

**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.**

Docket No. 9412

**RESPONDENT MICROSOFT CORP.'S OPPOSITION TO NON-PARTY SONY
INTERACTIVE ENTERTAINMENT LLC'S FOURTH MOTION FOR EXTENSION
OF TIME TO MOVE TO LIMIT OR QUASH SUBPOENA**

Sony Interactive Entertainment (“SIE”)—whose gaming business has dwarfed Xbox’s for 20 years—is not an ordinary third party in this action. At great expense and over an extended period, SIE has deployed delegations of executives, large teams of outside lawyers, and high-priced economists to persuade regulators here and around the world to block Microsoft Corp.’s (“Microsoft’s”) proposed acquisition of Activision Blizzard King. SIE’s efforts are paying off: The FTC’s complaint in this action is chock-full of allegations about the effects the deal will have on SIE’s business. This case is as much about SIE as it is about Xbox and Activision. Timely discovery from SIE is therefore critical to Microsoft’s defense.

Though SIE’s motion for an extension of time complains about the breadth of the subpoena and the length of the extensions already granted for it to respond to that subpoena, Microsoft already told SIE it would consent to a fourth extension of time to negotiate issues related to the scope of the subpoena’s requests. But Microsoft believes that court intervention is required now on one issue: whether SIE will collect and produce documents from certain custodians.

Throughout the meet and confer process, SIE has indicated that it may not be able to complete the reasonable custodial production requested by Microsoft before the close of discovery, and that even if the parties do agree on a deadline for production within the discovery timeframe, Microsoft “assume[s] the risk” of SIE missing that deadline. To help address that concern, Microsoft has on several occasions, and twice in writing, asked SIE to start collecting documents from the individuals that SIE and Microsoft have already agreed should be custodians. SIE has refused.

The parties have been negotiating custodians for several weeks now and are at an impasse. Microsoft requests that the Court deny SIE’s motion to the extent it seeks an extension of time to file a motion to quash on these custodial issues. Microsoft does not oppose a week-long extension to conclude negotiations of non-custodian issues.

A. Negotiations Over Custodians Have Proceeded On A Separate Track From Other Issues.

Custodian negotiations have been ongoing for several weeks. While SIE asserts that the subpoena was served on January 17, 2023, with a response date three days later, the subpoena was actually served in substance on January 12, 2023. Microsoft served a substantively identical subpoena on January 17, 2023, to correct the entity named in the subpoena from SIE Inc. to SIE LLC. The parties met and conferred on custodians on January 18, January 25, January 26, and February 1, and exchanged the following set of custodian proposals. Though Microsoft maintains that its initial proposal of 13 custodians is appropriate and proportional to the needs of the litigation and to SIE’s involvement, in the spirit of compromise, it indicated it was willing to agree to 7 custodians, plus a narrow search of one employee’s files.

Date	Proposal
Around January 13	SIE indicates it does not believe a custodial search is appropriate, or at most 1 custodian should be used.
January 18	SIE indicates it does not believe a custodial search is appropriate, or at most 3 custodians should be used.
January 23	Microsoft proposes a list of 13 custodians.
January 25	SIE proposes a list of 5 custodians.
January 26	Microsoft proposes a list of 9 custodians.
January 28	SIE proposes a list of 6 custodians.
January 30	Microsoft proposes full custodial searches of 7 SIE employees and a narrow search from 1 employee, Greg McCurdy, Senior Director of Competition & Regulatory Affairs.

SIE's unsupported assertion that the custodial issues are intertwined with other issues related to the subpoena is just not true. From the get-go, the parties have separated and prioritized custodian discussions precisely because custodial collections are the key gating issue to getting document review and production underway. The parties recognized and intended that negotiations over the scope of requests could be conducted simultaneously with the collection and processing of custodial data. Thus, negotiations over the document requests have trailed the custodian negotiations.¹

B. SIE Has Not Acted Diligently With Respect To Custodians.

Having reached agreement on at least a core set of custodians, Microsoft made the reasonable request that SIE begin collecting documents from agreed-upon custodians at various points during the negotiations, including in writing on January 26 and January 31. SIE rejected these requests. To Microsoft counsel's knowledge, SIE has not completed collections for a single custodian—not even for individuals like SIE President & CEO Jim Ryan, who has traveled the

¹ Discussions about the scope of requests occurred on January 25 and January 26. Based on those meet-and-confer sessions, Microsoft set out its positions and offered a plethora of compromises in writing on January 31, 2023. SIE has yet to respond to Microsoft's email.

world speaking out against the Microsoft/Activision deal and whose role as a custodian has never been in dispute.

SIE's outside counsel contacted Microsoft's counsel on the afternoon of February 2, 2023 stating that SIE would file a contested motion for extension of time if Microsoft did not agree to the extension within two hours. Microsoft responded noting that it would agree to extend the time to move to quash on non-custodial issues so that those negotiations could continue. But given the parties' impasse on custodians, those issues needed to be promptly addressed so as not to hold up SIE's response to the subpoena. Rather than accept Microsoft's offer to tee up custodian-related issues but continue to negotiate other issues, SIE unilaterally filed its motion for extension of time.

