

1 LUANNE SACKS, Bar No. 120811
 luanne.sacks@dlapiper.com
 2 CARTER W. OTT, Bar No. 221660
 carter.ott@dlapiper.com
 3 **DLA PIPER LLP (US)**
 555 Mission Street, Suite 2400
 4 San Francisco, CA 94105
 Tel: 415.836.2500
 5 Fax: 415.836.2501

6 Attorneys for Defendant
 SONY COMPUTER ENTERTAINMENT
 7 AMERICA LLC (erroneously sued as "Sony
 Computer Entertainment America Inc.")
 8

9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO DIVISION

12
 13
 14 In re SONY PS3 "OTHER OS"
 LITIGATION

CASE NO. 3:10-CV-01811

**DEFENDANT'S NOTICE OF MOTION
 AND MOTION TO COMPEL;
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
NOTICE OF MOTION AND MOTION TO COMPEL.....	1
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. INTRODUCTION	1
II. FACTUAL AND PROCEDURAL BACKGROUND.....	3
A. The PS3 And Other OS Feature.....	3
B. Firmware Update 3.21.....	4
C. Plaintiffs’ Reliance, Purchase, And Use Of Their PS3 Are Central To Their Claims	4
D. Plaintiffs Face Significant Hurdles In Obtaining Certification And Succeeding At Liability	7
E. The Present Discovery Dispute.....	8
III. LEGAL STANDARD.....	9
IV. THE COURT SHOULD ORDER PLAINTIFFS TO PRODUCE THE REQUESTED DOCUMENTS AND OTHER ITEMS.....	10
A. Plaintiffs’ PS3s And Personal Computers Are Integral To Their Claims And SCEA’s Defenses	10
B. The Court Should Order Production Of Documents Regarding Reliance And Purchase	14
C. The Court Should Order Production Of Documents Regarding Usage Of The PS3s	17
D. The Court Should Order Production Of Documents Relevant To Consolidated Complaint Allegations	19
E. The Court Should Order Production Of Communications Relating To This Litigation.....	22
F. The Court Should Order Production Of Communications Related To A False Representation Regarding This Litigation Made To The Public Via Mr. Ventura’s Counsel’s Website.....	23
V. THE COURT SHOULD ORDER PLAINTIFFS TO APPEAR FOR DEPOSITION	24
VI. CONCLUSION.....	25

1 **TABLE OF AUTHORITIES**

2 **Page**

3 **CASES**

4 *Aliki Foods v. Otter Valley Foods, Inc.*,
5 2010 WL 2985030 (D.Conn. March 26, 2010)..... 12

6 *ANZ Advanced Tech. LLC v. Bush Hog LLC*,
7 2010 WL 3699917 (S.D. Ala. Sept. 9, 2010)..... 12

8 *Arista Records LLC v. Tschirhart*,
9 241 F.R.D. 462 (W.D. Tex. 2006) 12

10 *Atlantic Recording Corp. v. Howell*,
2008 WL 4080008 (D. Ariz. Aug. 29, 2008)..... 12

11 *Balibrea v. J & J Maintenance, Inc.*,
12 2010 WL 147905 (N.D. Cal. Jan. 12, 2010) 9

13 *Bronsink v. Allied Property and Casualty Ins. Co.*,
14 2010 WL 2342538 (W.D. Wash. June 8, 2010)..... 12

15 *Bryant v. Mattel, Inc.*,
2007 WL 5416681 (C.D. Cal. Jan. 26, 2007) 12

16 *Coles v. Nyko Tech., Inc.*,
17 247 F.R.D. 589 (C.D. Cal. 2007) 12, 13

18 *CSC Holdings, Inc. v. Redisi*,
19 309 F.3d 988 (7th Cir. 2002)..... 10

20 *DIRECTV, Inc. v. Puccinelli*,
224 F.R.D. 677 (D. Kan. 2004)..... 10

21 *Duran v. Cisco Sys., Inc.*,
22 258 F.R.D. 375 (C.D. Cal. 2009) 9

23 *Flanagan v. Benicia Unified School Dist.*,
2008 WL 2073952 (E.D. Cal. May 14, 2008)..... 9

24 *Fulco v. Continental Cablevision, Inc.*,
25 789 F. Supp. 45 (D. Mass. 1992) 24

26 *Hammond v. Junction City*,
27 167 F. Supp. 2d 1271 (D. Kan. 2001) 24

28 *Hilao v. Estate of Marcos*,
103 F.3d 762 (9th Cir. 1996)..... 25

1 **TABLE OF AUTHORITIES**

2 (continued)

Page

3 *Holliday v. Extex*,
4 237 F.R.D. 425 (D. Hi. 2006) 13

5 *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*,
6 177 F.R.D. 360 (E.D. La. 1997)..... 13

7 *In re Sulfuric Acid Antitrust Litig.*,
8 231 F.R.D. 331 (N.D. Ill. 2005) 10

9 *New England Carpenters Health Benefits Fund v. First Databank, Inc.*,
10 242 F.R.D. 164 (D. Mass. 2007) 25

11 *Ochoa-Hernandez v. Cjaders Foods, Inc.*,
12 2010 WL 1340777 (N.D. Cal. April 2, 2010) 24

13 *Oracle USA, Inc. v. SAP AG*,
14 264 F.R.D. 541 (N.D. Cal. 2009) 9

15 *Packman v. Chicago Tribune Co.*,
16 267 F.3d 628 (7th Cir. 2001) 10

17 *Russo v. Network Solutions, Inc.*,
18 2008 WL 114908 (N.D. Cal. Jan. 10, 2008) 9

19 *Stratienko v. Chattanooga-Hamilton County Hospital Auth.*,
20 2009 WL 2168717 (E.D. Tenn. July 16, 2009) 12

21 *Survivor Media, Inc. v. Survivor Prods.*,
22 406 F.3d 625 (9th Cir. 2005) 9

23 *Vallone v. CNA Financial Corp.*,
24 2002 WL 1726524 (N.D. Ill. March 19, 2002) 24

25 *Yancey v. GMC Corp.*,
26 2006 WL 2045894 (N.D. Ohio July 20, 2006) 12

27 *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*,
28 259 F.3d 1101 (9th Cir. 2001) 9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

RULES

Federal Rules of Civil Procedure

Rule 23(a)(3)	13
Rule 23(c).....	1
Rule 26	1, 2, 8
Rule 26(b)	13
Rule 26(f)	8
Rule 34	9, 10
Rule 34(a)(1)	13
Rule 34(a)(2)(B).....	10
Rule 37	10
Rule 37(c)(1)	9
Rule 37(c)(1)(A).....	9
Rule 37(d)	25

OTHER AUTHORITIES

2 Joseph M. McLaughlin, <i>McLaughlin on Class Actions</i> § 11:1 (6th ed. 2009)	24
--	----

1 **NOTICE OF MOTION AND MOTION TO COMPEL**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE
3 NOTICE that on February 9, 2011, at 10:30 a.m. or as soon thereafter as counsel may be heard in
4 Courtroom C of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco,
5 California, defendant Sony Computer Entertainment America LLC (“SCEA”) will, and hereby
6 does, move to compel production of deponents, documents and materials sought in SCEA’s
7 Notice Of Deposition And Request For Production Of Documents. This motion is brought
8 pursuant to Fed. R. Civ. P. 26, 34, and 37 and is based on this Notice of Motion and Motion; the
9 Memorandum of Points and Authorities, *infra*; the Declaration of Carter Ott; the complete file
10 and record in this action; the argument of counsel; and such other and further evidence and
11 argument as the Court may choose to entertain.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 In their Consolidated Complaint, five individuals seek to prosecute nationwide class
15 action claims on behalf of themselves and approximately 10 million other purchasers of
16 PlayStation®3 (“PS3”) “advanced video gaming and computing system”¹ consoles.
17 Unfortunately, those five individuals (the “Class Representatives”) have failed completely and
18 unjustifiably to fulfill their discovery obligations. More specifically, Class Representatives have
19 (1) failed to appear for their properly noticed depositions after agreeing to the dates for the
20 depositions, and (2) failed to produce highly relevant documents requested by SCEA, including
21 those identified in the Class Representatives’ Rule 26 disclosures. Accordingly, SCEA asks this
22 Court to order immediate production of all requested documents and items and appearance at
23 deposition by Class Representatives.

24 The discovery sought is indisputably relevant to this litigation. The Consolidated
25 Complaint avers that Class Representatives and putative class members relied on representations
26 by SCEA regarding various features of the PS3 in making their purchasing decision, including
27 that users could install and use an alternative operating system, like Linux, (referred to as the

28 ¹ Consolidated Complaint (Docket #76), ¶ 30.

1 “Other OS”). Supposedly, Class Representatives and class members employed the Other OS
2 function to utilize their PS3s in lieu of a traditional personal computer (“PC”). Consequently,
3 according to the Consolidated Complaint, when SCEA issued a software update (referred to as
4 “Update 3.21”) years after the Class Representatives and class members bought their PS3s,
5 significant harm resulted. If a PS3 user downloaded Update 3.21, the Other OS feature would be
6 disabled, precluding further PC-type usage. If a PS3 user declined to download Update 3.21,
7 certain other features would be limited or unavailable. Class Representatives concede that
8 Update 3.21 was prompted by security concerns related to hacking of the PS3, but nonetheless
9 contend its issuance violated California and federal law.

10 The Consolidated Complaint alleges generally that all class members have been injured
11 because “their PS3s were devalued and they were denied part of its use.” But they allege a
12 multitude of differing instances of such injuries: some lost partitioned hard drive space, others
13 lost stored data; some accepted the download unknowingly, others refused the download and now
14 cannot play certain games and movies; some cannot access the PlayStation® Network (“PSN”) to
15 play online games or access funds they previously placed in their PSN “wallet” accounts; others
16 lost the use of peripherals, pre-paid services and software they previously bought for use with the
17 Other OS function. And some have suffered no apparent loss, like Class Representative Stovell,
18 who never took advantage of the Other OS feature in the more than three years he owned his PS3
19 and thus has experienced no change as a result of Update 3.21.

