PUBLIC[1]

UNITED STATES OF AMERICA
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

ORDER ON MOTION OF SONY INTERACTIVE ENTERTAINMENT LLC TO QUASH OR LIMIT SUBPOENA *DUCES TECUM*

I.

On February 3, 2023, non-party Sony Interactive Entertainment LLC ("SIE") filed a motion to quash or to limit a subpoena *duces tecum* served on SIE by Respondent Microsoft Corp. ("Microsoft") ("Motion"). On February 13, 2023, Microsoft filed an opposition to the Motion ("Opposition").[2] For the reasons set forth below, SIE's Motion is GRANTED IN PART and DENIED IN PART.

[1] SIE and Microsoft designated some of the information in their filings as "confidential." "[A]lthough Commission Rule 3.45(d) provides that parties shall not disclose confidential information, it specifically provides that the Rule does not preclude references in briefs to 'confidential information or general statements based on the content of such information.' 16 C.F.R. § 3.45(d)." *In re ECM BioFilms, Inc*., 2014 FTC LEXIS 16, at *9 (Jan. 14, 2014). This Order reveals only general statements based on the content of information that has been designated as confidential. *See also In re Bristol-Myers Co.*, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977) (holding that an Administrative Law Judge may reveal information if "public disclosure is required in the interests of facilitating public understanding" of decisions).

[2] On February 14, 2023, SIE sought leave to file a reply in support of its Motion, pursuant to Federal Trade Commission ("FTC") Rule 3.22(d), 16 C.F.R. § 3.22(d). Rule 3.22(d) provides that a reply brief "shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge's or the Commission's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief." 16 C.F.R. § 3.22(d). SIE's proposed reply does not reference any "recent important developments or controlling authority" that "could not have been raised earlier" in SIE's Motion. Accordingly, SIE's request to file a reply is DENIED.

II.

The Complaint in this matter alleges that Microsoft and SIE control the market for high-performance video game consoles and that Microsoft's proposed acquisition of video game developer and publisher Activision Blizzard, Inc. ("Activision")[3] would give Microsoft the ability and incentive to withhold or degrade Activision's content in ways that substantially lessen competition in the alleged relevant markets. Complaint ¶¶ 1, 60-95.

The Complaint further alleges that SIE's gaming console, PlayStation, competes with Microsoft's gaming console, Xbox, and that the current generation of PlayStation and Xbox consoles are the only high-performance consoles presently available. Complaint ¶¶ 26, 28, 64. According to the Complaint, Microsoft and SIE compete closely for high-quality console games, particularly those made by Activision, and that the proposed acquisition of Activision by Microsoft would give the combined firm less incentive to collaborate with SIE to optimize Activision content for PlayStation, including by potentially limiting SIE's access to Activision's highly popular video game franchise *Call of Duty*. Complaint ¶¶ 6-7, 66b, 106, 112, 115.

On January 17, 2023, Microsoft served a subpoena *duces tecum* on SIE, containing 45 document requests ("Subpoena"). On January 23, 2023, SIE provided written responses and objections to the Subpoena. SIE and Microsoft met and conferred regarding SIE's objections on five occasions. The Motion addresses the areas that remain in dispute, described more fully below.

Microsoft argues that SIE's video game business is integral to Complaint Counsel's theory of anticompetitive harm in this case and that SIE documents and data are central to the issues presented in this litigation. In general, SIE does not contest the relevance of the information sought but resists discovery primarily on the ground that searching for and producing the disputed data and documents is unduly burdensome. Microsoft responds that SIE has failed to demonstrate that complying with the requested discovery presents any undue burden, particularly considering the relevance of SIE's video game business to this proceeding.

III.

Pursuant to Rule 3.31(c)(1) of the Commission's Rules of Practice, parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. 16 C.F.R. § 3.31(c)(1). The Administrative Law Judge may deny or restrict discovery in order 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).

A non-party seeking to quash or limit a subpoena has the burden of demonstrating why discovery should be denied or restricted. *See In re HomeAdvisor, Inc.*, 2022 WL 4483130, at *2 (F.T.C. Sept. 26, 2022) (quoting *In re Polypore Int'l, Inc.*, 2008 WL 4947490, at *6 (F.T.C. Nov.

[3] "A video game publisher is a company that publishes video games that have been developed either internally by the publisher or externally by a video game developer." https://en.wikipedia.org/wiki/Video_game_publisher.

