

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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|                                     |   |                           |
|-------------------------------------|---|---------------------------|
| FEDERAL TRADE COMMISSION,           | ) |                           |
| 600 Pennsylvania Ave, NW            | ) |                           |
| Washington, DC 20580                | ) |                           |
|                                     | ) | Case: 1:08-mc-00360 (HHK) |
| Petitioner,                         | ) |                           |
| v.                                  | ) |                           |
|                                     | ) |                           |
| TAKE-TWO INTERACTIVE SOFTWARE, INC. | ) |                           |
| 622 Broadway                        | ) |                           |
| New York, NY 10012                  | ) |                           |
|                                     | ) |                           |
| Respondent.                         | ) |                           |

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

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### **PRELIMINARY STATEMENT**

No one at Take-Two Interactive Software, Inc. (“Take-Two”) is seeking to thwart the proper investigation by the Federal Trade Commission (“FTC”) staff of Electronic Arts, Inc.’s (“EA”) tender offer. On the contrary, from the outset, Take-Two has fully cooperated with these efforts, already having produced more than 479,000 pages of responsive documents through the date of this Opposition.<sup>1</sup> The issue before the Court is how the seemingly boundless desire of a government agency for information can be contained in order to save a company from the ruinous costs of compliance with a subpoena that requires it to search virtually every electronic and paper document in its possession, and to make available most of its senior executives for investigational hearings (pre-complaint depositions) in a situation where the company is not even a willing party to any transaction being investigated and where it is quite possible that no such transaction will ever occur.

The FTC’s Emergency Petition For An Order Enforcing A Subpoena *Duces Tecum* And A Civil Investigative Demand Issued In A Pre-Merger Investigation (the “Petition”) involves the FTC’s investigation of a conditional unsolicited tender offer by EA to purchase the outstanding shares of Take-Two for \$25.74 per share. Despite several extensions of the offer’s deadline, approximately 8% of Take-Two’s shareholders have offered to tender their shares.<sup>2</sup> Given that Take-Two’s shares have recently been trading on NASDAQ for as much as \$27.95 and the stock closed at \$26.47 on June 13, it appears the company’s shareholders do not believe that EA’s offer will be consummated unless

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<sup>1</sup> See Declaration of Michael L. Keeley (“Keeley Decl.”) at ¶ 6.

<sup>2</sup> See *id.* at ¶ 4.

the price is substantially increased.<sup>3</sup> Thus, unlike most acquisitions investigated by the FTC, there is serious doubt that this transaction will ever occur.

The Hart-Scott-Rodino Act, pursuant to which this investigation is being conducted, was designed to give the federal antitrust enforcers the time and tools to gather information sufficient to determine whether to challenge an acquisition under the antitrust laws. It decidedly was not designed to serve as a substitute for the normal, judicially-controlled, pre-trial discovery with its attendant safeguards against abuse. This is especially true in situations where the FTC is involved, since the federal court's role in an FTC enforcement action is limited to determining whether to issue a preliminary injunction.<sup>4</sup> A trial on the merits of an acquisition occurs within the agency before an Administrative Law Judge. The FTC's internal rules of practice provide ample opportunity for administrative pre-trial discovery if and when a complaint is filed. And, of course, the Federal Rules provide the FTC, as a plaintiff in a preliminary injunction proceeding, with ample pre-hearing discovery as well, should it ultimately decide to contest such acquisition.<sup>5</sup>

In the early years of Hart-Scott-Rodino's application, governmental requests for additional information were typically confined to the essential information needed by agencies to determine whether to challenge mergers and acquisitions. In recent years, however, the government's appetite for information has increased dramatically. With the growth of electronic data files, and the drastic increase of e-mails that must be searched, the burden of compliance has shifted from a nuisance to a huge expense. Although year after year, the Chair of the FTC, the Assistant Attorney General and their respective

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<sup>3</sup> See *id.*

<sup>4</sup> 15 U.S.C. 53(b) (2008) (authorizing the Commission to seek preliminary and permanent injunctions).

<sup>5</sup> Take-Two is not taking any position at this time with respect to whether the acquisition raises a legitimate antitrust issue.

spokespeople assure the antitrust bar that they are working diligently to reduce the burden caused by HSR Requests for Additional Information and ancillary CIDs and subpoenas, unfortunately, year after year, the burden and cost of compliance continues to rise. It is now generally acknowledged that the cost and burden have become truly staggering.<sup>6</sup>

It is simply unfair to compel a company that is the unwilling target of a takeover to be crippled with the burden and expense that the FTC is seeking to impose upon Take-Two. Nevertheless, Take-Two has gone to great lengths to accommodate the FTC's legitimate interests. It has offered to produce its key marketing and sales executives for interviews and/or investigational hearings (*i.e.* depositions) and has already made available to the FTC over 479,000 pages of its documents and full access to the company's data warehouse for purposes of allowing the FTC access to economic information concerning its operations, products, pricing, and other key data. Moreover, it has offered its continuing willingness to provide much of the material demanded by the FTC. For example, Take-Two has offered to make seven other executives' documents available and to provide them as witnesses. But there has to be a limit to the FTC's demands. In their most recent ultimatum, the FTC bluntly asserted that Take-Two must "search the files and [] produce all responsive, non-privileged documents for any

