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.**	**DOCKET NO. 9412**

NON-PARTY SONY INTERACTIVE ENTERTAINMENT LLC'S RESPONSE IN OPPOSITION TO RESPONDENT MICROSOFT'S MOTION TO CERTIFY TO THE COMMISSION A REQUEST FOR COURT ENFORCEMENT OF SUBPOENA

Non-party Sony Interactive Entertainment LLC ("SIE") respectfully requests that the Court deny Microsoft Corp.'s ("Microsoft") December 21, 2023 Motion to Certify a Request for Court Enforcement of Subpoena *Duces Tecum* ("Motion" or "Mot.").

INTRODUCTION

Discovery in this case closed on April 7, 2023. Scheduling Order, at 2 (Jan. 4, 2023). Six months later, on October 10, 2023, the United States Federal Trade Commission ("Complaint Counsel") filed a motion with this Court seeking to reopen discovery as to two agreements signed after discovery's close, one of them between Microsoft and SIE. Compl. Counsel's Mot. to Extend Fact Disc., at 1-2 (Oct. 10, 2023). Microsoft opposed, arguing that the Court should not permit "burdensome discovery into a now-closed merger." Microsoft's Opp'n to Mot. to

Extend Fact Disc., at 1 (Oct. 20, 2023) ("Opp'n"). The Court granted Complaint Counsel's motion, permitting it to take targeted discovery. *See* Order on Mot. to Extend Fact Disc., at 4 (Oct. 26, 2023) ("Order"). Pursuant to that Order, on November 1, 2023, Complaint Counsel served SIE with subpoenas seeking documents and testimony regarding the July 2023 agreement between Microsoft and SIE. SIE responded with a document production of around 50 documents on November 21, 2023, and offered a corporate designee for deposition.

Microsoft obtained a copy of this November 21 SIE document production and also arranged to participate in the corporate deposition of SIE. Nearly three weeks after SIE's production, on December 11, 2023, Microsoft contacted SIE and said that it would be serving its own document subpoena. Microsoft said that it did not like the quantity or content of the documents that SIE produced in response to Complaint Counsel's subpoena, and wanted to renegotiate the scope of SIE's compliance. Microsoft served a subpoena the following day, and demanded that SIE collect nearly a year's worth of documents from six custodians of Microsoft's choice, including three lawyers, and then run search terms, also of Microsoft's choice.

SIE asked Microsoft to identify the legal basis for it to enforce Complaint Counsel's subpoena or serve an out-of-time subpoena of its own. Microsoft could not do so. Instead, it filed the instant Motion asking this Court for assistance enforcing its invalid subpoena.

Microsoft's Motion should be denied.

ARGUMENT

I. Microsoft's Subpoena Is Invalid

Microsoft's Motion for assistance in enforcing its subpoena should be denied because there is no valid subpoena to be enforced. This Court's Order granted Complaint Counsel the right to additional discovery: "it is hereby ORDERED that **Complaint Counsel** is granted leave

to serve requests for production of documents and data, interrogatories, notices of depositions, and subpoenas *duces tecum* and *ad testificandum* for the purpose of taking discovery relevant to the Ubisoft Agreement and the Sony Agreement…." Order at 4 (emphasis added). Nowhere does the Order permit Microsoft to serve its own requests for production on SIE. More than eight months have passed since the close of discovery. If Microsoft wanted to pursue its own discovery from SIE regarding the agreement, it knows full well that it needed to seek and obtain leave of Court to do so. *See* 16 C.F.R. § 3.21(c)(2); Order at 2-3.

Microsoft is represented by sophisticated counsel. Microsoft could have opposed Complaint Counsel's request and asked in the alternative that, if the Court permitted Complaint Counsel additional discovery, Microsoft be allowed additional discovery as well. Microsoft made a choice not to make such a request, and told the Court that additional discovery was unnecessary because the "**agreements speak for themselves**." Opp'n at 3 (emphasis added). Then, two months later and without asking for leave of Court, Microsoft served its own subpoena on SIE seeking additional discovery related to the agreement.

Microsoft already has: (1) its own documents regarding the Microsoft-SIE July 2023 agreement, including the agreement itself; (2) a copy of SIE's November 2023 document production regarding the same; and (3) the opportunity to cross-examine SIE's corporate designee regarding the agreement. This is more than sufficient out-of-time discovery regarding "agreements [that] speak for themselves." Microsoft's December 12, 2023 document subpoena to SIE is invalid, § 3.21(c)(2), and its motion to enforce the subpoena should therefore be denied.

II. SIE Has Already Complied with Microsoft's Subpoena

Microsoft's Motion should be denied for the independent reason that SIE has already complied with the subpoena. SIE negotiated the November 1, 2023 subpoena with Complaint

Counsel, produced all responsive, non-privileged, non-duplicative documents SIE identified, and Complaint Counsel has not objected to SIE's compliance. SIE did not "cherry pick" the sources where it sought responsive documents: Rather, SIE looked for documents where it believed documents related to the agreement were likely to be. And, contrary to Microsoft's insinuations, SIE did not review the documents it located to determine which ones it thought would be helpful or unhelpful to Microsoft. SIE screened the documents only for responsiveness and privilege, and all responsive non-privileged material was produced.

