IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Petitioner, v. TAKE-TWO INTERACTIVE SOFTWARE, INC. , Respondent.	)	No. 08-MISC-360-HHK

MEMORANDUM IN SUPPORT OF EMERGENCY PETITION OF THE FEDERAL TRADE COMMISSION 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

The Federal Trade Commission ("Commission") petitions this Court, pursuant to Sections 9, 16, and 20 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 49, 56, 57b-1, and 28 U.S.C. § 1367, for an order requiring respondent, Take-Two Interactive Software, Inc. ("Take-Two"), to produce documents in accordance with a Commission administrative Subpoena *duces tecum* and to respond to written interrogatories in accordance with a Commission Civil Investigative Demand ("CID").[1] Both the Subpoena and the CID were issued April 21, 2008, as part of a pre-merger investigation that seeks to determine whether the proposed acquisition of Take-Two by Electronic Arts Inc. ("EA") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the FTC Act, 15 U.S.C. § 45. This investigation must be completed within the statutory time allowed by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"), Section 7A of the Clayton Act, 15 U.S.C. § 18a .

This petition is filed on an emergency basis because EA has announced it intends to consummate the transaction on 45 days notice to the Commission.[2] Since EA fully controls when it will provide such notice, the Commission must be prepared to determine whether the proposed transaction is anticompetitive and, if necessary, go into court to challenge it on a very abbreviated schedule over which it has, at most, very limited control. As a result, time of the

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[1] Commission CIDs are a type of administrative subpoena. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1087 (D.C. Cir. 1992); *United States v. Markwood*, 48 F.3d 969, 976 (6th Cir. 1995); *General Finance Co. v. FTC*, 700 F.2d 366, 367 (7th Cir. 1983). In a pre-merger investigation, Section 9 of the FTC Act, 15 U.S.C. § 49, gives the Commission authority to issue subpoenas in order to obtain the production of documents. When the Commission seeks responses to interrogatories, it invokes its authority to issue CIDs pursuant to Section 20 of the FTC Act, 15 U.S.C. § 57b-1.

[2] In fact, EA could close the transaction on as little as 10 days notice to the Commission. 16 C.F.R. § 803.10(b).

essence in the Court's resolution of this petition. The Subpoena and CID, along with their May 9 return date, specifically were designed to require Take-Two to promptly produce documents to Commission staff. This would permit staff to analyze these documents, to use them to prepare for investigational hearings of Take-Two officials, and to complete these investigational hearings with sufficient time for the Commission to evaluate the competitive effects of the proposed transaction and thus decide whether to challenge the transaction prior to it being consummated within the abbreviated schedule that EA will set in motion. Any delay in the resolution of this petition force the Commission to make its pre-consummation assessment of the proposed transaction based upon incomplete information. Further, if the Commission were forced by Take-Two's non-compliance to defer full evaluation of the proposed transaction until after it is consummated, further harm may result because it usually is far more difficult for the Commission to obtain effective relief after a merger has closed.

The Commission, therefore, requests that this Court expeditiously issue an Order to Show Cause against Take-Two and schedule a hearing thereon as soon as practicable and preferably no later than fourteen (14) calendar days of the filing of this Petition.[3] Further, the Commission requests that Take-Two's opposition to the petition (if any) be due within seven (7) calendar days of the date of entry of the Show Cause Order and the Commission's reply (if any), be due three (3) calendar days after the filing of Take-Two's opposition. Should the Court grant the petition, the Commission requests that Take-Two be ordered to produce to the Commission: (a) within three (3) calendar days of the date of entry of the Order, (i) the information responsive to

[3]Counsel for Take-Two, Stephen Axinn, is aware that the Commission is filing this petition and, at Mr. Axinn's request, Commission staff is sending him a courtesy copy of the petition and all related papers to counsel via email.

the eight categories of prioritized information agreed to by Take-Two and the Commission on May 7, 2008, *see infra,* and (ii) narrative responses to the interrogatories contained in the Commission's CID; and (b) within seven (7) calendar days, the remainder of the documents responsive to the specifications contained in the Subpoena.