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<sup>6</sup> See, e.g., Deborah Platt Majoras, Chairman, Federal Trade Commission, Reforms to the Merger Review Process (Feb. 16, 2006) (available at: [www.ftc.gov/os/2006/02/mergerreviewprocess.pdf](http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf)) (the new guidelines and procedures applying to all transactions after February 17, 2006 were meant to "address the increased burden on parties and Staff," as well as "recognizing that second requests ordinarily cost millions of dollars and typically take six to nine months to complete"); Bureau of Competition, Statement of the Federal Trade Commission's Bureau of Competition On Guidelines for Merger Investigations, (December 2002) (available at: [www.ftc.gov/os/2002/12/bcguidelines021211.html](http://www.ftc.gov/os/2002/12/bcguidelines021211.html)) (the policies stated therein seek "to reduce burdens on the parties that have received second requests").

additional current or former employee of Take-Two designated by the Commission . . .  
 .”— a truly open-ended fishing license.<sup>7</sup>

Instead of using its statutory power as Congress intended—to determine whether there is a fair basis for litigating the competitive effects of an acquisition—the FTC is attempting, improperly, to prepare for trial of a case that will, in all likelihood, never be brought.

#### I. Background

As of the date on which the FTC filed its Petition, Take-Two’s attorneys had already spent in excess of 3,500 hours reviewing the company’s files in search of documents responsive to the agency’s demands.<sup>8</sup> Take-Two, by then, had produced in excess of 13,000 documents—constituting more than 362,000 pages—not, as the FTC claims, a mere 721 pages.<sup>9</sup> To produce these documents, its attorneys reviewed in excess of 120,000 documents constituting over 1,100,000 pages.<sup>10</sup> Since then, more than 2,700 additional documents (comprising in excess of 117,000 pages) have been produced and the Company is continuing to review its files for responsive documents.<sup>11</sup> This process has already cost Take-Two in excess of \$2 million in legal bills and disbursements, not including the expenses of defending this proceeding, and is currently sustaining approximately an additional \$50,000 in legal expenses per day just to produce responsive documents as production continues through this action.<sup>12</sup> The FTC’s outstanding

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<sup>7</sup> (See Opposition Exhibit (“Opp. Ex.”) 37 at 2.) Take-Two disputes Mr. Horwitz’s assertion in the June 4 letter that Take-Two agreed to any open-ended commitments regarding productions. See Keeley Decl. at ¶¶ 23, 34.

<sup>8</sup> (See (Opp. Ex. 38) at 1.)

<sup>9</sup> Moreover, to the extent certain documents in Take-Two’s initial production may have been difficult to read, such resulted from Take-Two’s and its vendor’s efforts to provide these documents to Staff in an extremely expedited manner.

<sup>10</sup> (See Opp. Ex. 38 at 1.)

<sup>11</sup> See Keeley Decl. at ¶¶ 6, 30.

<sup>12</sup> See *id.* at ¶ 6.

demands will multiply this expense several times over on a company that has sustained \$323.3 million in net losses in the last two fiscal years.<sup>13</sup>

This steady stream of production, and absorption of cost, resulted from intense and productive good faith negotiations between Take-Two and the FTC, which commenced almost immediately after the issuance of its subpoena and civil investigative demand on April 21, 2008 (hereinafter collectively referred to as the “Second Request”).<sup>14, 15</sup> On April 23 and 25, 2008, Take-Two provided the FTC with documents that were responsive to Request 1(a), Specification No. 8 and Specification No. 13 of the Second Request, supplementing documents that had already been voluntarily provided in response to the FTC’s March 14 Letter requesting a voluntary production of preliminary information.<sup>16</sup> On April 23, Take-Two notified Staff that additional data collection would begin by Friday, April 25 if the parties could agree to a list of custodians by the following evening.<sup>17</sup>

On the following day, April 24, Staff requested a call to discuss which Take-Two custodians would likely have responsive documents.<sup>18</sup> After Take-Two’s counsel quickly confirmed her availability, Staff then insisted that counsel first identify custodians to be searched in addition to those Staff had already designated, based upon the organizational charts Take-Two had provided.<sup>19</sup> On April 25, Take-Two’s counsel complied with this request, proposing the names of additional individuals whose files could be searched.<sup>20</sup>

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<sup>13</sup> Take-Two Interactive Software, Inc., 2007 Annual Report (Form 10-K) at 26 (December 20, 2007) (\$323.3 million net income loss, FY06-FY07 combined).

<sup>14</sup> (See, e.g., Opposition Exhibits (“Opp. Exs.”) 20, 22, 25-36, 39.)

<sup>15</sup> A detailed digest of each event in the negotiation process can be found in the Declaration of Michael L. Keeley, referenced herein.

<sup>16</sup> See Keeley Decl. at ¶¶ 9, 16; (Opp. Exs. 11, 13-16, 20, 22.)

<sup>17</sup> (See Opp. Ex. 21.)

