

**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

**RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO COMPEL PRODUCTION**

The parties had a deal. Microsoft Corp. (“Microsoft”) would use technology assisted review (“TAR”) to respond to a massive Second Request, and later to refresh (and supplement) that production through the date of the Complaint. Activision Blizzard, Inc. (“Activision”) would do the same using search terms. Complaint Counsel would issue targeted requests for production, not to exceed 50.

After receiving 17 million pages from that bargain, Complaint Counsel have now served 81 wide-ranging RFPs that are not reasonably calculated to yield useful information. Complaint Counsel essentially make two demands: (1) that Respondents re-review millions of documents previously deemed least relevant, the burden of which is unjustifiable; and (2) that Respondents conduct a similarly burdensome review of post-Complaint documents, which is unlikely to yield non-privileged information and for which Complaint Counsel cite no precedent. Respondents have made clear that they will provide appropriate and targeted discovery of post-Complaint events, and have been doing so on an expedited basis. That is all the law requires. Complaint Counsel’s Motion should be denied.

BACKGROUND

Complaint Counsel’s Motion omits key background context fatal to its request.¹ This is not a dispute about Respondents’ unwillingness to produce relevant documents, but rather a dispute about Respondents’ unwillingness to pore through millions of documents previously agreed to be irrelevant because Complaint Counsel now hope to find needles in a haystack.

Respondents’ Massive 2R Productions. The scope of the Second Request was immense. Staff defined the relevant product and service so broadly as to touch every aspect of Respondents’ gaming businesses and the proposed transaction. *See* Ex. A (Second Request to Microsoft); Ex. B (Second Request to Activision). Microsoft therefore determined that TAR was the best way to respond. TAR has become an industry-standard option to approach electronic discovery. Keeling Decl. ¶¶15-19; *see also Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127, 129 (S.D.N.Y. 2015) (“[I]t is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it.” (collecting cases)). TAR learns to identify potentially responsive documents based on a statistical sample of the document universe coded by human reviewers. Keeling Decl. ¶¶16-18. The algorithm then assigns every document a numerical score for responsiveness, and non-privileged documents above a certain cutoff score are produced.² *Id.* ¶18.

Microsoft and Staff collaborated on the implementation of TAR during the investigation. The parties agreed on a list of 64 custodians and a TAR protocol, including a “recall rate” of 70. *Id.* ¶¶26-27. This agreement meant that at least 70% of all responsive documents would be produced—or, put differently, Staff agreed that up to 30% of all responsive documents would *not* be produced. This recall rate is common in Second Requests because low-scoring documents are unlikely to be useful.

¹ The full context is set forth in detail in the declarations of Robert Keeling (“Keeling Decl.”) and Bradley Pierson (“Pierson Decl.”), attached hereto as Exs. C and J, respectively.

² Human reviewers must still review responsive documents for privilege.

Id. ¶28. Using the agreed-upon TAR protocol, Microsoft produced more than 2.1 million documents totaling more than 9.5 million pages. *Id.* ¶31.

Staff also audited the TAR process, confirming that the “null set” contained no meaningfully responsive documents. *Id.* ¶¶29-30. Microsoft thereafter certified substantial compliance, and Staff did not challenge certification. *Id.* ¶¶29-31. Afterward, between August and October 2022, Microsoft voluntarily “refreshed” its production, using the same TAR model, to include documents being produced to foreign antitrust regulators. *Id.* ¶31. At Staff’s request, Microsoft also added two additional custodians to this “refresh.” *Id.*

Although employing human review, Activision likewise fully cooperated with Staff during the Second Request, resulting in the pre-Complaint production of over 850,000 documents from 49 custodians. Pierson Decl. ¶6. At multiple points during the Second Request, Staff proposed additional custodians and search terms, nearly all of which Activision accepted. *Id.* ¶3. Unsurprisingly, therefore, Staff did not challenge Activision’s substantial compliance with the Second Request. *Id.* ¶4.