JURISDICTION AND VENUE

The jurisdiction and venue of this Court to enter an order enforcing the Commission's Subpoena are conferred by Section 9 of the FTC Act, 15 U.S.C. § 49, which authorizes the Commission to invoke the aid of the United States District Courts in enforcing its subpoenas. This provision also confers jurisdiction to order enforcement of such subpoenas on any District Court where the Commission's inquiry is taking place. The Subpoena requires that documents concerning various aspects of Take-Two's business operations be produced at the Commission's headquarters in Washington, DC as part of an investigation based here. Accordingly, since this is a judicial district within which the Commission's inquiry is being carried on, this Court has the authority under Section 9 of the FTC Act to issue its process (*viz.*, a show cause order) to Take-Two in this proceeding. *E.g., FEC v. Committee to Elect Lyndon LaRouche*, 613 F.2d 849, 854-58 (D.C. Cir. 1979); *FTC v. Browning*, 435 F.2d 96, 100 (D.C. Cir. 1970); *FTC v. Tarriff*, No. 1:08-Misc-217-RCL slip. op. at 3 (D.D.C. Jun. 2, 2008) (attached as Pet. Exh. 4).

The jurisdiction and venue of this Court to enter an order to enforce the CID are conferred by Sections 20(e) and (h) of the FTC Act, 15 U.S.C. § 57b-1(e) and (h), which authorize the Commission to invoke the aid of the United States District Courts in enforcing such CIDs and confers jurisdiction on any district court where the person subject to the CID "resides, is found, or transacts business." Take-Two, which sells its video games all over the

country, transacts business in this district. (Pet. Exh. 1, ¶4). Additionally, this Court has supplemental jurisdiction to enforce the CID issued to Take-Two because the enforcement of the CID is "so related" to the enforcement of the Subpoena that enforcement of the Subpoena and CID "form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a).

STATEMENT OF RELEVANT FACTS

On March 13, 2008, EA issued a hostile cash tender offer to purchase the stock of Take-Two. The offer is set to expire on June 16. If Take-Two's shareholders accept the offer, they will receive approximately $2.1 billion in cash. (Pet. Exh. 1, ¶5). EA and Take-Two publish video game titles within overlapping genres, including the sports genre. In particular, historically EA and Take-Two have sold competing titles for simulated sports games, including basketball, football, hockey, and baseball. (Pet. Exh. 1, ¶6).

On April 16, 2008, the Commission issued Requests for Additional Information about the proposed transaction to both Take-Two and EA pursuant the HSR Act, 15 U.S.C. § 18a(e)(1) ("HSR second requests"). (Pet. Exh.1, ¶7). In most transactions, a HSR waiting period – after which the parties are free to consummate a transaction – is triggered by the certification of both parties that they have substantially complied with their HSR obligations, including any second requests. However, for cash tender offers, the HSR waiting period is triggered solely by certification of substantial compliance by the prospective purchaser (here EA). Thus, the waiting period begins to run regardless of when (or if) Take-Two substantially complies with any Commission requests for information. 15 U.S.C. §§ 18a(b)(1)(A) and (B); 16 C.F.R. § 803.10(b). *Id*. The purpose of this waiting period is to provide the Commission with an opportunity, following certification of substantial compliance, to complete its investigation and

to determine whether to challenge the transaction. EA has announced that it intends to consummate the transaction 45 days after it provides such certification to the Commission, http://www.reuters.com/article/technologyNews/idUSN0435662420080604.

To attempt to ensure that the Commission has an opportunity to review Take-Two's documents during the course of its investigation and before the expiration of the 45 day period whose start will be determined by EA, on April 21, 2008, the Commission issued a Subpoena and CID to Take-Two that sought a large subset of the materials requested in the HSR second request issued to Take-Two. Both the Subpoena and CID had return dates of May 9, 2008. (Pet. Exh. 1, ¶7; Pet. Exhs. 2 and 3). The compulsory process and return date were designed to permit the Commission to have an opportunity to conduct a meaningful review of Take-Two's submissions and to provide sufficient time to conduct investigational hearings. (Pet. Exh. 1, ¶7). Return receipts in the possession of the Commission indicate that, through its counsel, Take-Two received service of the Subpoena and CID on April 22, 2008.

On April 23, 2008, Alicia Batts, an attorney with Proskauer Rose LLP and counsel for Take-Two, discussed compliance with the CID and Subpoena with Reid Horwitz, the lead Commission attorney on the investigation. Ms. Batts proposed that the Commission extend the return date. Mr. Horwitz expressed a willingness to relax the return date if Take-Two agreed to review and provide responsive documents from the files of a limited number of Take-Two officials on an expedited rolling basis that would begin substantially before May 9. In a follow-up conversation on April 24, Mr. Horwitz proposed specific officials to be subject to such an agreement. (Pet. Exh. 1, ¶12).