20 Notably, this is not Class Representatives’ first attempt to avoid discovery. During the
21 parties’ Initial Case Management Conference, on September 2, 2010, Judge Seeborg rejected
22 Interim Lead Counsel’s request for one-sided discovery, *i.e.*, that discovery would be limited to
23 written requests issued by Plaintiffs pending resolution of SCEA’s outstanding pleading
24 challenges. By refusing to produce documents and appear for deposition, Class Representatives
25 are attempting to obtain the result that Judge Seeborg previously denied them, and they are in
26 patent violation of their Rule 26 disclosure obligations.

27 Accordingly, SCEA respectfully requests that the Court enter an order compelling
28 production of the requested documents and items within ten days of its hearing on this motion and

1 that Class Representatives' depositions proceed within twenty days thereafter.

2 **II. FACTUAL AND PROCEDURAL BACKGROUND**

3 **A. The PS3 And Other OS Feature**

4 At the time of its launch on November 17, 2006, the PS3 was sold with a number of
5 features, including the ability to play video games, movies, and music on various media including
6 CDs, DVDs, and Blu-ray discs; view photographs; and access SCEA's online gaming service, the
7 PlayStation®Network ("PSN").² The PS3 could be updated via periodic "firmware" updates.³
8 The PS3 also included an "Other OS" feature which enabled users to install and run an operating
9 system in addition to the PS3's native operating system.⁴ According to the Consolidated
10 Complaint, the Other OS feature "provide[d] users with an excellent platform to develop
11 applications for the PS3 or as a jumping off point for deployments to other products, including
12 those from IBM, Sony, or Mercury"⁵; "allowed Cell programming"⁶ and the operation of
13 supercomputer clusters"⁷; and allowed the PS3 to run like a "fully functional home computer,
14 loaded with more than 1,000 applications."⁸

15 A PS3 System Software License Agreement (the "SSLA") is made available to PS3 users
16 electronically. The SSLA makes clear that software updates may be made automatically by
17 SCEA and whether automatic or available for download by users, may disengage or alter some
18 functions:

19 From time to time, SCE may provide updates, upgrades or services to your PS3™
20 system to ensure it is functioning properly in accordance with SCE guidelines or
21 provide you with new offerings. **Some services may be provided automatically
22 without notice when you are online, and others may be available to you
23 through SCE's online network or authorized channels.** Without limitation,
24 **services may include the provision of the latest update or download of new
25 release that may include security patches, new technology or revised settings
26 and features which may prevent access to unauthorized or pirated content,
27 or use of unauthorized hardware or software in connection with the PS3™**

24 ² Consolidated Complaint (Docket #76), ¶ 36.

25 ³ Consolidated Complaint (Docket #76), ¶ 33.

26 ⁴ Consolidated Complaint (Docket #76), ¶ 36.

27 ⁵ Consolidated Complaint (Docket #76), ¶ 49.

28 ⁶ Plaintiffs explain that "Cell is a microprocessor which facilitates software development."
Consolidated Complaint (Docket #76), fn. 5.

⁷ Consolidated Complaint (Docket #76), ¶ 37.

⁸ Consolidated Complaint (Docket #76), ¶¶ 3, 47, and *see also* ¶ 37 ("[it] essentially allowed
users to operate the PS3 like a computer rather than simply a gaming console.")

1 **system.... Some services may change your current settings, cause a loss of**
2 **data or content, or cause some loss of functionality....**⁹

3 Those that access and use the PSN do so subject to a separate Terms of Service And User
4 Agreement (the “Terms of Service”).¹⁰ If the user clicks the “Do Not Accept” dialogue box, the
5 user will not be able to access the PSN. Similar to the SSLA, the “Maintenance and Upgrades”
6 section of the Terms of Service reaffirms that,

7 Some content may be provided automatically without notice when you sign in.
8 **Such content may include automatic updates or upgrades which may change**
9 **your current operating system, cause a loss of data or content or cause a loss**
10 **of functionalities or utilities. Such upgrades or updates may be provided for**
11 **system software for your PlayStation3™ computer entertainment system, the**
12 **PSP™ (PlayStation Portable) system, or other SCEA-authorized hardware.**¹¹

11 **B. Firmware Update 3.21**

12 “On or about April 1, 2010, [SCEA] released Update 3.21” for “security reasons”¹² which,
13 if installed, “would disable the [Other OS] feature.”¹³ PS3 owners were not required to download
14 Update 3.21.¹⁴ But “if a user failed to download Update 3.21, he or she would lose” access to the
15 PSN online features; playback of new PS3 software or Blu-ray discs that require Update 3.21;
16 copyright-protected videos stored on a media server; and use of future features and
17 improvements.¹⁵

18 **C. Plaintiffs’ Reliance, Purchase, And Use Of Their PS3 Are Central To Their** 19 **Claims**

19 The Class Representatives - Anthony Ventura, Jonathan Huber, Antal Herz, Jason Baker,
20 and Elton Stovell¹⁶- state ten claims for relief¹⁷ and demand compensatory (for the “full and/or

21 _____
22 ⁹ Declaration of Carter Ott ISO Motion to Compel (“Ott Decl.”), ¶ 2, Ex. A.

23 ¹⁰ Ott Decl., ¶ 3, Ex. B.

24 ¹¹ *Id.*

25 ¹² Consolidated Complaint (Docket #76), ¶¶ 4 & 53. Plaintiffs specifically allege that SCEA
26 stated that “the update was released in order to ‘protect the intellectual property of the content
27 offered on the PS3 system’” from a hack of the PS3. Consolidated Complaint (Docket #76), ¶ 63.
28 SCEA was entitled to terminate the functionality of the Other OS feature pursuant to its software
license. *See* Motion to Dismiss (Docket #97), Section II(B).

¹³ Consolidated Complaint (Docket #76), ¶ 52.

¹⁴ Consolidated Complaint (Docket #76), ¶ 53.

¹⁵ Consolidated Complaint (Docket #76), ¶ 53.

¹⁶ Consolidated Complaint (Docket #76), ¶¶ 10-19.

¹⁷ Specifically, the Consolidated Complaint states claims for (1) Breach of Express Warranty; (2)
Breach of Implied Warranty of Merchantability; (3) Breach of Implied Warranty of Fitness for a

1 partial refund of the total purchase price of each PS3 console”), consequential (based on various
2 unique “additional injuries”), and punitive damages; restitution; and injunctive relief.¹⁸

3 **Plaintiffs’ claims are premised on alleged representations purportedly made about**
4 **the PS3 and the Other OS function.**¹⁹ Plaintiffs claim that, since launching the PS3, SCEA has
5 engaged in “an extensive advertising campaign” that portrayed the Other OS feature as an
6 “essential and important characteristic”²⁰ that enabled the PS3 to function as a “personal
7 computer.”²¹ However, none of the Class Representatives identifies a specific representation on
8 which he supposedly relied. Instead, they state vaguely that, prior to their purchase, they
9 “performed extensive research on the Internet”²² and “[a]mong other things,” they “reviewed and
10 relied on the statements on [SCEA]’s website with regard to the PS3’s ‘Other OS’ feature, as well
11 as the PS3’s other advertised features such as the ability to access the PSN, play video games,
12 watch movies, and listen to music, among other things.”²³

13 Their Consolidated Complaint also references postings alleged made by other PS3 owners
14 that they contend demonstrate that putative class members uniformly reviewed relevant
15 representations.²⁴ But many other PS3 owners admit on the same websites that they did not
16 review any such representations and were not aware of the Other OS function.²⁵ This is not

17 Particular Purpose; (4) Violation of the California Consumer Legal Remedies Act; (5) Violation
18 of the Computer Fraud and Abuse Act; (6) Violation of the Magnuson-Moss Warranty Act; (7)
19 Violation of California’s False Advertising Law; (8) Violation of California’s Unfair Competition
20 Law; (9) Conversion; and (10) Unjust Enrichment for themselves and their proposed class.
21 Consolidated Complaint (Docket #76).

22 ¹⁸ Consolidated Complaint (Docket #76), Prayer for Relief & ¶¶ 56-63 (“Additional Injuries
23 Caused By the Release of Update 3.21”); Ott Decl., ¶ 32, Ex. PP (Amended Initial Disclosures),
24 10:2-10.

25 ¹⁹ See, e.g., Consolidated Complaint (Docket #76), ¶ 45.

26 ²⁰ Consolidated Complaint (Docket #76), ¶¶ 2 and 30 (“Defendant advertised, marketed, and sold
27 PS3 systems as including a built-in Blu-ray disc player, the ability to go online to access the PSN
28 and play against other players, and the ability to install other operating systems.”).

29 ²¹ Consolidated Complaint (Docket #76), ¶ 2 (“[SCEA] has consistently used the PS3’s ability to
30 serve as a personal computer...to market the PS3 and distinguish it from its competitors....”); ¶
31 36 (“By installing the Linux operating system, you can use the PS3™ system not only as an
32 entry-level personal computer with hundreds of familiar application for home and office
33 use....”); see also Consolidated Complaint (Docket #76), ¶¶ 34, 35, 38.

34 ²² Consolidated Complaint (Docket #76), ¶ 10, 14, 16, and 18.

35 ²³ Consolidated Complaint (Docket #76), ¶¶ 10, 14, 16, and 18.

36 ²⁴ Consolidated Complaint (Docket #76), ¶ 62, first and second paragraphs.

37 ²⁵ See Motion to Strike (Docket #96), 8:6-18.