Respondents’ Voluntary Post-Complaint Productions. Shortly after the Complaint was filed, Respondents offered to refresh their Second Request productions up to the date of the Complaint in an effort to expedite party discovery. Keeling Decl. ¶33. During subsequent meet-and-confers, Microsoft informed Complaint Counsel that it would use TAR for the refresh. Complaint Counsel voiced no objections. *Id.* ¶¶33-34. Complaint Counsel built upon Microsoft’s approach by asking Microsoft to produce documents from 10 new custodians, with the understanding that Microsoft would continue to use the same TAR model. *Id.* ¶33. Microsoft agreed, relying on Complaint Counsel’s representation that they had no interest in reinventing the wheel through RFPs or in receiving yet more documents there would not be time to review. *Id.* ¶35.

Microsoft thereafter used TAR to produce an additional 270,000 documents created between substantial compliance and the date of the Complaint, plus 166,000 documents from the 10 new custodians. *Id.* ¶34. Thus, without receiving any formal discovery request, Microsoft produced more than 445,000 documents, totaling 3 million pages, after this litigation commenced. *Id.* Activision produced over 122,000 documents in the same vein. Pierson Decl. ¶6.

Complaint Counsel Issued Improper and Overbroad RFPs. Notwithstanding this extensive course of dealing between the parties, and Respondents’ good-faith understanding of Complaint Counsel’s representations, Complaint Counsel served a set of wide-ranging RFPs shortly after the Complaint was filed. Two aspects of the RFPs are notable.

First, Complaint Counsel violated the Court-ordered limit of 50 RFPs per *party*,³ ultimately issuing 44 discrete requests to Microsoft and 37 to Activision. Complaint Counsel arrived at this approach by subdividing its numeric requests into subparts and by using run-on sentences to cram multiple requests into a “single” request. But that does not comply with FTC rules. A subpart counts separately if it can “stand alone and be answered irrespective of the answers to the others.” *In re McWane, Inc.* F.T.C. Dkt. No. 9351 (Apr. 16, 2012). Many of Complaint Counsel’s RFPs contain subparts that are logically and factually independent of each other; others count as more than one because they seek documents related to topics that could be answered without regard to the other. *See* Exs. E, K.

Second, Complaint Counsel’s proposed approach essentially seeks to undo the parties’ understanding, requiring Respondents to re-review the “discard pile” and use new search terms for evidence they claim must be missing but cannot describe; and to review and produce post-Complaint

³ Exhibits E and K break the RFPs into their 81 separate subparts.

documents for more than 100 custodians, notwithstanding the fact that many of these documents are privileged.

ARGUMENT

I. Complaint Counsel’s Requests to Microsoft Are Duplicative and Unduly Burdensome.

Complaint Counsel seek sweeping new searches of more than 14 million documents that simply duplicate what Staff requested and received in the Second Request. This would impose significant additional burden for no appreciable benefit. *See In re Intuit, Inc.*, F.T.C. No. 9408 (Oct. 31, 2022) (“Discovery shall be limited if the Administrative Law Judge determines that it is ‘unreasonably cumulative or duplicative,’ or the ‘burden and expense of the proposed discovery ... outweigh its likely benefit.’” (quoting 16 C.F.R. §3.31(c)(2)(i), (iii))).

Documents relevant to *all* the RFPs have already been produced. For example, Microsoft has produced more than 621,000 documents hitting on Complaint Counsel’s proposed search terms (including families). Keeling Decl. ¶¶22-23. These are the documents most likely to be responsive to Complaint Counsel’s RFPs, not Complaint Counsel’s proposed searches of the null set. Microsoft sampled the documents that would result from Complaint Counsel’s approach and identified virtually no responsive documents, finding instead nearly 98% false positives. *Id.* ¶¶45-47. Indeed, sampling found zero responsive documents for RFPs 3 and 11. *Id.* This is not surprising, since Staff also identified no responsive documents in their review of the null set validation sample. *Id.* ¶¶29-30. At the same time, undertaking this review would impose massive costs. *Id.* ¶¶41-44.