On April 25, Ms. Batts counter-proposed producing responsive documents from the files of a largely different group of Take-Two officials, which she represented would better meet the

Commission's needs. Ms. Batts stated that the search of these files would begin within several days, and that the Commission could expect to begin to receive documents shortly thereafter. The Commission accepted this counter-proposal, reserving the right to suggest adding a few additional individuals to the group of officials whose files would be reviewed. (Pet. Exh. 1, ¶13).[4]

During the week of April 28, 2008, another Commission attorney, Eric Elmore, repeatedly offered to speak to Ms. Batts to discuss remaining compliance issues, including a revised due date for full compliance. Ms. Batts declined these offers. No documents were produced to the Commission during that week other than a handful of documents relating to Take-Two's football title that had been informally requested prior to April 16. (Pet. Exh. 1, ¶14). On May 5, 2008, Mr. Horwitz received a telephone call from Stephen Axinn of Axinn, Veltrop & Harkrider LLP, who informed him that his firm was now assisting Proskauer Rose in its representation of Take-Two before the Commission. Mr. Axinn proposed meeting with counsel for the Commission on May 7 to discuss compliance with the Subpoena and CID. (Pet. Exh. 1, ¶15).

At the meeting, Mr. Axinn stated that Take-Two would not produce documents pursuant to the April 25 agreement entered into by Take-Two through Ms. Batts. (Pet. Exh. 1, ¶15). Instead, Mr. Axinn proposed that Commission staff could better advance its investigation by adopting an approach focusing on the production of specific categories of documents on a phased basis, rather than focusing on particular Take-Two personnel. Mr. Axinn represented

[4]Though not within the scope of Subpoena or CID, Mr. Horwitz also understood that Take-Two was willing to produce individuals for investigational hearings as is typically the case during HSR second request investigations, and would produce each witnesses's files to the Commission with sufficient time to review them prior to such hearings.

that, in the four days since he had been retained by Take-Two, he had hired 40 contract attorneys to expedite document review and would be prepared to produce some of the responsive materials within a few days and a significant portion of the balance of the first phase no later than May 16. He then suggested that, during or after completing its review of the documents produced in the first phase, Commission staff could identify additional documents that it wanted Take-Two to produce as the next phase. Mr. Axinn envisioned this iterative process continuing until the Commission staff had either completed or saw no reason to continue its investigation, or Take Two had substantially complied with the Subpoena and CID (and HSR second request). He also indicated Take-Two's willingness to make key individuals available for investigational hearings. *Id*. at ¶16.

Commission staff accepted this May 7 proposal, as confirmed in a May 8, 2008, letter to Mr. Axinn. (Pet. Exh. 1, ¶17; Pet. Exh. 5). Commission staff identified nine categories of documents that would constitute the first phase and, based upon this agreement, Commission staff agreed to extend Take-Two's compliance deadline for one week, from May 9 to May 16, 2008, for both the Subpoena and CID. (Pet. Exh. 1, ¶11; Pet. Exh. 5). Staff further indicated that it was prepared to extend Take-Two's return date further if the company demonstrated its good faith by starting production of the first phase of responsive documents during the week of May 5, and significantly expanded this production during the week of May 12. (Pet. Exh. 1, ¶17).

Commission staff received two very limited submissions following the May 7 agreement. On May 9, it received a description of Take-Two's databases and copies of its licensing agreements with the various professional and college sports leagues and associations. On May 14, it received 721 pages of pricing analyses, marketing and business plans, and emails. Many,

if not most, of these documents consisted of illegible spreadsheets. (Pet. Exh. 1, ¶18).

On May 9, 2008, Mr. Axinn's law partner, Michael Keeley, informed Commission staff that Take-Two would not produce the documents covered by the May 7 agreement and had directed him to cease any further document review or production unless the Commission further circumscribed its document requests. Take-Two had decided, because the proposed transaction is a hostile cash tender offer, that it did not want to be burdened with the expense or effort of compliance with the Subpoena and CID (or the HSR second request). Presumably to avoid compliance disputes, Mr. Axinn requested an indefinite extension on the May 16 return date. (Pet. Exh. 1, ¶19-20).

While Take-Two negotiated and reneged on agreements with Commission staff, the deadline for Take-Two to seek administrative relief from the Commission by raising all legal and factual objections to the Subpoena and CID through a petition to quash or limit the Subpoena and CID passed. 16 C.F.R. § 2.7(d) (deadline for filing such a petition with the Commission's Secretary is the earlier of 20 days after receipt of process or the return date). Take-Two has not filed a such petition, timely or otherwise. (Pet. Exh. 1, ¶33).

On May 15, 2008, Mr. Axinn and Commission staff reached an interim agreement under which the Commission agreed not to commence an enforcement proceeding for the Subpoena and CID until at least May 22, 2008. (Pet. Exh. 6).[5] In return for the Commission's forebearance, with what Mr. Axinn represented was express authorization of the Take-Two's general counsel, Take-Two agreed to review, as a first phase, the files of three of its officers,

[5]The Commission did not, however, extend the return date for the Subpoena and CID beyond May 16, 2008, and, therefore, Take-Two has been in default on this compulsory process since that date. (Pet. Exh. 1, ¶21).