1 surprising as there was no reference to the Other OS feature on the PS3's packaging.²⁶

2 **Plaintiffs' claims are also premised on their use of their PS3s.** Plaintiffs unanimously
3 contend that they all "used [their] PS3[s] to play games, watch Blu-ray discs and access the
4 PSN."²⁷ Messrs. Ventura, Huber, Herz, and Baker assert that they "also extensively used [their]
5 PS3[s] as [] computer[s]" but in different ways.²⁸ Specifically, Messrs. Huber and Baker claim
6 they browsed the Internet²⁹; Mr. Ventura did so and also played "Linux-specific games"³⁰; and
7 Mr. Herz further used his PS3 to "run word processing software, spreadsheet software, email
8 software, other productivity applications, and make his own programs."³¹ Conversely, Mr.
9 Stovell never used the 'Other OS' feature.³²

10 **There is no uniformity in the alleged injuries resulting from Update 3.21.** Plaintiffs
11 contend that all class members have been injured similarly in that Update 3.21 has devalued their
12 PS3s and denied them part of their use.³³ But their allegations concede that PS3 users have been
13 affected in different ways. Messrs. Huber and Herz installed Update 3.21 so they could "play
14 games online [and] access [the] PSN"³⁴ but no longer have "access to 'Other OS' feature and the
15 Linux operating system [they] had installed."³⁵ Messrs. Ventura and Baker did not install Update
16 3.21 "so that [they] can continue to use the 'Other OS' functions," and thus are "no longer able to
17 play online games, access the PSN, play new games or Blu-ray discs that require Update 3.21."³⁶
18 According to the Consolidated Complaint, some PS3 owners downloaded Update 3.21 not
19 knowing what it would do³⁷; others had Update 3.21 forced on them when they sent their PS3s in
20 for repair³⁸; "[m]any users purchased peripheral devices specifically for use with the 'Other OS'

21 _____
22 ²⁶ Consolidated Complaint (Docket #76), ¶ 45, fourth bullet point.

23 ²⁷ Consolidated Complaint (Docket #76), ¶¶ 10, 12, 14, 16, and 18.

24 ²⁸ Consolidated Complaint (Docket #76), ¶¶ 10, 12, 14, and 16.

25 ²⁹ Consolidated Complaint (Docket #76), ¶¶ 10, 12, 14, and 16.

26 ³⁰ Consolidated Complaint (Docket #76), ¶ 10.

27 ³¹ Consolidated Complaint (Docket #76), ¶ 14.

28 ³² Consolidated Complaint (Docket #76), ¶ 18.

29 ³³ Ott Decl., ¶ 18, Ex. Y (11/4/10 hearing transcript), 47:7-10.

30 ³⁴ Consolidated Complaint (Docket #76), ¶¶ 13 and 15.

31 ³⁵ Consolidated Complaint (Docket #76), ¶¶ 13 and 15.

32 ³⁶ Consolidated Complaint (Docket #76), ¶¶ 11, 17, and 61; Ott Decl., ¶ 18, Ex. Y (11/4/10
33 hearing transcript), 30:1-22.

34 ³⁷ Ott Decl., ¶ 14, Ex. M (*Huber* Complaint), ¶ 29.

35 ³⁸ Consolidated Complaint, ¶ 55; Ott Decl., ¶ 14, Ex. M (*Huber* Complaint), ¶ 30.

1 function, such as wireless keyboards and mice and external hard drives” but as a result of
2 downloading Update 3.21, these “devices are rendered superfluous”³⁹; other PS3 owners who
3 downloaded Update 3.21 without first “back[ing] up [stored] data on another medium” “lost” that
4 data;⁴⁰ some claim they lost hard drive space that had been partitioned for use with the Other OS
5 feature;⁴¹ and others who did not download Update 3.21 are allegedly foreclosed from using
6 “attributes” of the PS3 necessary to access pre-paid services such as Qore and Netflix.⁴² Of
7 course, many other PS3 owners concede they were not injured because the Other OS feature was
8 not relevant to their purchase.⁴³

9 **D. Plaintiffs Face Significant Hurdles In Obtaining Certification And Succeeding**
10 **At Liability**

11 Judge Seeborg is currently considering SCEA’s motion to dismiss the Consolidated
12 Complaint and a motion to strike the class allegations from that pleading.⁴⁴ He noted during the
13 hearing on those motions: “you’re talking about all sorts of disparate – disparate consumers doing
14 very different things. Some are upgrading. Some are not. Some are buying. Some are not. How
15 can you have a class?”⁴⁵ Of course, during that same hearing, counsel for the Class
16 Representatives argued that discovery would be necessary before certification issues could be
17 fully vetted before the Court.⁴⁶

18 **E. The Present Discovery Dispute**

19 This dispute is the result of months of meet and confer, commencing with an August 2010
20 email by SCEA regarding Plaintiffs’ preservation obligations, particularly regarding their PS3s
21

22 ³⁹ Consolidated Complaint, ¶ 58.

23 ⁴⁰ Consolidated Complaint, ¶ 56.

24 ⁴¹ Ott Decl., ¶ 18, Ex. 7 (11/4/10 hearing transcript), 44:21-45:7; Consolidated Complaint (Docket
#76), ¶¶ 56-57.

25 ⁴² Consolidated Complaint, ¶¶ 59-60. Notably, SCEA advises PS3 owners to back up their data.
Ott Decl., ¶ 9, Ex. H.

26 ⁴³ See Motion to Strike (Docket #96), 10:8-11:1; Ott Decl. ISO Motions to Dismiss and Strike
(Docket #98), ¶ 15, Ex. Q, p. 2 (“oh well, I don’t use it anyway so I don’t care.”), p. 4, p. 5 (“...
p. 7 (“Who cares? Its (sic) a feature that only 10 people use.”), p. 8, p. 10 (“I didn’t use it so i
don’t care.”)).

27 ⁴⁴ See Motion to Dismiss (Docket #97); Motion to Strike (Docket #96).

28 ⁴⁵ Ott Decl., ¶ 18, Ex. Y (11/4/10 hearing transcript), 37:18-21.

⁴⁶ Ott Decl., ¶ 18, Ex. Y (11/4/10 hearing transcript), 46:9-14.

1 and PCs.⁴⁷ Notwithstanding that their claims are premised on their alleged use of their PS3s in
2 lieu of traditional PCs, Plaintiffs contend that their PS3s and PCs “would not be relevant to
3 plaintiffs’ claims or [SCEA’s] defenses.”⁴⁸ Plaintiffs also refused to stop using their PS3s or
4 make forensic copies of the PS3 hard drives despite the inherent risk of spoliation.⁴⁹

5 Thereafter, SCEA served discovery requests demanding that Class Representatives appear
6 for deposition respectively on October 27 and November 2, 5, 8, and 9, and produce requested
7 documents prior to those depositions, including those identified in their Rule 26 disclosures.⁵⁰
8 Out of the thirty-one production requests SCEA served, Class Representatives agreed to produce
9 documents with regard to only two.⁵¹ SCEA complied with Class Representatives’ request to
10 meet and confer, but Class Representatives offered only an ultimatum: (1) they would make an
11 extremely limited production – which would not include the PS3s, any software or peripherals
12 used with the PS3s or any forensic image of the PS3 hard drives or of their other PC hard drives
13 and they would produce only documents they retained in hard copy without performing any
14 electronic searches, and (2) they would appear for deposition only if SCEA agreed not to seek to
15 reopen those depositions based on the inadequacy of that very limited production.⁵²

16 Consequently, SCEA was forced to bring the current motion to compel, and this motion is
17 not obviated by the partial recent production of documents by the Class Representatives,
18 particularly given that their counsel first used that production to demand that SCEA delay the
19 filing of this motion based on the representation that they would complete their production during
20 the week of December 1, and then waited (despite requests for confirmation) until the morning

21 ⁴⁷ Ott Decl., ¶ 10, Ex. I (8/26/10, 11:09 a.m. email and letter).

22 ⁴⁸ Ott Decl., ¶ 11, Ex. J (9/16/10, 12:05 p.m. email and letter); ¶ 13, Ex. P (10/4/10 email and
letter).

23 ⁴⁹ Ott Decl., ¶ 11, Ex. J (9/16/10 email and letter), ¶ 13, Ex. P (10/4/10 email and letter); *see also*
24 Joint CMC Statement And Rule 26(f) Report (Docket #86), 3:15-4:13 (“However, the parties
25 have also identified an issue regarding the extent of Plaintiffs’ obligations to preserve their PS3
26 consoles. Specifically, SCEA disputes Plaintiffs’ position that they may continue to use their
PS3s during the pendency of this litigation. SCEA believes that these PS3s must be preserved,
including barring any continued use, as these units are evidence..... Forcing Plaintiffs who would
otherwise use the PS3 for its remaining functions to stop using them unnecessarily would cause
them to incur additional damages in this litigation and will be unfair and prejudicial....”).

27 ⁵⁰ Ott Decl., ¶ 12, Exs. K-O.

28 ⁵¹ Ott Decl., ¶ 17, Ex. T-X.

⁵² Ott Decl., ¶ 21, Ex. BB (11/10/10 11:05 a.m. email); ¶ 27, Ex. HH (11/24/10, 8:26 a.m. email),
third paragraph.

1 the parties agreed that they would file these motions (December 15) to inform SCEA that their
2 production is not complete.⁵³

3 **III. LEGAL STANDARD**

4 A party “may obtain discovery regarding any matter not privileged that is relevant to the
5 claim or defense of any part.” “Relevant information for purposes of discovery is information
6 ‘reasonably calculated to lead to the discovery of admissible evidence.’”⁵⁴ This Court has issued
7 specific Standing Orders related to the production and use of documents that provide, among
8 other things:

9 11. In searching for responsive materials in connection with a request under Fed.
10 R. Civ. P. 34, parties must search computerized files, emails, voicemails, work
11 files, desk files, calendars and diaries, and any other locations and sources if
12 materials of the type to be produced might plausibly be expected to be found
13 there.