<sup>18</sup> (See *id.*)

<sup>19</sup> (See *id.*)

<sup>20</sup> (See Opp. Ex. 23.)

Staff countered with two substitute custodians, requesting that the parties continue these negotiations on Monday, April 28.<sup>21</sup> While retaining additional counsel during the week of April 28, Take-Two continued to make consistent progress preparing its files for review and production, incurring the burdensome costs that tasks such as data transfer, copying, and document collection entail.<sup>22</sup>

On May 7, 2008, at Take-Two's initiative, Take-Two's counsel met with FTC Staff to seek an acceptable solution that would enable Staff to receive the largest amount of priority documents in the shortest period of time, while reasonably containing the burden imposed on Take-Two.<sup>23</sup> At that time, Staff stressed to Take-Two that it felt time was of the essence in obtaining its production and memorialized in a May 8, 2008 letter that Take-Two produce nine categories of documents relating to videogames in the so-called "sports genre."<sup>24</sup> Both sides agreed that this agreement would not constitute a waiver of the FTC's right to seek other information called for by its Second Request or of Take-Two's right to object to further demands for production.<sup>25</sup> Take-Two offered to produce the requested documents on a rolling basis while the FTC evaluated whether it was necessary to seek additional information.<sup>26</sup> As Take-Two considered this rolling production an ordinary and customary process associated with ongoing good faith negotiations, it thus appeared that the parties would be able to resolve their differences without litigation.<sup>27</sup> Therefore, Take-Two did not invoke the internal FTC process for moving to quash the subpoena or CID before the return date of the Second Request: it

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<sup>21</sup> See id.

<sup>22</sup> See Keeley Decl. at ¶¶ 19, 20.

<sup>23</sup> See id. at ¶ 21.

<sup>24</sup> See id.

<sup>25</sup> See id.

<sup>26</sup> See id. at ¶¶ 21-25.

<sup>27</sup> See id.

reasonably believed that a motion to quash would only prolong the process further and destroy the good-will that Take-Two believed existed between the parties.<sup>28</sup>

Soon after the May 7 meeting, Take-Two learned from its electronic production vendor that well over 2 million documents (comprising over 14 million pages) would have to be searched in order to provide documents responsive to the May 8 Letter.<sup>29</sup> At that point, Take-Two explained to Staff that, unless the number of documents was greatly reduced, it would take several months and impose an unacceptable burden on the company to complete the production.<sup>30</sup> Take-Two further suggested that if Staff was interested in obtaining a meaningful production of documents and information quickly, its request should be further focused upon the three main executives responsible for sales and marketing for the relevant products, and Staff agreed.<sup>31</sup> Thus, the FTC's May 15, 2008 letter targeted its May 8, 2008 request for documents upon three key custodians: Robert Blau, Take-Two's Senior Vice President of Sales; Sarah Anderson, Senior Vice President of Marketing of 2K Games; and David Ismailer, Chief Operating Officer of 2K Games.<sup>32</sup>

By supplementing its legal team with large numbers of attorneys who worked through the long Memorial Day weekend, Take-Two began a rolling production of a vast amount of material on May 22 (5,834 documents and 117,106 pages), May 25 (4,811 documents and 170,407 pages), May 30 (625 documents and 51,712 pages), June 4 (1,719 documents and 22,448 pages), June 11 (1,397 documents and 25,416 pages), and June 12 (1,387 and 92,072 pages) as well as high level documents responsive to the

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<sup>28</sup> See *id.* at ¶ 22.

<sup>29</sup> See *id.* at ¶ 27.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at ¶ 28.

<sup>32</sup> (See Opp. Ex. 31.)

FTC's May 8 letter that could be secured using targeted searches (*i.e.* those which do not require searching through hundreds of thousands of documents).<sup>33</sup> In addition, Take-Two on May 9 provided access to its "data warehouse" as requested by Staff only two days earlier to enable the FTC's economists to access data needed for their analysis.<sup>34</sup>

Throughout this arduous process, Staff was kept apprised of the progress of the review, and Take-Two further negotiated with Staff concerning the scope of the Second Request.<sup>35</sup> Take-Two's expenses mounted daily, but counsel for Take-Two nevertheless offered on June 2 to produce additional files from Gary Dale, David Gershik, and Erik Whiteford, present and former executives with sales and marketing responsibilities, in addition to its previous offer to make David Ismailer, Sarah Anderson, and Robert Blau available for investigational hearings.<sup>36</sup> Staff did not accept this proposal, instead demanding that an additional six custodians' files be produced on top of the three proposed by Take-Two.<sup>37</sup>

On the very day a round of documents was produced by Take-Two, Staff again demanded the production of files from six more custodians on top of the three proposed by Take-Two, as well as eleven investigational hearings of Take-Two employees.<sup>38</sup> However, the FTC failed to inform Take-Two that EA had just agreed not to attempt to consummate its hostile offer for Take-Two's shares for at least 45 days after its substantial compliance with the FTC's Second Request.<sup>39</sup> The following morning, Take-Two's counsel responded to Staff's letter, affirming that Take-Two remained willing to

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<sup>33</sup> See Keeley Decl. at ¶¶ 29, 30.

