IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Petitioner, v. TAKE-TWO INTERACTIVE SOFTWARE, INC. , Respondent.	)	Misc. No.

DECLARATION OF REID B. HORWITZ

Reid B. Horwitz states and declares as follows:

1. I am an attorney employed in Washington, D.C., by the Mergers II Division in the Bureau of Competition of the Federal Trade Commission ("Commission"), and am authorized to execute this declaration. I am the attorney leading the Commission's investigation concerning the proposed acquisition of Take-Two Interactive Software, Inc. ("Take-Two") by Electronic Arts Inc. ("EA") through a hostile cash tender offer (the "proposed transaction").

2. I have reviewed all of the exhibits attached to the Petition of the Federal Trade Commission for an Order Enforcing a Subpoena *duces tecum* and a Civil Investigative Demand ("CID") and can verify that all of these exhibits are true and correct copies of documents contained in the Commission's files.

3. The Commission is an administrative agency of the United States government, organized and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq*. The Commission is authorized and directed by Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended, and Section 5 of the FTC Act, 15 U.S.C. § 45, as amended, to determine if acquisitions such as the

proposed transaction may substantially lessen competition. The Commission must conclude its investigation within the statutory time allowed by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Section 7A of the Clayton Act, 15 U.S.C. § 18a ("HSR Act"), in order to seek preliminary injunctive relief before the expiration of the premerger notice and waiting period under the HSR Act if the Commission has reason to believe such relief is warranted.

4. It is my understanding that Take-Two is a video game software developer and manufacturer that maintains its principal place of business at 622 Broadway, New York, NY 10012. It is my further understanding that through the sales of its video games Take-Two engages in commerce throughout the country, including in the District of Columbia

5. It is my understanding that EA initiated a hostile cash tender offer to purchase the stock of Take-Two on or about March 13, 2008. It is my further understanding that the deadline for this offer has been extended through June 16, 2008, and that if the offer is accepted, Take-Two's shareholders will receive approximately $2.1 billion in cash.

6. EA and Take-Two publish video game titles within overlapping genres, including the sports genre. In particular, historically EA and Take-Two sell competing titles for simulated sports games, including basketball, football, hockey, and baseball.

7. On April 16, 2008, the Commission issued requests for additional information ("HSR second requests") about the proposed transaction to both Take-Two and EA pursuant to the HSR Act. On April 21, the Commission issued a Subpoena and CID to Take-Two, setting a May 9, 2008, return date for both.

8. The Subpoena and CID complement the Commission's HSR second request to Take-Two since this compulsory process requires the production of a substantial subset of

information and documents sought by the HSR second request. Both the Subpoena and the CID were issued pursuant to a resolution passed by the Commission and were signed by a Commissioner. The Subpoena and CID, including a copy of the authorizing resolution, are attached to the petition as Pet. Exh. 1 and 2. After being issued, it is my understanding that both the Subpoena and CID were served by the Commission's Office of the Secretary.

9. 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 is critical because EA has announced that it intends to consummate the transaction 45 days after it certifies substantial compliance with its HSR obligations. *See* http://www.reuters.com/article/technologyNews/idUSN0435662420080604. Since EA controls when it will provide such certification, 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. Prior to the expiration of this 45 day period, therefore, Commission staff must receive Take-Two's documents, analyze them, use them to prepare for investigational hearings of Take-Two officials, and complete these investigational hearings with sufficient time for the Commission to evaluate the competitive effects of the proposed transaction.

10. The purpose of any HSR second request investigation is two-fold: (1) to gather sufficient information for the Commission to use internally to determine whether it has reason to believe the transaction poses a competitive concern; and (2) to collect evidence sufficient to support a government enforcement action, if one should prove necessary, to enjoin the consummation of the merger pending the Commission's adjudication of the underlying merits of the transaction in an administrative trial. The collection of such information and evidence

routinely involves reviewing documents and taking the testimony of corporate officials of the potentially merging parties, including those of the highest rank within the company, about the competitive dynamics of the market(s) potentially impacted by the transaction under review. The government ordinarily seeks injunctive relief before a federal court and presents its evidence prior to the expiration of the HSR Act premerger notice and waiting period due to the difficulty of obtaining meaningful relief after the consummation of the merger.

11. As a result, time is of the essence in collecting the documents and information sought from Take-Two through the Subpoena and CID, and using such documents and information, as is routinely the case in HSR second request investigations, as the basis for conducting investigational hearings of knowledgeable corporate officials of Take-Two. This information – including testimony by the highest ranking officials within the prospective merger partners – about the competitive dynamics of the video game industry will be used by the Commission to discharge its statutory obligation to determine whether a proposed transaction is likely to substantially lessen competition and, accordingly, whether to challenge the proposed transaction.

