

extensive correspondence with Respondents,² and identifying priority requests. Respondents have offered a hodgepodge of unavailing arguments: that the RFPs are overly broad and burdensome; that the RFPs are duplicative of the Second Request specifications; and that they already produced a large volume of documents in response to the Second Request and in their refresh of that Second Request production.³

Now, Respondents assert that there is “simply not enough time” for them to produce the requested documents.⁴ Respondents cannot complain of having too little time after proposing an expedited discovery schedule that has fact discovery set to close on April 7 ~~lun~~ingd hate on

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3.37(b). The Court will limit discovery only “if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or if the burden and expense of the proposed discovery outweigh its likely benefit.” *In re Daniel Chapter One, A Corp., & James Feijo, Respondents*, No. 9329, 2009 WL 569694, at *2 (F.T.C. Jan. 9, 2009). Importantly, “[p]arties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied.” *In re Intuit, Inc.*, No. 9408, 2022 WL 18389914, at *2 (F.T.C. Dec. 30, 2022) (quoting *In re Daniel Chapter One, supra*). As explained below, the discovery sought is highly probative of the issues in this case, and Respondents cannot justify their failure to produce responsive documents.

I. Respondents Should Produce Relevant Post-Complaint Documents

Respondents refuse to produce relevant documents created after the Complaint was filed on December 8, 2022. Respondents’ refusal includes, for example, Microsoft’s internal documents and correspondence related to ongoing negotiations with key third parties and submissions to regulators. Complaint Counsel has requested post-Complaint documents for a reasonable period of time—proposing a cutoff four weeks before the close of fact discovery. In the alternative, Complaint Counsel offered Respondents a reciprocal agreement not to rely on evidence dated after December

agreements, but Microsoft will not produce external communications or proposals sent to other third parties and will not produce any internal documents related to any agreements or proposed agreements.⁷ This approach prejudices Complaint Counsel, including most immediately by hampering Complaint Counsel's ability to prepare for depositions that are already underway.

Complaint Counsel respectfully moves the Court to order Respondents to produce documents responsive to the RFPs referenced herein through February 28, 2023.

II. Respondents Should Search for and Produce Documents Responsive to Complaint Counsel's RFPs

Respondents pointed to the volume of documents produced in the investigation as evidence that they have produced "enough" documents and should not be required to conduct diligent searches specifically in response to Complaint Counsel's RFPs. Respondents have repeatedly asserted that Complaint Counsel has not identified with sufficient specificity what is left to be produced. This assertion is false. Complaint Counsel has discussed each RFP in detail with Respondents, proposed specific search terms,⁸ and even cited specific file names of responsive documents that have not been produced. To support their baseless

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A. Microsoft should produce documents responsive to the following RFPs

RFP 1 requests materials sent to { [REDACTED] }. The { [REDACTED] } regularly reviews white papers, presentations, and discussion documents that are relevant to this litigation. Microsoft has taken the position that it has “fully satisfied” this request, even though Complaint Counsel has also identified specific file names of documents that have *not* been produced in the 2019 to 2022 time period. Microsoft agreed only to produce responsive documents and previously withheld videos from central Teams sites used by the { [REDACTED] }, but declined to produce any documents created after December 8, despite the fact that { [REDACTED] } meetings discussing, for instance, { [REDACTED] } { [REDACTED] }. Complaint Counsel identified specific steps Microsoft could take to identify further responsive documents that have not been produced, with minimal burden. For example, Complaint Counsel explained that Microsoft could easily identify responsive documents sent to the { [REDACTED] } that have not been produced by searching for emails sent to { [REDACTED] }, a dedicated email address for circulating materials to the { [REDACTED] }. Microsoft refused.

RFP 3 requests documents related to cross-play, *i.e.*, features that enable gamers to play a game together across different companies’ products. For example, cross-play enables gamers playing Call of Duty on Microsoft Xbox to play with gamers playing Call of Duty on Sony PlayStation. { [REDACTED] } { [REDACTED] } Microsoft made a similar argument when it acquired ZeniMax, but subsequently decided to take newly-acquired ZeniMax titles exclusive. *See* Compl. ¶ 12. In response to this RFP, Microsoft asserted that the

Second Request productions cover this request, but took no steps to confirm. In fact, the Second Request did not include a Specification related to cross-play. Microsoft effectively conceded the relevance of this topic when it requested documents relating to cross-play from a third party in this litigation.⁹ Microsoft's contradictory position is that it can seek relevant documents on this topic from a third party while avoiding similar discovery from its own files.

RFP 6 requests documents related to {REDACTED}, the code name for Microsoft's next generation gaming ecosystem. {REDACTED} is part of Microsoft's forward-looking strategy for its console, subscription, and cloud gaming businesses—all markets in which Complaint Counsel alleges harm. {REDACTED} {REDACTED}, after the Second Request was issued and after Microsoft's TAR had been trained to identify responsive documents.¹⁰ Compla

██████████ } Activision's in-house marketing group. Activision refuses to produce any more than a set of documents it cherry-picked to support its advocacy to a foreign regulator.