Indeed, it is hard to imagine what additional documents Complaint Counsel are hoping to find given what has been produced to date on the specific RFPs identified in their Motion:

RFP 1 asks for documents of the [REDACTED] Searching across Microsoft’s productions to date reveals that approximately 194,000 documents hitting on Complaint Counsel’s terms (including their family members) have already been produced. Nevertheless,

Microsoft conducted additional diligence in response to Complaint Counsel's concerns and produced all responsive documents identified, including [REDACTED] audio or video recordings and files from three central repositories.⁴ *Id.* ¶23.

RFP 3 asks for documents related to cross-play. Again, searching across Microsoft's productions to date using Complaint Counsel's search terms reveals that more than 127,000 documents, including their family members, have already been produced. *Id.* ¶23.

RFP 6 asks for documents related to [REDACTED]. A search of Microsoft's productions to date reveals that more than 124,000 documents hitting on Complaint Counsel's search terms, including their family members, have already been produced. In addition, Microsoft has identified video recordings related to [REDACTED] which were produced on March 13. *Id.* ¶¶23, 37.

RFP 11 asks for documents related to exclusivity decision-making. Complaint Counsel's exclusivity search terms hit on more than 205,000 documents Microsoft has already produced. Microsoft has also produced [REDACTED] which Complaint Counsel did not request before filing the motion, *see* Mot. 7, and which does not even contain any of Complaint Counsel's proposed RFP 11 search terms. Keeling Decl. ¶¶23, 50.

Finally, in response to **RFP 16**, Microsoft has produced all existing third-party agreements to distribute Activision content, often on an expedited basis, together with external communications about those agreements. *Id.* ¶38. If Microsoft reaches additional third-party agreements to distribute Activision content, it will produce those agreements and any related external communications. *Id.*

⁴ As Microsoft has repeatedly explained to Complaint Counsel, [REDACTED] is not a mailbox that contains emails, but a distribution list that routes emails to individual team members' mailboxes. Responsive, nonprivileged documents for nine members of this distribution list have already been produced.

Complaint Counsel’s demand for *internal* communications regarding these agreements is unreasonable because virtually all of those communications are likely privileged. *Id.*

Against that backdrop, it is telling to look at what Complaint Counsel have identified as the gaps in the production. Despite asking for a re-review of 14 million documents, they have identified only *three* documents they claim are relevant but were not produced. Mot. 6, 7. Even if marginally relevant documents in the TAR null set were an appropriate consideration here, Complaint Counsel are wrong on the facts. Two of these documents *were* produced, and the third would not have been produced by Complaint Counsel’s requested approach. Notably, however, Microsoft promptly located and produced that document this week—as Microsoft has been doing with every other specific document Complaint Counsel have requested. Keeling Decl. ¶¶49-50.

In short, Complaint Counsel have provided nothing close to the strong showing required to justify backtracking on an agreed approach that has already generated a massive amount of evidence. *See PRCM Advisers LLC v. Two Harbors Invst. Corp.*, 2022 WL 18027565, at *6 (S.D.N.Y. Dec. 30, 2022) (“Courts enforce discovery deals not only because lawyers should abide by their agreements, but also because if the parties could not rely on courts to enforce discovery agreements, there would be little incentive for parties to make them.” (citations and internal quotation marks omitted)). No court has ever ordered a party using TAR pursuant to an agreed protocol to further review documents in the null set that hit on broad search terms. *See* Keeling Decl. ¶¶55-57. Complaint Counsel cannot show that this case should be the first.

II. Complaint Counsel’s Requests to Activision Should Also Be Denied.

Likewise, the RFPs to Activision that Complaint Counsel move to compel are subsumed within—and unreasonably duplicative of—Second Request specifications. Requiring that Activision engage in the additional, duplicative discovery that Complaint Counsel demand would impose a burden and expense that outweigh any imagined benefit.