14, 2008)). A general allegation by the non-party that a subpoena is unduly burdensome is insufficient to carry that burden of showing that the requested discovery should be denied. *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009). Moreover, "[e]ven where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding." *Id*. (citing *In re Kaiser Alum. & Chem. Corp.*, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976)).

IV.

SIE seeks an order (A) limiting the custodians whose records are to be searched for responsive materials; (B) limiting the date range for responsive documents; (C) quashing enumerated document requests; and (D) quashing or limiting the Subpoena generally in accordance with purported agreements with Microsoft set forth in Exhibit H to the Motion.

A. Request to Limit Custodians

(1) Lin Tao and Hideaki Nishino

SIE opposes including Lin Tao and Hideaki Nishino as custodians whose files should be searched for documents responsive to the Subpoena. SIE does not, as to either requested custodian, contend that the custodian's files are irrelevant. As to Tao, SIE asserts that a "high percentage" of Tao's files are in Japanese, which SIE argues would render searching Tao's files more time-consuming and expensive. However, the declaration upon which SIE relies in its Motion does not quantify a cost or establish the extent of Japanese language files. *See* Motion Ex. B (Mahoney Decl. ¶ 11) (stating that "I also understand that a custodial collection of documents in this matter *could involve review of Japanese*-language files" (emphasis added)). Nor does SIE persuasively explain why searching for and producing Tao's files presents an undue burden to SIE. Accordingly, SIE's attempt to resist discovery as to Tao on the basis of undue burden is rejected.[4]

SIE Motion fails to include argument as to why discovery of the files of Nishino should be denied. Its claim that it was SIE's understanding that Microsoft had dropped its demand for Nishino's files and that Microsoft "has not mentioned" Nishino "in some time" (Motion at 6) is not legally dispositive. The issue on a motion to quash is not what the parties might have agreed to in the spirit of compromise, in order to avoid judicial resolution of a dispute, but whether the party resisting discovery has met its burden of establishing why discovery should be disallowed. As to Nishino, SIE has failed to meet that burden.

Accordingly, SIE's request to exclude Tao and Nishino as custodians is rejected.

[4] SIE's proposed reply attempts to supplement Mahoney's declaration with further details to quantify the number of suspected Japanese language documents and assert an estimated cost. Using a reply in this fashion is the quintessential effort to take a "second bite at the apple," which is patently beyond the scope of replies permitted by Rule 3.22(d). Even if the revised declaration were considered, it would not change the conclusion that SIE has failed to establish that searching either Tao's or Nishino's files would be unduly burdensome to SIE.

(2) Predecessor custodians

The relevant time period under the Subpoena for the custodial record searches is January 1, 2019 to present. Subpoena attachment, instruction 2 (Motion Ex. G). For those custodians who took their positions at SIE after that date, SIE seeks to limit the time period for the record search to the period of time since the custodian took the position and dispense with any obligation to search the records of those who held the position previously, *i.e*., the "predecessor custodians."

As grounds for this limitation, SIE argues that it is sufficient to search the records of the present custodian's direct supervisor because the documents would "overlap" with those of the predecessor custodian. The implication that responsive documents in the possession of a predecessor custodian would necessarily also be in the possession of that custodian's direct supervisor is speculative and unpersuasive. Accordingly, SIE's request to limit the scope of the custodial search as requested is rejected.

(3) Greg McCurdy

Greg McCurdy is identified as SIE's in-house antitrust lawyer. Microsoft contends that in this role, McCurdy has interacted with regulators, legislative staff, consultants, and other third parties regarding the challenged acquisition of Activision and that such external communications are relevant and not privileged. Microsoft states that, as a result of its negotiations with SIE, Microsoft has limited its request to McCurdy's communications with external entities only. Opposition at 5. Microsoft asserts that SIE must demonstrate that such communications are privileged and cannot properly rest on a blanket privilege assertion.

SIE maintains that McCurdy has no business role and that even if his communications with external entities were relevant, communications with external counsel and "public affairs" professionals were for the purpose of seeking or obtaining legal advice and are therefore privileged. *See* Ex. F (McCurdy Decl. ¶ 4). SIE further argues that it would be unduly burdensome to require a search of McCurdy's files for potentially very few relevant and non-privileged documents, and that the types of communications that Microsoft seeks will be obtained through searches of the files of the custodians to which Microsoft and SIE have agreed are relevant.