Chief Operating Officer and Senior Vice President, David Ismailer, Senior Vice President for Marketing, Sarah Anderson, and Senior Vice President for Sales, Bob Blau. Mr. Axinn represented that Take-Two believed these three individuals were the persons most likely to have information responsive to the Commission's compulsory process. For these three individuals Take-Two would search for a subset of the documents covered by the May 7 agreement: (1) marketing and competition documents, including past and present product development plans, consumer research documents, and documents describing Metacritic ratings for the company's basketball and hockey titles; and (2) business and strategic plans for the company's basketball and hockey titles. On a rolling basis beginning within one week, Take-Two agreed to produce all non-privileged responsive documents. (Pet. Exh. 1, ¶21).

On May 22, 3008, Take-Two began the electronic production of some of the documents within the scope of the May 15 interim agreement. (Pet. Exh. 1, ¶22).

On May 27, 2008, Commission staff spoke with Mr. Keeley, who reported that the document review for the three individuals covered within the May 15 interim agreement was not yet complete due to continuing privilege review. He also stated that his firm had not and did not intend to review any paper-format documents, only documents stored in electronic format. He also revealed that Take-Two had directed his firm to produce no additional documents absent any further agreement with Commission staff once the production pursuant to the May 15 interim agreement was completed. (Pet. Exh. 1, ¶23).

Commission staff indicated to Mr. Keeley that it expected Take-Two to search the files of additional employees consistent with Take-Two's May 7 commitment to provide a phased response to the Subpoena and CID. Mr. Keeley responded that he could not agree to such an undertaking without first consulting his client. He also agreed to consult with Take-Two about

producing several Take-Two officials for investigational hearings by Commission staff, with the identification of the specific individuals to be deposed to be determined. (Pet. Exh. 1, ¶24).

On May 28, Mr. Keeley and Commission staff again spoke. Staff informed Mr. Keeley that it wanted Take-Two to produce documents for between an additional six to nine current or former officials of Take-Two. (Pet. Exh. 1, ¶¶25-26).[6] Staff also requested that Take-Two expand its search to include documents relating to boxing and tennis. (Pet. Exh. 1, ¶26). Finally, staff indicated that it wanted Take-Two to designate the person or persons most familiar with Take-Two's pricing, including promotional pricing, and, if this person (or these persons) was (were) not among the persons already designated by the Commission, that the documents of such person(s) also be produced. *Id*.

Mr. Keeley again indicated that he lacked the authority to make any commitments on behalf of Take-Two. Commission staff reminded him that Take-Two was not in compliance with the Subpoena and CID, that the agreement to forego seeking judicial enforcement of the Commission's compulsory process had expired, and that because time remained of the essence, staff needed a response to its proposed second phase of document production by noon on Friday, May 30, 2008, so that, if necessary, the Commission could file this petition with sufficient time to obtain the information sought by Subpoena and CID and have a meaningful opportunity to

[6]The six persons whose documents the Commission definitely wants to be produced are: Gary Dale, Executive Vice President for Sales; Ben Feder, Chief Executive Officer; David Gershik, Vice President of Sales; Chris Hartman, President of 2K Games; Greg Thomas, President of Visual Concepts; and Eric Whiteford, former Vice President of Marketing. (Pet. Exh. 1, ¶25). Because their names appeared frequently on documents already produced to the Commission, staff requested that Take-Two inform them of the titles and place on the organization chart for three individuals: Jason Argent; Even Drew Smith; and Christopher Snyder. The Commission reserved the right to demand the production of these individuals' files based upon this additional information. (*Id*. at ¶26).

assess and use it. (Pet. Exh. 1, ¶27).

On May 29, at Mr. Keeley's request, Commission staff agreed to extend Take-Two's deadline for responding to the Commission's May 28 proposal until June 2, because of the personal travel schedule of Mr. Axinn. Also on that day, Mr. Keeley left a voice mail message that identified the titles of Argent, Smith and Snyder. (Pet. Exh. 1, ¶28).