The April 25 Agreement and Take-Two's Breach

12. It was within this context that my agency colleagues and I held a series of discussions with Take-Two's counsel for the purpose of expediting the company's response to at least certain portions of the Subpoena. Those discussions began on April 22, 2008, when I spoke with Alicia Batts, a member of the Proskauer Rose LLP law firm, who then represented Take-Two. On April 23, Ms. Batts and I discussed Take-Two's request to relax the May 9, 2008, return date for the Subpoena and CID in return for Take-Two's agreement to provide responsive documents from the files of a limited number of Take-Two officials on an expedited rolling basis

that would constitute an initial submission. In a follow-up conversation on April 24, I proposed specific officials whose files would be included in that initial submission.

13. On April 25, Ms. Batts counter-proposed producing responsive documents from the files of a largely different group of Take-Two officials, whose files she represented would better assist the Commission in gaining an early insight into the competitive dynamics of competition within the video game industry. Ms. Batts stated that the search of these files would begin within several days, and that the Commission could expect to begin receiving documents shortly thereafter. The Commission accepted this counter-proposal, reserving the right to suggest the addition of a few individuals to the group of officials whose files would be produced in that initial submission. Though not within the scope of the Subpoena or CID, I also understood that Take-Two was willing to produce these same corporate officials for early investigational hearings.

14. During the week of April 28, 2008, it is my understanding that another Commission attorney, Eric Elmore, repeatedly attempted to speak to Ms. Batts to discuss remaining compliance issues, including a revised due date for full compliance. It is my understanding that Ms. Batts declined these repeated offers to confer. No documents were produced by Take-Two to the Commission during that week or the previous week other than a handful of documents relating to Take-Two's All Pro Football title that had been informally requested prior to April 16, and some organization charts.

15. On May 5, 2008, I received a telephone call from Stephen Axinn of Axinn, Veltrop & Harkrider LLP, who informed me 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. On

May 7, 2008, several agency colleagues and I met with Mr. Axinn. At that meeting, Mr. Axinn stated that Take-Two would not produce any additional documents pursuant to the agreement entered into by Take-Two on April 25 through Ms. Batts.

The May 7 Agreement and Take-Two's Breach

16. At our meeting on May 7, Mr. Axinn proposed that Commission staff could better advance its investigation by adopting an approach that focused on specific categories of documents or data rather than on systematic searches of the files of specific Take-Two corporate officials. Mr. Axinn suggested that the Commission identify such categories of documents and data and then Take-Two would quickly gather and produce these materials as its first phase response to the Subpoena and CID. These documents, according to Mr. Axinn, would come from the files of 15 custodians whose files Take-Two had already collected. Mr. Axinn represented that, in the four days since he had been retained by Take-Two, he had hired a substantial number (40) of contract attorneys to expedite document review. He further represented that Take-Two was 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 Take-Two's first phase responses, Commission staff could identify additional documents or data 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.

17. Commission staff accepted Mr. Axinn's proposal during the May 7 meeting and then confirmed the agreement in a May 8, 2008, letter to Mr. Axinn from Mr. Elmore and a

Commission Bureau of Competition Assistant Director, Catharine Moscatelli (appended hereto as Pet. Exh. 5). The letter identifies the nine categories of documents and data that Take-Two and Commission staff agreed would make up the first phase. Wholly 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. 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 materials during the week of May 5, and significantly expanding this production during the week of May 12. Commission staff received no immediate objections, corrections or comments concerning its May 8 confirmatory letter.

18. Commission staff received only two very limited submissions following the May 7 agreement over the next two weeks. On May 9, we 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, we received a half box (721 pages) of assorted documents. A number of these documents consisted of pdf versions of spreadsheets. None were produced in native format and, accordingly, there were instances where the documents were illegible either because columns were provided on successive pages without indications as to what was being cross-referenced or because the columns had not been widened sufficiently when their image was recorded so that "#####" rather than numbers were visible. By producing these documents in pdf format, Take-Two violated the express instructions of the CID and Subpoena that required that spreadsheets and powerpoints be produced in their native formats precisely to prevent this problem.

19. Between May 9 and May 15, 2008, Mr. Axinn's law partner, Michael Keeley, made a series of telephone calls to other agency colleagues and me in which he informed us that

Take-Two would not not comply with the May 7 agreement. He stated that because the proposed transaction is a hostile cash tender offer, Take-Two had decided that it was unfair for the Commission to burden it with the expense and effort that would be required to comply with the Subpoena and CID (and by extension, the HSR second request). During this time, Mr. Keeley requested an indefinite extension on the May 16 return date for the Subpoena and CID. This request was not granted.