In-house counsel are not immune from discovery merely by virtue of their role as lawyers, nor does SIE contend otherwise. *See In re Rail Freight Fuel Surcharge Antitrust Litig.,* 2009 WL 3443563, at *9-10 (D.D.C. Oct. 23, 2009) (granting motion to compel production of documents from in-house counsel designated as custodians). Rather, SIE contends that the burden of searching for responsive documents is too great because it is "likely" that such search will yield few non-privileged documents and that any non-privileged documents discovered are "unlikely" to be relevant. Motion at 5. SIE's assertions are conclusory and unsupported. Such unsupported allegations are insufficient to support denying discovery. *Polypore*, 2009 FTC LEXIS 41, at *10; *see also Krueger v. Ameriprise Fin., Inc.*, 2013 WL 12139425, at *7 (D. Minn. Aug. 15, 2013) (stating that the "conclusory claim that the search of [counsel]'s documents will result in the production of a burdensome privilege log is not reason to take her

off of the list of custodians in possession of responsive ESI"). Moreover, Microsoft has narrowed the request to external communications only and has limited the time period to the approximately eight months in which McCurdy has been in his current role. This substantially reduces the alleged burden associated with collecting and reviewing McCurdy's documents. Accordingly, SIE's request to exclude McCurdy as a custodian is rejected.

B. Request to Limit Date Range

Instruction 2 of the Subpoena's specifications provides that unless a document request otherwise specifies, the applicable time period for responsive documents commences on January 1, 2019. SIE objects to requests 14, 19, 22-25, 28, 29, 35, and 43 to the extent they specify a time period commencing in 2012. SIE requests that these document requests be limited to the Subpoena's generally applicable time period commencing in 2019.[5] SIE argues that documents reaching back a decade are minimally relevant to this action, which is focused on the likelihood of future anticompetitive effects from the challenged acquisition and that imposing a burden on SIE to search for and produce documents going back to 2012 is unjustified.

Microsoft counters that the foregoing requests should not be quashed but does not address why these requests should not be time limited as requested by SIE. Microsoft does not address why the requests should not be governed by the generally applicable time period commencing in 2019 or otherwise explain why these document requests require application of an extended time period.

Requiring SIE to conduct a document search and produce documents going back ten years appears on its face to be excessive, especially where, as here, the issues in the case do not center on past conduct but on the alleged likelihood of anticompetitive effects in the future. Microsoft fails to explain otherwise. Accordingly, SIE's request to limit the applicable time period for requests 14, 19, 22-25, 28, 29, 35, and 43 to begin January 1, 2019, is granted.

C. Request to Quash Specified Document Requests

(1) Request 3

SIE seeks to quash request 3, which asks SIE to produce: "All drafts of and Communications regarding [SIE's] President and CEO Jim Ryan's declaration titled 'SIE Declaration to FTC on Microsoft – Activision Blizzard Transaction,' dated December 5, 2022." SIE does not contend that the request seeks information that is not relevant. Rather, SIE states only that "[t]here are no non-privileged documents responsive to this request beyond SIE's communication to the FTC attaching the signed declaration, which Microsoft already has." Motion at 8.

FTC Rule 3.38A(a) requires that "[a]ny person withholding material responsive to a subpoena" based on a claim of privilege shall, if so directed in the subpoena "submit, together with such claim, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing

[5] SIE also seeks to quash request 35 entirely, based on separate objections which are addressed *infra*.

information itself privileged or protected, will enable other parties to assess the claim." 16 C.F.R. § 3.38A(a). Instruction 14 of the Subpoena directed SIE to provide such a schedule if it were relying on privilege to withhold documents. Motion Ex. G, Specifications at 19. Moreover, Rule 3.38A(b) specifies: "A person withholding material for reasons [of privilege as] described in § 3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process." 16 C.F.R. § 3.38A(b).

Based on the foregoing, SIE has failed to demonstrate that request 3 should be quashed and the request is rejected.

(2) Request 13

SIE seeks to quash request 13, which seeks documents related to "performance reviews or evaluations" of SIE's CEO as well as that employee's "direct [r]eports" or other related "leadership or management." Motion at 8. SIE argues that such information is not relevant to this case and constitutes an unjustified invasion of employee privacy.

