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10 *Interim Co-Lead Counsel*

11 **UNITED STATES DISTRICT COURT**
12
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 In Re Sony PS3 "Other OS" Litigation

Case No. CV-10-1811-RS

15 **DECLARATION OF ROSEMARY RIVAS**
16 **IN SUPPORT OF: (A) PLAINTIFFS'**
17 **MOTION FOR A PROTECTIVE ORDER;**
18 **AND (B) PLAINTIFFS' MOTION FOR AN**
19 **ORDER: (1) COMPELLING DISCOVERY**
20 **FROM DEFENDANT SCEA'S PARENT**
21 **COMPANY, AND (2) ENTERING THE**
22 **NORTHERN DISTRICT OF**
23 **CALIFORNIA'S STANDARD**
24 **PROTECTIVE ORDER.**

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Date: February 9, 2011
Time: 10:30 a.m.
Judge: Magistrate Judge Edward M. Chen
Courtroom: C, 15th Floor

1 I, Rosemary M. Rivas, declare as follows:

2 1. I am a partner with the law firm Finkelstein Thompson LLP, Interim Co-
3 Lead Counsel representing the Plaintiffs in the above-captioned action. I am a member in good
4 standing of the State Bar of California. I have personal knowledge of the facts stated herein, and
5 if called on to do so, could and would testify competently thereto. I make this declaration in
6 support of: (A) Plaintiffs' Motion for a Protective Order; and (B) Plaintiffs' Motion for an
7 Order: (1) Compelling Discovery from Defendant SCEA's Parent Company, and (2) Entering the
8 Northern District of California's Standard Stipulated Protective Order.

9 2. Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, on August 12,
10 2010, Plaintiffs (represented by myself and my co-counsel in this case, James Pizzirusso, James
11 A. Quadra, Rebecca Coll and Daniel L. Warshaw), met and conferred in-person and by telephone
12 with Defendant's counsel, Luanne Sacks and Carter Ott.

13 3. During the Rule 26(f) meeting, the parties discussed a number of matters. Ms.
14 Sacks informed us that notwithstanding SCEA's anticipated motion to dismiss, SCEA would not
15 seek to stay discovery.

16 4. During the parties' Rule 26(f) meeting, I requested that SCEA provide Plaintiffs
17 with a draft stipulated protective order. I informed Ms. Sacks that Plaintiffs did not want to be in
18 the position where SCEA would refuse to produce responsive documents absent the entry of a
19 protective order. Ms. Sacks indicated that SCEA would provide a draft stipulated protective
20 order within one week. Mr. Ott stated that SCEA would also provide a redlined version of the
21 Northern District of California's Stipulated Protective Order.

22 5. Further, Ms. Sacks informed Plaintiffs that it was Defendant's position that to
23 comply with their preservation obligations, Plaintiffs should no longer use their PS3s. Ms. Sacks
24 also informed Plaintiffs that Defendant intended to seek discovery from and depose the unnamed
25 class members who previously filed complaints but were not named in the Consolidated Class
26 Action Complaint. Attached hereto as **Exhibit A** is a true and correct copy of a letter that
27 Defendants sent to Plaintiffs, dated August 26, 2010 outlining Defendant's preservation
28 demands, which included demands on absent class members.

1 6. On September 8, 2010, Plaintiffs served SCEA by overnight mail their First
2 Request for Production of Documents (“Document Requests”), of which a true and correct copy
3 is attached hereto as **Exhibit B**. Attached hereto as **Exhibit C** is a true and correct copy of
4 Defendant’s Responses and Objections to Plaintiffs’ First Set of Requests for Production of
5 Documents (“Defendant’s Responses and Objections”). Defendant did not serve any responsive
6 documents with its responses at this time. To date, Defendant has only produced its various
7 terms of service, warranties, and licensing agreements which are publicly available on its
8 website.

9 7. Attached hereto as **Exhibit D** is a true and correct copy and exemplar of the
10 deposition notices Defendant Sony Computer Entertainment America LLC (“SCEA”) served on
11 each of the Plaintiffs on September 24, 2010.

12 8. On October 18, 2010, the parties discussed, among other things, meeting and
13 conferring regarding Defendant’s Responses and Objections and the stipulated protective order.
14 On this same date, Mr. James Pizzirusso sent Ms. Sacks the Northern District of California’s
15 Standard Stipulated Protective Order. Attached hereto as **Exhibit E** is a true and correct copy of
16 an email string reflecting the parties’ communications.