In a June 2 telephone call, Mr. Axinn informed Commission staff that Take-Two would not voluntarily fully comply with the Subpoena or CID. (Pet. Exh. 1, ¶). Instead, at most Take-Two would review the documents of three additional officials (Gary Dale, David Gershik and Eric Whiteford) and their documents would only be subject to the limited scope of review of the May 15 interim agreement, not the broader review of the May 7 agreement. Mr. Axinn represented that the review and production of documents for the initial three employees cost $1.2 million and review and production for three more employees would cost an additional $1 million. Mr. Axinn also contended that documents relating to boxing and tennis video games need be produced because, in Mr. Axinn's opinion, these two game genres did not have any antitrust implications. Later in the day, in a conversation with Deputy Assistant Director Bloom, Mr Axinn ambiguously suggested that Take-Two might be willing to review unspecified files for unidentified employees. (Pet. Exh. 1, ¶¶ 29-31).

On June 4, Commission staff emailed a letter to both Mr. Axinn and Mr. Keeley stating that negotiations with Take-Two had reached an impasse, and that the staff would seek immediate judicial enforcement of the Subpoena and CID barring a representation by Mr. Axinn before 9:00 AM June 5, 2008, that Take-Two was willing to produce additional and comprehensive phased responses in a prompt and timely manner. (Pet. Exh. 7). Mr. Axinn responded by telephoning both the Director of the Bureau of Competition and the Commission's

Principal Deputy General Counsel during the afternoon of June 4, requesting that they intercede before staff filed this petition. Both declined Mr. Axinn's request. On June 5, Mr. Axinn sent a letter to Mr. Horwitz responding to Mr. Horwitz's June 4 letter. Mr. Axinn's letter made no new proposals concerning document production or compliance but did reveal that Take-Two had not yet completed document production covered by the May 15 interim agreement. (Pet. Exh. 1, ¶ 25 and 32).

ARGUMENT

I. THE SCOPE OF ISSUES CONSIDERED IN PROCEEDINGS TO ENFORCE COMPULSORY PROCESS IS NARROW

Although "the court's function is 'neither minor nor ministerial,' the scope of issues which may be litigated in a [compulsory process] enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity." *FTC v. Texaco Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (internal citation omitted). Indeed, the "very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the *rapid* exercise of the power to investigate . . ." *Id.* (emphasis added).

The standard for judicial enforcement of administrative compulsory process is settled:

> It is well established that a district court must enforce a federal agency's investigative subpoena if the information sought is "'reasonably relevant,'" *FTC v. Texaco Inc.*, 555 F.2d 862, 872, 873 n.23 (D.C. Cir.) (*en banc*) (*quoting United States v. Morton Salt*, 338 U.S. [at] 652 . . .) -- or, put differently, "'not plainly incompetent or irrelevant to any lawful purpose' of the agency," *Id.* at 872 *(quoting Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 . . . (1943))*; accord United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145 (D.C. Cir. 1987) -- and not "unduly burdensome" to produce, *Texaco*, 555 F.2d at 881. We have said that the agency's own appraisal of relevancy must be accepted so long as it is not "'obviously wrong.'" *FTC v. Carter*, 636 F.2d [at] 787-88 (*quoting Texaco*, 555 F.2d at 877 n.32).

FTC v. Invention Submission Corp., 965 F.2d 1086, 1089 (D.C. Cir. 1992). *Accord United States v. Legal Services for New York City*, 249 F.3d 1077, 1083 (D.C. Cir. 2001); *CFTC v. McGraw-Hill Companies, Inc.*, 390 F.Supp.2d 27, 35 (D.D.C. 2005). If an agency's administrative compulsory process meets this standard, this Court "must enforce it." *In re Sealed Case (Admin. Subpoena)*, 42 F.3d 1412, 1415 (D.C. Cir. 1994).

II. THE CIVIL INVESTIGATIVE DEMAND SHOULD BE ENFORCED

A. The Civil Investigative Demand is Within the Authority of the Commission

The Commission's authority to issue its Subpoena and CID is clear. So, too, is the Commission's authority to investigate acts and practices that may violate § 5(a) of the FTC Act or Section 7 of the Clayton Act. *See Adams v. FTC*, 296 F.2d 861, 867-70 (8th Cir. 1961); *FTC v. United States Pipe & Foundry Co.*, 304 F. Supp. 1254, 1259 (D.D.C. 1969); *see also FTC v. Ken Roberts Co.*, 276 F.3d 583, 584 (D.C. Cir. 2001) (Commission subpoenas to be enforced unless the Commission "patently" lacks authority over the subject of the investigation), *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980); *FTC v. Green*, 252 F. Supp. 153, 155-56 (S.D.N.Y. 1966).

B. The Procedural Requirements were Followed

The Subpoena and CID were issued pursuant to a valid Commission resolution authorizing the issuance of compulsory process for possible violations of the FTCA and Clayton Act arising from the possible acquisition of Take-Two by EA. (Pet. Exhs. 2 and 3). The Subpoena and CID were signed by a Commissioner, *id*., and were served by the Commission's Secretary as provided by the Commission's Rules. (Pet. Exh. 1, ¶). The procedural requirements for the CID were, therefore, followed.