RFP 2 requests documents related to the relevance of cross-play,¹¹ which was missing from the search terms Activision used during the investigation. Activision refused Complaint Counsel's request to run a search for the term "cross-play" in the documents Activision has already collected.

RFPs 5 and 7 respectively request documents related to offering Activision on subscription services and cloud gaming services, including services from Nvidia (GeForce NOW), Nintendo (Nintendo Switch Online or NSO), Google (Stadia), and Amazon (Luna) and request documents related to offering Activision games on Nintendo devices. Even after identifying examples of relevant terms missing st elevaTJ-0.006 Tw6sA.00Wr4n Nin41 Tc -0.001 Tw [(se-4 (ti)

Dated: March 14, 2023

Respectfully submitted,

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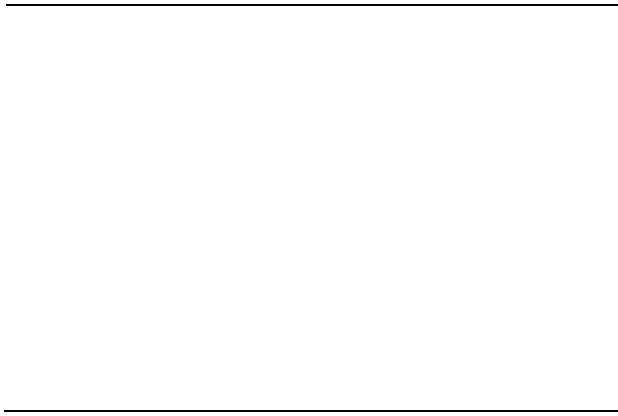
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Counsel Supporting the Complaint



Since then, the parties have had numerous additional M&Cs to discuss the RFPs via videoconference. On February 10, 2023 at 5:00 PM, Complaint Counsel (Jennifer Fleury and Nicole Callan) met with Respondents' Counsel (Grace Hill and Robert Keeling for Microsoft, and Julia York, Michael Sheerin and Bradley Pierson for Activision). On February 13, 2023 at 11:00 AM, Complaint Counsel (Nicole Callan and Jennifer Fleury) again met with Respondents' Counsel (Grace Hill and Robert Keeling for Microsoft, and Julia York, Bradley Pierson and Andrew Kabbes for Activision).

On February 15, 2023 at 1:00 PM, the parties had a M&C on Complaint Counsel's First Set of Requests for Production (the "data RFPs"), during which Complaint Counsel (Jennifer Fleury and Nicole Callan) and Microsoft's Counsel (Grace Hill and Robert Keeling for Microsoft) also briefly discussed the document RFPs. On February 24, 2023 at 10:00 AM, Complaint Counsel (Jennifer Fleury and Nicole Callan) again met with Respondents' Counsel (Grace Hill and Robert Keeling for Microsoft, and Bradley Pierson for Activision). Complaint Counsel has also exchanged letters and numerous emails with Respondents.

During a regularly scheduled weekly meeting amongst the parties on February 27, 2023 at 4:30 PM, Complaint Counsel (Jennifer Fleury) raised to Counsel for Respondents (Julia York for Activision, and Beth Wilkinson and Grace Hill for Microsoft) that Complaint Counsel believed the parties were nearing impasse regarding several of the RFPs.¹ Following this meeting, Complaint Counsel (Jennifer Fleury) sent an email to Respondents' Counsel (including Grace Hill and Robert Keeling for Microsoft, and Julia York for Activision) on February 28, 2023 Exhibit Q, stating that Complaint Counsel was considering filing a motion to compel on

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specific priority requests given the outstanding issues, and Complaint Counsel asked whether

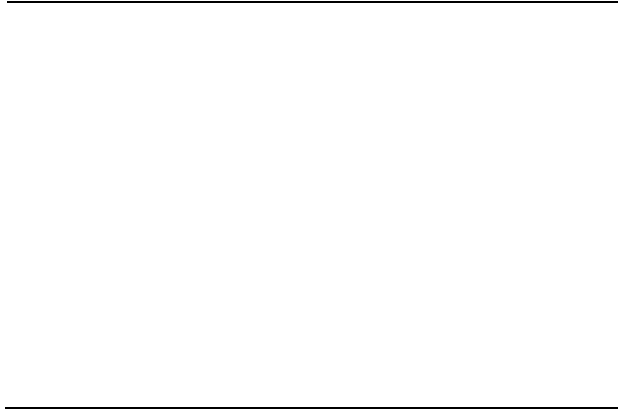


Exhibit A

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit B

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Exhibit C

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Exhibit D

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit E

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit F

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit G

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit H

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Exhibit I

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Exhibit J

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Exhibit K

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Exhibit L

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Exhibit M

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Exhibit N

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Exhibit O

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Exhibit Q

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Exhibit S

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Exhibit T

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Exhibit V

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Exhibit W

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