17 9. On October 19, 2010, Plaintiffs agreed to appear in San Francisco, California for
18 deposition as follows: November 9, 2010 (Plaintiff Antal Herz); November 15, 2010 (Plaintiff
19 Anthony Ventura); November 19, 2010 (Plaintiff Elton Stovell); November 22, 2010 (Plaintiff
20 Jason Baker); and December 9, 2010 (Plaintiff Jonathan Huber). Defendant agreed to this
21 schedule.

22 10. Attached hereto as **Exhibit F** is a true and correct copy and exemplar of
23 Plaintiffs’ responses and objections to SCEA’s notice of deposition and document requests
24 (“Plaintiffs Responses and Objections”) that Plaintiffs served on SCEA on October 28, 2010.
25 Plaintiffs deemed most of Defendant’s document requests objectionable, and therefore offered to
26 meet and confer about them.

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1 11. On October 29, 2010, the parties met in-person to discuss Defendant’s Responses
2 and Objections. During this meeting, Ms. Sacks informed Plaintiffs that SCEA is responsible for
3 the marketing and distribution of the PlayStation 3 (“PS3”), as well as for providing customer
4 support relating to the PS3. Ms. Sacks stated that Defendant’s parent, Sony Computer
5 Entertainment, Inc. (“SCEI”) was responsible for the PS3’s design, as well as for the decisions
6 related to including and removing the PS3’s “Other OS” function. When the parties discussed
7 Plaintiffs’ Document Request Nos. 5-7 and 10-13, Ms. Sacks indicated that SCEA did not have
8 responsive documents in its possession, custody and control, but that to the extent such
9 documents existed, they were likely in the possession, custody and control of SCEI in Japan.
10 According to Ms. Sacks, SCEA was not obligated to produce responsive documents located in
11 Japan.

12 12. During the parties’ October 29, 2010 meeting, Plaintiffs also discussed the issue
13 of the stipulated protective order. Ms. Sacks stated that Defendant would not produce documents
14 until the parties reached an agreement on the stipulated protective order and that a draft would be
15 forthcoming. Plaintiffs proposed that if Defendant produced documents, Plaintiffs would
16 maintain such documents confidential under the designation “Attorneys’ Eyes Only” until a
17 protective order was entered by the Court.

18 13. On November 8, 2010, the day before the first scheduled deposition of Plaintiff
19 Antal Herz, Plaintiffs received an email informing them that Defendant’s counsel, Ms. Sacks,
20 was ill. Defendant asked to reschedule Plaintiff Herz’s deposition. Attached hereto as **Exhibit**
21 **G** is a true and correct copy of this email. Although Plaintiff Antal Herz was prepared to
22 proceed with the deposition scheduled on November 9, 2010, Plaintiffs’ counsel agreed to
23 reschedule the deposition.

24 14. On November 9, 2010, Defendant for the first time requested a meet and confer to
25 discuss Plaintiffs’ Responses and Objections and also to discuss the issues from the parties’
26 October 29, 2010 meet and confer. The parties agreed to meet and confer by telephone on
27 November 12, 2010 when Ms. Sacks was feeling better.

1 15. Attached hereto as **Exhibit H** is a true and correct copy of a letter I sent to Ms.
2 Sacks on November 10, 2010 confirming the results of the parties' meet and confer of October
3 29, 2010 to facilitate the parties' telephonic meet and confer on November 12, 2010.

4 16. The parties participated in a lengthy meet and confer by telephone on November
5 12, 2010 regarding the depositions and Plaintiffs' Responses and Objections, among other
6 things. Specifically, Ms. Sacks indicated that with respect to Defendant's Document Request
7 No. 14, Defendant expected Plaintiffs to conduct a search on the Internet for any advertisements
8 they relied upon in purchasing their PS3s. Ms. Sacks stated that if Plaintiffs did not do so,
9 Defendant would object to Plaintiffs' ability to introduce any such materials that were later
10 discovered at summary judgment or at trial. Unfortunately, the parties were unable to resolve
11 their differences. Attached hereto as **Exhibit I** is a true and correct copy of an email string dated
12 November 8, 2010 through November 12, 2010 between Plaintiffs' counsel and Defendant's
13 counsel reflecting part of the parties' meet and confer efforts during that time frame. The parties
14 agreed to meet and confer the following week regarding a hearing date and briefing schedule on
15 Plaintiffs' motion for a protective order and cross motions to compel.