RFP 1 is subsumed within Specifications 7, 8, 9, and 10 of the Second Request, pursuant to which Activision produced over 423,000 documents, including 57,473 documents from the three custodians referenced in Complaint Counsel’s proposed order. Pierson Decl. ¶7. While the Motion demands that Activision produce studies from its marketing department, Activision’s Second Request production already contained hundreds of such studies. *Id.* ¶7. Even under Complaint Counsel’s purported compromise, Activision would have to review approximately 507,292 documents for responsiveness to RFP 1, which would cost approximately [REDACTED] *Id.* ¶7. RFP 1 is thus both unreasonably duplicative and burdensome.

RFP 2 is similarly duplicative of Specifications 7, 8, and 16 of the Second Request, pursuant to which Activision produced more than 457,000 documents. *Id.* ¶8. Complaint Counsel contend that Activision did not search the term “cross-play” during the Second Request, but “cross-play” (and iterations thereof) appears in more than 185,000 documents in Activision’s productions. *Id.* ¶8. Given the low responsiveness rate (0.06%) of a random sample of these documents and the large volume of documents already produced, Complaint Counsel’s demands regarding RFP 2 are unreasonably duplicative and burdensome. *Id.* ¶8.⁵

III. Complaint Counsel’s Demand for Post-Complaint Documents Imposes Substantial and Unjustified Burden.

In addition to its demand for a discovery do-over, Complaint Counsel also clamor for extensive post-Complaint discovery “through February 28, 2023.” Mot. 3. This should also be denied.

Respondents are unaware of any precedents requiring production of documents generated after the date of the Complaint, and Complaint Counsel have identified none. *See SPS Techs., LLC v. Boeing Co.*, 2019 WL 2409601, at *8 (N.D. Ill. June 7, 2019) (“Ordering review and production of

⁵ Although RFPs 5, 7, and 8 are also unreasonably duplicative of prior productions, Activision will agree to Complaint Counsel’s proposals related to those requests because the additional review required is not unduly burdensome.

communications post-Complaint runs the risk of including too many irrelevant documents being swept into the review.”). And for good reason—to keep discovery open to the date the Motion was filed would result in an untenable burden on Respondents, who have already been producing documents related to real-time events on an expedited basis.

Since the Complaint was filed, many of Respondents’ custodians have been involved in defending this proceeding and regulatory proceedings in Europe and the United Kingdom, significantly increasing the proportion of their documents that are privileged or protected. Keeling Decl. ¶¶52-53. To produce post-Complaint documents, Respondents would therefore have to review hundreds of thousands of documents from these custodians, in addition to navigating a cumbersome clawback process should any privileged documents slip through. *Id.* ¶¶51-54.

Respondents have made clear that they will produce appropriate relevant post-Complaint discovery, and have been actively doing so on a priority basis; for example, directly emailing to Complaint Counsel post-Complaint agreements reached with third parties that may impact Complaint Counsel’s theories of harm, and expediting the production of external communications related to those deals. But there is no warrant for the broad-ranging additional and burdensome discovery that Complaint Counsel demand.

CONCLUSION

For the foregoing reasons, the Motion to Compel should be denied.

Dated: March 15, 2023

Respectfully submitted,

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By: /s/ Beth Wilkinson

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Exhibit A

[CONFIDENTIAL - REDACTED IN ENTIRETY]

Exhibit B

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Exhibit C

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Exhibit D

[CONFIDENTIAL - REDACTED IN ENTIRETY]

Exhibit E

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Exhibit F

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Exhibit G

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Exhibit H

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Exhibit I

[CONFIDENTIAL - REDACTED IN ENTIRETY]

Exhibit J

[CONFIDENTIAL - REDACTED IN ENTIRETY]

Exhibit K

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 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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I also certify that I caused the forgoing document to be served via email to:

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