



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.”).

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

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.

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.

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.

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

Dated: January 2, 2024

Respectfully,

/s/ Larry Malm

Carl Lawrence Malm

2112 Pennsylvania Avenue, N.W.



DUCES TECUM

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:

Date: January __, 2024

D. Michael Chappell
Chief Administrative Law Judge

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:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, D.C. 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, D.C. 20580
OALJ@ftc.com

I also certify that I caused the foregoing document to be served via email to:

James Weingarten
James Abell
Meredith Levert
Jennifer Fleury
Cem Akleman
Amanda Butler
Merrick Pastore
Nicole Callan
Ethan Gurwitz
Maria Cirincione
James Gossmann
Stephen Santulli
Edmund Saw
Michael A. Franchak
Peggy Bayer Femenella
Kassandra DiPietro
J. Alexander Ansaldo
David E. Morris
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580
(202) 326-2289
jweingarten@ftc.gov
jabell@ftc.gov
mlevert@ftc.gov

jfleury@ftc.gov
cakleman@ftc.gov
abutler2@ftc.gov
mpastore@ftc.gov
ncallan@ftc.gov
egurwitz@ftc.gov
mcirincione@ftc.gov
jgossmann@ftc.gov
ssantulli@ftc.gov
esaw@ftc.gov
mfranchak@ftc.gov
pbayerfemenella@ftc.gov
kdipietro@ftc.gov
jansaldo@ftc.gov
dmorris1@ftc.gov

Beth Wilkinson
Rakesh N. Kilaru
Kieran Gostin
Grace L. Hill
Anastasia M. Pastan
Alysha Bohanon
Sarah E. Neuman
Wilkinson Stekloff LLP
2001 M Street, NW
Washington, D.C. 20036
(202) 847-4010
bwilkinsonstekloff.com
rkilaru@wilkinsonstekloff.com
kgostin@wilkinsonstekloff.com
ghill@wilkinsonstekloff.com
apastan@wilkinsonstekloff.com
abohanon@wilkinsonstekloff.com
sneuman@wilkinsonstekloff.com

Michael Moiseyev
Megan Granger
Weil, Gotshal & Manges LLP
2001 M Street, NW
Washington, D.C. 20036
(202) 682-7235
michael.moiseyev@weil.com
megan.granger@weil.com