14 14. As soon as a party has notice of this order, the party shall take such
15 reasonable steps as are necessary to preserve evidence related to the issues
16 presented by the action, including, without limitation, interdiction of any
17 document destruction programs and any ongoing erasures of email, voicemails,
18 and other electronically recorded material to the extent necessary to preserve
19 information relevant to the issues presented by the action.

20 15. Except for good cause, no item will be received in evidence if the proponent
21 failed to produce it in the face of a reasonable and proper discovery request
22 covering the item, regardless of whether a motion to overrule any objection
23 thereto was made.⁵⁵

24 In addition, Rule 37 provides that “if a party, in response to a request for inspection
25 submitted under Rule 34, fails to...permit inspection as requested, the discovering party may

26 ⁵³ Ott Decl., ¶ 27, Ex. HH (11/24/10, 8:26 a.m. email) and II (11/29/10, 10:54 p.m. email; ¶ 31,
27 Ex. OO (12/9/10, 4:14 p.m. email); and ¶ 34, Ex. RR (12/15/10, 4:00 a.m. email).

28 ⁵⁴ *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005) (citation omitted);
see also *Duran v. Cisco Sys., Inc.*, 258 F.R.D. 375, 378 (C.D. Cal. 2009).

⁵⁵ Standing Order, ¶¶ 11, 14, and 15; see also Unless substantial justification is found, sanctions
for failure to produce documents referenced in initial disclosures are mandatory, and documents
not produced for initial disclosures without valid excuse will be precluded from use. *Flanagan v.*
Benicia Unified School Dist., 2008 WL 2073952, at *3 (E.D. Cal. May 14, 2008). See also,
Russo v. Network Solutions, Inc., 2008 WL 114908, at *2 (N.D. Cal. Jan. 10, 2008) (Judge Chen
stated, “It is the burden of the party facing sanctions to show that the failure to comply was either
substantially justified or harmless.”) (citing to *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259
F.3d 1101, 1107 (9th Cir. 2001)). In addition to evidence preclusion sanction, the Court may
“order payment of the reasonable expenses, including attorney’s fees, caused by the failure” to
provide initial disclosures. *Balibrea v. J & J Maintenance, Inc.*, 2010 WL 147905, at *2 (N.D.
Cal. Jan. 12, 2010) (citing to Fed. R. Civ. P. 37(c)(1)(A)). The Ninth Circuit gives “particularly
wide latitude to the district court’s discretion to issue sanctions under Rule 37(c)(1).” *Oracle*
USA, Inc. v. SAP AG, 264 F.R.D. 541, 544-45 (N.D. Cal. 2009).

1 move for an order compelling...inspection in accordance with the request.”⁵⁶ In ruling on a
2 motion to compel, district courts consider many factors, including timeliness, good cause, utility,
3 and materiality.⁵⁷ Although the moving party carries the burden, the party opposing the motion
4 must support each ground on which it has refused to provide information or evidence.⁵⁸

5 **IV. THE COURT SHOULD ORDER PLAINTIFFS TO PRODUCE THE REQUESTED**
6 **DOCUMENTS AND OTHER ITEMS**

7 **A. Plaintiffs’ PS3s And Personal Computers Are Integral To Their Claims And**
8 **SCEA’s Defenses**

9 Plaintiffs’ claims are indisputably based, in large part, on their use of their PS3s: they
10 allege that they used their PS3s in lieu of a personal computer and stated in their Initial
11 Disclosures that they intend to rely in making their case in chief on their “PS3 units” as well as
12 other unspecified “[d]ocuments regarding the ‘Other OS’ function and the operation, installation
13 and use of Linux on the PS3.”⁵⁹ On these bases, SCEA requested that the Class Representatives
14 produce:

15 **Request for Production No. 3: ANY and ALL PS3s that YOU purchased,**
16 **received, or otherwise acquired, including, but not limited to, the PS3**
17 **referenced in Paragraph[s] 12, 14, 16, and 18] of the CONSOLIDATED**
18 **COMPLAINT.**⁶⁰

19 **Request for Production No. 7: A forensic copy of the hard drive for ANY**
20 **and ALL PERSONAL COMPUTERS used by [Plaintiffs] during the**

21 ⁵⁶ Fed. R. Civ. P. 34(a)(2)(B).

22 ⁵⁷ *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 992 (7th Cir. 2002).

23 ⁵⁸ *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 647 (7th Cir. 2001); *In re Sulfuric Acid*
24 *Antitrust Litig.*, 231 F.R.D. 331, 333 (N.D. Ill. 2005); *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D.
25 677, 681, fn. 1 (D. Kan. 2004).

26 ⁵⁹ Ott Decl., ¶ 32, Ex. PP (Amended Initial Disclosures), 9:4-21.

27 ⁶⁰ Plaintiffs’ objection to this request, which is substantially the same as its objections to SCEA’s
28 other requests reads: “Plaintiff incorporate by reference his General Objections and further
objects to this Request insofar as it violates his right to privacy, is overly broad, unduly
burdensome, seeks information irrelevant to the claims or defenses of any party to this litigation
and is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff also
objects to this Request to the extent this Request seeks information in SCEA’s possession,
custody, or control, as to which SCEA has equal access. Moreover, Plaintiff objects to this
Request since it believed that any testing of Plaintiff’s PS3s will ultimately cause harm to the
items. Defendants are also directed to the letter from Plaintiffs’ counsel dated September 16,
2010 addressed to Luanne Sacks outlining Plaintiffs’ objections to Defendant’s request for the
production of Plaintiffs’ PS3 consoles. Therefore, Plaintiff will not produce the PS3s in his
possession, custody, or control without an appropriate order from this Court. Subject to and
without waiving the foregoing objections, Plaintiff is willing to meet and confer to clarify what
this request seeks and/or narrow this request to appropriate relevant areas.” See Ott Decl., ¶ 17,
Exs. T-X. Plaintiffs’ additional objections are also submitted with this motion. See *id.*

1 **DESIGNATED PERIOD, including, but not limited to, any used by**
2 **[Plaintiffs] at [their] place of residence and/or place of business.**⁶¹

3 On the grounds of relevancy and privacy, the Class Representatives refused absolutely to produce
4 forensic copies of their personal computer hard drives, but agreed to meet and confer with regard
5 to production of their PS3s.⁶² But this meet and confer was unsuccessful, resulting only in an
6 offer from the Class Representatives to provide information of little probative value:
7 “[p]hotographs and serial numbers of [their] PS3s”⁶³ and that “a mutually acceptable vendor may
8 inspect the PS3 hard drives and prepare a report, at SCEA’s expense, that sets forth (1) whether
9 Linux was installed and the date of installation; and (2) whether the following types of files exist,
10 or not, on the hard drives: video game files, movie files, music files, word processing files, email
11 files or other Linux software related files.”⁶⁴

12 Subsequently, all Class Representatives but Mr. Baker⁶⁵ have produced various photos of
13 their PS3 that confirm the inadequacy of a photographic reproduction of the subject product. Mr.
14 Herz supplied only a photo of a sticker apparently on the back of his PS3 console listing the serial
15 number.⁶⁶ Similarly, Mr. Ventura produced two photos: a close-up of a serial number sticker;
16 and a photo of two-thirds of the top of his PS3.⁶⁷ Mr. Stovell produced numerous pictures of
17 PS3s, including his and several apparently on display at a convention or seminar.⁶⁸ Mr. Huber
18 produced three photos of his PS3 – two close-ups of model and serial number stickers and one
19 photo of the PS3 top.⁶⁹ SCEA has no means of determining from these photos the current
20 physical condition of these consoles, whether they have been tampered with or abused, let alone if
21 they are functional.

22 _____
23 ⁶¹ Ott Decl., ¶ 12, Exs. K-O. SCEA’s document requests are identical except for variations based
24 on the specific allegations in the Consolidated Complaint. For purposes of efficiency, SCEA will
25 refer to them collectively.

26 ⁶² Ott Decl., ¶ 17, Exs. T-X.

27 ⁶³ Ott Decl., ¶ 22, Ex. C (11/12/10, 2:32 p.m. email).

28 ⁶⁴ Ott Decl., ¶ 24, Ex. E (11/18/10, 3:20 p.m. email).

⁶⁵ Plaintiffs have not provided an explanation for why they have not produced similar photos for
Mr. Baker.

⁶⁶ Ott Decl., ¶ 29, Ex. KK (Herz Production), HERZ 0000005.

⁶⁷ Ott Decl., ¶ 30, Ex. LL (Ventura Production), VENTURA 0000040-41.

⁶⁸ Ott Decl., ¶ 30, Ex. NN (Stovell Production), STOVELL 0000190, 0000193-195, and 0000197.

⁶⁹ Ott Decl., ¶ 29, Ex. JJ (Huber Production), HUBER 0000009, 0000010, 0000012

1 It is clear that forensic copies of these devices as well as physical production of the units
2 themselves are highly probative in this matter, and that they should therefore be produced. As an
3 initial matter, these are “documents” within the definition of the Evidence Code that courts
4 regularly require parties to produce.⁷⁰ These devices are also highly relevant. An analysis of the
5 hard drives from these devices will show how they were used, when, and with what frequency
6 relative to each other; and will provide a means of testing the veracity of Plaintiffs’ allegations
7 and their deposition testimony regarding their use of the PS3, particularly in lieu of other PCs.
8 This analysis will also demonstrate the extent to which Class Representatives’ use of their PS3
9 and the Other OS feature is typical of each other and the putative class.