Microsoft asserts that the production must be "cherry-picked" because in Microsoft's view the production is not large enough or helpful enough to Microsoft. *See* Mot. 2, 4-5. Microsoft asserts that SIE must search the files of six custodians chosen by Microsoft using the search terms chosen by Microsoft. Mot. at 6-9. Microsoft offers no precedent in support of its position, nor could it. The District Court for the Northern District of California was presented with substantively identical (though more timely) arguments in the recent *FTC v. Meta* litigation. *See* Order re Discovery Dispute re Defendant's Subpoena to Apple, Inc., *FTC v. Meta Platforms, Inc.*, No. 22-cv-04325-EJD (N.D. Cal. Nov. 4, 2022). There, Defendant Meta Platforms, Inc. ("Meta"), represented by some of the same counsel representing Microsoft here, served non-party Apple, Inc. ("Apple") with a subpoena seeking documents. *Id.* at 1. The subpoena there was timely and authorized. Apple offered to produce responsive documents that it identified after a reasonable search, but Meta moved to compel Apple to perform specific custodial searches because it believed that Apple might otherwise make a biased and selective production. *Id.* 1-3. The court denied Meta's request, stating that "[i]t is reasonable for Apple to search for such responsive documents by, for example, identifying those employees with relevant knowledge about the existence and locations of responsive documents, and then conducting

deliberate and focused searches for those documents" and comply with its discovery obligations without micromanagement by Meta's counsel. *Id.* at 2-3. The court rejected Meta's demand that Apple conduct a search using custodians and search terms of Meta's choice. *Id.* at 3. Microsoft's parallel but untimely and procedurally improper request should similarly be denied here.

III. The Burden of Microsoft's Proposed Re-Search Outweighs Its Likely Benefit, Particularly Given Microsoft's Admission that the Material Sought is Not Relevant

Finally, Microsoft's motion should be denied for a third independent reason: Courts limit discovery where "the burden and expense of the proposed discovery . . . outweigh its likely benefit." 16 C.F.R. § 3.31(c)(2)(iii). Here Microsoft seeks to obtain an order requiring SIE to collect and search all documents in the possession of six custodians dating back nearly one year. Three of these proposed custodians are lawyers, and production of their documents would require extensive privilege review. Such a custodial production would introduce undue burden and expense on a non-party in return for a production of materials that Microsoft has already told this Court are not relevant.

Specifically, Microsoft told this Court that background materials discussing its agreement with SIE are **irrelevant** to this litigation because the final agreements speak for themselves. Opp'n at 3-6. Microsoft also told this Court that the materials are irrelevant because the Microsoft-SIE agreement was not necessary to the district court's decision to deny Complaint Counsel's motion for a preliminary injunction in any case. *See* Opp'n at 5. And Microsoft told this Court that further materials related to its agreement with SIE are irrelevant because there has already been extensive discovery and a 5-day trial on the merits involving 16 witnesses and

hundreds of trial exhibits. *See* Opp'n at 5. In short, Microsoft told this Court again and again that the materials at issue in its present motion are irrelevant to this litigation.

Given Microsoft's own repeated and vehement positions that the materials at issue in this motion are irrelevant, it is perhaps not surprising that Microsoft did not approach this Court and seek leave to serve out of time discovery. Microsoft's demand that SIE collect nearly one year worth of documents from six custodians, three of whom are lawyers, and then search and review those materials for responsive non-privileged documents is highly burdensome. This burden far outweighs the expected benefit of additional discovery here, where Microsoft has conceded that the material sought is not relevant to the litigation.

CONCLUSION

SIE respectfully requests that the Court deny Microsoft's Motion.

Dated: January 2, 2024

Respectfully,
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UNITED STATES OF AMERICA
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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 DENYING RESPONDENT MICROSOFT CORP.'S MOTION TO CERTIFY TO THE COMMISSION A REQUEST FOR COURT ENFORCEMENT OF SUBPOENA *DUCES TECUM* ISSUED TO NONPARTY SONY INTERACTIVE ENTERTAINMENT LLC

Upon consideration of Respondent Microsoft Corp.'s ("Microsoft") Motion to Certify to the Commission a Request for Court Enforcement of Subpoena *Duces Tecum* Issued to Nonparty Sony Interactive Entertainment LLC ("SIE") and SIE's opposition thereto, it is HEREBY

ORDERED that Microsoft's motion is DENIED. Microsoft's request for court enforcement of the subpoena *duces tecum* issued to SIE shall not be certified to the Commission, and this Court does not recommend that district court enforcement be sought.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: January __, 2024

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2024, 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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