

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)	
600 Pennsylvania Avenue, NW)	
Washington, DC 20580)	
)	
Petitioner,)	
)	
v.)	No. 08-MISC-360-HHK
)	
TAKE-TWO INTERACTIVE SOFTWARE, INC. ,)	
622 Broadway)	
New York, NY 10012)	
)	
Respondent.)	

**EMERGENCY PETITION OF THE
FEDERAL TRADE COMMISSION FOR AN ORDER ENFORCING A
SUBPOENA *DUCES TECUM* AND A CIVIL INVESTIGATIVE DEMAND
ISSUED IN A PRE-MERGER INVESTIGATION**

PRELIMINARY STATEMENT

The Federal Trade Commission (“Commission”) petitions this Court, pursuant to Sections 9, 16, and 20 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 49, 56, 57b-1, and 28 U.S.C. § 1367, for an order requiring respondent, Take-Two Interactive Software, Inc. (“Take-Two”), to produce documents in accordance with a Commission administrative Subpoena *duces tecum* and to respond to written interrogatories in accordance with a Commission Civil Investigative Demand (“CID”). Both the Subpoena and the CID were issued as part of a pre-merger investigation that seeks to determine whether the proposed acquisition of Take-Two by Electronic Arts Inc. (“EA”) (the “proposed transaction”) would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the FTC Act, 15 U.S.C. § 45.

This petition is filed on an emergency basis because EA has announced it intends to

consummate the transaction on 45 days notice to the Commission.¹ Since EA fully controls when it will provide such notice, the Commission must be prepared to determine whether the proposed transaction is anticompetitive and, if necessary, go into court to challenge it on a very abbreviated schedule over which it has, at most, very limited control. As a result, time of the essence in the Court's resolution of this petition. The Subpoena and CID, along with their May 9 return date, specifically were designed to require Take-Two to promptly produce documents to Commission staff. This would permit staff to analyze these documents, to use them to prepare for investigational hearings of Take-Two officials, and to complete these investigational hearings with sufficient time for the Commission to evaluate the competitive effects of the proposed transaction and thus decide whether to challenge the transaction prior to it being consummated within the abbreviated schedule that EA will set in motion. Any delay in the resolution of this petition force the Commission to make its pre-consummation assessment of the proposed transaction based upon incomplete information. Further, if the Commission were forced by Take-Two's non-compliance to defer full evaluation of the proposed transaction until after it is consummated, further harm may result because it usually is far more difficult for the Commission to obtain effective relief after a merger has closed.

The Commission, therefore, requests that this Court expeditiously issue an Order to Show Cause against Take-Two and schedule a hearing thereon as soon as practicable, and preferably no later than fourteen (14) calendar days of the filing of this petition.² Further, the Commission

¹In fact, EA could close the transaction on as little as 10 days notice to the Commission. 16 C.F.R. § 803.10(b).

²Counsel for Take-Two, Stephen Axinn, is aware that the Commission is filing this petition and, at Mr. Axinn's request, Commission staff is sending a courtesy copy of this petition and all related papers to counsel via email.

requests that Take-Two's opposition to the petition (if any) be due within seven (7) calendar days of the date of entry of the Show Cause Order and the Commission's reply (if any), be due three (3) calendar days after the filing of Take-Two's opposition. Should the Court issue an Order granting the petition, the Commission requests that Take-Two be ordered to produce to the Commission: (a) within three (3) calendar days of the date of entry of the Order, (i) the information responsive to the eight categories of prioritized information agreed to by Take-Two and the Commission on May 7, 2008, and (ii) narrative responses to the interrogatories contained in the Commission's CID; and (b) within seven (7) calendar days of the date of entry of the Order, the remainder of the documents responsive to the specifications contained in the Subpoena.

In support of this petition, the Commission alleges the following:

1. The Commission is an administrative agency of the United States government, organized and existing pursuant to the FTC Act, 15 U.S.C. § 41 et seq. The Commission is authorized and directed by Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), to prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce, and to enforce the federal antitrust laws, including § 7 of the Clayton Act, 15 U.S.C. § 18. (Petition Exhibit ("Pet. Exh.") 1, ¶ 3).

3. Take-Two is a video game software developer and manufacturer that maintains its principal place of business at 622 Broadway, New York, NY 10012. Take-Two is engaged in, and its business affects, "commerce" as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. Through the sales of its video games, Take-Two engages in commerce throughout the country, including in this district. (Pet. Exh.1, ¶ 4).

4. On March 13, 2008, EA initiated a hostile cash tender offer to purchase the stock

of Take-Two. This offer expires on June 16, 2008. If the offer is accepted, Take-Two's shareholders will receive approximately \$2.1 billion in cash. (Pet. Exh. 1, ¶ 5). EA and Take-Two publish video game titles within overlapping genres, including the sports genre. In particular, historically EA and Take-Two have sold competing titles for simulated sports games, including basketball, football, hockey, and baseball. (*Id.* at ¶ 6).