Nowhere does SIE dispute that the custodian issues are ripe. Instead, SIE asserts that bifurcating custodians and other issues is inconsistent with the Rules of Practice. But the provision SIE cites—16 C.F.R. § 3.34(c)—merely indicates that a moving party must make all its arguments on a particular issue in an opening motion because replies are not permitted as a matter of right. Further, § 3.22(g) makes clear that multiple motions on a single subpoena are permissible: “Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the *first motion* concerning compliance with the discovery demand at issue.” (emphasis added). While Microsoft has no interest in burdening the Court with piecemeal briefing, the custodian issues are sufficiently distinct from any other potential issues (which in both SIE's and Microsoft's estimation likely will not be litigated) such that separate motions would not be inefficient.

C. There Are A Few Custodian-Related Issues Ripe For Decision.

Despite Microsoft's compromises, there are a few issues on which the parties regrettably cannot reach agreement. *First*, SIE is refusing to produce any documents from Greg McCurdy, who has been deeply involved in SIE's global campaign against the Microsoft/Activision deal.

SIE claims that Mr. McCurdy is a lawyer and the associated burden of reviewing his documents for privileged material is not justified.² To address SIE's concerns, Microsoft offered to limit the search of Mr. McCurdy's files to only those documents and communications shared *outside of SIE* (i.e., documents and communications for which there is no colorable privilege concern). SIE continues to refuse to collect a single document from Mr. McCurdy.

Second, SIE is unwilling to include a single custodian with oversight of or direct involvement in key aspects of SIE's business that are highly relevant to this action: SIE's financial planning and strategy, and SIE's hardware strategy and development. After initially *proposing* that PlayStation Chief Financial Officer Lin Tao be a custodian, SIE later refused to include her (or anyone in her reporting line) as a custodian. Likewise, SIE has not agreed to include Hideaki Nishino, Senior Vice President of Global Product Strategy and Management (or anyone in his reporting line) as a custodian, even though he oversees SIE's hardware business, and two of the central questions in this matter are the scope of the relevant product market for gaming consoles (i.e., hardware) and whether SIE has tools in its arsenal to compensate for the hypothetical loss of Activision content.

Third, SIE refuses to collect from agreed-upon custodians' predecessors where the custodian has not been in his or her role for the duration of the relevant time period.

D. SIE Cannot Show Good Cause To Extend Its Deadline To Raise Custodian-Related Issues.

An extension of time may be granted under Rule 4.3(b) only where there is "good cause shown." 16 C.F.R. § 4.3(b). SIE cannot demonstrate good cause for extending the time to move

² Mr. McCurdy's role at SIE is not limited to lawyering; it also includes government affairs and public policy initiatives. And SIE's counsel has never disputed that Mr. McCurdy has responsive, non-privileged documents in his files.

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to quash on custodian-related issues. An extension would serve no purpose other than to delay disposition of issues that are ripe for review and that are currently holding up SIE's custodial collections—a necessary first step in producing documents responsive to Microsoft's subpoena. SIE has had ample notice of Microsoft's positions on custodians and cannot reasonably claim that it cannot meet the deadline for a motion to quash. Indeed, earlier this week, SIE's counsel represented that SIE had deployed resources to draft a motion to quash in anticipation of the February 3 deadline. SIE should not be permitted to use the parties' ongoing negotiations over separate issues to continue to stall disposition of custodian-related issues and custodial collections. And in light of SIE's counsel's repeated warnings that Microsoft "assume[s] the risk of [SIE's] missed deadlines," SIE's assertion that an extension of seven days will not delay the proceedings cannot be taken seriously.

* * *

For the foregoing reasons, Respondents request that this Court deny SIE's motion for extension of time.

Dated: February 3, 2023

Respectfully submitted,

By: /s/ Kieran Gostin

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In the Matter of

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Docket No. 9412

**[PROPOSED] ORDER GRANTING IN PART AND DENYING IN PART MOTION
FOR EXTENSION OF TIME TO MOVE TO LIMIT OR QUASH SUBPOENA**

On February 2, 2023, Non-Party Sony Interactive Entertainment LLC (“SIE”) filed its Fourth Motion for Extension of Time to Move to Limit or Quash or Otherwise Respond to Respondent Microsoft’s Corp.’s subpoena.

Pursuant to Rule 4.3 of the Commission’s Rules of Practice, 16 C.F.R. § 4.3(b), the Court finds that SIE has failed to show good cause for the extension sought. The motion is hereby DENIED IN PART and GRANTED IN PART. SIE is given until February 3, 2023 to move to limit or quash Respondent’s subpoena as to custodial issues and until February 10, 2023 to move to limit or quash Respondent’s subpoena based on any other issues.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February ___, 2023

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 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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The Honorable D. Michael Chappell
Administrative Law Judge
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I also certify that I caused the forgoing document to be served via email to:

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