C. The CID and Subpoena Seek Information that is Reasonably Relevant to the Commission's Investigation

Compulsory process issued by the Commission should be enforced so long as it is "reasonably relevant" – or put differently, "not plainly incompetent or irrelevant to any lawful purpose of the agency." *Invention Submission Corp.*, 965 F.2d at 1089. Here, this threshold is more than met. The Commission's Subpoena and CID are in furtherance of an investigation seeking to determine whether the proposed acquisition of Take-Two by EA could result in any violations of the FTC Act or the Clayton Act. The information sought by the Commission through the Subpoena and CID, which are substantially similar to standard HSR second requests, is reasonably relevant to this investigation because it is designed to produce information that will assist the Commission in ascertaining whether "the law is being violated in some way and . . . to determine whether or not to file a complaint." *Invention Submission Corp.*, 965 F.2d at 1090.

The Commission's Subpoena and CID are specifically focused on obtaining more knowledge about Take-Two, its operations, the markets in which operates, and the potential anticompetive effects on these markets as a result of the proposed transaction. While Take-Two's board and management currently may oppose the proposed transaction, the ultimate decision makers are not them, but Take-Two's shareholders. Thus, even while this is characterized as a "hostile" tender offer, it remains indisputable that this is the Commission's only opportunity to obtain information reasonably relevant to its investigation and thereby fulfill its statutory duty to review the proposed transaction under the authority of the HSR Act and, if necessary, to seek to prevent it.

1. The May 7, 2008, Agreement between Take-Two and the Commission Concerning Categories of Documents and Information to be produced to the Commission

The categories of documents and information that Take-Two agreed to produce through the agreement reached with Commission staff on May 7, 2008 (Pet. Exh. 4), are clearly relevant to the Commission's investigation on the potential effect of the proposed transaction on competition in sports games markets.[7] The first category related to a discount pricing strategy conducted by Take-Two in 2004-05 for its sports games, including its games in direct competition with games sold by EA. The effect of such price competition clearly is relevant to the investigation given that the proposed transaction would eliminate any future price competition in these areas between EA and Take-Two. The second category covered Take-Two's marketing documents for its basketball, boxing, football, hockey, and tennis simulated sports games. This information is relevant because it involves the types of games as to which Take-Two and EA have competed historically.

The third category involved information relating to Take-Two's relationship with three of its primary retail outlets. This information is relevant since it would help to explain how Take-Two competes on the retail level. The fourth category involves games under development by Take-Two, including updates of existing games. This will help to reveal potential future competition between Take-Two and EA. The fifth category covered information concerning marketing documents for Take-Two's "2K" series of sports games (baseball, basketball, football and hockey). This information is relevant because, again, these are areas in which Take-Two and EA have historically competed. The sixth category involved Take-Two's licensing agreements with major sports leagues. This information is relevant because affiliation with these

[7]The May 7 agreement included nine categories of prioritized information. One of these categories was responding to CID interrogatory 21. This interrogatory is addressed in the discussion of the CID, *infra*.

leagues can enhance the marketing for a particular sports game, *e.g.*, National Hockey League for a hockey game.

The seventh category related to any studies prepared for Take-Two by NPD studies, an independent market research company that focuses on consumer trends, sales and other marketing information, involving Take-Two's 2K sports games and other sports games. These documents are relevant because they provide information on past, current and potential sports games markets. The eighth category concerned business and strategic plans for Take-Two's sports games. This information is relevant because it will help to explain Take-Two's view of sports games markets.

2. The Documents and Information Specified in the CID and Subpoena

a. The CID

The CID consists of 26 interrogatories requiring narrative or other responses. Described summarily below, the interrogatories are set out in full in Pet. Exh. 3. Take-Two has not produced a single response to the CID even though, as indicated below, all of the interrogatories seek information reasonably relevant to the Commission's investigation of the potential transaction. Moreover, in the agreement with Commission reached on May 7, 2008, Take-Two specifically promised to respond to Interrogatory 21 no later than May 16, 2008. (Pet, Exh. 4).

Interrogatory 1 asks for the identification of persons with knowledge about Take-Two's products. Interrogatory 26 asks for the identification of all persons who prepared Take-Two's responses. Interrogatory 21 asks Take-Two to identify all electronic databases it maintains and what information is contained in each such database. These interrogatories are relevant because they provide the potential sources of information for the Commission's investigation.

Interrogatory 2 requests a listing of prices for Take-Two's products since 2004.