5. Sections 9, 20(e) and (h) of the FTC Act, 15 U.S.C. § 49 and 57b-1(e) and (h), empowers the Commission to require by Subpoena the production of documentary and by CID - to obtain responses to written interrogatories. These provisions also authorize the Commission to seek enforcement of this compulsory process in any United States District Court where the person "resides, is found, or transacts business." Along with Fed. R. Civ. P. 81(a)(5) and 28 U.S.C. § 1367, these provisions provide this Court with jurisdiction and venue over this proceeding.

6. The Declaration of Reid Horwitz, which verifies the allegations of this petition, is attached hereto as Pet. Exh. 1. Additional exhibits attached to this Petition are:

- Pet. Exh. 2 Subpoena *duces tecum* to Take-Two, April 21, 2008 (includes a copy of the Commission's April 17, 2008, Resolution Directing Use of Compulsory Process in Nonpublic Investigation);
- Pet. Exh. 3 Civil Investigative Demand to Take-Two, April 21, 2008 (includes a copy of the Commission's April 17, 2008, Resolution Directing Use of Compulsory Process in Nonpublic Investigation);
- Pet. Exh. 4 Slip opinion in *FTC v. Tarriff*, No. 1:08-Misc-217-RCL (D.D.C. Jun. 2, 2008);
- Pet. Exh. 5 May 8, 2008, letter to Stephen Axinn from Commission Staff;
- Pet. Exh. 6 May 15, 2008, letter to Stephen Axinn from Commission Staff;
- Pet. Exh. 7 June 4, 2008, letter to Stephen Axinn from Commission Staff.

7. On April 16, 2008, the Commission issued Requests for Additional Information about the proposed transaction to both Take-Two and EA pursuant the Hart Scott Rodino (“HSR”) Act, 15 U.S.C. § 18(e)(1) (“HSR second requests”). (Pet. Exh. 1, ¶7).

8. On April 17, 2008, the Commission passed a Resolution Directing Use of Compulsory Process in Nonpublic Investigation. This resolution authorized the use of compulsory process to investigate whether the proposed transaction between EA and Take-Two is in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Section 7 of the Clayton Act, 15 U.S.C. § 18. (resolution is the last page of both Pet. Exhs. 2 and 3).

9. On April 21, 2008, the Commission issued its Subpoena and CID. Both had a return date of May 9, 2008. (Pet. Exh. 1, ¶7). The Subpoena contains 29 document production specifications. (Pet. Exh. 2). The CID contains 27 interrogatories. (Pet. Exh. 3). Together, this compulsory process constitutes a substantial subset of the Commission’s April 16, 2008, HSR second request to Take-Two. (Pet. Exh. 1, ¶8).

10. The Commission issued the Subpoena and CID in addition to the HSR second request because, for cash tender offers, the HSR creates an abbreviated schedule for cash tender offers. 15 U.S.C. §§ 18a(b)(1)(A) and (B); 16 C.F.R. § 803.10(b). This schedule is triggered solely by certification by the prospective purchaser (here EA) that it has substantially complied with its HSR second request, *id.*, and EA has announced it intends to consummate the transaction on 45 days after such certification. *See*

<http://www.reuters.com/article/technologyNews/idUSN0435662420080604>. Since EA fully determines when it will provide such certification, the Commission must be prepared to

determine whether the proposed transaction is anticompetitive and, if necessary, go into court to challenge it on a very abbreviated schedule over which it has, at most, very limited control. The

Subpoena and CID, along with their May 9 return date, specifically were designed to require Take-Two to promptly produce documents to Commission staff. This would permit staff to analyze these documents, to use them to prepare for investigational hearings of Take-Two officials, and to complete these investigational hearings with sufficient time for the Commission to evaluate the competitive effects of the proposed transaction and thus decide whether to challenge the transaction prior to it being consummated within the abbreviated schedule that EA will set in motion. (Pet. Exh. 1, ¶¶9-11).

11. As ¶ 10 demonstrates, time is of the essence for the resolution on this petition given the 45 day notice period that will be triggered solely by the action of EA and the substantial work that the Commission must complete prior to the expiration of this 45 day period. The Commission, therefore, requests that this petition be heard and resolved on an emergency basis.