<sup>34</sup> See *id.* at ¶¶ 7, 24.

<sup>35</sup> See Keeley Decl. at ¶¶ 23, 28-29, 33; (Opp. Exs. 34-36, 39.)

<sup>36</sup> See Keeley Decl. at ¶¶ 7, 33.

<sup>37</sup> See *id.* at ¶¶ 32, 34.

<sup>38</sup> See *id.* at ¶ 34; (Opp. Exs. 36-37.)

<sup>39</sup> See Keeley Decl. at ¶ 35. While we have no way of knowing when EA will be in a position to "substantially comply," it is reasonable to assume that it is at least several weeks from the June 3 date of this agreement.

discuss the outstanding issues regarding the scope of the investigation in the hopes of reaching an amicable agreement without the need for costly litigation.<sup>40</sup> Later that day, the FTC filed the present action. Nonetheless, Take-Two has continued its rolling production to the FTC in good faith, consistent with the negotiations that had been ongoing for months prior to this action.<sup>41</sup>

## **ARGUMENT**

### **I. THE FTC IMPLICITLY CONCEDES THAT THE SUBPOENA AND CID ARE UNDULY BURDENSOME**

The FTC does not contest in its motion paper that the Subpoena and CID are unduly burdensome, but merely asserts that Take-Two is precluded from making that contention. In its argument to this Court, as well as in its negotiations with Take-Two, the FTC simply refuses to appreciate the tremendous and unnecessary burden its demands impose upon Take-Two.

#### Governmental Abuse of the Hart Scott Rodino Second Request Process

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR”) established a process designed to provide the FTC and the Department of Justice’s (“DoJ”) Antitrust Division with the right to essential information and a set period of time to review the anti-competitive potential of acquisitions subject to the Act. In the case of an all-cash tender offer such as EA’s offer, the time period established by law is 15 days, plus in the event of the issuance of a Second Request, an additional 10 days following substantial compliance by the offeror.<sup>42</sup> Because Take-Two’s failure to comply with the Request for Additional Information would not toll the running of this second 10-day waiting period,

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<sup>40</sup> See Keeley Decl. at ¶ 37; (Opp. Ex. 38 at 2-3.)

<sup>41</sup> See Keeley Decl. at ¶ 38; (Opp. Ex. 39.)

<sup>42</sup> 15 U.S.C. 18a(e)(2) (2008).

the FTC has followed the practice of issuing compulsory process to targets of all-cash tender offers in order to secure the information the agency requires to determine whether to challenge the acquisition.

Congress never intended the Second Request process to substitute for the normal process of litigation discovery. Rather, Congress enacted HSR to insure that the FTC need not have to decide whether to challenge a transaction without a sufficient factual basis.<sup>43</sup> Thus, even in the Congressional debates, sponsors of the legislation made clear that the scope of information to be gathered in a Second Request must be carefully limited and should not be burdensome.<sup>44</sup> Similarly, in contrast to Mr. Horwitz's assertion<sup>45</sup> that HSR acts as a pretrial discovery tool, the former Assistant Attorney General of the Antitrust Division of the DoJ has stated:

[I]nvestigative discovery is different from trial discovery. In the investigative stage, the Division is trying to determine whether the transaction will result in a violation of the law that is subject to legal challenge. Some of this investigative discovery is relevant to the litigation that might ensue, but there are many items of information that the Division must obtain through litigation discovery that are not part of the investigative process.<sup>46</sup>

Unfortunately, abuses of this so-called "Second Request" process have become widespread, prompting criticism from the Bar and even senior government officials

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<sup>43</sup> See Stephen M. Axinn et al., Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act, at § 9.03(6) (rev. ed., 17th release 2007).

<sup>44</sup> See 122 Cong. Rec. H10, 293 (daily ed. Sept. 16, 1976) (Representative Rodino stating that "a government request for material of dubious or marginal relevance, or a request for data that [can] not be compiled or reduced to writing in a short period of time, might well be unreasonable"); see also Stephen M. Axinn et al., Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act, at § 2.04(2) (rev. ed., 17th release 2007) (stating that "Senator Hart emphasized the government's responsibility to secure relevant information and not to issue unduly burdensome Section 7A(e) requests").

<sup>45</sup> See Declaration of Reid B. Horwitz, Esq., June 5, 2008 at ¶ 30.

<sup>46</sup> R. Hewitt Pate, Antitrust Enforcement at the DOJ – Issues in Merger Investigations and Litigation, (Dec. 10, 2002), available at: <http://www.usdoj.gov/atr/public/speeches/200868.htm> (emphasis added); see also Alec Chang, Federal Trade Commission, Merger Best Practices Workshop, June 5, 2002, available at: <http://www.ftc.gov/bc/bestpractices/020605sfxscript.pdf> (stating that the "HSR [Act] is a notice . . . but [does not act as] precomplaint discovery [or] precomplaint preparations.").