10 In *Coles v. Nyko Technologies, Inc.*, the class plaintiff alleged violations of the Unfair
11 Competition Law, False Advertising Act, and the Consumer Legal Remedies Act, and warranty
12 claims based on the defendant’s manufacture and marketing of an electronic device called
13 “Intercooler 360” “which ‘is an external snap-on cooling system specifically designed to reduce
14 the internal operating temperature of Microsoft’s Xbox 360 gaming and entertainment
15 console.’”⁷¹ According to the operative complaint,

16 ‘the Xbox 360s contain several heat-sensitive computer chips designed to shut the
17 consoles down when internal temperatures soar too high. After short periods of
18 use, the Xbox 360s were widely reported to automatically shut down, rendering
19 the consoles inoperable.’ ... ‘[A]lthough designed to remedy defects in the Xbox
20 360, consumers soon discovered that the Intercooler 360’s own defects actually
exacerbated the defects in the Xbox 360....’ ... Specifically, consumers
discovered ‘the Intercooler 360 had numerous fundamental defects..., including,
inter alia, freezing, skipping, synchronization problems, disc error messages,

21 ⁷⁰ See, e.g., *Coles v. Nyko Tech., Inc.*, 247 F.R.D. 589, (C.D. Cal. 2007) (ordering production of
22 plaintiff’s Xbox 360 for inspection and forensic analysis); *Bryant v. Mattel, Inc.*, 2007 WL
5416681, *10 (C.D. Cal. Jan. 26, 2007) (“[Plaintiff] shall produce the hard drives of his
23 computers for forensic imaging.”); *Aliki Foods v. Otter Valley Foods, Inc.*, 2010 WL 2985030,
**12-20 (D. Conn. March 26, 2010) (regarding plaintiffs’ failure to comply with the court’s
24 discovery orders, including its order requiring plaintiff to produce hard drive); *ANZ Advanced
Tech. LLC v. Bush Hog LLC*, 2010 WL 3699917, **2 & 4 (S.D. Ala. Sept. 9, 2010) (plaintiff
25 ordered to produce hard drives); *Stratienko v. Chattanooga-Hamilton County Hospital Auth.*,
2009 WL 2168717, *4 (E.D. Tenn. July 16, 2009) (plaintiff ordered to produce hard drive); *Arista
Records LLC v. Tschirhart*, 241 F.R.D. 462, 463 (W.D. Tex. 2006) (defendant ordered to produce
26 hard drive); *Atlantic Recording Corp. v. Howell*, 2008 WL 4080008, *1 (D. Ariz. Aug. 29, 2008)
(court ordered defendant to produce computer hard drive); *Yancey v. GMC Corp.*, 2006 WL
2045894, **2-4 (N.D. Ohio July 20, 2006); *Bronsink v. Allied Property and Casualty Ins. Co.*,
27 2010 WL 2342538, *5 (W.D. Wash. June 8, 2010).

28 ⁷¹ *Id.* at 591.

1 pixelization problems, and ironically, overheating.⁷²

2 The *Coles* plaintiff did not dispute that the Intercooler 360 and Xbox 360 were tangible things
3 that “may be inspected and tested” by the defendant, but objected that⁷³ such devices were
4 irrelevant to class certification.⁷⁴ The *Coles* court disagreed:

5 [h]ere, defendant Nyko’s examination and testing of plaintiff’s Intercooler 360
6 and Xbox 360 and (sic) will assist defendant Nyko in addressing whether ‘the
7 claims or defenses of the representative parties [are] typical of the claims or
8 defenses of the class,’ Fed. R. Civ. P. 23(a)(3), or whether typicality exists.⁷⁵

8 SCEA’s request to examine the PS3 and the hard drives of the PS3 and Class Representatives’
9 PCs mirror those at issue in *Coles*.

10 Here, production of forensic copies of these devices is particularly important because they
11 are unimpeachable sources of information regarding Plaintiffs’ use for which there is no
12 substitute. These devices provide a true and correct history of Plaintiffs’ use of their PS3s and
13 PCs that are not subject to the flaws of memory or bias.

14 In addition, it is axiomatic that – as the subjects of this litigation – SCEA has a right to
15 physically inspect Plaintiffs’ PS3s.⁷⁶ This inspection is necessary to confirm whether the units
16 have been tampered with or destroyed; whether they still function; and to confirm the serial and
17 model numbers for purposes of later identification and to obtain further relevant discovery.
18 Accordingly, Class Representatives’ refusal to produce these devices is insupportable.⁷⁷

19 Class Representatives also asserted privacy rights as a basis for refusing to produce their
20 PS3s and PCs, but without identifying the specific information contained on these devices that
21 implicates any possible need for privacy protection. Moreover, Class Representatives have failed
22 to explain why their need for privacy protection exceeds that of SCEA from whom they have

23 _____
24 ⁷² *Id.* at 591.

25 ⁷³ *Id.* at 592.

26 ⁷⁴ *Id.*

27 ⁷⁵ *Id.* at 592-93.

28 ⁷⁶ *See* Fed. R. Civ. P. 34(a)(1) (“A party may serve on any other party a request within the scope of Rule 26(b): to produce and permit the requesting party or its representative to inspect, copy, test, or sample....”); *see also Coles v. Nyko Tech., Inc.*, 247 F.R.D. 589, 593 (C.D. Cal. Nov. 27, 2007); *Holliday v. Extex*, 237 F.R.D. 425, 426-27 (D. Hi. 2006).

⁷⁷ *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 368 (E.D. La. 1997) (failure to cooperate in discovery supports finding of inadequacy).

1 demanded production of numerous confidential trade secret and commercially sensitive
2 documents. SCEA has offered to produce such private information upon entry of an appropriate
3 protective order (which proposed protective order has been rejected by the Class
4 Representatives).⁷⁸ And of course, it is possible that the Class Representatives are seeking to
5 protect disclosure to SCEA and the Court of documents that might be relevant to typicality,
6 adequacy, and the veracity of their allegations. For example, if one or more of the Class
7 Representatives used their PS3s in an unauthorized fashion (*i.e.*, in violation of copyright laws),
8 that would bear directly on their adequacy to proceed as a representative of the putative class.⁷⁹

9 Finally, as set forth more fully below, the Class Representatives' PS3 and PC hard drives
10 may also contain additional documents responsive to SCEA's other documents requests.⁸⁰ For
11 example, because the Class Representatives contend that they performed research about the PS3
12 on their PCs prior to purchase, these devices should reveal those searches and any results
13 obtained. On this additional basis, the Court should order production of forensic copies of these
14 devices.

15 **B. The Court Should Order Production Of Documents Regarding Reliance And**
16 **Purchase**

17 In their Initial Disclosures, the Class Representatives stated that they intended to rely on
18 “[s]creen shots from the SCEA website regarding the PS3” and “[d]ocuments regarding the
19 ‘Other OS’ function and the operation, installation and use of Linux on the PS3”⁸¹ but failed to
20 produce these documents with their disclosure statement. Accordingly, SCEA requested that the
21 Class Representatives produce such documents:

22 **Request for Production No. 14: ANY and ALL DOCUMENTS that**
23 **[Plaintiffs] relied upon in purchasing, receiving or acquiring any PS3,**

24 ⁷⁸ Notably, the only remaining issue open with regard to the protective order appears to be Class
25 Representatives' refusal to agree that the protective order should include a “highly sensitive”
26 designation – something that is justified in any instance in which a party produces trade secret
27 documents. Unless Class Representatives are contending that their PS3 and PC hard drives
28 contain trade secrets, they surely have no basis to withhold their contents as private given their
objection to the use of a highly sensitive designation for any purpose. *See* Ott Decl., ¶ 26, Ex.
GG (11/23/10, 7:29 p.m.).

⁷⁹ Ott Decl., ¶¶ 2-3, Exs. A-B.

⁸⁰ *See* Sections II(A) and (B), V, and VI, *infra*.

⁸¹ Ott Decl., ¶ 32, Ex. PP (Amended Initial Disclosures), 9:4-21.

1 **including but not limited to, ANY and ALL DOCUMENTS CONCERNING**
2 **YOUR allegations in Paragraph[s 10, 12, 14, 16, and 18] of the**
3 **CONSOLIDATED COMPLAINT....**

4 Although the Class Representatives stated in their response to these requests that they
5 would produce responsive documents, to date, they have not.⁸² Indeed, they announced they
6 would produce responsive documents only if currently possessed in hard copy, without
7 conducting any electronic searches, which they intend to do prior to trial so they may offer such
8 additional items as evidence.⁸³ Clearly, this is contrary to the rules of discovery and disclosure –
9 the Class Representatives must produce any documents now that they intend to rely upon at trial,
10 particularly in advance of their depositions. Should they fail to do so, this Court should enter
11 preclusive sanctions or require they reappear for deposition.