16 17. The parties held another telephonic meet and confer on November 15, 2010,
17 wherein they continued to discuss the discovery disputes. Counsel for SCEA stated that it would
18 be willing to stipulate to SCEA producing documents from SCEI but that Plaintiffs would need
19 to follow the requirements for taking depositions in Japan under international discovery rules.
20 Plaintiffs' counsel requested that SCEA provide a proposal in writing. The parties also discussed
21 SCEA's demand for forensic copies of Plaintiffs' PS3 hard drives. The parties were unable to
22 reach an agreement on the discovery disputes and therefore agreed to stipulate to a briefing
23 schedule on Plaintiffs' motion for a protective order and cross motions to compel.

24 18. On November 18, 2010, I sent an email to SCEA stating that Plaintiffs would not
25 agree to produce forensic copies of the hard drives and instead proposed to allow a mutually
26 acceptable vendor to inspect the PS3 hard drives and prepare a report, at SCEA's expense, that
27 sets forth (1) whether Linux was installed and the date of installation; and (2) whether the
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1 following types of files exist, or not, on the hard drives: video game files, movie files, music
2 files, word processing files, email files, or other Linux software related files. I requested that
3 SCEA inform Plaintiffs by November 22, 2010 whether it agreed to this proposal. In response to
4 my email, Ms. Sacks responded on November 19, 2010 stating that she would inform us of
5 SCEA's position by November 22, 2010. Unfortunately, Plaintiffs did not learn that SCEA
6 rejected Plaintiffs' proposal until November 23, 2010 after 10:00 p.m.

7 19. Attached hereto as **Exhibit J** is a true and correct copy of an email string dated
8 from November 8, 2010 through November 23, 2010 between Plaintiffs' counsel and
9 Defendant's counsel related to the Defendant's draft stipulated protective order.

10 20. Attached hereto as **Exhibit K** is a true and correct copy of an email string dated
11 from November 18, 2010 through November 24, 2010 between Plaintiffs' counsel and
12 Defendant's counsel relating to the parties' discovery disputes.

13 21. Attached hereto as **Exhibit L** is a true and correct copy of an email string dated
14 from November 29, 2010 through December 1, 2010 between Plaintiffs' counsel and
15 Defendant's counsel related to the parties' discovery disputes.

16 22. Attached hereto as **Exhibit M** is a true and correct copy of the stipulation
17 Defendant proposed and sent to Plaintiffs on December 8, 2010 regarding discovery of
18 Defendant's parent, SCEI. Attached hereto as **Exhibit N** is a true and correct copy of an email
19 string dated from December 8, 2010 through December 9, 2010 between Plaintiffs' counsel and
20 Defendant's counsel related to the stipulation.

21 23. Attached hereto as **Exhibit O** is a true and correct copy of an email string dated
22 from December 8, 2010 through December 10, 2010 between Plaintiffs' counsel and Defendant's
23 counsel related to the parties' meet and confer efforts on Plaintiffs' motion to compel.

24 24. Attached hereto as **Exhibit P** is a true and correct copy of the declaration of John
25 Fabry, one of Plaintiffs' counsel.

26 25. On December 1, 2010, Plaintiffs' counsel, Calvo & Clark, began producing
27 documents. Plaintiffs are endeavoring to complete their document production as soon as
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1 possible. Plaintiffs have produced (or will produce) the following categories of information to
2 the extent such information is in their possession, custody or control:

- 3 a. Photographs of their PS3s (including photographs of the serial numbers);
- 4 b. Proofs of purchase for their PS3s and product inserts (such as manuals);
- 5 c. Photographs of peripherals used with PS3's "Other OS" feature;
- 6 d. Any advertising related to the PS3;
- 7 e. Non-privileged communications between the named Plaintiffs and anyone
8 regarding the "Other OS" function or Firmware Update Version 3.21;
- 9 f. Any information relating to "hacking" or "jailbreaking" of the PS3;
- 10 g. Technical articles regarding Linux;
- 11 h. Emails from SCEA;
- 12 i. Screen shots of Firmware Update Version 3.21;
- 13 j. Copies of complaint letters sent to the Better Business Bureau and the Federal
14 Trade Commission; and
- 15 j. Non-privileged documents cited in the Consolidated Class Action Complaint filed
16 on July 30, 2010.

17 I declare under penalty of perjury under the laws of the United States of America that the
18 foregoing facts are true and correct. Executed this 15th day of December in San Francisco,
19 California.

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21 /s/ Rosemary M. Rivas
22 Rosemary M. Rivas
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