themselves. For example, the most recent Federal Trade Commission Chairman Deborah Majoras lamented in a 2006 address that “complying with a second request in a significant transaction routinely costs millions of dollars and requires months to respond,” and more specifically that such investigations “often rang[e] from six to nine months.”<sup>47</sup> Underscoring Former Chairman Majoras’s comments, Scott Sher and Daryl Teshima completed a study in 2005 finding that “the same number of attorneys required to review documents from 14 employees in 2005 would have been used to review 135 employees’ documents in 2001 [and] [t]hat alone has increased the cost of the Second Request process tremendously.”<sup>48</sup> Indeed, current Federal Trade Commission Chair William Kovacic has pointed to “suggest[ions by commentators] that federal antitrust enforcement officials pay too little attention to the resources that firms consume in responding to information demands [and that a] fruitful area for institutional reform is to pursue new techniques for reducing information demands. . . .”<sup>49</sup>

These equitable considerations, which are so important where two companies voluntarily agree to participate in a transaction, are even more crucial to consider where a target of a hostile tender offer that may never be consummated has been unwillingly dragged into the Second Request process. It is under these latter circumstances that the

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<sup>47</sup> See Deborah Platt Majoras, Chairman, Federal Trade Commission, Reforms to the Merger Review Process (Feb. 16, 2006) (available at: [www.ftc.gov/os/2006/02/mergerreviewprocess.pdf](http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf)).

<sup>48</sup> Scott Sher and Daryl Teshima, e-Normous: The Increasing Burden Associated with Electronic Document Production in Second Request Investigations, The Antitrust Source, November 2005.

<sup>49</sup> Ernest Gellhorn and William E. Kovacic, Analytical Approaches and Institutional Processes for Implementing Competition Policy Reforms by the Federal Trade Commission, December 12, 1995, available at [http://www.ftc.gov/opp/global/gmu\\_1.shtml](http://www.ftc.gov/opp/global/gmu_1.shtml); see also Antitrust Division Department of Justice, Report to Congress Regarding Merger Review Procedures as Required by Section 630(c) of Public Law 106-553, June 19, 2001, available at: <http://0225.0145.01.040/atr/public/guidelines/8550.htm> (stating that “Staff[] ha[s] been instructed to limit the burden of second requests by omitting specifications from the Model Second Request in investigations where they will not provide helpful information”); (Opp. Exs. 18, 19) (requesting that if Take-Two “believes that the required search or any other part of [the Second Request] can be narrowed in any way that is consistent with the Commission’s need for documents, [Take-Two is] encouraged to discuss such questions and possible modifications with the Commission. . .”).

FTC served its Second Request upon Take-Two on April 21, and imposed an 18-day return date of May 9, 2008.<sup>50</sup>

The Subpoena and CID At Issue Seek Legions Of Documents  
That Are Not Consistent with the FTC's Claim of Imminent Need

The Second Request served upon Take-Two is extraordinarily broad. It would require Take-Two's counsel to turn the company upside down, spending months and millions of dollars to search for and produce "all" non-privileged documents "relating to" or "concerning" a wide range of topics, some with only the slightest possible relevance to an investigation that is permitted by the HSR Act.<sup>51</sup> Some of these topics, among many others, covered by the Second Request include:

- (1) Take-Two's compliance with the Robinson-Patman Act;<sup>52</sup>
- (2) Take-Two's implementation of or their customers' compliance with contracts or promotional agreements regarding Take-Two's largest twenty wholesale and retail customers;<sup>53</sup>
- (3) Take-Two's marketing and advertising plans for every video game product;<sup>54</sup>
- (4) any consumer research;<sup>55</sup>
- (5) any analyst reports that discuss any aspect of the video gaming industry;<sup>56</sup>
- (6) any plans of the company or any other person;<sup>57</sup>
- (7) any intellectual property agreements for all video game products;<sup>58</sup>
- (8) and any comparison of the company's video game titles with those of any other person in the sports, shooter, strategy, racing, and action genres.<sup>59</sup>

<sup>50</sup> See Keeley Decl. at ¶ 10; (Opp. Ex. 18, 19.)

<sup>51</sup> See Keeley Decl. at ¶¶ 13, 36. The FTC acknowledges as such in the brief. See Petition at 14 (stating that the Second Request is "substantially similar to standard HSR second requests.")

<sup>52</sup> (Opp. Ex. 18 at ¶ 4(d).)

<sup>53</sup> (Id. at ¶¶ 5(b); 6(b).)

<sup>54</sup> (Id. at ¶ 9.)

<sup>55</sup> (Id. at ¶ 10.)

<sup>56</sup> (Id. at ¶ 11.)

<sup>57</sup> (Id. at ¶ 15.)

<sup>58</sup> (Id. at ¶ 18.)

Take-Two is further mandated to produce documents encompassed by the Second Request that are dated from January 1, 2004 to the present.<sup>60</sup> This time period is double the two-year period presumed by the FTC's own 2006 Revised Second Request Guidelines.<sup>61</sup>

The FTC's requests are far from "specifically focused" to quickly collect the documents that most directly bear upon the anticompetitive effects of a potential transaction with EA. Mr. Horwitz' Declaration candidly concedes that they are being used as pre-complaint discovery.<sup>62</sup> Compliance with these demands will require months of effort, many millions of dollars in legal fees and electronic processing and production charges, and thousands of hours of lawyers' time to conduct reviews to determine relevancy and protect the attorney-client privilege, all in pursuit of a transaction that may never occur.<sup>63</sup> As a matter of fundamental equity, the court should not allow the FTC to impose such weighty and unnecessary burdens on Take-Two.