12 The Class Representatives' Initial Disclosures also identified documents relevant to their
13 PS3 purchases, including “[t]he PS3 packaging,” “[t]he documents provided by SCEA with the
14 PS3,” and “[d]ocuments evidencing and relating to Plaintiffs’ purchase of their PS3 and related
15 items.”⁸⁴ These documents have also been referenced by Lead Counsel in its arguments to the
16 Court.⁸⁵ SCEA requested production of these documents:

17 **Request for Production No. 5: ANY and ALL DOCUMENTS and things**
18 **that, at the time of purchase, receipt and/or acquisition, accompanied each**
19 **PS3 to be identified and produced in response to Request Number 3,**
20 **including, but not limited to, boxes, containers, packaging materials,**
21 **instruction manuals or pamphlets, papers, inserts, promotional materials,**
22 **disclaimers, warranty cards, reports, brochures, schematics, customer**
23 **service information, graphics, pictures, cables, controllers, connectors,**
24 **remote control devices, protective covering, Compact Disc, Digital Versatile**
25 **Disc, Blu-ray™ Disc, and/or ANY other writings, hardware, software and/or**
26 **peripherals.**

27 **Request for Production No. 4: ANY and ALL DOCUMENTS**
28 **CONCERNING the purchase, receipt, and/or acquisition of each PS3 to be**
29 **identified and produced in response to Request Number 3, including, but not**
30 **limited to purchase orders, bills of sale, invoices, credit card receipts,**
31 **cancelled checks and money orders.**

32 **Request for Production No. 8: ANY and ALL DOCUMENTS**
33 **CONCERNING the purchase, receipt and/or acquisition of ANY and ALL**
34 **PERSONAL COMPUTERS in [the Class Representative’s] possession,**
35 **custody or control, including, but not limited to, any used by [the Class**

82 Ott Decl., ¶ 17, Exs. T-X.

83 Ott Decl., ¶¶ 22 and 25, Exs. CC and FF.

84 Ott Decl., ¶ 32, Ex. PP (Amended Initial Disclosures), 9:4-21.

85 See Ott Decl., ¶ 18, Ex. Y (11/4/10 hearing transcript), 28:8-29:16.

1 **Representative] at his place of residence and/or place of business during the**
2 **DESIGNATED TIME PERIOD, including, but not limited to purchase**
3 **orders, bills of sale, invoices, credit card receipts, cancelled checks and**
4 **money orders.**

4 The Class Representatives responded to Request for Production Number 8 with a refusal to
5 produce, and Request Number 5 with objections and a statement that they would be “willing to
6 meet and confer,” which resulted in a general refusal to produce.⁸⁶ Notably, just days before
7 SCEA was to file this motion, the Class Representatives produced a limited group of responsive
8 documents: Messrs. Herz, Ventura and Stovell produced supposed proof of purchase for their
9 PS3s⁸⁷; Mr. Huber produced half of a purchase receipt,⁸⁸ Messrs. Huber, Herz, and Baker
10 produced photographic images of the boxes that apparently contained their PS3s⁸⁹; Mr. Stovell
11 produced photographic images of part of the box for his PS3⁹⁰; and Messrs. Herz and Stovell also
12 produced some documents that apparently came with their PS3s.⁹¹ There is, however, no
13 indication that any of the Class Representatives have produced all documents responsive to the
14 relevant requests. And there is nothing demonstrating their purchase of PCs, nor any
15 confirmation that documents relevant to such a purchase do not exist. Class Representatives’
16 limited production in fact confirms that, without an order from this Court, they will not produce
17 any of the software or other media that they purportedly received, bought or used with their PS3s,
18 despite the fact that these materials figure prominently in their claims.⁹² The Court should order

19 ⁸⁶ Ott Decl., ¶ 17, Exs. T-X; Ott Decl., ¶ 22, Ex. CC (11/12/10, 12:52 p.m. email); ¶ 22, Ex. CC
20 (11/12/10, 2:32 p.m. email). They also agreed to produce documents responsive to Request for
21 Production Number 4, and apparently produced some documents responsive to that request, but
22 have failed to confirm that they have produced all responsive documents. Ott Decl., ¶ 22, Ex. CC
23 (11/12/10, 12:52 p.m. email).

22 ⁸⁷ Ott Decl., ¶ 29, Ex. KK (Herz Production), HERZ 0000015-16; Ott Decl., ¶ 30, Ex. LL
23 (Ventura Production), VENTURA 0000004; Ott Decl., ¶ 30, Ex. NN (Stovell Production),
24 STOVELL 0000001-2.

23 ⁸⁸ Ott Decl., ¶ 29, Ex. JJ (Huber Production), HUBER 0000002.

24 ⁸⁹ Ott Decl., ¶ 29, Ex. JJ (Huber Production), HUBER 0000003-8; ¶ 29, Ex. KK (Herz
25 Production), HERZ 0000004 and 0000221-226; ¶ 30, Ex. MM (Baker Production), BAKER
26 0000151-156.

25 ⁹⁰ Ott Decl., ¶ 30, Ex. NN (Stovell Production), STOVELL 0000003-8.

26 ⁹¹ Ott Decl., ¶ 29, Ex. KK (Herz Production), HERZ 0000009-10, 0000011-14, 0000017-18.

27 ⁹² See, e.g., Consolidated Complaint (Docket #76), ¶ 14 (prior to downloading Update 3.21, Mr.
28 Herz used his PS3 to “play video games, watch movies, and listen to music, among other
things....[and] run word processor software, spreadsheet software, email software, other
productivity applications, and make his own programs.”); ¶ 18, Ex. Y (11/4/10 hearing
transcript), 30:1-22 (“....You also cannot play any Blu-ray DVDS.... When you do not download

1 the Class Representatives to produce all responsive documents and confirm that all such
2 productions are complete.

3 **C. The Court Should Order Production Of Documents Regarding Usage Of The**
4 **PS3s**

5 The Class Representatives' use of their PS3s, including the Other OS feature, is
6 unquestionably one of the central topics in this litigation. In their Initial Disclosures, they state
7 that they will rely on a broad set of documents related to their use: "[d]ocuments regarding the
8 'Other OS' function and the operation, installation and use of Linux on the PS3."⁹³ SCEA
9 thereafter requested that the Class Representatives produce documents which evidenced their use
10 of their PS3s:

11 **Request for Production No. 6: ANY and ALL DOCUMENTS and/or things**
12 **not responsive to Request Number 3 CONCERNING ANY data, game,**
13 **program, operating system, application, file, hard drive, memory storage**
14 **device, Internet browser, mouse, printer, television, cable, wireless network,**
15 **hardware, firmware, peripheral, monitor, keyboard, Compact Disc, Digital**
16 **Versatile Disc, Blu-ray™ Disc, and/or software code that [Plaintiff] authored,**
17 **created, used with, connected to, installed on, downloaded to, backed up to,**
18 **backed up from, imaged and/or uninstalled on each PS3 to be identified and**
19 **produced in response to Request Number 3 that did not accompany each PS3**
20 **at the time of purchase, receipt and/or acquisition.**

21 **Request for Production No. 15: ANY and ALL DOCUMENTS**
22 **CONCERNING [Plaintiff's] use of each PS3 to be identified and produced in**
23 **response to Request Number 3, including, but not limited to, ANY and ALL**
24 **DOCUMENTS CONCERNING YOUR allegation in Paragraph 14 of the**
25 **CONSOLIDATED COMPLAINT that "[Plaintiff] uses the PS3 for personal,**
26 **family and household uses" and "also extensively used his PS3 as a computer,**
27 **including to browse the Internet, run word processor software, spreadsheet**
28 **software, email software, other productivity applications, and make his own**
29 **programs."**

30 **Request for Production No. 9: ANY and ALL DOCUMENTS**
31 **CONCERNING agreements you signed, affirmed, or otherwise consented to**
32 **CONCERNING YOUR use of each PS3 identified and produced in response**
33 **to Request Number 3, including, but not limited, ANY and ALL**
34 **DOCUMENTS CONCERNING warranties, license agreements, and terms of**
35 **use.**

36 The Class Representatives declined production of these items originally,⁹⁴ and their recent limited

37 [Update] 3.21, any new DVDs that come out that require the newer firmware update, you cannot
38 play.").

⁹³ Ott Decl., ¶ 32, Ex. PP (Amended Initial Disclosures), 9:19-20.

⁹⁴ Ott Decl., ¶ 17, Exs. T-X; ¶ 22, Ex. CC (11/12/10, 2:32 p.m. email).

1 production is far from complete. Other than a handful of emails related to registration of Messrs
2 Herz and Baker's PSN accounts⁹⁵, and Mr. Baker's use of his PSN⁹⁶, nothing was produced
3 regarding use of the PSN. Mr. Baker produced several articles regarding Linux, including use of
4 Linux on the PS3; instructions regarding Yellow Dog Linux software; and several pages from
5 SCEA's website regarding the Other OS feature. But all of these documents were apparently
6 printed on September 20, 2010, months after the Consolidated Complaint was filed.⁹⁷ The only
7 other documents the Class Representatives produced consist of photographs of a handful of
8 miscellaneous items that three of the Class Representatives apparently used with their PS3s.⁹⁸ Of
9 course, SCEA has no ability to confirm what these items are or inspect them to assess if they
10 function or were ever used and to what extent. In addition, the Class Representatives have made
11 no effort to produce any of the agreements they consented to regarding their PS3s with the
12 exception of blurry photographs produced by Mr. Herz of a widescreen television displaying
13 directions on the installation and consequences of installing Update 3.21, and other photographs
14 produced by Mr. Ventura of a widescreen television apparently displaying the terms of use of
15 another license agreement.⁹⁹

16 From this production, SCEA has no way of assessing the Class Representative's use of
17 their PS3s or the agreements they entered into with regard to that use. Certainly, without such
18 agreements, SCEA has no way of confirming the veracity of their allegations that it has violated
19 the CLRA by including unconscionable terms in the SSLA.¹⁰⁰ Rather, SCEA and the Court are
20 apparently required to make due with Plaintiffs' biased and flawed memories of how and when
21 they used their PS3s while more substantial, reliable evidence may well exist.

22 SCEA also requested that the Class Representatives produce documents regarding hacking

23 _____
24 ⁹⁵ Ott Decl., ¶ 29, Ex. KK (Herz Production), HERZ 0000020-21; ¶ 30, Ex. MM (Baker
Production) BAKER 0000001.

25 ⁹⁶ Ott Decl., ¶ 30, Ex. MM (Baker Production), BAKER 0000002-4 and BAKER 0000008-15

26 ⁹⁷ Ott Decl., ¶ 30, Ex. MM (Baker Production), BAKER 0000016-150.

27 ⁹⁸ Ott Decl., ¶ 29, Ex. JJ (Huber Production), HUBER 0000010-11 and 0000013; Ott Decl., ¶ 30,
Ex. LL (Ventura Production), VENTURA 0000040; ¶ 29, Ex. KK (Herz Production), HERZ
0000003 and 0000006.

