cited by Microsoft, the in-house counsel at issue had highly relevant non-legal functions. See *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 2009 WL 3443563, at * 9-10 (D.D.C. Oct. 23, 2009) (addressing scope of review of in-house counsel's files where plaintiffs alleged the individuals at issue had non-legal duties and attended a price-fixing meeting, and defendant *did not contest their inclusion* as custodians); Joint Status Report, *Le v. Zuffa, LLC*, No. 2:15-cv-

PUBLIC RECORD

1045 (D. Nev. Dec. 4, 2015) (ECF No. 206) (“[E]ach of these custodians performed significant, highly relevant non-legal functions in addition to their legal functions.”); Minute Entry, *Le v. Zuffa, LLC*, No. 2:15-cv-1045 (D. Nev. Dec. 8, 2015) (ECF No. 207). By contrast, Mr. McCurdy [REDACTED] Mot., Ex. F (McCurdy Decl. ¶ 3) [REDACTED]

Mot. at 4-5.

Dated: February 14, 2023

Respectfully submitted,

/s/ Leah Brannon

D. Bruce Hoffman (bhoffman@cgsh.com)

Leah Brannon (lbrannon@cgsh.com)

Carl Lawrence Malm (lmalm@cgsh.com)

Isabel Tuz (ituz@cgsh.com)

2112 Pennsylvania Avenue, N.W.

Washington, D.C. 20037

T: +1 202 974 1500

CLEARY GOTTlieb STEEN & HAMILTON LLP

Counsel for Non-Party Sony Interactive Entertainment LLC

EXHIBIT 1

[This entire exhibit is subject to the Protective Order]

EXHIBIT 2

[This entire exhibit is subject to the Protective Order]