Courts have routinely modified or quashed agency subpoenas where the production demand is overly burdensome and the information sought is only tangential to the purpose of the investigation. See, e.g., EEOC v. United Air Lines, Inc., 287 F.3d 643, 653-54 (7th Cir. 2002) (quashing EEOC subpoena where it was not limited by geography, type of employee, or the type of policy which was at issue). Further, courts often modify government subpoenas that would require a search of all of a company's files, to avoid an undue burden on its lawyers. See, e.g., EEOC v. McCormick &

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<sup>59</sup> (Id. at ¶ 14); see also Keeley Decl. at ¶ 12.

<sup>60</sup> (See Opp. Ex. 18 at Instruction V.)

<sup>61</sup> See Deborah Platt Majoras, Chairman, Federal Trade Commission, Reforms to the Merger Review Process (Feb. 16, 2006) (available at: [www.ftc.gov/os/2006/02/mergerreviewprocess.pdf](http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf)).

<sup>62</sup> See Declaration of Reid B. Horwitz, Esq., June 5, 2008 at ¶ 30.

<sup>63</sup> See Keeley Decl. at ¶¶ 13, 36.

Schmick's, No. 07-80065, 2007 U.S. Dist. LEXIS 38049, at \*19-21 (N.D. Cal. May 15, 2007) (modifying EEOC subpoena where compliance would have taken thousands of review hours). In cases where the subpoenaed party has already produced a substantial number of documents, courts have required that the demanding party make a more targeted additional request should it be necessary. See, e.g., Belle Fourche Pipeline Co. v. U.S., 554 F. Supp. 1350, 1362 (D. Wyo. 1983) (finding that the FERC's original request had been too broad, requiring it to examine the documents it already received and determine if further targeted requests were needed), rev'd on other grounds, 751 F.2d 332, 335 (10th Cir. 1984).

Here, as outlined above, Take-Two has already expended in excess of 6,000 hours of legal time to comply with the FTC's May 15 request, which the government acknowledges is only the tip of the iceberg of its current demands.<sup>64</sup> Particularly in light of the unique circumstances of EA's tender offer, which is unlikely to be consummated any time soon, the FTC must be required to justify the specific burdens it seeks to place on Take-Two, rather than reciting the sweeping and conclusory boilerplate that all of its interrogatories and document demands are "reasonably related" to its investigation.

The FTC fails to engage in any meaningful analysis, in either its negotiations or motion papers, of its specific requests. It refuses to acknowledge that compliance with all of its requests would require a comprehensive, company-wide review of Take-Two's data and documents, which encompass a huge universe of information due to a number of litigation holds the company has in place.<sup>65</sup> This type of request is exactly the sort of unrestrained and unreasonable governmental action that Congressman Rodino, as well as

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<sup>64</sup> See Keeley Decl. at ¶ 6; Petition at 9.

<sup>65</sup> See Keeley Decl. at ¶¶ 13, 27.

other sponsors of the bill, said that HSR should not be used for: “an unlimited, exploratory investigation whose purposes and limits can be determined only as it proceeds.”<sup>66</sup> Accordingly, the Second Request served upon Take-Two should be quashed as unduly burdensome, and the Commission should be ordered to reduce its demands in accordance with the policies and restrictions envisioned by Congress in the HSR Act.

## II. TAKE-TWO’S UNDUE BURDEN ARGUMENT IS NOT WAIVED

### Under the FTC’s Own Rules, a Petition to Modify or Quash Was Inappropriate Before Exhausting Good-Faith Negotiations

The FTC argues that pursuant to 16 C.F.R. 2.7(d)(1), Take-Two was required to file a petition to quash or modify the Second Request within 20 days of its service, or otherwise prior to the return date.<sup>67</sup> However, 16 C.F.R. 2.7(d)(2) requires that “each petition shall be accompanied by a signed statement representing that counsel for the [party resisting production] has conferred with counsel for the Commission in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement.” 16 C.F.R. 2.7(d)(2) (2008).

The FTC fails to mention this provision because it knows that before May 8, the date by which it now claims a limiting petition had to be filed, Take-Two had been engaged in constant good faith negotiations with the Commission counsel, including its Office of General Counsel, about meeting the FTC’s demands, while concurrently seeking to minimize the burden imposed on Take-Two by limiting the scope of the Second Request.<sup>68</sup> These negotiations rendered a potential petition inappropriate.<sup>69</sup> In

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<sup>66</sup> See H.R. Rep. No. 94-1343, at 10 (1976).

<sup>67</sup> See Petition at 21.

<sup>68</sup> See Keeley Decl. at ¶¶ 8, 14-17, 21-23.