Take-Two's Third Proposal and Subsequent Retrenchment

20. It is my understanding that in a May 9 telephone call with Mr. Elmore and Ms. Victoria Lippincott, another Commission attorney working on this investigation, Mr. Keeley stated that instead of searching the files of 15 employees for responsive documents, Take-Two would search the files of only three employees for marketing and pricing documents relating to basketball and hockey video games, but would include the files of the remaining 12 custodians in its search for documents responsive to the other eight categories identified on May 7.

21. On May 15, 2008, Mr. Axinn contacted me by telephone to state that Take-Two no longer intended to carry through with its latest offer, and instead was going to further narrow the scope of its search in the first phase to only three employees: David Ismailer, Sarah Anderson, and Bob Blau. He further stated that the search of their files would be limited to a subset of the documents covered by the May 7 agreement. For example, in the May 7 agreement Take-Two agreed to conduct a search for marketing and competition documents relating to boxing and tennis video game titles. (Pet. Exh. 5, p. 2) As of May 15, Take-Two stated it would not search for such documents as part of its first phase of responses. (Pet Exh. 6) In a subsequent phone call that day involving Bureau of Competition Deputy Assistant Director Morris Bloom, me and Mr. Axinn, Mr. Axinn stated that he would try to complete the production of documents from the files

of Ismailer, Anderson and Blau quickly, but that he could not guarantee he could complete his review by May 25. Mr. Bloom then informed Mr. Axinn that the Commission staff would not extend the CID and Subpoena compliance deadline any further, but that the Agency would forego filing a judicial enforcement action until at least May 22 for purposes of evaluating the sufficiency of Take-Two's compliance. I sent Mr. Axinn a confirmation letter to this effect that day, a copy of which is appended as Pet. Exh. 6.

22. On May 22, 2008, Mr. Keeley represented by letter that Take-Two, through a third-party litigation support company, had that day begun the electronic production of documents from the files of Ismailer, Anderson and Blau.

The Commission's Second Phase Search Proposal and Take-Two's Response

23. On May 27, 2008, to assess the status of Take-Two's compliance with the first phase of its document submission and to ascertain its intentions with regard to additional phases, several agency colleagues and I, including Deputy Assistant Director Bloom, spoke by telephone with Mr. Keeley. Mr. Keeley represented that the production of documents from the files of Ismailer, Anderson and Blau was not yet complete due to continuing privilege review. When queried regarding the manner in which the search was being conducted, Mr. Keeley stated that his firm was reviewing only electronic documents and that he did not intend to review any paper documents located within the files of these employees. He also indicated that after Take-Two completed the production of the files from these three employees, it had no present intent to conduct further searches.

24. The Commission staff indicated to Mr. Keeley that we expected Take-Two would search the files of additional employees consistent with Take-Two's commitment to provide a phased response to the Subpoena and CID. Mr. Keeley responded that he could not commit to

such an undertaking without first consulting his client. He stated that Take-Two was "very reluctant" to review files beyond those of Ismailer, Anderson and Blau because Take-Two considered compliance with the Commission's compulsory process in a hostile cash tender offer situation to be an "undue burden." Mr. Keeley also agreed to consult with his client 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. We told him that we would contact him the following day to identify those employees whose files we proposed would constitute the next phase of Take-Two's search.

25. On May 28, my agency colleagues and I again spoke with Mr. Keeley by telephone. He stated that he expected the search of the files of Ismailer, Anderson and Blau would be completed by June 2, although I understand that as of today the production of Ismailer's files is not yet complete. We informed Mr. Keeley that we had identified at least six additional employees whose files should be included in the second phase of Take-Two's response. We stated that these individuals appeared likely to have highly responsive documents by virtue of their titles and positions and we anticipated that they could provide highly useful information during investigational hearings. These employees are: Ben Feder, CEO; Christoph Hartmann, President of 2K Games; Greg Thomas, President, Visual Concepts (the wholly-owned studio that develops many of Take-Two's sports games); Gary Dale, Executive Vice President of Sales; and David Gershik, Vice President of Sales. We also asked for the files of Erik Whiteford, former Vice President of Marketing for 2K Sports. Although it is my understanding that he is no longer employed by Take-Two, we stated that we were under the impression that Take-Two still maintained and could review his files. The files of Feder, Hartmann, Dale, Gershik and Whiteford had been among those on the earliest lists of employees whose files either Ms. Batts

had proposed producing or that I, in April, had requested be included as part of the review process leading to a high priority document production by Take-Two.