Interrogatories 3, 4 and 6 request various annual, quarterly and annual sales and financial information for Take-Two's products while Interrogatory 16 requests identification of the types of financial statements prepared by Take-Two since 2003. Interrogatory 5 requests information about the production and related contract terms and pricing for the media on which Take-Two's products are published. Interrogatory 7 requests various types of information about how Take-Two establishes recommended prices for its products and any price-checking programs it uses. These interrogatories are relevant to the Commission's investigation because they provide financial information about Take-Two.

Interrogatory 8 requests information concerning Take-Two's relationship with its largest 20 wholesalers while Interrogatories 9 and 12 request information concerning its relationship with retailers, especially its largest 20 retailers. Interrogatories 10 and 17 request information about any websites concerning Take-Two products maintained by Take-Two and any third parties. Interrogatory 11 asks for the identity of any consultants who worked with Take-Two regarding its concerns about EA's entering into licensing agreements with professional sports brands. These interrogatories are relevant to the Commission's investigation because they provide information about how Take-Two sells and markets its products.

Interrogatory 13 asks for Metacritic ratings for Take-Two's products. Interrogatory 14 requests the identification of the top five video games that restrain the prices on Take-Two's games while Interrogatory 15 asks for the identification of the top five competitors' video games that Take-Two has evaluated for its own product development. Interrogatory 19 requests how Take-Two evaluates the development potential for its products. Interrogatory 18 asks for the identification of all other video game producers since 1998. Interrogatory 20 requests the identification of all trade or other associations to which Take-Two belongs. Interrogatory 23

requests Take-Two to explain its future business plans. These interrogatories are relevant to the Commission's investigation because they provide information about how Take-Two competes in the marketplace and helps to provide information about who Take-Two views as its competitors.

Interrogatory 22 requests an identification of all statements or actions by Take-Two or others concerning the proposed transaction. This interrogatory is relevant because it will help the Commission determine how Take-Two and others perceive the proposed transaction.

Interrogatory 23 asks Take-Two to state its document retention and destruction program and to identify the jurisdictions where it does business and maintains resident agents. This interrogatory is relevant because helps to determine what information may have been destroyed by Take-Two.

b. The Subpoena

The 29 Subpoena document production specifications are designed to permit the Commission to obtain documents that will permit it learn more about Take-Two, its sports and other games, and the markets on which the proposed transaction may have an impact on competition. As a result, the documents sought by the Commission are "reasonably relevant" to the Commission's investigation of the transaction. Described summarily below, the document production specifications are set forth in full in Pet. Exh. 2.

Specification 1 requests organization charts and personnel directories for Take-Two from January 1, 2004, through the present. This specification permits the Commission to determine who may have information relevant to the investigation.

Specification 2 is covered by category 8 of the May 7 agreement.

Specification 3 requests documents relating to any discounts or allowances for Take-Two's video games, such as rebates and promotional allowances. Specification 4 requests

documents relating to any data involving the substitutability or cross-elasticity of other video games for Take-Two's video games. Specifications 5 and 6, respectively, request documents relating to Take-Two's relationships with its twenty largest wholesalers and retailers, including all contractual and promotional agreements in place since January 1, 2006. Specification 13 requests all documents relating to vendor participation in product placement with retailers. These specifications are relevant to the Commission's investigation because they will provide information about how Take-Two sells and markets its products and how Take-Two defines its product market(s).

Specification 7 requests a copy of packaging for each of Take-Two's sports, shooter, strategy, racing and action games. Specifications 8, 9 and 10, respectively, request the production of all marketing and advertising materials, marketing and advertising plans, and consumer research materials concerning these types of games. Specification 14 requests the production of all documents comparing Take-Two's sports, shooter, strategy, racing and action games with those of any other entity. As with the specifications discussed in the preceding paragraph, these specifications are relevant to the Commission's investigation because they will provide information about how Take-Two sells and markets its products and how Take-Two defines its product market(s).

Specification 11 requests the production of any analyst reports concerning the video gaming industry, including Take-Two's competitors and the effect of the proposed transaction. Specification 12 is mostly covered by the Category 7 of the May 7 agreement but also requests the production of any documents analyzing the effect of licenses from professional sports leagues. These specifications are relevant to the Commission's investigation because they will provide information about how Take-Two markets its products and how Take-Two defines its

product market(s).

Specification 15 asks for the production of all planning documents relating to Take-Two's video games, such as business and strategic plans, investment banker or other consultant reports, and budgets and financial projections. Specification 16 requests the production of corporate financial statements. Specification 26 requests similar types of documents. These specifications are relevant to the Commission's investigation because they will provide financial information about Take-Two.