<sup>69</sup> See *id.* at ¶ 22.

fact, the FTC's letter on May 8 asks that Take-Two "demonstrate[] its good faith by starting this week and significantly expanding next week the production of documents and information that we discussed at yesterday's meeting."<sup>70</sup>

Take-Two promptly demonstrated its good faith pursuant to this request by producing documents and information on May 9, May 13, May 19, May 20, as well as the subsequent large scale document productions on May 22, May 25, May 30, June 4, June 11, and June 12 (amounting to over 15,000 documents and 479,000 pages).<sup>71</sup> Take-Two produced these documents, enduring substantial expense, on the premise that the FTC was also acting in good faith regarding the negotiation of subsequent demands.<sup>72</sup>

Throughout this period, documents that were identified as most pertinent to the FTC's investigation were being continually uploaded to an electronic viewer, at Take-Two's expense, to which the FTC had immediate and constant access.<sup>73</sup> As long as it appeared that the FTC was negotiating in good faith, Take-Two determined not to poison the negotiation process by filing a petition to quash.<sup>74</sup> Nor could Take-Two's counsel have signed a petition denying the progress of those negotiations.

The cases cited by Staff in support of its waiver argument are all distinguishable from the facts of this case, as none encompasses a situation where a governmental agency and subpoenaed party had been negotiating in good faith the scope of the agency's request, and the agency sought to enforce the entirety of the subpoena before the mandated negotiations had run their course. See EEOC v. Cuzzens of Georgia, Inc., 608 F.2d 1062, 1063-64 (5th Cir. 1979) (no indication that the subpoenaed employer had

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<sup>70</sup> (See Opp. Ex. 26 at 1.)

<sup>71</sup> See Keeley Decl. at ¶¶ 6, 24-25, 30.

<sup>72</sup> See *id.* at ¶¶ 21-25, 27-30.

<sup>73</sup> See *id.* at ¶ 30.

<sup>74</sup> See *id.* at ¶ 22.

engaged in good faith negotiations); FTC v. Tarriff, No. 08-217, 2008 U.S. Dist. LEXIS 42739, at \*3-4 (D.D.C. June 2, 2008) (does not address the alleged exhaustion of remedies); NLRB v. Baywatch Sec. & Investigations, No. 04-220, 2005 U.S. Dist. LEXIS 45955, at \*8 (S.D. Tx. Apr. 28, 2005) (subpoenaed party did not respond to the NLRB's application for judicial enforcement for five months); EEOC v. City of Milwaukee, 919 F.Supp. 1247, 1254 (E.D. Wis. 1996) (statute at issue authorizing petition to modify or quash subpoena did not require exhaustion of negotiations); FTC v. O'Connell, 828 F.Supp. 165, 167 (E.D.N.Y. 1993) (respondent did not engage in negotiations regarding withheld documents that he knew were responsive to the CID at issue); FTC v. Invention Submission Corp., No. 89-272, 1991 U.S. Dist. LEXIS 5523, at \*1-4, 6 (D.D.C. Feb. 14, 1991) (no indication of good faith negotiations subsequent to service of the subpoena); FTC v. Standard Oil Co. of Ohio, No. Misc. 79-0116, 1979 U.S. Dist. LEXIS 10730, at \*1-2 (D.D.C. July 29, 1979) (same); FTC v. U.S. Borax and Chem. Corp., No. 78-0009, 1978 U.S. Dist. LEXIS 19496, at \*1-2 (D.D.C. Feb. 17, 1978) (respondent to subpoena deleted portions of documents responsive to the request); FTC v. Stanley Kaplan Educ. Ltd., 433 F.Supp. 989, 992 (D. Mass 1977) (respondent never disputed the scope of the subpoena).

Further detracting from the weight of the FTC's argument is the fact that "it is now beyond dispute that the exhaustion doctrine is to be applied flexibly, with an eye toward its underlying purposes." Etelson v. Office of Personnel Mgmt., 684 F.2d 918, 923 (D.C. Cir. 1982) (collecting cases).<sup>75</sup> In the case "where the exhaustion of administrative remedies is only required by [an] agency regulation, in determining

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<sup>75</sup> In fact, "[t]he [exhaustion] doctrine is indeed so flexible that some assert it to be, at least in part, a matter of judicial discretion." Etelson, 684 F.2d at 923 n. 7.

whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.” Cossio v. Hawk, No. 97-445, 1998 U.S. Dist. LEXIS 2433, at \*7 (D.D.C. Feb. 25, 1998).

In Etelson, the court found that because the appellant (1) had raised a form of the claim before the agency, (2) could not have raised the claim in its present form before the agency, and (3) had been aware of the agency’s disinclination to respond favorably to the claim, appellant would not be ousted from court on exhaustion grounds. Etelson, 684 F.2d at 923. Similarly, Take-Two’s attorneys have repeatedly worked with Staff to limit the onerous nature of the requests, and were prevented from filing a petition to modify or quash the subpoena because of ongoing good faith negotiations. See 16 C.F.R. 2.7(d)(2). Because Take-Two would have been denied a remedy on that basis, its petition to quash would have been futile. See Postal Careers Inst., Inc., No. 972-3282, 1998 F.T.C. LEXIS 190, at \*4-5 (1998) (rejecting petition to quash a civil investigative demand, inter alia, due to the petitioner’s failure to submit a Rule 2.7(d)(2) statement, as “[t]he conferral requirement is mandatory.”).