12. On April 25 and May 7, 2008, successive counsel for Take-Two entered into agreements with Commission staff that would have provided the agency with documents from a targeted group of employees potentially possessing key information to the Commission's investigation. This information likely would have contributed significantly to the Commission's market analysis which will control the outcome of this investigation. Moreover, either agreement would have helped to assure that the Commission promptly would receive these documents on an expedited basis. As indicated in ¶ 10, expedited production was (and remains) critical to the Commission. Further, if Take-Two's initial productions under either agreement had provided substantial information for the Commission to assess the proposed transaction, this could have served as a basis for narrowing what the Commission would consider to be a satisfactory response to the Subpoena and CID. Thus, by reneging on both of these agreements

Take-Two foreclosed itself from the possibility of significantly reducing its burden of coming into compliance with the Commission's compulsory process. (Pet. Exh. 1, ¶¶12-13 and 16-18). As part of the May 7 agreement, the Commission extended the May 9 return date for its compulsory process to May 16, 2008. (Pet. Exh.1, ¶17).

13 Within a short period of time after entering into the April 25 and then the May 7 agreements, Take-Two's counsel informed the Commission that Take-Two was wholly renegeing on the agreement. (Pet. Exh. 1, ¶¶15 and 19).

14. On May 15, 2008, after Take-Two renegeed on the May 7 agreement, counsel for Take-Two and Commission staff reached an interim agreement that solely served to delay the Commission from commencing an enforcement proceeding to compel compliance with the Subpoena and CID until at least May 22, 2008. In return for this forbearance by the Commission, Take-Two agreed to conduct promptly a very limited review of the files of three Take-Two officials. (Pet. Exh. 1, ¶21; Pet. Exh. 6). This interim agreement did *not*, however, extend the return date for the Subpoena and CID beyond May 16, 2008. (Pet. Exh. 1, ¶21).

15. On June 2, 2008, counsel for Take-Two informed Commission staff that Take-Two would not voluntarily fully comply with the Subpoena or CID. At most, Take-Two represented that it would conduct a limited review of the files of three additional Take-Two officials and ambiguously promised that it would possibly consider searching unspecified files for unidentified individuals at an undetermined time. (Pet. Exh. 1, ¶¶ 29-30).

16. In sum, while the May 16, 2008, return date for both the Subpoena and CID has run, as its own counsel admits, Take-Two is not in compliance with the Subpoena and CID and, absent an Order by this Court order, never will be.

17. When a party has any legal or factual objections to compulsory process issued by

the Commission, a long standing Commission Rule requires that all such objections initially be raised with the Commission through a petition to limit or quash the process filed with the Commission's Secretary. 16 C.F.R. § 2.7(d). Such a petition must be filed within the earlier of twenty days of service of process or the return date. *Id.* Take-Two has utterly failed to file such a petition, timely or otherwise. (Pet. Exh. 1, ¶33).

18. The Subpoena and CID issued to Take-Two are within the Commission's statutory authority, proper procedures were followed, and the information sought is reasonably related to the Commission's investigation of the proposed acquisition of Take-Two by EA. Take-Two is barred from asserting any objections before this Court that it otherwise may have been able to raise because it failed to raise them in the first instance with the Commission and, therefore, failed to exhaust its administrative remedies. Further delays in the Commission's investigation caused by Take-Two's failure to comply are contrary to the public interest. Therefore, the Subpoena and CID should be enforced in full.

19. No previous application for the relief sought herein has been made to this or any other court.

WHEREFORE, the Commission invokes the aid of this Court and prays:

- a. That this Court expeditiously enter an Order to Show Cause directing Take-Two to explain why it should not be required to comply with the Subpoena and CID, conduct a hearing on this petition within fourteen (14) days of the filing of the petition, and then make a prompt determination by this Court of Take-Two's obligation to comply with the Subpoena and CID;
- b. That following a determination that Take-Two must comply with the Subpoena and CID, that this Court enter an Order requiring that Take-Two produce to the

Commission:

- (1) Within three (3) calendar days of the date of entry of the Order,
 - (a) the information responsive to the eight categories of prioritized information agreed to by Take-Two and the Commission on May 7, 2008, as set forth in Pet. Exh. 5, and
 - (b) narrative responses to the interrogatories contained in the Commission's CID; and
 - (2) Within seven (7) calendar days of the date of entry of the Order, the remainder of the documents responsive to the specifications contained in the Subpoena; and
- c. That this Court provide such other relief as it deems just and proper.

Respectfully submitted,

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel - Litigation

JOHN ANDREW SINGER
Attorneys for Petitioner
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-3234
Fax (202) 326-2477
Email: jsinger@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2008, I served a copy of the foregoing Petition, Memorandum in support thereof, Declaration of Reid B. Horwitz, proposed Order to Show Cause, and proposed Order to compel via Federal Express and email on the following:

Stephen M. Axinn, Esq.
Axinn, Veltrop & Harkrider
114 West 47th Street
New York, NY 10036
sma@avhlaw.com

JOHN ANDREW SINGER