Microsoft contends that the materials are relevant to understanding "the metrics on which SIE's executives and business are evaluated." Opposition at 6. This argument is unpersuasive. This is not an employment case and the "metrics" by which employees are evaluated have no apparent logical connection to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent. Microsoft asserts that it has agreed to limit request 13 to performance reviews or evaluations that are "otherwise responsive" to the Subpoena. Opposition at 6-7. This proffered "limitation" is too vague and overbroad to serve as a meaningful way to limit the production to relevant information. Moreover, employees have a privacy interest in maintaining the confidentiality of their personnel files. *Byrd v. D.C.*, 2008 WL 11493720, at *4 (D.D.C. Feb. 8, 2008). It is unclear how Microsoft's purported limitation would preserve this interest.

For all the above reasons, SIE's request to quash request 13 is granted.

(3) Request 35

SIE seeks to quash request 35, which asks SIE to produce "[a]n executed copy of every Content licensing agreement You have entered into with any third-party publisher between January 1, 2012 and present." SIE argues that such information has no apparent probative value. SIE further asserts that SIE's system does not enable SIE to search for contracts by company type and instead requires a search by company name. Therefore, according to SIE, compiling the contract documents responsive to the request would require a manual review of over 150,000 contract records with roughly 60,000 companies across various databases. SIE argues that such a manual review is unduly burdensome, particularly because SIE will also have to determine whether each contract imposes a notice obligation when disclosing the contract to a third party.

Microsoft argues that the Complaint in this case makes a number of allegations regarding high-performance video game console developers' exclusivity arrangements with video game publishers. Microsoft states that it is aware that SIE requires many third-party publishers to agree

to exclusivity provisions, including preventing the publishers from putting their games on Xbox's multi-game subscription service, and that understanding the full extent of SIE's exclusivity arrangements and their effect on industry competitiveness will assist in its defense. Microsoft further contends that SIE's 150,000 figure represents all its contracts, not just content-licensing agreements, and that SIE presumably is aware of the names of the companies with which it has content-licensing agreements and can therefore create keyword searches to isolate the relevant contracts.

The nature and extent of SIE's content-licensing agreements are relevant to the Complaint's allegations of exclusivity arrangements between video game console developers and video game developers and publishers. *See, e.g.*, Complaint ¶¶ 9, 12, 51, 53 (referencing exclusivity arrangements). In addition, the alleged burden of having to review an excessive volume of contracts is materially decreased because, as held above, the applicable date range will be limited to January 1, 2019 to the present. Moreover, it is logical to assume that SIE can determine the names of those companies with which it has content-licensing contracts and frame its digital record search accordingly to minimize the need for a manual search of all its contract records.

Based on the foregoing, SIE's request to quash request 35 is rejected.

D. Request to Quash or Limit Subpoena in Accordance with Exhibit H

SIE requests an order limiting the definitions in the Subpoena and various unspecified individual document requests in accordance with a submittal attached to the Motion and identified as Exhibit H. SIE refers generally to its response to the Subpoena, containing objections to 20 separate definitions, asserting that the definitions are "overly broad, unduly burdensome, and vague." Motion at 7. SIE fails to include any particulars, examples, or legal arguments. Moreover, SIE's Exhibit H is not itself legal argument or an explanation for quashing or limiting any definition or document request, but rather appears to be a document setting forth SIE's understanding of various agreements made by SIE and Microsoft in the course of negotiating SIE's objections to the Subpoena. This catch-all approach by SIE fails to meet its burden on a motion to quash or limit.[6] Accordingly, SIE's request that the Subpoena's definitions and various individual document requests be quashed or limited in accordance with Exhibit H is rejected.

V.

Based on the foregoing, the Motion is GRANTED IN PART and DENIED IN PART, as set forth below:

1. SIE's request to limit custodians is DENIED;

[6] SIE's attempt to shift responsibility for its failure to properly support its position to Microsoft for Microsoft's purported "refusal to grant an adequate extension to SIE's time to move to quash" is unavailing. Motion at 7. While such agreements are encouraged, a party is not obligated to agree to extensions of time and SIE fails to explain why, after agreeing to three motions to extend SIE's time to file a motion to quash, Microsoft was obligated to agree again. Moreover, SIE withdrew its fourth motion to extend.

2. SIE's request to limit document requests, including requests 14, 19, 22-25, 28, 29, 35, and 43, to the time period January 1, 2019 to present is GRANTED;

3. SIE's request to quash document request 3 is DENIED;

4. SIE's request to quash document request 13 is GRANTED;

5. SIE's request to quash document request 35 is DENIED; and

6. SIE's request to quash or limit the Subpoena, including its definitions, instructions, and document requests, in accordance with Exhibit H to the Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February 23, 2023