Accordingly, if there is a party to this petition that has failed to fully utilize the administrative process before seeking equitable relief before the Court, it is the FTC. The Staff has failed to exhaust good faith negotiations regarding the scope of the subpoena before precipitously filing its Emergency Petition. The Second Request served by Staff anticipates such an ongoing and cooperative process, but it now seeks to use it as a weapon in negotiations with Take-Two, hoping to impose a burden that is clearly inappropriate and inequitable given the nature of this potential (but currently unlikely) transaction.

Moreover, the FTC rule at issue is necessarily consistent with public policy, as it is imperative that parties be able to negotiate in good faith without the fear that one party will later use the process as a weapon to assert that a meritorious judicial argument had been waived. Where negotiations are unfruitful, the burden is on the respondent to seek relief elsewhere, but where, as here, Take-Two and Staff had successfully established a mode of negotiation without having to expend judicial resources, Take-Two should not be penalized because the FTC decided to file this Petition amidst otherwise productive negotiations. Rather, Take-Two should now be entitled to the relief that the law and the equities demand.

The FTC's Petition Seeks an  
Inequitable Order and Thus Should be Denied

It is a well-established principle that limits exist on agencies' subpoena power, and the duty to enforce those limits rests with the federal courts when their process has been invoked. See SEC vs. Arthur Young & Co., 584 F.2d 1018, 1032-33 (D.C. Cir. 1978); see also Sunshine Gas Co. v. U.S. Dep't of Energy, 524 F. Supp. 834, 841 (N.D. Tex. 1981). Particularly, "[t]here is no rule requiring a court to act against conscience [-] the [] judicial enforcement of administrative subpoenas [] is equitable in character [and] [e]quitable considerations should prevail." Sunshine Gas, 524 F.Supp. at 841 (citing Chapman v. Maren Elwood College, 225 F.2d 230, 234 (9th Cir. 1955)). Here, the FTC seeks a wholly inequitable judgment requiring Take-Two to search the entirety of the Company's voluminous documents and records at enormous expense of time and money. At the same time, the FTC counter-intuitively claims that time is of the essence in identifying those documents most pertinent to its investigation of this transaction that may never occur. Yet despite its strict treatment of Take-Two, the FTC has negotiated a

limitation on EA's obligations under the Second Request and obtained a 45-day post-compliance waiting period with EA, a window 50% longer than it would have if this were a traditional acquisition rather than a cash tender offer, and more than four times as long as Congress deems necessary for a cash tender offer, as we have here.<sup>76</sup>

This Court has the discretion to review the FTC's demands, determine that they are not justified, and quash its subpoena. As the court in Sunshine Gas held under similar circumstances, "[i]t is not an element of the judicial process to allow or enforce fishing expeditions." See id. at 839. In applying principles of equity, the Sunshine Gas court held that it would "not allow the Department of Energy to bootstrap itself when justifying an investigation into every record and document [the respondent] possesse[d]." See id. at 841. That court found that such a broad investigation was not consistent with equity. Neither are the FTC's demands here. As noted above, Take-Two has already produced over 479,000 pages of over 15,000 responsive documents to date (including more than 2,700 documents comprising in excess of 117,000 pages since the filing of this Petition).<sup>77</sup> These are the documents identified by the FTC as among its highest priority requests. Staff now seeks to use these good faith productions as a bootstrap to demand a comprehensive review of all of Take-Two's documents and data which would take many months and millions of dollars to complete.<sup>78</sup> The production the FTC seeks is simply unjustified, unreasonable, and unfair. It is simply not consistent with equity to allow such a sweeping and unfocused demand, while the FTC simultaneously claims that time is of the essence in reviewing the most pertinent documents in its evaluation of an

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<sup>76</sup> See 15 U.S.C. 18a(e)(2) (2008).

<sup>77</sup> See Keeley Decl. at ¶¶ 6, 30.

<sup>78</sup> See Keeley Decl. at ¶¶ 13, 36.

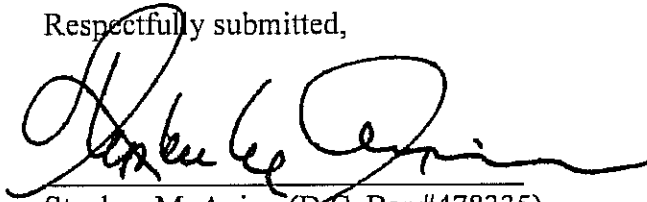
unconsummated, and hardly likely, transaction. Its Petition should therefore be denied, and its Second Request quashed.

CONCLUSION

It is respectfully submitted that this Court should deny the relief requested by the FTC's Petition and quash its subpoena and CID as unduly burdensome. It should further order both parties to negotiate an acceptable compromise that recognizes the FTC's legitimate need for information consistent with its responsibilities under Hart-Scott-Rodino and also Take-Two's legitimate concerns about burden, expense and disruption to its business. We further respectfully request that the Court retain jurisdiction to resolve any disputes that the parties are unable to resolve through good-faith negotiation.

Dated: June 16, 2008

Respectfully submitted,



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