Specification 17 requests the production of all market studies, forecasts and surveys for its products. Specification 18 requests any intellectual property agreements relating to its interactive games. Specification 19 requests documents regarding economies of scale in the production of its products. Specification 20 requests documents concerning the cost of entry into the markets for its products. Specification 21 requests documents provided to or received from third parties concerning its products. These specifications are relevant to the Commission's investigation because they will provide information about how Take-Two sells and markets its products, its costs of production for its products, how Take-Two defines its product market(s), and how Take-Two views its competition.

Specifications 22 through 24 involve requests for documents concerning the proposed transaction. Number 22 asks for any documents from consultants concerning the transaction, 23 asks for all Take-Two documents relating to the transaction, and 24 asks for all documents relating to any efficiencies that may arise from the transaction. Specification 25 requests the production of documents relating to any possible transactions involving Take-Two with parties other than EA. These documents are relevant to the Commission's investigation because they will provide responsive information about how Take-Two views and is reacting to the proposed

transaction.

Finally, Specification 27 requests all documents previously produced to the Commission by Take-Two but not in machine readable form. Specifications 28 and 29 request the production of Take-Two's document retention and destruction policies and a copy of any internal documents prepared to by Take-Two concerning directions on the preparation of its response to the Commission's compulsory process.

D. Take-Two is Barred from Objecting to this Court that the CID and Subpoena are Unduly Burdensome

The failure of Take-Two to seek any administrative relief from the Commission concerning the Subpoena and CID bars it from raising any factual or legal objections (relating to burden or otherwise) for the first time with this Court. Long standing Commission Rule 2.7(d)(1), 16 C.F.R. § 2.7(d), requires that all legal or factual objections to Commission compulsory process must be raised through a petition to quash or modify the Subpoena or CID. Such petitions must be filed with the Commission's Secretary "within twenty (20) days after service of the subpoena . . ., or, if the return date is less than twenty (20) days after service, prior to the return date." Here, Take-Two, which was served with the Subpoena and CID on April 22, 2008, has utterly failed to file a petition to quash or limit, timely or otherwise. (Pet. Exh 1, ¶33).

It is a well established principle of administrative law that a party that fails to exhaust its administrative remedies will not be permitted to raise objections for the first time in court. *E.g., EEOC v. Cuzzens of Georgia, Inc*., 608 F.2d 1062, 1063-64 (5th Cir. 1979); *NLRB v. Baywatch Security & Investigations*, 2005 WL 1155109, at *2 (S.D. Tex. Apr. 28, 2005); *EEOC v. City of Milwaukee*, 919 F. Supp. 1247, 1255 (E.D. Wis. 1996); *FTC v. O'Connell*, 828 F. Supp. 165, 168 (E.D.N.Y. 1993); *FTC v. Invention Submission Corp.*, 1991 WL 47104, at *2 n.12 (D.D.C.

Feb. 14, 1991), *aff'd*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Standard Oil Co. of Ohio*, 1979 WL 1663 at *2, n.4 (D.D.C. 1979); *FTC v. U.S. Borax and Chemical Corp*., 1978 WL 1316 (D.D.C. 1978); *FTC v. Stanley Kaplan Educ. Ltd.*, 433 F. Supp. 989, 992 (D. Mass. 1977). *Cf. FTC v. Tarriff*, No. 1:08-Misc-217-RCL slip. op. at 2-3 (D.D.C. Jun. 2, 2008) (in a Commission action to compel compliance with CID court considered objections in the first instance raised by a timely petition to quash filed with and then denied by the Commission).

The message of these cases is unambiguous: a recipient of administrative process that has any legal or factual objections to the process must in the first instance seek relief from the administrative agency that issued the process – the recipient cannot raise any objections for the first time in court, even if these objections are raised in the context an enforcement proceeding initiated by the administrative agency. This concept is critical since administrative process like the Commission's is not self-enforcing. If courts held otherwise and permitted objections to be raised for the first time in court, this would serve as an invitation for the recipients of administrative process to ignore administrative remedies such as those set out in 16 C.F.R. § 2.7(d) and sit on their rights unless and until the issuing agency seeks judicial enforcement of its process. This would result in a needless waste of judicial resources if courts were forced to consider such objections in the first instance. Not only would courts be forced to resolve objections that may have been resolvable at the administrative level, courts would also be forced to develop a record rather than to reach theirs decisions based upon a record developed before the administrative agency.

CONCLUSION

For the reasons set out above, this Court promptly should issue an Order to Show Cause against Take-Two and then should grant the relief requested by the Commission in this Petition.

Respectfully submitted,

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