28 ⁹⁹ Ott Decl., ¶ 29, Ex. KK (Herz Production), 000007-8; Ott Decl., ¶ 30, Ex. LL (Ventura
Production), 0000014-39.

¹⁰⁰ Consolidated Complaint (Docket #76), ¶¶ 114-124.

1 or “jailbreaking” of the PS3¹⁰¹:

2 **Request for Production No. 30: ANY and ALL DOCUMENTS**
3 **CONCERNING any hack or “jailbreak” of the PS3, including ANY and**
4 **ALL DOCUMENTS CONCERNING COMMUNICATIONS YOU have had**
5 **with a PERSON who has hacked the PS3.**

6 Plaintiffs assert in their Consolidated Complaint that Update 3.21 was issued to address
7 security issues related to hacking the PS3.¹⁰² Accordingly, any documents in their possession,
8 custody, or control regarding hacking or jailbreaking are discoverable. Class Representatives
9 have agreed to produce a limited subset of these documents: “we will produce any internet
10 postings by any deponent that includes any references to ‘hacking’ or ‘jailbreaking’ the PS3
11 (using those terms)...”¹⁰³ Such a limited production is woefully inadequate; however, the Class
12 Representatives have not to date made even the promised production.

13 **D. The Court Should Order Production Of Documents Relevant To**
14 **Consolidated Complaint Allegations**

15 The Consolidated Complaint, consisting of over sixty pages, consists of numerous
16 allegations regarding the marketing, sale, and use of the PS3; the materiality of statements
17 regarding the Other OS feature; and how the Class Representatives and members have been
18 similarly affected and damaged. SCEA requested that the Class Representatives produce
19 documents regarding allegations they made in just thirteen of the paragraphs in this pleading:

20 **Request for Production No. 10: ANY and ALL advertisements, marketing,**
21 **promotion literature, DOCUMENTS and/or COMMUNICATIONS which**
22 **YOU contend are “false and/or misleading” as alleged in Paragraph 141 of**
23 **the CONSOLIDATED COMPLAINT.**

24 **Request for Production No. 11: ANY and ALL DOCUMENTS**
25 **CONCERNING YOUR allegation in Paragraph 2 of the CONSOLIDATED**
26 **COMPLAINT that SCEA “advertised the PS3’s ‘Other OS*’ feature as an**
27 **essential and important characteristic,”**

28 **Request for Production No. 12: ANY and ALL DOCUMENTS**
29 **CONCERNING YOUR allegation in Paragraph 4 of the CONSOLIDATED**
30 **COMPLAINT that “Defendant could have taken other less intrusive or**
31 **extreme measures, other than disabling the ‘Other OS’ feature, to address its**
32 **purported ‘security’ concerns.”**

33 **Request for Production No. 13: ANY and ALL DOCUMENTS**
34 **CONCERNING YOUR allegation in Paragraph 4 of the CONSOLIDATED**

35 ¹⁰¹ “Jailbreaking” is a process that allows device users to gain root access to the command line of
36 a device’s operating system, thereby removing usage and access limitations imposed prior to sale.

37 ¹⁰² Consolidated Complaint (Docket #76), ¶ 4.

38 ¹⁰³ Ott Decl., ¶ 22, Ex. CC (11/12/10, 2:32 p.m. email).

1 **COMPLAINT that “Defendant’s removal of the ‘Other OS’ feature**
2 **eviscerated one of the PS3’s primary purposes, i.e., its use as a personal**
3 **computer.”**

4 **Request for Production No. 16: ANY and ALL DOCUMENTS**
5 **CONCERNING YOUR allegation in Paragraph 48 of the CONSOLIDATED**
6 **COMPLAINT that “[t]he ‘Other OS’ function was extremely valuable to PS3**
7 **purchasers.”**

8 **Request for Production No. 17: ANY and ALL DOCUMENTS**
9 **CONCERNING YOUR allegation in Paragraph 56 of the CONSOLIDATED**
10 **COMPLAINT that “Defendant did not adequately notify its customers that**
11 **all such data would be lost once they installed the update.”**

12 **Request for Production No. 18: ANY and ALL DOCUMENTS**
13 **CONCERNING YOUR allegation in Paragraph 58 of the CONSOLIDATED**
14 **COMPLAINT that “[m]any users purchased peripheral devices specifically**
15 **for use with the ‘Other OS’ function, such as wireless keyboards and mice**
16 **and external hard drives. Such devices are rendered superfluous to users**
17 **that install Update 3.21.”**

18 **Request for Production No. 19: ANY and ALL DOCUMENTS**
19 **CONCERNING YOUR allegation in Paragraph 59 of the CONSOLIDATED**
20 **COMPLAINT that “[u]sers who chose not to install Update 3.21 were also**
21 **damaged in that they lost access to many attributes of PS3 (sic) including**
22 **their PSN purchases other than gaming. For example, Defendant offers**
23 **Qore, an online service that offers a variety of content and news concerning**
24 **PS3 functions. Users pay \$24.99 for an annual subscription. However, users**
25 **that purchased Qore prior to the release of Update 3.21 and who did not**
26 **install the update were denied the benefit of their annual subscription.**
27 **Similarly, users who do not install Update 3.21 lose access to any prepaid**
28 **PSN account balances.”**

29 **Request for Production No. 20: ANY and ALL DOCUMENTS**
30 **CONCERNING YOUR allegation in Paragraph 79 of the CONSOLIDATED**
31 **COMPLAINT that “Defendant expressly warranted via its advertising,**
32 **statements, brochures, website information, public statements, owner’s**
33 **manuals, and other representations that the functionality of the PS3 would**
34 **include both the ‘Other OS’ and the various other advertised functions.”**

35 **Request for Production No. 21: ANY and ALL DOCUMENTS**
36 **CONCERNING YOUR allegation in Paragraph 105 of the**
37 **CONSOLIDATED COMPLAINT that “[b]efore purchasing the PS3,**
38 **Plaintiffs each reviewed and relied on Defendant’s affirmative**
39 **representations about the PS3’s features and omissions of material facts,**
40 **including that Defendant would disable the ‘Other OS’ feature.”**

41 **Request for Production No. 22: ANY and ALL DOCUMENTS**
42 **CONCERNING YOUR allegation in Paragraph 107 of the**
43 **CONSOLIDATED COMPLAINT that “Defendant failed to adequately**
44 **disclose, at the time of purchase, that it might disable the ‘Other OS’**
45 **feature.”**

46 **Request for Production No. 23: ANY and ALL DOCUMENTS**
47 **CONCERNING YOUR allegation in Paragraph 114 of the**
48 **CONSOLIDATED COMPLAINT that “Defendant also violated Civil Code**
49 **§1770(19) by inserting one or more unconscionable provisions into a**
50 **contract.”**

1 **Request for Production No. 24: ANY and ALL DOCUMENTS**
2 **CONCERNING YOUR allegation in Paragraph 165 of the**
3 **CONSOLIDATED COMPLAINT that “[b]y purchasing a PS3, Plaintiffs and**
4 **each member of the Class became owners of their PS3 and all of their PS3’s**
5 **features. Thus, the PS3’s features, including the ‘Other OS’ feature, which**
6 **was designed, marketed, and built-in to the PS3, were Plaintiffs’ and the**
7 **Class’s property.”**

8 **Request for Production No. 25: ANY and ALL DOCUMENTS**
9 **CONCERNING YOUR allegation in Paragraph 8 of the CONSOLIDATED**
10 **COMPLAINT that “Plaintiffs have suffered injury in fact and have lost**
11 **money and property as a direct result of Defendant’s acts.”**

12 The Class Representatives refused to produce any documents other than those “specifically cited
13 in the complaint.”¹⁰⁴

14 The documents SCEA requested go to the core of the claims in the Consolidated
15 Complaint, including, regarding the “false and/or misleading” representations allegedly made
16 about the PS3; the materiality of such representations and purchasers’ asserted reliance on such
17 representations; PS3 users’ published security concerns prior to Update 3.21; the adequacy of
18 disclosure regarding Update 3.21; and the alleged harm that PS3 owners incurred as a result of
19 Update 3.21. There is no basis for refusing production of such documents.

20 Class Representatives also contend that they and their counsel are adequate to represent
21 the proposed class.¹⁰⁵ SCEA requested documents related to this contention:

22 **Request for Production Number 27: ANY and ALL agreements [Plaintiff]**
23 **has entered into with his counsel in the above-captioned litigation, including,**
24 **but not limited to, ANY and ALL engagement agreements.**

25 **Request for Production Number 31: DOCUMENTS sufficient to establish**
26 **[Plaintiffs’] employment history.**

27 Class Representatives refused to produce these documents unreasonably.¹⁰⁶ The requested
28 engagement agreements demonstrate the scope of Class Representatives’ relationship with their
29 counsel. SCEA should have the ability to inquire regarding the terms of their fee arrangements,
30 including any contingency fee and cost sharing arrangements, as such arrangements bear on their
31 and their counsel’s ability to adequately represent the class. Similarly, Class Representatives’

32 ¹⁰⁴ Ott Decl., ¶ 22, Ex. CC (11/12/10, 2:32 p.m. email).

33 ¹⁰⁵ Consolidated Complaint (Docket #76), ¶ 76.

34 ¹⁰⁶ Ott Decl., ¶ 17, Exs. T-X; Ott Decl., ¶ 22, Ex. CC (11/12/10, 2:32 p.m. email).

1 employment history – and relevant information SCEA may obtain from their current and former
2 employers – bears on various aspects of adequacy as well as veracity.