26. Because their names appeared frequently on documents already produced to the Commission, staff further requested that Take-Two provide the titles of three additional individuals: Jason Argent; Evan Drew Smith; and Christopher Snyder. We suggested that depending on what responsibilities they held, the Commission might want to add their files to the second phase search. We also requested that Take-Two expand its search to include documents referring to boxing and tennis video games. Finally, we asked Take-Two to designate the person or persons most familiar with Take-Two's pricing for its sports games, including promotional pricing, and, if this person (or these persons) were not among the search group identified by the Commission, that the documents of such person(s) also be produced in the next phase.

27. Mr. Keeley indicated that he lacked the authority to make any commitments on behalf of Take-Two regarding the company's willingness to conduct a second phase search without first consulting his client. We reminded him that Take-Two was not in compliance with the Subpoena and CID, that our agreement to forego seeking judicial enforcement of the Commission's compulsory process had expired, and that because time remained of the essence, we needed a response to our proposed second phase of document production by noon on Friday, May 30, 2008, so that we could, if necessary, file this petition with sufficient time to obtain the information sought by Subpoena and CID.

28. On May 29, at Mr. Keeley's request, the 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, among other things, identified the titles of Argent, Smith and Snyder.

29. On June 2, several agency colleagues and I conferred with Messrs. Axinn and Keeley by telephone. Mr. Axinn stated that Take-Two would not voluntarily fully comply with the Subpoena or CID. Instead, Mr. Axinn indicated that, at most, Take-Two would agree to search the files of three additional current or former employees: Dale, Gershik and Whiteford. Any such reviews would be subject only to the limited scope of review set out on May 15, *see* Pet. Exh. 6, not the broader review to which Take-Two agreed on May 8, *see* Pet Exh. 5.

30. Mr. Axinn stated that Take-Two would not review or produce documents from the files of any employees beyond Ismailer, Anderson, Blau, Dale, Gershik and Whiteford, although it is my understanding that in a subsequent phone call he had with Deputy Assistant Director Bloom he suggested that Take-Two might at some later point in time be willing to produce some set of files from some unspecified employee or group of employees. He also stated in the June 2 call that Take-Two had already spent $1.2 million to review and produce documents from the files of Ismailer, Anderson and Blau, and would have to spend another $1 million to review and produce the files of Dale, Gershik and Whiteford. According to Mr. Axinn, Take-Two believed that it was unreasonable to spend more than this to comply with the outstanding Subpoena and CID given that the proposed transaction was not a consensual transaction. When asked why Take-Two would produce the files of those particular three custodians but not the files of the company's CEO, Ben Feder, the President of 2K Games, Christoph Hartmann, or the President of Visual Concepts, Greg Thomas, Mr. Axinn provided two explanations: (1) these individuals were "creative types" who would leave the company rather than agree to allow their files to be searched; and (2) he did not believe that the Commission should use its premerger investigation as "discovery to build a case." However, if the Commission did not conduct discovery, as Mr. Axinn proposes here, the Commission jeopardizes its ability to support a petition for injunctive

relief, which must be filed before the expiration of the HSR notice and waiting period, should it ultimately conclude that such relief was necessary.

31. Mr. Axinn also rejected the Commission's request that Take-Two search for and produce documents relating to boxing and tennis video games as part of its search. Mr. Axinn indicated that the Commission need not investigate whether this transaction would reduce competition in this group of video games because he believed that these games did not constitute markets that implicated antitrust concerns. To the contrary, since a determination by the Commission as to what markets may be affected by the proposed transaction goes to the core of the Commission's investigation, Mr. Axinn's personal belief simply is not dispositive. This only serves to underscore that, ultimately, some of the most potentially relevant and important evidence on this and other issues relating to the investigation likely will come from Take-Two's documents.

32. 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. It is my understanding that Mr. Axinn responded that day 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. It is my further understanding that both declined Mr. Axinn's request. On June 5, Mr. Axinn responded to my letter with a letter that made no new proposals.

33. To my knowledge Take-Two has not filed with the Commission's Secretary a

petition to limit or quash the Subpoena or CID consistent with the procedure established in 16 C.F.R. § 2.7(d). 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.

I certify that the above statements are true to the best of my knowledge, information and belief subject to the penalties for unsworn statements set out in 28 U.S.C. § 1746.

DATE:

June 5, 2008

Washington, DC

Reid B. Horwitz