3 **E. The Court Should Order Production Of Communications Relating To This**
4 **Litigation**

5 The Consolidated Complaint includes extensive quotes from Internet sites regarding the
6 Other OS feature and Update 3.21, which are supposedly “[t]ypical” of “complaints” made by
7 PS3 users.¹⁰⁷ Consistent with these allegations, in their Initial Disclosures, the Class
8 Representatives identify generically numerous communications related to the PS3 and the Other
9 OS feature on which they intend to rely in their case in chief: “[c]ommunications between
10 Plaintiffs and SCEA and/or SCEA’s agents,” “[c]ommunications between Plaintiffs and third
11 parties regarding removal of the Other OS feature from the PS3,” “[c]ommunications between
12 Plaintiffs and the Better Business Bureau,” and “[c]ommunications between Plaintiffs and the
13 Federal Trade Commission.”¹⁰⁸ SCEA requested that Class Representatives produce documents
14 related to all such possible communications:

15 **Request for Production No. 2: ANY and ALL DOCUMENTS**
16 **CONCERNING COMMUNICATIONS YOU have made, read, seen, sent,**
17 **received, viewed, or heard CONCERNING SCEA; the PS3, including any**
18 **hack or ‘jailbreak’ of the PS3; or this litigation, including, but not limited to,**
19 **ANY and ALL DOCUMENTS CONCERNING COMMUNICATIONS made**
20 **in public or private, in writing or electronic, including anywhere on the**
21 **Internet.**

22 **Request for Production No. 26: ANY and ALL COMMUNICATIONS with,**
23 **between or among ANY PERSON, including but not limited to members of**
24 **the class you propose in Paragraph 70 of the CONSOLIDATED**
25 **COMPLAINT, that YOU have seen, read, sent, received, viewed, or heard,**
26 **CONCERNING PS3, SCEA, the PSN, or any matter asserted in this**
27 **litigation.**

28 **Request for Production No. 29: “ANY and ALL DOCUMENTS**
29 **CONCERNING YOUR nicknames, handles, or other moniker YOU use**
30 **other than YOUR name when COMMUNICATING on Internet websites,**
31 **Internet postings, chat rooms, or blog posts.”**

32 Following a meet and confer, Class Representatives announced they would produce only those
33 “communications between the named plaintiff and anyone (other than privileged communications

34 _____
35 ¹⁰⁷ Consolidated Complaint (Docket #76), ¶ 62.

36 ¹⁰⁸ Ott Decl., ¶ 32, Ex. PP (Amended Initial Disclosures), 9:11-15.

1 with counsel) regarding the Other OS function or Update 3.21.”¹⁰⁹ Thereafter, Messrs. Ventura
2 and Herz produced a handful of responsive documents. Specifically, Mr. Ventura produced
3 correspondence regarding related complaints he filed with the Federal Trade Commission and
4 Better Business Bureau, but not the actual complaints he filed, and Mr. Herz produced some
5 electronic communications regarding this litigation.¹¹⁰

6 Finally, the nicknames Class Representatives have used to communicate on the Internet
7 will assist in identifying their online communications available from all sources, and therefore
8 may lead to further discoverable information.¹¹¹

9 **F. The Court Should Order Production Of Communications Related To A False**
10 **Representation Regarding This Litigation Made To The Public Via Mr.**
11 **Ventura’s Counsel’s Website**

12 On June 6, 2010, SCEA discovered that Mr. Ventura’s counsel, Meiselman Denlea
13 Packman Carton & Eberz P.C., had the following false statement regarding this lawsuit posted on
14 its website:

15 [b]ecause [SCEA] failed to defend it’s intentions in court, the judge decided that
16 [SCEA] will have to pay every PS3 owner, who bought his PS3 before March 27,
2010, a refund of 50% of the price when purchased.... [SCEA] will also be
handing out refunds at ‘E3,’ a large video-gaming event, to all registered PS3
owners.¹¹²

17 Upon discovering this, SCEA’s counsel immediately contacted the Meiselman firm and
18 following SCEA’s demand, the posting was removed.¹¹³ SCEA later learned that the Meiselman
19 firm had communicated with the general public, ostensibly including putative class members,
20 about the posting on its firm’s website, which it contended was the result of third party hacking.
21 SCEA accordingly requested that the firm preserve such communications¹¹⁴ and sought
22 production of relevant documents from Class Representatives:

23 _____
24 ¹⁰⁹ Ott Decl., ¶ 22, Ex. CC (11/12/10, 2:32 p.m. email).

25 ¹¹⁰ Ott Decl., ¶ 30, Ex. LL (Ventura Production), VENTURA 000005-13); Ott Decl., ¶ 29, Ex.
26 KK (Herz Production), HERZ 0000019 and 0000022-36.

27 ¹¹¹ Notably, many of the documents showing online communications may be on the hard drives of
28 Plaintiffs’ PS3s and PCs. This is a further reason why Plaintiffs should produce forensic images
of these devices.

¹¹² Ott Decl., ¶ 4, Ex. C (6/6/10, 11:27 a.m. email).

¹¹³ Ott Decl., ¶ 4, Ex. C (6/6/10, 11:27 a.m. email).

¹¹⁴ Ott Decl., ¶ 6, Ex. E (6/7/10, 11:11 a.m. email); ¶ 7, Ex. F (6/7/10 letter); ¶ 9, Ex. H (6/10/10,
5:28 a.m. email).

1 **Request for Production No. 28: ANY and ALL DOCUMENTS**
2 **CONCERNING an allegedly false posting made on or about June 6, 2010 on**
3 **the website of Meiselman Denlea Packman Carton & Ebert P.C.**
4 **CONCERNING this litigation, including, but not limited to, the investigation**
5 **of the source of that posting, including whether it was the result of hacking;**
6 **the identity of the individual(s) who allegedly hacked that website to create**
7 **the posting; and YOUR COMMUNICATIONS CONCERNING the posting,**
8 **including CONCERNING the alleged hack and the accurate status of this**
9 **litigation.**

10 Class Representatives have, however, refused to produce these documents.¹¹⁵

11 These documents are relevant because they refer to the litigation, bear on the public and
12 putative class members' understanding of the litigation, and may bear on the issue of adequacy.
13 These communications are not privileged as there is no attorney-client relationship between
14 individuals communicating with Class Representatives, even if they are members of the class,
15 about postings on a law firm's website, nor regarding any Class Representative's communications
16 with a law firm that it had not engaged.¹¹⁶ In fact, the Meiselman website disclaims any attorney-
17 client relationship, that any of its communications constitute legal advice, or that any information
18 sent to the firm will be kept confidential:

19 The information contained within the Meiselman, Denlea, Packman, Carton &
20 Eberz P.C. ("Meiselman Denlea" or the "firm") website is intended for
21 informational purposes only, and **should not be construed as legal advice or**
22 **professional counsel on any subject matter....** The transmission of the
23 Meiselman Denlea website, in part or in whole, and/or communication with the
24 firm by electronic mail or through the Meiselman Denlea website **does not**
25 **constitute or create an attorney-client relationship** or impose any obligation on
26 Meiselman Denlea or any of its attorneys. Any information sent to Meiselman
27 Denlea by electronic mail or through the Meiselman Denlea website **is not**
28 **secure, and is done so on a non-confidential basis....**¹¹⁷

29 **V. THE COURT SHOULD ORDER PLAINTIFFS TO APPEAR FOR DEPOSITION**

30 Finally, the Court should enter an order compelling Class Representatives to promptly
31 appear for deposition. Their refusal to appear for their properly noticed and scheduled

32 ¹¹⁵ Ott Decl., ¶ 17, Exs. T-X; ¶ 7, Ex. F (6/7/10 email and letter); ¶ 8, Ex. G (6/9/10 email and
33 letter); ¶ 22, Ex. CC (11/12/10, 2:32 p.m. email).

34 ¹¹⁶ See *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, *4 (N.D. Cal. April 2,
35 2010); 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 11:1 (6th ed. 2009); *Hammond*
36 *v. Junction City*, 167 F. Supp. 2d 1271, 1286 (D. Kan. 2001); *Fulco v. Continental Cablevision,*
37 *Inc.*, 789 F. Supp. 45, 47 (D. Mass. 1992); *Vallone v. CNA Financial Corp.*, 2002 WL 1726524,
38 at *1 (N.D. Ill. March 19, 2002).

39 ¹¹⁷ Ott Decl., ¶ 33, Ex. QQ (emphasis added).

1 depositions is sanctionable conduct.¹¹⁸ As noted above, the Class Representatives refused to
2 appear unless SCEA would agree not to seek to reopen their depositions based on their inadequate
3 production. However, they cannot simply refuse to appear for their properly noticed depositions
4 because those depositions may be reopened should it be determined that the Class Representatives
5 failed to search for and/or produce requested documents. If Class Representatives did not wish to
6 appear for their deposition (after agreeing to the dates for the depositions), the proper course was
7 to seek a protective order, which they did not do.¹¹⁹ Nor should they be permitted to halt
8 discovery or delay the deadline for class certification by refusing to comply with discovery.

9 **VI. CONCLUSION**

10 Based on the foregoing, defendant Sony Computer Entertainment America LLC
11 respectfully requests that the Court enter an order compelling the Class Representatives to
12 produce the documents and things requested and appear for their depositions.

13 Dated: December 15, 2010

DLA PIPER LLP (US)

14 By: /s/ Luanne Sacks

15 LUANNE SACKS
16 Attorneys for Defendant
17 SONY COMPUTER ENTERTAINMENT
18 AMERICA LLC

26 _____
27 ¹¹⁸ Fed. R. Civ. P. 37(d); *Hilao v. Estate of Marcos*, 103 F.3d 762, 764-65 (9th Cir. 1996).

28 ¹¹⁹ Fed. R. Civ. P. 37(d); *see New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 242 F.R.D. 164, 166 (D. Mass. 2007) (party who objects to noticed deposition cannot refuse to appear but must obtain protective order).